

THE STATE

Versus

PAMELA HOMELA

IN THE HIGH COURT OF ZIMBABWE

TAKUVA J with Assessors Mr W.T. Matemba & Mrs C. Baye

GWERU 28 SEPTEMBER & 5 OCTOBER 2015

Criminal Trial

Shumba for the state

Ms V. Kwande for the accused

TAKUVA J: The accused was charged with murder, it being alleged that on the 11th day of August 2014 and at Village 1 Chief Ntabeni, Silobela in the Midlands Province, the accused person unlawfully caused the death of Proud Moyo by stabbing him with a knife once on the left side of the chest, intending to kill him or realizing that there was a real risk or possibility that her conduct may cause death and continued to engage in that conduct despite the risk or possibility.

She pleaded not guilty to the charge. State and defence outlines were read and produced as exhibits one and two respectively and I do not intend to repeat their contents suffice to state that the accused raised the defence of self defence. Specifically she stated that the deceased entered a hut she was in and started assaulting her with an open hand while she was seated. She attempted to stand up but accused pushed her down and tried to take the knife she was using to cut the meat. Since she was pregnant, she believed that the accused would easily overpower her and stab her with the knife. As they were struggling for the knife, she quickly “jerked her arms from the deceased’s grip and stabbed him once on the left side of the chest.” Accused said she did not intend to kill the deceased but just wanted “to deter him and fend off his attack.”

Exhibit 3 was accused’s confirmed warned and cautioned statement in which she stated:

“I admit to the charges being levelled against me. I did not intentionally stab Proud Moyo with a knife because we were fighting. He wanted to take the knife which I was using to cut some meat and we used to have some misunderstandings so that time I thought he wanted to grab the knife and stab me also.”

Exhibit 4 was a post mortem report by Dr T. Moyo whose findings are that the cause of death was: (1) severe left sided haemopneumo-thorax due to trauma; (2) Hypovolaemic shock due to haemorrhage.

Exhibit 5 was a dental report that shows the accused's age as between 16 – 17 years.

Finally exhibit 6 was a kitchen knife with the following dimensions – length of handle – 10,5cm

- total length – 28,5cm
- weight – 0,162kg
- length of the blade 18 cm

The evidence of the following witnesses was admitted as it appears in the outline in terms of section 314 of the Criminal Procedure and Evidence Act chapter 9:07 by consent:

- 1) Lovemore Mutakirwa
- 2) Timothy Chamwaita
- 3) Dr T. Moyo
- 4) Dr T. Mapanzure
- 5) P. Svondo

Only one state witness gave *viva voce* evidence, namely Masline Mpofu who is accused's sister-in-law. She is a 23year old mother of two who is married to accused's husband's elder brother. She lives in the same village with the accused and deceased. On the fateful day she was at home when deceased sent a boy to collect a patch from accused's hut. The boy returned and informed deceased that accused had refused to give him the patch. Deceased then jumped off the

cart and went to the hut where accused was. She said as she was going to the kitchen she heard some noise emanating from accused's hut. Although she could not see inside the hut, she said she concluded that a fight was going on inside the hut. Further, she said she heard accused and deceased exchanging insults until deceased emerged from the hut and fell down. Accused then came out wielding a knife. When she enquired from the accused what had happened, accused said she did not care because deceased had also injured her finger. She screamed for help and neighbours gathered resulting in accused's arrest.

When it was put to her in cross examination that the deceased had assaulted the accused inside the hut she said, "I cannot say that, all I heard is noise". She said exhibit 6 belongs to accused and her husband. As regards who was bigger in stature between accused and deceased, she said accused was bigger.

The state closed its case after the testimony of this witness. The bulk of what this witness said is common cause.

The defence also called one witness, namely the accused. She adopted her defence outline as her evidence in chief and added nothing. She was however cross examined by the State Counsel. While admitting that the reason for the fight was the unavailability of a "patch," she denied that she did not want to give it to the deceased.

