

THE STATE
versus
KENNEDY PALIZA

HIGH COURT OF ZIMBABWE
MUSAKWA J
HARARE, 30 & 31 October, 14 November 2014 & 23 January 2015

Assessors: 1. Mr Kunaka
2. Mr Mhandu

Criminal Trial

E. Nyazamba, for the state
T. Katehwe, for accused

MUSAKWA J: The accused pleaded not guilty to contravening s 47 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. It is alleged that on 26 February 2008 and at number 3711 Old Highfield, Harare, the accused unlawfully and with intent to kill assaulted Memory Paliza by striking him with a knobkerrie all over his body thereby causing injuries from which the deceased died.

It is not very clear why it took six years to prosecute such a straightforward case.

In his defence outline the accused states that on the day in question, the deceased who was of unsound mind shattered some window panes. When the accused attempted to talk to the deceased, the latter tried to attack him. The two had a scuffle and the deceased fell against the wooden arm rest of a couch. The accused never intended to use the knobkerrie he was holding. Thus he denies intending to kill the deceased or realising the real risk or possibility of causing death. The deceased was violent and the accused meant to discipline him and to protect himself against attack.

It is common cause that the deceased was the accused's nephew and the two resided together with other relatives. The deceased was on medication for a mental disorder. He had defaulted in taking medication which rendered him belligerent.

The state led the bulk of its evidence by way of admissions of the witnesses' testimony as summarised in the summary of state case. The post-mortem report on the

deceased was produced. The report noted bruises on the right shoulder, thigh, leg and left shoulder. There was scalp haematoma of the right parietal as well as left pneumothorax due to collapsed lung which was perforated by fractured ribs. The fourth to sixth ribs were fractured on the anterior and posterior walls. The cause of death was noted as pneumothorax and multiple rib fractures arising from assault.

The accused's warned and cautioned statement was also produced. It (In its poorly translated version) reads as follows:

"I do not admit the charge. It is true that I assaulted the deceased with a knobkerrie but I wanted to discipline him as my nephew since he had a tendency of breaking window panes. I had no intention of killing him, and furthermore the deceased was of mental health (sic) so he liked violence. I wanted to defend myself. I assaulted him at the ninth (sic) hour and the following morning he requested for some water to drink and was given by my mother. He did not die soon after the assault. He should have died of other causes not assaults. The deceased was my nephew whom I loved and I looked after him since he was young. So I do (sic) like him to die in such a way."

Laison Paliza the accused's younger brother was the only state witness to give viva voce evidence. He stated that following the shattering of two window panes by the deceased the accused came home and resolved to discipline the deceased. He told everyone to leave the dining room. This was around 8 p.m. He had seen the accused holding a broom stick.

From his room he could hear sounds of blows striking and the deceased's panting. The deceased also stated he would break more panes. He estimated the assault to have lasted for about twenty five minutes.

Considering the accused's admission to the use of a knobkerrie, Laison withheld evidence on this aspect. The evidence attributed to him in the summary of state case is to the effect that the accused used a knobkerrie. This was a material discrepancy which state counsel should have addressed with the witness.

Laison further testified that the following morning another nephew woke him up. When he went into the passage he saw the deceased lying on his back. The deceased was not stirring although the body was still warm. Attempts to resuscitate him proved futile.

The witness further explained that on the day of the assault, when the accused arrived home the deceased was seated in the lounge. Asked if the deceased had attacked the accused (per defence outline) he obviously speculated that it might have been so as the deceased was of a violent disposition on account of not taking medication. On the following day he said he saw a smaller piece of the broke broom stick.

Another remarkable aspect of this witness is that when the deceased was being assaulted he retired to bed. In fact he made reference to taking some medication. He did not seek to intervene as he thought the deceased was merely being disciplined.

The accused's evidence in-chief was quite brief. He stated that the deceased was in the habit of breaking window panes. He resolved to discipline him. Hence the use of a broom stick. He called the deceased to the dining room and he complied. He demanded to know why the deceased was behaving in a defiant manner. The deceased got up and advanced towards the accused. The accused picked up the broom stick and started to assault the deceased. He justified his action as being motivated by trying to deter the deceased from being violent. He did not foresee the fatal consequences. The deceased normally paid heed to what he said.

Under cross-examination he confirmed that he ordered everyone from the room. As to how he intended to discipline the deceased he stated that by assaulting him with the stick. He also stated that he did not know that the deceased had defaulted in taking his medication. Asked if the deceased attacked him he answered in the negative. He was then asked why he claimed the deceased was about to attack him and he replied that it was the manner in which he got up. They then grappled and fell down, with the deceased hitting against the arm rest of the sofa with his chest. He admitted that the fall was accidental. He also admitted that he desisted from assaulting the deceased after about twenty five minutes. This, he said was after the intervention of his mother.

