

THE STATE  
versus  
CLIVE PASIPAMIRE

HIGH COURT OF ZIMBABWE  
MUNGWARI J  
HARARE, 12 April 2022 & 4 May 2022

### **Criminal Trial**

Assessors: *Mr Mhandu*  
*Mrs Chitsiga*

*A Chogumaira*, for the State  
*D Moyo*, for the Defence

MUNGWARI J: The deceased, a 33 year old reveller at Muchemwa Bar Dunstan Shopping Centre, Ruwa, lost his life at the hands of the accused, a fellow patron at the said bar. As a result, the accused was hauled before this court on a charge of murder as defined in s 47 (1) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. The state alleged that on the 23<sup>rd</sup> of October 2020 at around 2100hrs, the deceased had a misunderstanding with the accused at the bar. Angered by the deceased's conduct, accused picked up a farm brick and struck deceased once on the head. The deceased sustained injuries on the head from which he later succumbed to. He was found dead at the entrance of the bar in the early hours of the 24<sup>th</sup> of October 2020.

The accused pleaded not guilty to murder but admitted to having negligently caused the death of the deceased. He subsequently tendered a plea of guilty to culpable homicide as defined in s 49 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*].

The state accepted the limited plea of guilty to culpable homicide and the parties subsequently prepared a statement of agreed facts. The statement of agreed facts was tendered as Exhibit 1 to the record.

It was apparent from the statement of agreed facts that on the fateful day the deceased was the aggressor at Muchemwa Bar. Not only to accused but to anyone in sight. He was what can be aptly termed a nuisance to the revellers at Muchemwa Bar. He initially got into an altercation with other villagers and then subsequently got into another one with Liberty,

accused's friend, who he slapped on the face. In a bid to avoid further run-ins accused and Liberty decided to leave the bar and went and sat outside as they continued imbibing. Deceased also followed suit and tried to join the accused and others who were drinking and sharing alcohol from accused's bottle. Accused would have none of this and so an altercation between deceased and accused ensued. During the tussle accused was grabbed by the trouser belt by the deceased. Accused an amputee with only one arm, then picked up a half brick and struck the deceased once on the left side of the head. Deceased collapsed as a result of the blow.

In the early hours of the following morning, deceased was found dead at the entrance of the bar. A post mortem was conducted by Dr Yoandry Olay Mayedo at Harare Central Hospital and he concluded that the cause of death was due to brain damage, subarachnoid haemorrhage and moderate head trauma.

Ultimately, accused admitted that he was negligent when he assaulted the deceased with a half brick on the head and in doing so failed to realise that death might result from his conduct which caused the injuries from which the deceased eventually succumbed to.

### **Exhibits tendered.**

The state tendered in evidence, the post mortem report, whose contents have already been outlined herein. The report was tendered as exhibit 2. The state also tendered the half brick, the weapon that was used to perpetrate the offence. On sight, it is a typical brick which is half the size of a regular one, grey in colour and made from cement. It is not particularly threatening. The certificate of weight, of the brick, also an exhibit confirmed its weight of 3.18kgs. Significantly too, the accused's warned and cautioned statement was also tendered as Exhibit 5. His version of events then was that;

“...I admit to the charge levelled against me. I struck the now deceased after he had assaulted my relative. I did not have intention of killing now deceased, I wanted him to feel pain and I was drunk.”

In essence his warned and cautioned statement confirmed his assertion of not having the intention to kill the deceased.

As the facts and the warned and cautioned statement were both clear that it was never his intention to cause the death of the deceased, we accepted a limited plea of guilty to culpable homicide. We accordingly found that the concession made by the State was proper in the instance.

### **Disposition**

Accordingly, the court finds the accused not guilty of murder but guilty of a lesser charge of culpable homicide.

### **Sentence**

In passing sentence, we considered all the mitigatory and aggravatory factors as advanced by counsels.

