

THE STATE  
versus  
EDSON PHILLIMON MLAMBO

HIGH COURT OF ZIMBABWE  
MWAYERA J  
MUTARE, 11 and 16 October 2018

### **Criminal Trial**

ASSESORS: 1. Mr Sana  
2. Mr Chagonda

*J Chingwinyiso*, for the State  
*L Mhungu*, for the defence

MWAYERA J: The accused was initially charged with murder as defined in s 47 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. It is alleged that on 7 June 2017 and at Ratelshoek Tea Estate, Chipinge, the accused unlawfully and with intent to kill or realising that there was a real risk or possibility that his conduct might cause death and continued to engage in that conduct despite the risk or possibility shot Tinashe Gwiza in the head with a 12 Bore Pietro Beretta shotgun once thereby inflicting injuries from which the said Tinashe Gwiza died. The accused pleaded not guilty to murder but admitted to having negligently caused the death of the deceased. The accused 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. A statement of agreed facts was tendered as an Annexure "A". It was apparent from the statement of agreed facts that on the fateful day the deceased together with 5 others connived to go and steal irrigation polythene pipes at Ratelshoek Tea Estate. The deceased and company proceeded to the Estate with a 1 ½ ton truck and stole 14 x 100m rolls of polythene irrigation pipes. As they were making good their escape from the farm the security guard on duty alerted the accused who then teamed up with the Estate Manager to follow up on the intruders. The accused armed himself with a shotgun with five bores. The accused and the Estate Manager

who were using a Ford Ranger Twin Cab truck managed to intercept the truck in which the loot, accused and colleagues were in.

The truck and the Ford Twin Cab were involved in an accident as they side swapped at an intersection. This caused the truck to stop. The accused then fired two warning shots into the air and another shot in the direction of the now deceased and shot him in the head. The accused discovered the deceased lying on the ground bleeding profusely. The deceased was about 4 metres away from the truck. He was rushed to Chipinge Hospital where he passed on the following day the 8<sup>th</sup> of June 2017. The remains of the deceased were examined and cause of death was established as skull fracture secondary to bullet injury.

The State tendered in evidence the Post Mortem Report, Ballistic Report relating to the firearm and spent cartridges and also the firearm in question. Further the State produced a sketch plan drawn at the scene by the attending police details. All the exhibits were tendered by consent. The accused admitted to having negligently caused the death of the deceased by firing a shotgun in the direction of the deceased. He admitted having been negligent by failing to realise that death might result from his conduct resulting in injuries from which the deceased died.

We convicted the accused on his own plea of guilty to culpable homicide. Having been addressed in mitigation and aggravation we proceeded to sentence as follows:

### **Sentence**

In passing sentence, we have considered all mitigatory factors and aggravatory circumstances submitted by both Mr *Mhungu* for the defence and Mr *Chingwinyiso* for the State respectively. The accused is a fairly old man of 63 with family responsibilities in the form of a wife, 4 minor children, and 5 grandchildren.

The accused pleaded guilty to the offence thereby showing remorse and genuine penitence. As correctly observed in cases cited, the plea of guilty should be rewarded although that does not reduce the criminal liability. The accused did not raise spurious defences and thus assisted in the smooth administration of justice. In the case of *S v Fergas* (1) ZLR 487 at 493B the Supreme Court had this to say:

“A plea of guilty must be recognised for what it is, a valuable tool for smooth administration of justice while not absolving it will be rewarded.”

Also see *S v Makumbe* HH 39/2013 MAVANGIRA J (as she then was) and HUNGWE J reiterated the need to reward a plea of guilty when assessing sentence. The accused in the present case ought to be rewarded for his plea of guilty to culpable homicide.

We have also taken note of the fact that although the accused was only incarcerated for a week before being admitted to bail this matter has been hanging on his head for a period of about 1 year. The trauma and anxiety that goes with suspense cannot be understated, it is huge.