According to her, deceased was angry when he confronted her in the kitchen hut. Once inside, the deceased insulted her before he slapped her on the cheek and pinned her down. She said she still had the knife in her hands as she was using it to cut the meat she was about to cook. They then wrestled for the knife with deceased holding the sharp end of it while she held the handle. She believed deceased wanted to disarm her of the knife and then use it to stab her. As she twisted her hands, the knife pointed towards deceased who was then stabbed in the chest. Further, she said she was lying on her back and deceased was in a bending position with his chest close to the knife's blade. She admitted that from the injury sustained by the deceased,

excessive force was used to push the knife that deep. However she attributed this to the fact that as she twisted the knife, the deceased was also pulling it towards his chest.

According to the accused the scuffle took a very short period.

Analysis

The issue for determination is whether or not self defence has been established. The requirements of this defence are as follows;

1. an unlawful attack
2. upon the accused or upon a 3rd party where the accused intervenes to protect that 3rd party
3. the attack must have commenced or be imminent
4. the action taken must be necessary to avert the attack
5. the means used to avert the attack must be reasonable

See - *S v Banana* S-158-94;
S v Chauke 1991 (2) SACR 251 (B);
S v Mandizha S-200-91

The law also requires that in judging whether the means employed by the accused to defend himself were reasonable the court must avoid an armchair approach. *S v Manyekete* S 386/81. In other words the court must not impute to a person suddenly faced with a murderous assault a mental calm and ability to reason. *Ex post facto* reasoning which does not take into account the pressure that the accused was under must be avoided – *S v Zikhala* 1953 (2) SA 568 (A).

Applying these legal principles to the facts in casu we make the following findings;

- 1) There was an altercation between deceased and accused over a patch deceased wanted to use to mend the scotch cart tyre
- 2) The deceased clapped the accused on the cheek and proceeded to pin her down

- 3) There was a struggle for the possession of a knife accused was holding and using
- 4) The accused then stabbed the deceased during that struggle
- 5) The accused delivered one stab wound to the deceased's chest
- 6) The deceased died from injuries inflicted by the accused person
- 7) The State could not rebut the accused's version on the circumstances surrounding the assault. This was so because there was no independent witness to the stabbing other than the accused who we find to be a credible witness. Therefore we find that there was indeed an unlawful attack on the accused by the deceased.
- 8) We find also that the attack had commenced and the action taken by the accused was necessary to avert the attack
- 9) We however find that the means used to avert the attack were not reasonable in that the accused used excessive force to push the knife into the deceased's chest.
- 10) Further, we find that the excess was not immoderate and on that basis a verdict of murder cannot be sustained
- 11) However, we find that a verdict of culpable homicide is justified in the circumstances.

Accused was therefore found not guilty of murder but guilty of culpable homicide.

Reasons for sentence

Accused stands convicted of culpable homicide. The court must decide what sort of punishment is appropriate and what the object of the sentence is. Is the object:

- (a) To punish the offender?
- (b) To deter the offender?
- (c) Deter others?
- (d) Compensate the victim?
- (e) Rehabilitate the offender?
- (f) Protect the public?
- (g) A combination of all or any of these objects?

Having taken into account the object (s) of sentence and the accused's circumstances, the court must fix a penalty appropriate for the offender and for her offence.

In *S v Ngulube* HH-48-02 it was held that before assessing a sentence the court must equip itself with sufficient information to enable it to assess sentence humanely and meaningfully and to reach a decision based on fairness and proportion.

In *S v Shariwa* HB-37-03 the court held that judicial officers must adopt a rational approach towards sentencing. There is no room in our system for an "instinctive" approach to sentencing. Sentencing should be a rational process where the court strives to find a punishment which will fit both the crime and the offender. Whatever the gravity of the crime and the interests of society, the most important factors in determining the sentence are the person, and the character and circumstances of the crime. Also, the determination of an equitable quantum of punishment must chiefly bear a relationship to the moral blameworthiness of the offender. However, there can be no injustice where, in the weighing of offence, offender and the interests of society more weight is attached to one or another of these, unless there is over-emphasis of one which leads to the disregard of the other.

The court should not be over-influenced by the seriousness of the type of the offence and fail to pay sufficient attention to other factors which are of no less importance in the actual case before the court. Justice should be tempered with mercy.

In *S v Manyevere* HB-38-03 it was stressed that punishment should as far as possible be individualized by conducting meaningful pre-sentencing investigations. Assessment should not be based on haphazard guess. The court should weigh personal circumstances against the reason why the accused committed the offence and the circumstances of the offence.

