

THE STATE
versus
SIBONGILE JEKE SIYANJALIKA

HIGH COURT OF ZIMBABWE
BACHI MZAWAZI J
CHINHOYI, 29 February 2024.

Assessors: *1. Mrs. Mawoneke*
2. Mr. Mutombwa

Criminal Trial

R. Nikisi, for the State
T. Marinda, for the accused

BACHI MZAWAZI J: This matter proceeded as a stated case. The defence had brokered a limited plea which the State accepted. The plea bargaining reduced the charge of murder to culpable homicide. The court found the plea bargaining proper as the State did not have any eye witness to the offence. The summarized facts from the statement of agreed facts are as follows:

The deceased Keith Kadziyange and the accused Sibongile Siyanjalike were in a love relationship. On the 29th of October 2022, both got temporary employment from Lake Harvest Sports Club. It was during a Nyami nyami Festival which was being held at the said venue. Both were engaged as toilet cleaners for that day.

The allegations are that the deceased got extremely jealous over the accused's interactions with male patrons who attended the festival. It is alleged that, on two separate occasions the deceased had confronted the accused on the same allegations. During the first encounter it is said the deceased slapped the accused thrice on the face. It is the accused's version that she did not take issue but returned to the pavilion and sat down as if nothing had happened.

It so happened that accused who was then playing games within the area saw the accused seated with two men. Deceased, again accosted the accused, grabbed her and dragged her by her dress whilst assaulting her. In the midst of the onslaught, the accused sought help from a member of the police force, to intervene and save her. The deceased is said to have snatched the button stick which the police officer was holding and struck the accused once on the stomach. This is said to have prompted the accused to break an empty beer bottle nearby. She then used the broken bottle to inflict fatal neck injuries on the deceased. The deceased bled profusely resulting in his death. The post mortem report tendered into evidence by consent disclosed the cause of death as hypochloremia shock and severe right neck trauma due to stabbing.

From the facts, as detailed in the agreed statement of facts, it is evident that this was a case of aggravated gender-based violence. The deceased unfortunately through his jealous rage provoked the situation. He assaulted the accused not only once but twice on separate occasions on the day in question.

It was revealed that the two although lovers were not married. They shared the same house but accused had several minor children from her previous relationship. She was at most a lady, of the night who engaged in the old profession in order to fend for her family. What aggravated the situation is that the deceased was brazen enough to disregard the presence and intervention of the police. He continued to physically abuse the accused in the presence of law enforcement personnel.

Killing someone, a human being is intolerable. The accused was negligent in picking, then breaking a beer bottle and using the same to stab the deceased on a delicate part of the body housing major veins and arteries. As such she negligently failed to realise that death may result from her conduct. See, *State v Pamela Homela HB 214/15*

Accordingly, accused is found guilty of culpable homicide as pleaded.

In sentencing the accused the court took into account both her personal and the circumstances of the case. She is a single young mother

aged thirty-five, with three minor children whom she stays with in a single room. She survives by marketing herself in order to sustain a living and support her children. She was orphaned at a very tender age with an aged father. The father stays in a remote rural area and cannot look after the children.

In the sentencing enquiry the court learnt that her children lived with friends during her 9 months pretrial incarceration stint. The sentencing report allows the court to have an insight on the accused's humanity element. Her, upbringing, background, personality traits, and general characteristics are put into perspective. These play a major role in the ultimate person and impacts their behavioral patterns. It also helps in the individualization of sentence. It also sheds light on what influenced the individuals to react in the manner they did. This was highlighted by *A Van der Hoven & Ors* in "A forensic case study of a paedophile illustrating the presentation and value of the pre-sentence report, *Acta Criminologica* 16 (2) 2003. See, *State v Doynose (CC47 2018) [2020] ZAWCHC SAFLI*.

The brother of the victim also testified as to their lose. He told the court that he could not comprehend the behavior of his brother and why he was into ladies of the night. He told the court that the deceased was single and had no children but generally a quiet person.

The presumptive sentence for culpable homicide is 5 years. It is aggravatory that the accused used a dangerous weapon to fend off the deceased's attack.

In counterbalancing the mitigation and aggravation submissions, the court is greatly indebted to the closing submissions from both counsel and has considered the triad sentencing principle of balancing the interests of the crime, the offender and society. See, *State v Zinn 1969 (2) SA 537 (A)*.

