

**THE STATE**

**Versus**

**PETERSON MAURICE ELDERMAN**

IN THE HIGH COURT OF ZIMBABWE  
KAMOCHA J  
BULAWAYO 26 AND 27 OCTOBER 2011

*T Hove* state counsel

*T. Muganyi* defence counsel

Criminal Trial

**KAMOCHA J:** The 36 years old accused was charged with the crime of murder. It being alleged that on 9 March 2007 at number 2 Tuli Close, Richmond, Bulawayo he did wrongfully, unlawfully and intentionally kill and murder Rayaan Peterson a young child in his lifetime there being. The said child was his son. When the charge was put to him he tendered a plea of not guilty.

The state outline was read and produced as exhibit one while his defence outline was read and produced as exhibit 2. In his long winded defence outline he said on the fateful day there was a family gathering at number 2 Tuli Close, Richmond, Bulawayo. He alleged that he had planned the family gathering with his cousins, Roy Smear and Robert Nzali. Beers were bought and on arrival at the venue he was told that Thandiwe Sibanda and the child were there. He referred to Thandiwe Sibanda as his wife but other people referred to her as his girlfriend.

The accused went into the house and took the child from his mother (child's). He asked the mother how the child was and was told that he was not quite well but the accused himself gained the impression that the child was not bad. He said he had not seen the child for more than a month. He therefore decided to take a walk to the shops with the child.

While at the shops he bought some more beers and gave the child a few sips of beer as the child kept on nagging by gesture. (Meaning the child kept on asking for beer).

On his way back he decided to go through a bushy area where he wanted to answer to the call of nature. While he was there he was approached by three people from behind. One of them had dreadlocks. One of them asked for matches from the accused but he did not have any. The three people set upon him and struggled with him wanting to drag him into the bush

and beat him and the child. He held the child in his arm as the two were being pummeled with blows by the assailants. As the scuffle ensued a car approached and shone its lights on the assailants who immediately disappeared into darkness into the bush. That gave the accused a chance to run back to number 2 Tuli Close.

On arrival he noticed that Roy Smear was not there. When he inquired about his whereabouts he was told that people at the venue in fact believed he (accused) had gone with Roy Smear and others.

Since only women had remained he decided to go and sit at a car that was parked nearby.

When the mother of the child asked to get the child from the accused the accused refused to give the child to her stating that he had not seen the child for a long time and wanted more time with him. The accused's sister brought a towel so that accused could wrap the child with it.

The accused said he requested to talk to the mother of the child but she said it was cold outside and went on to further suggest that they should sit inside the car. While they were in the car he gave the child more sips of beer. That infuriated the mother who complained that the child was not well. She went to tell the accused's cousin that he was giving beer to the child.

After supper the child appeared sleepy. Accused and the mother of the child went to ask for a place for the child to sleep and were told to put him in the children's room.

Thereafter he and the mother went to a shed within the premises where the two had a chat for a long time before the accused went to join other men while she joined other women.

When it was time to collect the child and go to her uncle's place to sleep the mother of the child discovered that the child was breathless. People were alerted and a decision was taken to convey the child to hospital where the child was pronounced dead.

The accused said he loved his son so much and would never have done anything to hurt, harm or let alone cause his death. While admitting being with the child at all material times he denied causing his death.

What is strange and sticks out like a sore thumb is the fact that the accused never mentioned the alleged mugging by three assailants to all his cousins and friends. Not only did he not tell the people at the family gathering but he also did not mention that to the police

when they recorded his warned and cautioned statement. In his long extra-curial statement he said this:-

“I do not admit the charge. I did not kill my son. I loved him a lot. We had a family gathering on that day. On that day I was with my son who I hadn't seen for some time. The reason being that he was staying with his mother. It was a day where we gather and have a beer drink and some food. During this period I did give my son some alcohol but it was only a few sips. That was only after he suggested for some by his gestures. There was quite a number of people there. Later that evening my son was now irritable and wanted to sleep so both my wife and I took him to the bedroom to sleep. In the same room there were other children that were sleeping. I remember my wife coming and telling me she wanted to leave to her uncle's place where she was spending the night so she asked me to take the child for her. I told her to go and get him seeing I was still enjoying myself with the other men. We were actually braaing some meat. She came back several times worrying me to take her half way with the child. When we got to the room she entered first and when she touched the child she started screaming which led the other family members coming in. They tried to resuscitate him but to no avail which led us to rushing him to Mpilo Hospital where we were told he had passed away.”