In his address Mr *Nyazamba* quite correctly submitted that the requirements of defence of person as provided in s 253 of the Code were not met. He further submitted that even if it were accepted that the accused was under attack, the means he used were unreasonable. He also submitted that the accused was aware of the risk of using a stick on the deceased. In such a case there was an element of recklessness.

Having initially reasoned so well Mr *Nyazamba* then somersaulted in his next submission. He concluded that the accused should be convicted of culpable homicide. He based this submission on the accused's belief that he was disciplining the deceased. Mr *Nyazamba* also attacked his own case by submitting that there was no internal examination of the deceased's skull. The submission here is that it ought to have been established whether the deceased would have survived had he received medical attention. This, in my view is a superfluous submission as Mr *Nyazamba* had earlier on submitted that there was no break in the chain of causation as he made reference to s 11 of the Code.

In his address, Mr *Katehwe* for the defence made common cause with Mr *Nyazamba*'s submissions regarding a verdict of culpable homicide. He submitted that there is a fine line between a deliberate killing and death resulting from a realisation of real risk or possibility. He thus submitted that whilst the accused might not have subjectively foreseen death, a reasonable person would have foreseen the possibility of causing death.

There is no doubt that the accused's conduct caused death. He used a weapon and inflicted injuries which resulted in the deceased's death. It is immaterial and does not arise that the deceased could have survived if he had received medical attention. In any event, it is the accused himself who should have ensured that the deceased received medical attention.

The accused person was not under attack. He formulated a decision to assault the deceased and he used a weapon. This was not justified in the circumstances. He then called the deceased into the room where the assault took place. He firstly cleared the room of other people. That he assaulted the deceased because the latter made as if he wanted to attack him is not supported by his own admission and even by the somewhat hesitant testimony of *Laison*. Therefore, it is safe to reject self-defence.

In his testimony the accused claimed to have used a broom stick. Nonetheless his defence outline and the confirmed warned and cautioned statement refer to a knobkerrie. The two instruments cannot be mistaken for each other. Even if it were to be generously accepted that there was wrong interpretation from the vernacular in the warned and cautioned statement, the same cannot be said of the use of the same term in the defence outline. Suffice it to note that there was no satisfactory explanation why the accused mentioned knobkerrie in the two documents. Therefore, we hold that the accused used a knobkerrie as opposed to a broom stick. Even the injuries are likely to have been inflicted by a knobkerrie, especially the rib fractures.

We cannot conclude that the accused's avowed intention was to cause death. He set out to punish the deceased for breaking a mere two window panes. In doing so, he chose to use a weapon.

The test for realisation of real risk or possibility is subjective and is provided in s 15 of the Code. It has two components, namely-

- (a) Awareness that there is a risk or possibility that the conduct embarked on might result in the relevant consequence and the relevant fact or circumstance existed when the accused engaged in the conduct.

(b) Recklessness. This entails that despite the real risk or possibility the person whose conduct is complained of continued to engage in such conduct.

In terms of s 15 (2) of the Code, recklessness is implicit in the term realisation of risk or possibility. Where awareness of real risk or possibility is proved, recklessness shall be inferred from the fact that the relevant fact or circumstance actually existed when the accused engaged in the conduct.

To deliberately embark on an assault of another person entails an awareness of the real risk or possibility of injury. In the present case the assault lasted for close to half an hour. The accused only desisted after the intervention of his mother. It is inevitable to infer that because grievous bodily harm ensued, the accused must have realised the real risk or possibility of fatal consequences of his conduct. This is evidenced by the three ribs that got fractured and perforated the lungs. It is immaterial that the head injury was not fully explored. There is no doubt as to what caused death.

Accordingly, the accused is found guilty of contravening s 47 (1) (b) of the Code.

Regarding the punishment for murder s 48 (2) of the Constitution provides that-

“A law may permit the death penalty to be imposed only on a person convicted of murder committed in aggravating circumstances, and—

- (a) the law must permit the court a discretion whether or not to impose the penalty;
- (b) the penalty may be carried out only in accordance with a final judgment of a competent court;
- (c) the penalty must not be imposed on a person—
 - (i) who was less than twenty-one years old when the offence was committed;
 - or
 - (ii) who is more than seventy years old;
- (d) the penalty must not be imposed or carried out on a woman; and
- (e) the person sentenced must have a right to seek pardon or commutation of the penalty from the President.”

It is evident that there is no provision in the Constitution or any other statute where the term aggravating circumstances is defined. Counsel for the defence, in his written submissions points out that the omission of reference to extenuating circumstances and the introduction of the term aggravating circumstances should be interpreted to mean that there must be introduced an enactment that defines that term.

