

THE STATE

Versus

BONISO SIBANDA

IN THE HIGH COURT OF ZIMBABWE
DUBE-BANDA J with Assessors Mr Ndlovu and Mr Bazwi
HWANGE CIRCUIT COURT 5 OCTOBER 2020

Criminal Trial

Mrs M. Chedafor for the State
Mr N. Ndlovu, for the accused

DUBE-BANDA J: The accused was arraigned before this Court on 5th October 2020 on a charge of murder as defined in section 47 of the Criminal law [Codification and Reform] Act Chapter 9:23. It being alleged that on the 3rd March 2020, and at Chinotimba Old Bar, and along fourth Avenue Road near house number 1228 Chinotimba, Victoria Falls and along a footpath between house number 1186 and 1189 Chinotimba, Victoria Falls, and at house number 9419 Mkhosana, Victoria Falls, the accused unlawfully assaulted Auxilia Nkomazana with open hands across the face, booted feet on the hips, knocked her head against the wall, against a wooden bed base and the concrete floor several times intending to kill her or realising that there was a real risk or possibility that his conduct may cause death but continued to engage in that conduct despite the risk or possibility.

The accused tendered a plea of guilty to a lesser charge of culpable homicide. The State accepted the plea of guilty to culpable homicide. The State tendered into the record of proceedings a statement of agreed facts which was marked Annexure A. According to the statement, the accused was 40 years at the time of the commission of the offence. The deceased was 32 years at the time she met her death. The accused was deceased's husband. On the 4th March 2020, and around 1600 hours, the accused came home and found the deceased not home and she had left two of their minor children unattended. Accused followed the deceased and found her at Chinotimba old Bar drinking with other patrons. A misunderstanding ensued and the accused assaulted the deceased on the face with open hands and she fell down. Accused carried the deceased out of the beer hall. Outside the beer hall the two began to walk home. When they arrived home, the two started quarrelling over

deceased's infidelity. The accused further assaulted the deceased by pushing her head against the wall. The deceased slept on the floor the whole night until the next morning when the accused discovered that the deceased was no longer breathing and he sought assistance from neighbors and further called an ambulance. The ambulance crew attended the scene and found that deceased had already died. The accused made a report to the police that the deceased had died after a short illness after defaulting on her anti-retroviral medication. Police attended to the scene and observed injuries on the deceased's body which led to the arrest of the accused.

The state tendered a post mortem report compiled by a pathologist, Dr. Juana Rodriguez Gregori at United Bulawayo Hospital, Bulawayo 11 March 2020. The post mortem report number 298/ 297/2020, was received by consent and marked Exhibit 1. The findings in the post mortem report list the cause of death as: cerebral edema; encephalic contusion and head trauma.

The facts show that the injuries sustained by the deceased were caused by the accused. The post mortem report shows that the injuries inflicted by the accused caused the death of the deceased. In accepting a limited plea of guilty to culpable homicide, the State is conceding that the accused neither had the requisite intention to kill the deceased ; norrealised a real risk or possibility that his conduct may cause death, and continued to engage in that conduct despite the risk or possibility of death.

The facts of this case show that the accused was the aggressor. He followed the deceased to the bar, and started to assault her. He assaulted the deceased on the face with open hands and she fell down. Accused carried the deceased out of the beer hall. At home the accused further assaulted the deceased by pushing her head against the wall. By assaulting the deceased in the manner he did, the accused negligently failed to realise that death may result from his conduct; orrealised that death may result from his conduct and negligently failed to guard against thatpossibility.

On the basis of the facts of this case, we are satisfied that the State's concession is properly made, it accords with the facts and the law. It cannot be said that the accused is

guilty of the crime of murder. In the result, the accused is accordingly found not guilty of murder and found guilty of the lesser crime of culpable homicide.

Sentence

You have been convicted of the crime of culpable homicide. This Court must now decide what sentence is appropriate for the offence for which you have been found guilty. To arrive at the appropriate sentence to be imposed, this Court will look at your personal circumstances, take into account the nature of the offence you have been convicted of, and factor in the interests of society.

In determining an appropriate sentence, we are guided by section 49 of the Criminal Law [Codification and Reform] Act Chapter 9:23. We factor in the personal circumstances of the accused which are as follows: he is 40 years old, he is the father of minor children, one 8 years and another 2 years old. He is not employed, however he has US\$150.00 in savings. Again, we take into account the fact that the accused is a first offender. He pleaded guilty to the lesser charge of culpable homicide. We also take note that he was in pre-trial incarceration for a period of two weeks before he was admitted to bail pending trial.

However, we take into account that the accused has been convicted of a serious offence. A life was ended. It is incumbent on this court to emphasize the sanctity of human life. Society frowns at the taking of another human being's life. The courts must send a loud and clear message that the killing of fellow human being will not be tolerated. We note that the accused committed a barbaric act of mindless brutality directed at a helpless and vulnerable woman. The crime is rendered all the more serious by the fact that he betrayed the relationship of trust that existed between him and the deceased and by suddenly turning on her when she was helpless, brutally assaulting her, which assault led to her death.

The interests of society are significantly implicated in a case such as this that involves both domestic violence and violence against a woman. As both domestic violence and violence against woman generally are prevalent, society is entitled to expect of courts to impose sentences that send a clear message that violence against the weak and vulnerable in our society will not be tolerated.

The criminal law must deal effectively with gender-based violence. For instance, the criminal law must severely punish a man who responds with violence towards a woman when he believes that she is cheating on him. He has no right at all to respond by violence. The law provides remedies against a cheating spouse. There is a lawful answer to infidelity. No one is permitted to answer infidelity by violence. Such an attack must be condemned under criminal law in order to disabuse the accused and like-minded men of these mistaken notions, that they can assault their spouses for infidelity. The act of punishment serves as retribution. It serves also to signify that such crimes will not be tolerated, that there is a significant and serious consequence to be suffered by the perpetrator.

With the facts of this case, a non-custodial term will trivialize an otherwise serious case. We are of the view that the following sentence will meet the justice of this case, the accused is sentenced to 5 years imprisonment of which 2 years imprisonment is suspended for 5 years on condition the accused does not within that period commit an offence of which an assault or physical violence on the person of another is an element and for which upon conviction he is sentenced to a term of imprisonment without the option of a fine.

National Prosecuting Authority, state's legal practitioners
Ncube Attorneys, accused's legal practitioners