As can be seen from the above statement he never mentioned the attack on him and the child by some unknown assailants. The story only features in his defence recorded some 4 years 6 months later on 24 October 2011 two days from the date of his trial.

His extra-curial statement was produced by consent as exhibit 3. Exhibit 4 was an affidavit by Cst Bhebhe who identified the body of the deceased to Dr I. Jekonya who examined the remains of the deceased and compiled a post mortem report exhibit 5. The doctor observed and recorded the following injuries on the remains of the child:-

#### **External examination**

Under marks of violence he noticed some finger marks around the neck and base of the chin and bruises. There was a total fracture dislocation of the lower upper arm just above the elbow.

#### **Internal examination**

Under this head he noticed the following:- The lung was pale and over inflated. Bruised back of the chest wall from inside. Old healing fracture of the left seventh rib towards the back midline and right rib near the midline. The stomach contained copious amounts of fluid – liquor. The

liver had multiple ruptures especially on the right back and midline of the liver and there was massive subcapsula (under liver sheath) hematoma.

The doctor remarked that the pale organs indicated severe hemorrhage and in this case it was caused by bleeding from the ruptured traumatized liver due to severe force that was used.

The findings on the neck were indicative of manual strangulation which on its own could have caused death. Similarly, the hemorrhage on its own could have caused death. As a result of these findings the doctor opined that this was an intentional murder and was effectively and thoroughly carried out. The old healing fractures of the ribs were suggestive of previous child abuse by the assailants.

His conclusion was that death was:

- a) Due to severe hemorrhagic shock and manual strangulation
- b) Liver traumatic ruptures
- c) Callous murder and
- d) Domestic violence

The evidence of the following witnesses was admitted by consent in terms of the provisions of section 314 of the Criminal Procedure and Evidence Act [Chapter 9:07] Isaac Makaya, Robert Nzali, Bimha Wilfred, Cst Bhebhe and Dr I. Jekonya.

Three witnesses gave viva voce evidence namely the mother of child Thandiwe Sibanda, Roy Smear and Vanisha Timm. Their evidence is largely common cause and corroborative of each other.

Thandiwe Sibanda said the accused had phoned her requesting to see the child. She went to the venue and arrived at around 5p.m. The accused arrived shortly thereafter. The child was about 2 years old at the time. On arrival accused took the child from its mother and went out of the house while she remained inside with accused's cousin cooking. The accused went out of the premises with the child and was away for about 2 hours and only returned after night fall at around 7p.m. It had become dark and a bit cold outside.

The witness told the court that she and the accused's cousin thought the accused and the child had gone to the shops with other men but that was not the case.

On his return the witness asked him where he had been since he had not gone out with other men. His reply was that he had taken a walk with the child. She noticed that the accused had a swelling on the left side of his forehead and the child had a scratch below his left eye.

She asked the accused what had happened but the accused told her that the child had scratched himself. Most importantly the mother observed that the child was breathing heavily almost gasping for breath. She asked the accused why that was so. His reply was that he had given the deceased some beer without saying what type of beer but said he had given him a little bit of it.

I pause to observe that he had in fact given the child a lot of it because the doctor who examined his remains found copious amounts of fluid – liquor in the stomach. It is difficult to understand why the accused did that. His story that he gave him little sips is therefore not true.

The accused would not let the mother have the child. The accused left the kitchen where they had been standing and went to sit in the veranda with the child in his hands. She followed him as she had become worried about the condition of the child. When she got to where accused was she noticed that the child was no longer breathing heavily like before and thought he had fallen asleep. The accused had made the child lie in his arms face down. She then suggested that the child should be taken to bed. The accused would still not let her have the child but stood up with the child in his hands. They went to the spare bedroom together and left the child there to sleep. The accused then suggested that two of them go and sit at a garage like shelter.

