THE STATE
versus
TAPIWA POUL

HIGH COURT OF ZIMBABWE
TSANGA J
HARARE, 15, 16, 17 & 24 May 2019

Assessors: 1. Mr Shenje
2. Mr Musengezi

Criminal Trial

K Mufute, for the state
D Muchada, for the accused

TSANGA J*:* The deceased, Godfrey Bango lost his life on Christmas day in 2017 following a stabbing by the accused person Tapiwa Poul. The accused pleaded not guilty. The state and the accused were agreed on certain facts regarding the events of that day and they were submitted by consent as follows:

1. The accused and the deceased were known to each other and both resided at Benga Farm Compound, Kadoma.
2. On the 25th day of December 2017 at around 18:00 hours, the deceased was coming from Glasgow Shopping Centre in the company of Pfumayi Marayi and one Barrack going to Benga Farm Compound when they met the accused who had disembarked from a motor vehicle at Benga turn off.
3. The deceased asked the accused to identify himself. A misunderstanding arose between the accused and the deceased leading to a fight. The two were later restrained by Pfumayi Marayi and the accused left and went to Matereke shebeen.
4. Moments later the deceased entered the shebeen and slapped the accused on the face and the two shoved each other outside where they started fighting.
5. The accused then produced a stainless steel knife and used it to stab the deceased once on the upper right arm and once on the right side of the chest.

6. The accused fled the scene leaving the deceased lying unconscious on the ground and threw away the knife.
7. On the 27th day of December 2017, the accused surrendered himself at ZRP Kadoma and made indications leading to the recovery of the stainless knife.
8. The body of the now deceased was taken to Kadoma General hospital where a post mortem was carried out by DOCTOR JAVANGWE who concluded that the cause of death was
   i) Hypovolemic shock
   ii) Severed right tracheal artery
   iii) Penetrating incision wound on the upper arm

The state's exhibits

The medical report was admitted in evidence as exhibit 1. Also admitted as exhibit 2 was the accused's warned and cautioned statement which was confirmed by the magistrate. It is necessary to regurgitate its contents given that it was made by the accused only a few days after the commission of the offence and captured his version at the time of what had happened on that day. This is what he said.

> "I have understood the caution and I admit to the allegations that have been levelled against me that I killed the deceased Godfrey Bango by stabbing him once on the right armpit and once on the right side of the chest with my okapi knife. I was walking along the road behind the now deceased who was in the company of a young girl towards home as I was coming from Kadoma Town. By the time I passed them he accused started to assault me three times on my back with a sjambok and on my face for no apparent reason and I started to run away. When I was about to reach my place the deceased started to assault me again with hands and this time I pulled my okapi and stabbed him once on the right arm pit and once on the chest but intended to stab him on the hand without intention to kill. I ran away after stabbing the deceased and I threw the okapi knife in the banana plants".

What is of importance is that he acknowledges pulling out his okapi knife and attacking the deceased with it when they had the second encounter. The okapi knife used was admitted as exhibit no 3.

The accused's oral evidence

In his defence outline and oral evidence the accused raised self-defence in his second encounter with the deceased that evening that led to the stabbing. He said that at the time, the deceased was holding him in such a manner that he could not breath. He also told the court that he had drunk at least ten pints of castle beer that day. He claimed to have stabbed the deceased only once and surmised that the knife may have slid right through to inflict the second wound. In other words, there was now a variation between his warned and cautioned

statement, the agreed statement of facts, and, his evidence in court, regarding the number of times he said he had stabbed the deceased. In cross examination, he also told the court that he had bought the okapi knife that Christmas day for the purposes of cutting onions, tomatoes and peeling cucumbers at the braai fest that was taking place at the drinking place that day. However, he did not produce any witnesses to verity his purchase.

Self-defence was being introduced for the first time. It is a defence which in terms of s 253 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23]* (The code) can be a complete defence to murder where one has killed in order to preserve one's own life at the time. The attack must have commenced or been imminent; the conduct must be necessary to avert the attack; the means used must be reasonable; and, lastly, the force used must be proportionate to the attack.

The difficulty with the defence under the factual circumstances of this case is that it was being raised by the accused for the first time at the trial when he had had various opportunities to indicate that at all times he had acted in self-defence. His own actions soon after the stabbing were not actions of a person who had acted to defend himself. He told nobody after the commission of the offence that the stabbing had been an act of self-defence. If he stabbed him on the arm in order for him to let go, then logically one would expect him to immediately reveal that he had just stabbed someone in self-defence. Instead, he chose to run away from the scene, to throw away the knife, to get some money from home and disappear for a few days. There were people present at the shebeen to whom he could have revealed what had taken place.