Mr Nikisi advocated for a short and sharp sentence. He cited the cases of *State v Tamolin HB 144/2015*, which he submitted was on all fours with the current matter. In that case the court sentenced the accused to 2 years imprisonment with one suspended. See, *State v Mpofu HB 183/23*.

In consideration, the court looked at the aspect of the ever-increasing gender-based violence in general and violence against women in particular. It also looked at the aspect of the minor children of the accused who look up to their mother, the accused as their only parent and provider.

It is clear that the accused's background played a role on her actions. She lost her mother at a tender age and assumed responsibility over herself from then on. Her survival instinct led her to the oldest profession after the father of her children passed away. She has no history of violence or criminal behavior. The physical abuse by the deceased on her person was not justified. This is the height of gender violence on the down and trodden members of our society. She had cried out for help from the police officer but the deceased failed to take heed. Her degree of blame worthiness is minimal.

If she is sent to prison, the children will be left to be street kids and prone to abuse. The court also took into account that in the circumstances of this case punishing the mother by another stint of a custodial term will be indirectly punishing the children. The sins of the mother will be indirectly visited on the children. The plight of the children is of significance in a case where they will be left with no one to look after them, surely this is not in the interest of society. Gender sensitivity in sentencing this accused person should be a driving factor, without being gender biased.

The court would like to associate itself with the observations made in the case of *State v Malunga 1990 (1) ZLR 124* and cases cited therein. In *State v Moyo, HH-63-84* the following passage stands out;

"Equality means equal treatment for persons in equal conditions. It does not mean absolute equality for everyone. To treat alike, ignoring their difference, adult and child, the insane, the raw savage and the civilized man would be the height of injustice. *Suum cuique tribure* implies that everyone should be given his due, not that everyone should be given the same".

This, however, does not mean that women offenders should be treated any differently from equally circumstanced male offenders.

Notwithstanding that, the circumstance of this case warrants affirmative action against the backdrop of gender-based violence and elimination of all forms of violence against women. From, the familial, ties and unity, gender violence against women, gender-based violence aspects cannot be over looked when sentencing female offenders. The *UN Bangkok Rules* speaks to the treatment of women prisoners and non-custodial measures for women and the need for gender responsiveness in the Criminal Justice System. See Bontrager, S Borricks, K, Slupi, E (2013) *Gender and Sentencing: A meta-analysis of Gender, Race & Justice*. Tessa, M., Cho, A, Sphon, C., Rodriguez, N 2018: "The role of parental status and involvement in sentencing lengthy decisions. Men and women sentenced to prison." Arditti JA (2012): *Parental incarceration and the family: Psychological and Social effect of imprisonment on children, parents and caregivers*. New York: New York University Press.

The practical reasons for the differentiation in the sentences of sexes was well captured in the case of *Anne James & Anor S HH-35-84* as follows;

- "The practical reasons maybe enumerated as
- a) Offences involving dishonesty committed by men outnumber that committed by women.
 - b) The incidence of recidivism among women is comparatively rare.
 - c) It often happens that the female offender has young children requiring care".

The accused person did not plan and meditate in order to execute the murder. It was more of reflex action of self-preservation at the spur of the moment. She cannot be placed in the category of what is termed the "Evil Woman" Achivalry approach is more appropriate in these circumstances. The Evil Woman "theory" speaks to instances where a female offender commits a well calculated heinous offence. See, *Bontrager et al (supra)*.

Whilst not condoning resolving disputes by retaliating with dangerous weapons, the court is of the view that a non-custodial sentence will meet the justice of this case. A fine will not send the right deterrent message to the particular community and society at large. The above

stated factors peculiarize the offence and calls for an individualized sentence.

However, community service will allow the offender to pay for her crime whilst playing her motherly familial role to her children. See, *State v Arnold Jeri HH 516-17*.

Accordingly, the accused person is sentenced to 3 years imprisonment. 2 years suspended for 5 years on condition accused does not commit offences of this nature, involving assault or violence, upon which if convicted will be imprisoned without an option of a fine. The remaining 1 year is wholly suspended on condition that accused performs 620 hours of community service at Nyamhunga Clinic.

National Prosecuting Authority for the State.

Masawi & Partners Legal Practitioners for the accused.