To her surprise each time she asked him to let her have the child he refused. He always said the child was alright and fine. So he never allowed her a chance to take the child and look at him closely that was why all she could see was the scratch below the left eye. The accused would not allow her to have the child even when she could hear him breathing as if he was snoring and gasping for breath.

The accused acted in that manner for fear that the witness would have noticed other injuries on the deceased. For instance she would have probably observed the finger marks around the neck. She also could have discovered much earlier that the child was lifeless and that his face was swollen. He deliberately prevented her from discovering earlier that the child had died. As a result the child was only discovered to be breathless after she had wanted to collect him and go to her uncle's place where she was going to sleep.

The witness told the court that the accused's mother did not want him to be in love with her. She never accepted the child and never went to see him until he died. She said the accused's mother first saw the child in the mortuary.

She told the court that some other time before the fateful day the accused had visited her and the child. During his visit when the child was crying he took him out with him to go and make him stop crying. He was away with the child for some time and returned. The next day

she noticed that the child had a blood shot eye. The child would scream when she was washing him especially when she touched his sides. When she told the accused he suggested that the child should be taken to the clinic and gave her some money as medical expenses. The eye was treated but the pain on the sides was not. The mother told the court that she never assaulted the child herself. This seems to suggest that the fractures to the seventh rib and the eight right rib occurred during the accused's visit. The child did not have the pain before the accused's visit. The accused must have inflicted those injuries as the child could not have inflicted them on himself.

The witness told the court that the accused had disputed paternity in this matter. He even deserted the witness when she was two months pregnant and only returned when the child was six months old. She thought there was a change of heart on the part of the accused as he seemed to have accepted the child. He even supported the child.

Under cross-examination the witness emphasized that when she asked the accused where he had gone to with the child he said he was just somewhere outside. He never told her that he had gone to the shops. She also was emphatic that when she asked him why he had a swelling on the left forehead the answer he gave her was that he did not know what happened to him.

I pause to observe that if he had been attacked and mugged this would have been the opportunity to tell his girlfriend about it. She said accused never mentioned any attack on him.

The witness told the court that other than having a flu the child did not have any other problem when she went with him to the gathering. He was given paracetamol for the flu.

It came out clearly under cross examination that after the child was about 8 or 9 months accused appeared to love him and openly regretted the fact that he had denied being the father of the child due to the influence of his family members.

The witness told the court that the accused had taken some beer but was not drunk at all. This is supported by the other witnesses. This witness was fair, and did not want to exaggerate things. She told this court that she and the accused reconciled after the death of the child and have since had two children together aged 3 years and 9 months respectively. She had nothing against the accused. She was a credible witness who is worth to be believed.

Her evidence is corroborated by that of Roy Smear and Vanisha Timm who both stated that accused never mentioned the attack on him and the child by some unknown assailants.

The accused had no witnesses to call but gave evidence himself and stuck to what he said in his defence out line. However, he faired very badly as he was unable to explain why he had not mentioned the attack on him and the child. His explanation that he did not see it necessary is nonsensical and clearly false. The story of the attack is clearly a hopeless after thought which must be rejected.

The court finds that the accused took the child away for two hours. When he returned with the child he had sustained the injuries from which he died. The only reasonable inference that can be drawn from all the proved facts is that the accused inflicted the injuries from which the child died. The attack on the deceased was a brutal and callous one. The accused planned the murder. He phoned the mother of the child saying she should bring the child as he wanted to see him.

On arrival at number 2 Tuli Close he was told the deceased and his mother were already there. He took no time and immediately went to take the child from the mother. After taking him away from the mother he again wasted no time and went away with him to some unknown destination where he carried out the murderous attack on the child. He was away for about 2 hours with the deceased.

On his return he would not allow the mother to have the child thereby preventing any early medical treatment of the child. He kept on saying the child was alright when he knew that he had brutally assaulted the child. His aim was to ensure that the child died. That explains why he would not allow the mother to have him before he died.