Even when he gave his statement on the 28th of December 2017, not once did he mention acting in self-defence. His response in cross examination, that he did not mention self-defence in his warned and cautioned statement because he was afraid again defies logic as that was the opportunity to tell it like it happened. When his statement was confirmed on the 29th of December 2017, again he was also totally mum about self-defence. From his own warned and cautioned statement and even from the agreed statement of facts, he simply produced the knife and used it as part of his consciously chosen weaponry against the deceased in the fight they were having. He stabbed the accused in retaliation to the fight and not because be he was in danger. He was being punched with bare hands. There was no danger there. The deceased was unarmed. Self-defence is something that he now seeks to rely on because he knows that strategically it is a full defence yet it not supported by the facts and his own statements at the crucial time of the offence.

As for his alleged drunkenness on that day, in terms of s 221 of the Code voluntary intoxication is not a defence for a crime such as this where the effect of intoxication was not such that he lacked the requisite intention knowledge or realisation about what he was doing. We find that he was not so drunk as to not know what he was doing. His actions speak for themselves. He was able to pull out the knife from his pocket. He had the opportunity to open and use it. The state was correct that it would have required both his hands to open. After the commission of the offence he was also able to attend to the disposal of the knife and to his own getaway. These are far from being actions of a man who was so drunk that did not know what he was doing.

The crucial issue in our view is whether he stabbed the deceased with the intention to kill. Materially, we find that whilst he stabbed the deceased and engaged in a fight with him, he was not the instigator of the attack at the shebeen. He was notably unwilling to divulge the exact circumstances that had led to the earlier fight in the first place since the claim that he had been assaulted for nothing equally made no sense. When he took out the knife the issue is what was his intention. He told the police in his warned and cautioned statement that he did not intend to kill but to stab him on the hand. Yet he inflicted two distinct stab wounds. We also take note that he was carrying a prohibited knife, and, as stated, there was no evidence led by him in support of his assertion that he had indeed purchased it only that day for the benign purposes he outlined. Section 39 (iii) of the Code describes a prohibited knife amongst others as one which is released from the handle or sheath of the knife manually. It was one such knife and would indeed have required the use of both his hands for it to function. The reason why such knives are prohibited on the person is precisely because of the likelihood of their use in the commission of crimes. But it is not the possession of the knife that is at issue here but its use in the murder of the deceased.

With two stab wounds the case would appear to fall on the edge of murder in terms of s 47 (1) (b). There must have been a realisation of the real risks involved and that his conduct might cause death. It is also a case on the cusp of a negligent death in that his conduct can be attributed to a very high degree of negligence. Realising that death might result he negligently failed to guard against it and went on to stab the deceased twice. Because of its borderline nature we lean in favour of finding the accused guilty of culpable homicide.

Verdict: The accused is found guilty of culpable homicide in terms of s 49 (b) of the Criminal Code.

In arriving at an appropriate sentence, we take into account the submissions made that he is a family man and a first offender. The deceased was also equally a family man whose family has now been left to fend for themselves. The issue of his remorse raised on behalf of the accused is not directly relevant to the charge. Remorse is always after the fact as discussed in the case of *S* v *Thomas Kanongo* HH 159/19. Its bearing on the actual crime committed is in reality peripheral.

There is also the fact that a human life was needlessly lost. Our courts are increasingly concerned with the use of knives under drunken circumstances without any regard to the value of life. In *S* v *Brighton Mukwacha* HH 233-16, a 9 year effective sentence was imposed for culpable homicide involving stabbing to the left breast. Our courts have been harsher in other cases especially those where the finding has been that of murder. A sentence of 20 years for example was imposed in *S* v *Masave* HB 27/13 for a murder arising from a stabbing. This is clearly not a case for a suspended sentence as suggested by the accused's counsel.

The deceased was 28 according to the post-mortem report. He died in the prime of his life. In reaching its verdict we noted the borderline nature of the case with murder. The accused is accordingly sentenced to 10 years imprisonment of which two years is suspended on condition that the does not during that time commit an offence involving violence on the person of another for which he is sentenced to a term of imprisonment without the option of a fine.

Effective sentence 8 years imprisonment.

National Prosecuting Authority, State's Legal practitioners
Dube Manikai and Hwacha, Accused's Legal Practitioners