

THE STATE  
versus  
MAXWELL JECHE

HIGH COURT OF ZIMBABWE  
HUNGWE J  
MUTARE, 24 & 27 February 2015 & 3 March 2015

ASSESSORS: 1. Mr Rajah  
2. Mr Chidawanyika

**Criminal Trial**

Ms *JR Matsikidze*, for the State  
Ms *M Simango*, for the accused

HUNGWE J: The accused denied that he intended to kill the deceased when he struck her during a drunken brawl outside their residential premises on 12 March 2014. He was charged with murder. The state persisted with the serious charge when the matter was called for trial.

In his defence the accused told the court that in the company of Dennis Chitsara, Melba Ndawana and Tawanda Nathan Mutomba they had spent a greater part of the day drinking intoxicating alcohol until late. At around 8 or 9 pm he and the deceased, his lover, had gone outside to relieve themselves. They picked up a quarrel. She slapped him. He had retaliated and a fight ensued. In the fight the deceased lost her balance and fell over a steel fire stand. She did not get up. He knelt and felt her pulse. There was none. He panicked and called a neighbour who confirmed that the deceased was dead. He had no intention to kill her but admitted that he had negligently caused her death.

The State called those who were present at the residence and taking part in the drinking. They all testified that the accused had kicked the deceased before they both went out. There was noise from outside which indicated that all was not well. Melba asked her husband to go and find out if both the accused and the deceased were fine. He found the accused testing for the deceased's pulse. When a neighbour confirmed that the deceased had died, a report was made to police resulting in accused's arrest.

It is clear from this evidence that no-one could testify as to how the assault which took place outside the house had begun and ended; whether or not the deceased had initiated as claimed by the accused. At the end of the day, the State was unable to substantiate the averment in the indictment that the accused had, with intent to kill, assaulted the deceased “with a fire stand, booted feet and clenched fists several times all over the body thereby causing injuries from which the deceased died.” The accused’s version was not challenged by any other evidence.

In light of this difficulty, the State, in its closing submissions, conceded that the crime charged could not be proved. It therefore accepted the accused’s plea to a lesser charge of culpable homicide. That concession in the view of the court, was well made. We do not find much difference between this case and the case of two friends who, in a drunken stupor, pick up a quarrel which leads to the death of one of them as a result of the fight or scuffle. The crime of murder requires proof of an intent to kill. That intention can be in the form of actual or legal intention. In its raw form actual intention is when the accused desires the death of the deceased by setting in motion a plan by which he or she achieves that purpose. In other words, the death of the deceased is the motive for the conduct of the accused in that he/she desire death as the outcome of his/her actions. Legal intention, on the other hand, also called indirect intention is a result of deductive inferences from the proven facts or circumstances. The accused in that case does not express any desire to kill the deceased but sets upon a course of conduct in which he realises that death or serious injury is reasonably foreseeable but persists in such conduct notwithstanding the realisation of the risk of death or serious injury as resulting from such conduct.

In the present case the State can only rely on the admitted facts since there was no eye witness regarding how the deceased was assaulted. Accused engaged in a fight with his lover in the night. He must have struck her so severely that she fell. The effect of alcohol prevented him from desisting in conduct in which serious injury was clearly reasonably foreseeable but for the effects of alcohol. She too, was drunk as evidenced by her singing and dancing as she made her way out of the lounge. He did not see it fit to desist from assaulting her. In failing to exercise restraint and assaulting her in such a way that she died shortly afterwards, he acted negligently. There is no doubt that she died there and then. The medical examination of the remains of the deceased show that the deceased had died as result of trauma secondary to assault. The accused admitted that he was the proximate cause of the deceased’s death. On

the admitted facts, he cannot escape conviction on the lesser charge of culpable homicide as defined in s 49 of the Criminal Law (Codification & Reform) Act, [*Chapter 9:23*].

*National Prosecuting Authority*, for the State  
*Mutungura & Partners*, for the accused