THE STATE

Versus

NKAZIMULO NKOMO

IN THE HIGH COURT OF ZIMBABWE
KABASA J with Assessors Mr. P. Damba and Mr. J. Sobantu
BULAWAYO 12 AND 16 MAY 2022

Criminal Trial

K.M. Guveya, for the state
T. Tavengwa, for the accused

KABASA J: The accused is facing a charge of murder to which he pleaded not guilty. It is alleged that on 9th September 2021 at around 1800 hours the accused arrived home and started shouting at his two sons, accusing them of leaving the kitchen hut exposed to rain. He armed himself with a knobkerrie, ordered the two boys, aged 13 and 11, to lie down and proceeded to assault them with the knobkerrie. He thereafter ordered the younger boy to go and pen the goats whilst he remained assaulting the now deceased. After the assault the now deceased staggered out of the bedroom and fell to the ground. He subsequently succumbed to his injuries that same night.

In his defence the accused accepted that he caused the now deceased's death but it was not his intention to do so. He tendered a limited plea to culpable homicide which the state was not prepared to accept. In explaining the circumstances leading to the now deceased's demise, he said he arrived home around 1600 hours from Thokozani shops where he had spent the day with his friends. He proceeded to his bedroom for a change of clothes so he could join

his friends on a hunting trip. He then realised that ZAR 200 was missing from his wallet and none of his two sons owned up to the theft. He was infuriated and ordered the boys to lie face down on the floor, took a knobkerrie and proceeded to assault them with it. He used the "handle" not the head of the knobkerrie. He did not use excessive force and did not foresee that his conduct could cause death. He was sorry that he failed to guard against the resultant death and for his failure to properly discipline his son.

To prove its case the state produced the post mortem report which was prepared by Doctor Juana Rodriguez Gregori and gave the cause of death as:-

- Subarachnoid hemorrhage
- Cranial trauma

The accused's confirmed warned and cautioned statement in which he admitted assaulting the now deceased with a knobkerrie leading to his death was produced and marked exhibit 3. The knobkerrie whose weight is 0,450 kg and length 65 cm was produced and marked exhibit 2.

The statements of 6 witnesses was admitted into evidence in terms of section 314 of the Criminal Procedure and Evidence Act, Chapter 9:07. The state then led evidence from two witnesses.

The accused's 11 year old son was the first witness. His evidence was largely common cause. The gist of it was that he was in the bedroom with the now deceased and it was raining. Their father arrived and he was making noise. He ordered them to come and see the door to the kitchen they had left open when it was raining. He thereafter ordered them back into the bedroom where he asked them to lie down which they did before he used a knobkerrie to assault them. The first one broke and he took another one. The now deceased was

assaulted on the back, head and buttocks whilst he was assaulted on the back. He was allowed to go first and ordered to pen the goats whilst the accused remained assaulting the now deceased. The now deceased subsequently staggered out of the bedroom and fell to the ground. Their mother who had been away at church arrived, took him into the bedroom where the now deceased fell asleep. The witness in his innocence was not aware that, that which he regarded as "sleep" marked his elder brother's death.

This witness's evidence was clear and straightforward. For an 11 year old he narrated his evidence with such clarity that it was easy to follow. He impressed us as a credible witness who merely related what he recalled.

The second witness was the accused's wife. She was not at home when the assault occurred and only arrived to see the now deceased on the ground crawling and the first witness crying. She then learnt of the assault but the accused did not tell her why he had assaulted the children. She helped the now deceased up and took him to the bedroom. He however did not respond when she called his name. She then covered him with a blanket and after she had done that the accused wanted to commit suicide and die like his child. She sought help from an uncle and the police later came and took possession of the knobkerrie, which was surrendered to them by the accused.

The witness, like the first witness, stated that the accused's relationship with the children was good and only changed when he consumed alcohol.

Her evidence was clear and we found her to be a credible witness.

The accused testified in his defence and maintained that he intended to discipline the children but had no intention to kill.

He appeared overwhelmed under cross-examination as he subsequently accepted that the first witness's account of the events was correct and he had no cogent reason to assault the 2 boys. He also admitted that he intended to cause the now deceased's death. It was however clear that he was just accepting in order to get the process over and done with. We got the impression that he was overwhelmed and had resigned himself to whatever was to befall him, in much the same way as he did when he sought to take his own life that fateful night.

It was therefore important to consider the totality of the evidence in order to establish whether the accused intended to kill his son or realised the risk or possibility that his conduct may cause death but continued nonetheless.

We were left in no doubt that the accused had consumed alcohol on this day. Both witnesses said he was drunk but not very drunk.

In terms of section 221 of the Criminal Law (Codification and Reform) Act, Chapter 9:23:-

> "(1) If a person charged with a crime requiring proof of intention, knowledge or the realisation of a real risk or possibility -
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> (a) was voluntarily or involuntarily intoxicated when he or she did or omitted to do anything which is an essential element of the crime; but
> (b) the effect of the intoxication was not such that he or she lacked the requisite intention, knowledge or realisation, such intoxication shall not be a defence to the crime, but the court may regard it as mitigatory when assessing the sentence to be imposed."

The accused recalled the events of this fateful day and although he kept repeating that he was drunk, we were satisfied that he was not so drunk as to fail to appreciate what he was doing.