In assessing an appropriate sentence *in casu*, the court will keep these principles in mind. The court will consider what has been submitted by accused's legal practitioner in mitigation and aggravating features submitted by the State Counsel.

In aggravation, the State Counsel conceded that there is only one such factor namely the loss of a young life. We agree that the deceased was a young man whose life was prematurely terminated. Also culpable homicide arising from the use of violence is a serious offence.

However, on the other hand we have the following mitigating factors.

1) Youthfulness

The accused was aged 16 at the time she committed the offence. She was a juvenile at the material time and it is trite that due to immaturity, young people act irrationally. The courts have always treated young offenders with leniency.

2) First offender

First offenders should be kept out of prison wherever possible – *S v Chitanda* HH-215-89; *S v Van Jaarsveld* HB-110-90. Young first offenders, particularly should be kept out of prison whenever possible. *S v Mudekwe & Anor* HH-7-86; *S v Ncube* HB-153-86

3) Female first offender

Usually, female 1st offenders are treated more leniently than their male counterparts – *S v Malunga* 1990 (1) ZLR 124 (H); *S v Gwatidzo* HH-271-90

4) Accused's family background

According to the Probation Officer's report exhibit 7, the accused has a chequered past. The court will highlight the following milestones in her life.

- (a) She comes from a broken family in that her parents divorced when she was only 5 years old.
- (b) Her mother re-married while she remained in the custody of her father who also re-married a woman who abused her physically and emotionally. Her father died when

- she was 12 years old and she went to live with her paternal grandparents who were advanced in age. She dropped from school after grade 7 due to poverty. She worked as a domestic worker for a short time but had to return to be a care-giver to her frail and sick grandfather who subsequently died. She was left looking after her old grandmother.
- (c) At the age of 16 she eloped to Alfred Moyo (deceased's brother). This family was headed by deceased's father who passed on the month accused arrived i.e. March 2014. Discipline was not effectively enforced due to the fact that the deceased's mother was not respected in the family. It is common cause that accused and deceased had a long standing grudge. Deceased would not eat what accused cooked. Deceased was in the habit of scolding accused when he was drunk.
- (d) At the time of the offence i.e. August 2014 accused was 7 months pregnant. She was suffering from emotional turbulence. It is clear from the above that the accused had an unbalanced upbringing, got married at a tender age and lacked proper moral teaching and guidance.

5) The aftermath of the crime/repercussions of the crime

The accused is now the sole custodian of an 8 month old baby since the husband and his family have chased her away from their home. The accused is stigmatized as a murderer in that community hence the clear ostracism. Quite clearly this amounts to punishment.

6) Circumstances surrounding the commission of the crime

- (i) The accused was a victim of an unlawful attack by the deceased
- (ii) She was fighting a young man,
- (iii) She was 7 months pregnant and emotionally unbalanced
- (iv) The accused did not look for a weapon to use
- (v) She delivered a single blow in circumstances where she had an opportunity to deliver more blows.
- (vi) The excess was not immoderate.

For these reasons, the court is satisfied that *in casu*, the mitigating features far outweigh aggravating factors. The court finds that precedents set in cases like *S v Lewis Moyo* HB-90-12 and *S v Makunde* HB-32-13 are not applicable as they are distinguishable from the facts *in casu*.

In the present case, the court is of the view that the purpose of sentence should be rehabilitative. The sentence should help her have a normal and useful life again. The accused must be re-integrated into society. We therefore take the view that a custodial sentence would be inappropriate as it would achieve the exact opposite consequences. Since accused is emancipated in the sense that she is now a 17 year old mother, committing her to an institution in terms of section 351 (2) (3) of the Criminal Procedure and Evidence Act will not achieve the desired results. Further accused is an unemployed indigent rural girl who due to immaturity failed to cope with the rigours of a housewife in a rural setting. The complex dynamics of running such a home coupled with her immaturity and the fact that the family she married into was morally disintegrating and decaying overwhelmed her.

Accordingly, accused is sentenced as follows:

Four (4) years imprisonment wholly suspended for 5 years on condition accused is not convicted of an offence involving violence against the person of another for which upon conviction she will be sentenced to a term of imprisonment without the option of a fine.

Prosecutor General, state's legal practitioners
H. Tafa & Associates, accused's legal practitioners