The accused and his family will live with the stigma of having caused the death of the deceased. We were referred to some cases decided by this court as a way of giving guidance on sentence. The cases although not on all fours with the present case were quite useful. Mr *Mhungu* stressed a central principle in sentence for culpable homicide, that an offender is not being punished for intention because in the first place he does not have the intention but will be punished for his carelessness. See *S v Richards* (1) ZLR SC 2001 129 where the Supreme Court in deciding on an appropriate sentence for a conviction of culpable homicide clearly stated pertinent remarks on page 132 as follows:

“The function of crime of culpable homicide is not so much to punish evil doers as to inculcate caution in the citizenry and encourage attentiveness to the safety of others. In short, the function of culpable homicide is as much educative as it is coercive.”

The accused in this case ought to be punished for his failure to comply with the expected social norms of care which a reasonable man placed in his position ought to have exercised. The accused armed himself with a shotgun which is a lethal weapon. He was in pursuit of intruders, human beings and was aware these same people upon bringing their truck to a halt by virtue of the impact with accused and manager’s vehicle would escape. The accused fired at close range in the direction of people. The accused was negligent in the manner he fired the dangerous weapon in circumstances where he ought to have foreseen the risk or harm to the human beings who were fleeing. It is for that carelessness that an appropriate sentence has to be considered.

This then brings us to the other aggravatory circumstances that cannot escape our attention. The accused negligently caused the death of the deceased by firing in the general direction of the deceased. The accused having been a security guard for 34 years ought to have been trained in the use of a firearms. His conduct on the night in question borders on recklessness. After the accident the truck of the intruders having side swapped with the accused and manager’s vehicle stopped and the loot remained at the farm. The overzealous

display of power was not necessary. He knew the shotgun would discharge pellets in different directions and that there were people making good their escape but nonetheless he fired shots in the direction of the people.

The accused's moral blameworthiness is high given the property he sought to protect had been abandoned as the truck with the loot had come to a halt. Further in aggravation is the fact that the sanctity of human life is clearly spelt out in the Constitution. It is a God given right which no one has a right to take. A young 20 year old man was robbed of his life at a prime age of his life. The accused an old man of experience as a security guard ought to have done better and not use a lethal weapon on a human being. We were also referred to cases by the State Counsel in which a knife and okapi knife respectively were used. Although the circumstances are not similar to the present case, the cases are relevant in so far as they show that use of lethal weapons occasioning death albeit negligently ought to be appropriately punished. See *S v Mafunde* HB 32/13, *S v Mabhena* HB 148/13.

In our endeavour to pass sentence we are alive to the principle that the court has to strike a balance between the offence, offender and societal interests while at the same time tempering justice with mercy, see *S v Rubie* 1975 (4) SA @ 620. The courts should not make the community lose confidence in the justice delivery system by letting those who caused loss of precious human life go unpunished. The right signal has to be sent to those in authority and power that they should refrain from exerting force and unnecessarily shoot to kill under the realm of protecting property.

At the same time the message has to be sent loud and clear that a progressive society like ours emphasises the need for the rule of law to be observed. Arrests do not mean killing, the law should be allowed to take its course. The sentence should also reflect that the courts frown at lawlessness. The deceased and company had gone to this farm for purposes of stealing and this caused the unfortunate loss of precious human life. The fact that the accused has been a security guard for 34 years and that despite the miserable low salary or wage of ±\$ 300.00 went out with full force to protect his employer's property is indicative of his loyalty. We have found this to be highly mitigatory and it further reduces his moral blameworthiness.

The defence counsel also went into lamentations like the "biblical Jeremiah" urging the court to temper justice with mercy. Having considered all the submissions by both counsel and given the circumstances of the offence it is our considered view that the offence is deserving of a custodial term. We will not trivialise negligent killing of another with a firearm in protection of property in circumstances where it was not necessary and could have

been avoided. Given the degree of negligence exhibited in this case which can be described as high, it would be a mockery of the justice delivery system to impose a fine were an experienced security personnel negligently fired at close range and in the range of head causing death of the deceased. We are however, persuaded by the personal and mitigatory circumstances highlighted by the defence counsel to suspend a large portion of the prison term.

The accused is sentenced as follows: 3 years imprisonment of which 2 ½ years is suspended for 5 years on condition accused does not within that period commit any offence involving unlawful use of a firearm and or violence on the person of another for which he is sentenced to imprisonment without the option of a fine.

*National Prosecuting Authority, State's legal practitioners  
Mhungu & Associates, accused's legal practitioners*