

THE STATE
versus
CONTINENT NGAIRONGWE
and
BEVERLY NGAIRONGWE

HIGH COURT OF ZIMBABWE
TSANGA J
HARARE, 5 February 2020

Murder Trial

M. Mugabe, for the state
T. Zinto, for the 1st accused
B. Ndhlovu, for the second accused person

TSANGA J: The two accused were charged with the murder of Fungai Mubepeti which took place on the 27th of April 2019 at Ngairongwe village homestead, Mutengu village, Chief Mujinga, Gwiwa, in Tengwe. They were said to have assaulted her at their homestead with a stick all over her body causing injuries from which she died. The first accused pleaded not guilty to murder but guilty to culpable homicide. The second accused pleaded not guilty to murder and tendered a defence outline in which she sought an acquittal. I will deal with the first accused lesser plea first. The state accepted a plea of guilty to culpable homicide in relation to the first accused.

A statement of agreed facts was tendered by the state and the first accused's defence counsel. It was read for the record by the Prosecutor. From the agreed facts, the accused was the deceased's nephew. The deceased's cattle had grazed on the accused's maize field. The deceased approached the accused person at his homestead accusing him of striking her heifer with an axe. She wanted compensation for the beast. An argument ensued leading to the accused assaulting the deceased including striking her on the head with a stick. The accused stated that he did not intend to kill her but struck her out of fury for the reason that instead of discussing the issue of compensation for the grazed maize field, she wanted to be compensated for her heifer. He denied axing the heifer. He denied having any intention to kill

or realising the real possibility that his actions would result in the death of the deceased. He pleaded guilty to culpable homicide, in other words, to causing death through negligence.

With the consent of first accused's defence counsel the post-mortem report was tendered as exhibit 1. The doctor who examined the deceased's body at Karoi hospital observed a health body; a deep cut on the skull; bleeding inside the skull or intracranial haemorrhage. He concluded that the cause of death was head injury. She was 62 years old according to the age on that report.

The sticks used in the assault were also admitted as exhibit No 2. They consisted of two long shaven thin sticks about a meter and half in length and four small sticks about a ruler's length.

The first accused's lawyer confirmed that the elements of culpable homicide had indeed been explained to the accused and that the plea was genuinely made. The court accepted the lesser plea to the charge in view of the state outline and the statement of agreed facts and passed a verdict of guilty of culpable homicide against the first accused person.

The court then turned to the issue of sentence considerations. In mitigation for the first accused Mr Zinto urged the court to take into account that the accused is a fairly young person aged 28. He is also a married man with two children aged five and two years old. He is also a farmer. Besides, he is a first offender. The emphasis was on giving the accused a chance at life as he was still in his productive years. Moreover, it was argued that the circumstances of the offence reduced his blameworthiness in that it was the deceased who had come this homestead and had provoked him. It was therefore argued on his behalf that a wholly suspended sentence would meet the justice of the case.

Despite the plea of guilty to culpable homicide, the fact was that a life had been irrevocably lost. The state therefore emphasized the sanctity of life and loss of human life. Also, as highlighted by the state, there had been alternative ways of settling the dispute other than through the violence that was used. It was therefore the state's view that a custodial sentence of at least 7 years would meet the justice of the case.

It was glaringly improper for the first accused's counsel to consider a suspended sentence as even remotely appropriate under the factual circumstances. The 28 year accused assaulted a 62 year old woman on the head for that matter, known to be a delicate part of the body. The very act of using violence at all, let alone on a woman of that age was an act of gross negligence and a display of lack of respect and self-control. Moreover, the deceased and the accused were relatives. No matter how angered the accused may have been about her

supposed lack of remorse over the fact that her cattle had grazed his fields, this was not a reason to resort to deadly violence. While in the agreed facts he denied attacking the cow it then boggles the mind why she wanted compensation if he had not done anything to it. Cows will always accidentally graze over crops. Indeed the fact that his lawyer could even approach the court on his behalf for a wholly suspended sentence is worrisome. Under the factual circumstances, it suggests that the accused is a character who still has a lot of maturing to do in terms of his understanding of the consequences of violence. It is disturbing that having killed a person, albeit negligently all he expects is virtually what amounts to a slap on the wrist. I am in agreement with the state that this is a case that definitely warrants a term of imprisonment. As noted, the deceased was 62 years old and sustained a fractured skull. It is not normal conduct for a 28 year old to be beating a defenceless 62 year old, let alone a woman for that matter.

As regards the youthfulness of the accused, whilst youth is to be considered as are all his other personal circumstances, still where life has been lost, courts take this very seriously. For instance, in the case of *S v Mabhena* HB 148 /13, a twenty five year old accused was found guilty of culpable homicide having killed his brother in a fight. He received a 10 year sentence with three years suspended. In that case he had already spent 2 years in custody whereas in this case the accused has spent eight months in custody.

Taking the accused's personal circumstances into account which include the eight months he has spent in custody, a similar sentence is warranted in this case. The circumstances herein are indeed those where the accused needs to consciously rehabilitate himself towards non-violence.

The purpose of a suspended sentence is said to be rehabilitative. Where a sentence is deemed lengthy, suspended sentences are generally not encouraged as per case law. See *S v Gorogodo* 1998 (2) ZLR 378 (S) at 383 B-D; *The Attorney General v Paweni Trading Corporation (Pvt) Ltd & Ors* 1990 (1) ZLR 24 (S). However, this is not a hard and fast rule as stated in *S v Sawyer*, 1999 (2) ZLR 390 as cited in *S v William Nhongo & 2 Ors* HH 52/03. A seven year sentence is not too lengthy and without anything else hanging over his head, it may not induce him not to commit similar offences involving assault and violence. This is indeed the kind of situation where a suspended sentence hanging over his head upon release from prison, would serve to remind him of the need to stick to the straight and narrow temper wise.

Accordingly the accused is sentenced as follows:

10 years imprisonment of which 3 years is suspended for five years on condition that he accused does not during that time commit a crime involving violence for which he is sentenced to a period of imprisonment without the option of a fine. 7 years effective.

THE SECOND ACCUSED

As regards the second accused person, her defence outline incorporating her not guilty plea was that she had only witnessed the first accused assaulting the deceased. Her role had been to restrain the first accused from further assaulting the deceased who at that time was failing to stand up. Against the backdrop of the facts of this case and this defence tendered, the state's counsel was of the view that the state did not have sufficient facts to pursue the charge of murder against the second accused person. He accordingly withdrew the charge after plea. This was in accordance with s 8 (b) of the Criminal Procedure and Evidence Act [Chapter 9:07 which provides as follows:

8 Power to stop public prosecutions

The Prosecutor-General, or any person conducting criminal proceedings on behalf of the State may—

(a)

(b) at any time after an accused has pleaded to a charge, but before conviction, stop the prosecution in respect of that charge, in which event the court trying the accused shall acquit the accused in respect of that charge.

Suffice it to emphasise that s 8 (b) gives the prosecution the determinative role in stopping the prosecution in respect of a charge after plea. Factual insufficiency of evidence is indeed a legitimate ground for halting the trial of an accused from proceeding. Thus, where an accused has pleaded but the state withdraws the charge after plea and before conviction, the role of the judge is a limited one. It is the duty of the judge to acquit the accused in respect of that charge. The verdict against the second accused is therefore as follows:

The accused is not guilty of murder and is acquitted.

National Prosecuting Authority: State's Legal Practitioners
Zvimba Law Chambers: 1st Accused's Legal Practitioners
Bothwell Ndhlovu Attorneys At Law: 2nd Accused's Legal Practitioners