We took note of fact that accused is a first offender. He is a young man who is currently 29 years old. He was 27 years old at the time of commission of the offence and therefore fell into the bracket of youthful offenders. In addition to this he has some fairly heavy family responsibilities on his shoulders. Though he is not married and does not have any offspring he is an unsophisticated villager who makes a living from piece jobs. Out of his meagre wages he is the sole breadwinner for his elderly grandparents.

He pleaded guilty to the offence of culpable homicide and in so doing, showed remorse and contrition for his actions as he did not waste the courts time by raising frivolous defences. He therefore assisted in the smooth administration of justice.

Essentially courts should not just pay lip service to a plea of guilty but ought to credit it for what it is worth and this should reflect in the sentence.

The facts of the matter also make the circumstances in which the death occurred mitigatory. The accused is an amputee with only one hand. He lost his left hand at a very tender age. Being the physically weaker one and inebriated as he was, he was prompted to overreact by deceased's incessant show of aggression towards himself and many others, his relative Liberty included. Were it not for deceased's actions towards him, today he would not be standing as a convicted person. We have therefore considered that to some extent the deceased was the author of his demise as he was the aggressor. This in essence reduces the accused's moral blameworthiness. Notwithstanding this the accused will still live with the stigmatisation of having taken someone's life. The court maybe lenient but society will not be.

In passing sentence, we also considered that accused was subjected to a total of 15 months pre-trial incarceration while awaiting finalisation of this matter. For that period the accused had the charge of murder hanging above his head. The trauma that goes with facing such serious allegations cannot be ignored.

Against this is the fact that a precious life was needlessly lost as a result of the conduct of the accused. The State in aggravation correctly emphasised the sanctity of human life. The

Zimbabwean Constitution s 48(1) makes it clear that every person has a right to life. This court therefore has a duty to protect this right. A person who unlawfully takes away another's life deserves to be punished adequately not only to deter the offender and likeminded people but to ensure that society retains confidence in the justice delivery system. In this case accused's actions are even compounded by the fact that he did not stop to render any assistance to the accused despite that he was the aggressor.

This court bemoans the seemingly never-ending rise of violence as a choice of resolving disputes. Adults are expected to behave in a mature manner and exercise self-restraint even in the face of provocation. The State lent a voice to this and implored the court to impose a deterrent sentence that sends a message to society to resort to other means such as mediation as opposed to violence. It prayed for an effective custodial sentence of not less than 5 years imprisonment.

The universal sentencing principle is that the punishment should fit the criminal as well as the crime and be fair to society whose interests are rooted in the administration of justice.

In attending to this principle we are also cognisant of the sentencing patterns as pronounced by a plethora of case law. Cases in which bricks are negligently thrown at others by those who will be inebriated are not novel. In the case of *S v Mutayi HMT2/18*, the accused and deceased were at Ndashuwa homestead for a beer drink when an altercation arose between the two. In between the tussle accused picked up a brick and struck deceased on the head and he died. Accused was convicted on a charge of culpable homicide and was sentenced to 4 years imprisonment with 1 year suspended. In the case of *S v Matinyenya HH 204/20* the accused struck the deceased with a brick on the forehead and he died. He was convicted of culpable homicide and sentenced to 5years imprisonment with 2 years suspended. The predominant sentencing trend in these cases is imprisonment even where the accused has been found guilty of culpable homicide. It represents a sign of the court's revulsion at the unnecessary loss of life.

*In casu* accused is a young offender who acted negligently whilst drunk and caused the death of the deceased. A prison term that gives him a chance at rehabilitation is called for. The credit for the plea of guilty and remorse will be reflected in the suspended portion of the sentence.

An appropriate sentence would have been 6 years with portions suspended. However, in light of the lengthy pre-trial incarceration period that accused has been subjected to he will be sentenced to a shorter period of;

5 years imprisonment of which 3 years imprisonment is suspended for 5 years on condition accused does not within that period commit any offence involving the use of violence upon the person of another and or negligently causing the death of another through the use of violence and for which upon conviction he will be sentenced to a term of imprisonment without the option of a fine.

*National Prosecuting Authority, State Legal Practitioners*  
*Samuriwo Attorney, Defense Legal Practitioners*