Does this however mean that he had the requisite intention to kill? We think not. Whilst we are not persuaded to accept that the provocation emanating from the fact that the children had not completely closed the kitchen door was sufficient to cause the accused to lose self-control to such an extent as to avail him as a partial defence to murder, we are however of the view that the circumstances of the assault do not prove that the accused intended to kill or realised the risk or possibility that his conduct may cause death.

The assault was a misguided chastisement of the children. The force used however cannot be described as severe. We are fortified in saying so because the head of the knobkerrie used in that assault, wielded with severe force and aimed at a 13 year old's head would have fractured the skull. Whilst the use of the knobkerrie was uncalled for, especially given that the accused said he used to take a switch from the trees in the yard when disciplining the children, we are unable to say the resultant injuries speak to an intention to kill or that he appreciated the risk or possibility of such occurring.

We were referred to several cases by *Mr Tavengwa* urging the court to return a verdict of guilty to culpable homicide (*S* v *Smile Ncube* HB 80-18, *S* v *Nqobile Ncube* HB 162-15, *S* v *Chipika* HB 129-17 and *S* v *Chenyika* HB 86-21) and in all these cases the accused were convicted of culpable homicide in circumstances which are more or less similar to the ones *in casu*.

In *S* v *Chipika* HB 129-17 a 14 year old boy died at the hands of his mother who struck him all over the body with switches and throttled him because he had eaten food which was meant for another child.

The court was satisfied that there was no intention to kill. We are cognisant of the fact that in that case the cause of death was not determined due to the body's state of decomposition but the throttling in itself speaks of an

assault that can be equated to the use of a knobkerrie but without severe force as happened *in casu*.

In *S* v *Chenyika* HB 86-21, a 15 year old girl died at the hands of her mother who assaulted her all over the body with switches, a strap and an axe handle and she succumbed to cerebral edema, encephalic contusion and head trauma. The accused was angry because the deceased was engaging in sexual intercourse with men and had confirmed as much to her mother.

The court agreed with the state that in assaulting her daughter the accused had no intention to cause her death but was negligent in the manner she assaulted her.

We are equally of the view that the circumstances of this case show that the accused *in casu* was negligent in the manner he assaulted his son. The negligence lay in the weapon used and the part of the body the blows were directed at. His reaction after the incident and his statement as reflected in his defence outline are indicative of the fact that he had no intention to kill and he equally did not realise the risk or possibility that his conduct could cause death.

We could have held a different view had the evidence shown that the 0,450 kg knobkerrie was repeatedly used on the head with enough force to fracture the skull.

The injuries which led to the now deceased's death are almost similar to the injuries which took the accused's daughter in the *S* v *Chenyika* case (*supra*)

In the circumstances we find that the accused negligently caused the death of the now deceased.

The accused is accordingly found not guilty of murder but guilty of culpable homicide.

Sentence

In assessing an appropriate sentence I have considered the fact that you are a first offender. You showed contrition when you accepted you caused your son's death and tendered a plea of guilty to the lesser offence of culpable homicide which the state was not prepared to accept.

Your demeanor in court also spoke to the fact that you deeply regret causing your son's death.

The death of your son is likely to weigh heavily on you for the rest of your life. The stigma that you will carry of being referred to as that one who killed his son will equally weigh heavily on you.

You were a loving father, as testified by your son and wife who appears to turn into something else once under the influence of alcohol. Your reaction on the night in question also shows how deeply you regretted causing your son's death. You wanted to take your own life.

You are 34 years old and you have 3 minor children, the fourth one having died at your hands.

You have spent 7 months in pre-trial incarceration.

In aggravation is the fact that a young life was needlessly lost. There is need to respect the sanctity of life for it is a precious gift which cannot be replaced once taken.

As a father your son looked up to you for protection. One often hears children who, when playing with other children and are unhappy with the conduct of another child brag that they will report that child to their father. This shows how children look to their fathers for protection. You failed your child.

The rights of children are jealously guarded and the United Nations Convention on the Rights of the Child (CRC) provides for the basic rights of a child, among these are the rights to family care and parental care, protection from maltreatment, neglect, abuse and degradation.

Our Constitution expresses the same rights, underscoring these values which are internationally recognised. The Declaration of Rights, Chapter 4 and Section 81 thereof, speaks to these rights as enshrined in the CRC.

Society expects no less. A home must be a place of safety, a sanctuary for every child and not a place of abuse.

You cannot escape a term of imprisonment. It need not be a lengthy one as the imprisonment from physical confinement in the 4 corners of a prison cell cannot compare to the psychological imprisonment you will be in for the rest of your life.

In *S* v *Chenyika* (supra), the mother who caused her daughter's death received a sentence of 3 years with 1 year suspended for 5 years and in *S* v *Chipika (supra)*, the mother who caused her son's death received 5 years with 3 years suspended for 5 years on the usual conditions of good behavior.

In the *Chenyika* case the accused was nursing a small child which is not so in your case. That said, regard being had to the factors already alluded to, a sentence of 5 years with 2 years suspended for 5 years on condition you do not

within that period commit an offence of which an assault on the person of another is an element and for which upon conviction you will be sentenced to a term of imprisonment without the option of a fine, will meet the justice of this case.

You are so sentenced. Effective term-3 years imprisonment.

National Prosecuting Authority, state's legal practitioners
Mutuso, Taruvinga & Mhiribidi, accused's legal practitioners