The accused is clearly guilty of murder with actual intent.

### **Extenuating circumstances**

#### **Defence Counsel**

Those are circumstances which reduce the accused's moral blameworthiness.

In *S v Chaluwa* 1985 (2) ZLR 121

The seriousness or gruesomeness of an offence can never exclude the possibility of extenuation. The facts of the case must be considered with possible mitigating circumstances in order to arrive at a proper finding as to the weight to be given to each.

Where the conviction is based on the findings of accused's version these findings even if unlikely cannot be excluded from a consideration of extenuating circumstances.

*In casu* is clear that accused had psychological pressure from close family members especially the mother who despised his wife. She even did not see her grandson. That could have disturbed and confused the accused.

Accused's doubt of paternity which is indicative of him deserting the mother of the deceased.

Such conduct is indicative of immaturity and lack of experience of life thoughtlessness.

*S v Chinhinga* SC-79-02 accused had taken alcohol had taken 5 beers which could have had a serious impact with accused's mental balance. That is all.

### **State Counsel**

The decision whether there are special circumstances lies with the Judge and assessors *S v Jaure* 2001(2) ZLR 393.

Going by the definition – it is so broad as to encompass any factor that may reduce the accused's moral blameworthiness.

The psychological pressure seemed to be one of those factors which serves to reduce the accused's moral blameworthiness. The state concedes that that factor constitutes extenuating circumstances.

The accused was not immature at the time he committed the offence. The doubt of paternity cannot be considered as extenuating. Even if he doubted that the child was not his every human being has got a right to life.

There is only one factor..... That is all.

### **Reply**

Accused would even visit his mother alone. That on its own counts as an extenuating circumstance.

### **By court**

Although accused himself did not want to open up about the psychological pressure from the relatives especially his mother evidence shows that there was pressure. Accused's mother never even saw the deceased until he died.



The concession by the state is proper in my view. Psychological pressure from relatives caused the accused to do what he did. In the result I find that that amounts to special circumstances.

Public Prosecutor - accused is a first offender

### **Mitigation**

Defence Counsel - accused is 36 years old. Accused has two minor children with deceased mother aged 3 years and 9 months respectively.

Accused is the bread winner of that family through his work as a mechanic. The matter has taken 4 years 6 months to come to trial. A sentence of 12 years is suggested.

### **State Counsel**

This was a pre meditated murder. It was a brutal and callous attack on the innocent child a young precious life was lost unnecessarily. It is the duty of this court to protect the sanctity of life – see the *Jaure* case where it held that inspite of the finding of extenuating circumstances the death sentence may still be imposed if the Judge concludes that the extenuating circumstances far outweighed by the aggravating features. That decision should be made by the Judge alone although assessors may give informed opinion to the Judge. The court can still impose the death sentence if the scales are tilted the other way.

In the event that the court makes a finding to the contrary the state is guided by the following cases – *Denis Ncube v S* SC-114-93. Accused had been sentenced to death. On appeal it was found there were extenuating circumstances 20 years imprisonment was imposed.

*Mahlalela Nyoni v S* SC-253-92 accused had been sentenced to death on appeal 20 years was imposed.

### **Sentence**

All that needed to be said on behalf of the accused has been said and is being taken into account. This is a proper case to impose sentence other than capital punishment.

In this matter the accused carefully planned the murder. After brutally and callously attacking the child the accused gave him copious amounts of alcohol to drug him. The accused had previously attacked the deceased breaking two of his ribs. As if that was not enough he went on to commit is brutal and callous murder. A young life was unnecessarily lost. The court has a duty to protect human life.

Judgment No. HB 165/11

Case No. HCT 126/11

CRB 32/03/07

For quite some time the court was entertaining a sentence of life imprisonment but has decided against it at the last minute and will impose a sentence other than that.

In the circumstances the justice of this matter will be met by a sentence of **THIRTY YEARS IMPRISONMENT.**

*Criminal Division, Attorney General's Office, applicant's legal practitioners  
Dube-Banda, Nzarayapenga & Partners, accused's legal practitioners*