Both Mr *Katehwe* and Mr *Nyazamba* cited Hungwe J's decision in *S v Mutsinze* HH-645-14 in which the learned judge interpreted s 48 of the Constitution. The learned judge concluded that there is no law in place which defines aggravating circumstances. He went further to remark that the effect of s 48 of the Constitution is to give courts unfettered discretion on sentence, which was not the case in respect of s 337 of the Criminal Procedure and Evidence Act [*Chapter 9:07*]. Hungwe J went further to remark that the introduction of the term aggravating circumstances means that a law must be enacted which defines that term.

Section 337 of the Criminal Procedure and Evidence Act provides that-

“Subject to section three hundred and thirty-eight, the High Court—

- (a) shall pass sentence of death upon an offender convicted by it of murder:
Provided that, if the High Court is of the opinion that there are extenuating circumstances or if the offender is a woman convicted of the murder of her newly-born child, the court may impose
 - (a) a sentence of imprisonment for life; or
 - (b) any sentence other than the death sentence or imprisonment for life, if the court considers such a sentence appropriate in all the circumstances of the case”.

It is well established that prior to the coming into effect of the present Constitution, the death penalty was mandatory where a person was convicted of murder unless the court found extenuating circumstances. Section 338 of the Criminal Procedure and Evidence Act excludes the death penalty for the following-

- a) a pregnant woman; or
- (b) a person who is over the age of seventy years; or
- (c) a person who, at the time of the offence, was under the age of eighteen years.

In light of s 48 of the Constitution, it is imperative that s 338 of the Criminal Procedure and Evidence Act be aligned with the Supreme law.

Although extenuating circumstances was not defined, the term basically relates to circumstances or factors surrounding the commission of the offence that lessen the moral blameworthiness of the convicted person. In arriving at such finding a court weighed the mitigating factors against aggravating factors. See for example the cases of *S v Jacob* 1981 ZLR 1 (AD) and *S v Phineas* 1973 (3) SA 897 (RAD).

A constitutional provision must be accorded a generous and purposive interpretation. As was stated in *Smythe v Ushewokunze and Another* (1998 93) SA 1125 (ZS) at 1134-

“In arriving at the proper meaning and content of the right guaranteed by s 18 (2), it must not be overlooked that it is a right designed to secure a protection, and that the endeavour of the Court should always be to expand the reach of a fundamental right rather than to attenuate its meaning and content. What is to be accorded is a generous and purposive interpretation with an eye to the spirit as well as to the letter of the provision; one that takes full account of changing conditions, social norms and values, so that the provision remains flexible enough to keep pace with and meet the newly emerging problems and challenges.”

The law referred to in s 48 of the Constitution which provides for the passing of the death penalty already exists. The framers of the present Constitution could not have been oblivious of that fact. The only snag is the absence of what constitutes aggravating circumstances. That notwithstanding, the common law which is also part of our law provides for what constitutes aggravating circumstances in the commission of a crime as a plethora of decisions of the superior courts demonstrate.

Notwithstanding the absence of a definition of aggravating circumstances it is possible, from the particular facts of a case, to make a finding of what constitutes aggravating circumstances. Within a legal context aggravating circumstances are ordinarily understood to be those circumstances that reduce an accused person’s moral blameworthiness. See *S v Jacob* 1981 ZLR 1.

There are some crimes within our jurisdiction which provide for minimum mandatory sentences unless a court finds that special circumstances or reasons exist for non-imposition of such mandatory sentences. The particular statutes do not define special circumstances or reasons. Nonetheless courts have not been hamstrung in determining what constitutes special circumstances or reasons. This is because they have had recourse to the common law.

Examples that immediately come to mind are-

- a) Stock theft in contravention of s 114 (2) as read with subs (3) of the Criminal Law (Codification and Reform) Act.
- b) Unlawful dealing in or possession of precious stones in contravention of s 3(1) of the Precious Stones Trade Act [*Chapter 21: 06*].

In so considering we note the following factors. The accused was provoked by the deceased’s conduct. Hence, when he assaulted the deceased, he was seeking to punish him for his violent conduct of breaking two window panes. In the process he used a knobkerrie which broke the deceased’s ribs. The assault lasted for close to half an hour, as we have already found. The nature of the assault in the present case cannot, in my view constitute aggravating circumstances as to warrant the imposition of the death penalty. In addition, there

was no premeditation, which is why we found him guilty of contravening s 47 (1) (b) of the Code.

We therefore make a finding that there are no aggravating circumstances.

Tadiwa & Associates, pro deo legal practitioners for accused