

THE STATE
versus
SIMBARASHE MATINYENYA

HIGH COURT OF ZIMBABWE
TSANGA J
HARARE, 2 & 4 March 2020

**Assessors: Mr Barwa
Mrs Chitsiga**

CRIMINAL TRIAL

H.V Huni, for the State
B. Mupwanyiwa, for the accused

TSANGA J: This is a sentencing determination hearing in a case in which the accused who was charged with murder pleaded guilty to and was convicted of the lesser offence of culpable homicide. The agreed facts upon which the verdict of culpable homicide was reached and which are material to consider were that on the 12th of June 2018 at around 22 00 he had an altercation with his brother at village no.6 Bostik extension F, Donain, Battlefields in Kadoma. They had been drinking together with their older brother earlier than night when an altercation arose over the fact that the accused was alleged to have thrown a stone on top of the roof of the tuck-shop where they were buying beer from. A fist fight ensued between the two brothers and they were restrained by their older brother. According to the agreed facts, the accused had escaped and gone home. When the now deceased and his older brother got home, the deceased is said to have charged at the accused intending to continue fighting him. The accused had then picked up a brick and thrown it at the now deceased intending to scare him and to get a chance to run away from the intended attack. The now deceased's brother was struck on the head with the brick and sustained a head injury on top of the left ear. He was taken to Kadoma hospital and later to Parirenyatwa Hospital where he died on the 21st of June 2018. The post mortem report which was admitted in evidence by consent as Exhibit 1 showed that he died of meningitis, base of skull fracture and blunt force head trauma as a result of the assault.

Significantly, the accused's warned and cautioned statement was also admitted as Exhibit 2. It was made nearer to the time of the commission of the offence and the facts therein vary somewhat with the statement of facts albeit it was not in dispute that the accused threw a stone which fatally killed his brother. In the warned and cautioned statement he does not state that the brick was a pre-emptive strike. His version of what happened was as follows:

"I do admit to the allegations of striking my brother Stephen Matinyenya with a brick. I entered in a shop and Stephen Matinyenya started alleging that I threw a brick on the roof of the shop. I denied the allegations and he assaulted me with fist on my face and a metal object once on my right shoulder. I went out of the shop going home and before I arrived I met Stephen Matinyenya, I picked a half brick and struck him with brick one on the head and I ran away and went to my brother's home Leonard Matinyenya."

As the facts and the confirmed warned and cautioned were both clear that he threw a brick at a deceased, we accepted the limited plea of guilty to culpable homicide. Suffice it to note that for purposes of considering an appropriate sentence we are of the view that the issue of the pre-emptive strike alluded to in the agreed facts was an after-thought and that he was not in any imminent danger when he committed the offence. He acted in retaliation for having been earlier assaulted by the deceased.

In mitigation the accused is said to be now 24 years old having been only 22 years old at the time he committed the offence. He is not married, is not employed, stays with his mother and essentially plays the role of the pater familias as his father died and his older brother is of ill health. He is also a first offender. His counsel, Mr Mupwanyiswa urged the court to be lenient with him arguing that under the circumstances a wholly suspended sentence coupled with community service would meet the justice of the case, particularly given his age at the time that he committed the offence. Moreover, he was said not to have wasted the court's time in pleading to culpable homicide and accepting that he had indeed negligently caused death.

The state, in aggravation, emphasised the seemingly never ending spiral of violence as a choice of resolving dispute in cases of this nature. The sanctity of life, it was argued, should be protected. His blameworthiness was said to be high as he had run away to his brother's house after committing the offence instead of assisting the deceased. From the state's view, a sentence of 10 years with 3 years suspended was argued to be within an acceptable range. The state relied on the case of *S v Mhlanga* HB 2 /18 in which the accused therein had struck his deceased brother with a hoe handle. He had been sentenced to culpable homicide and

received a sentence of 10 years with 3 suspended. The state also drew on the case of *S v Robert Mugwanda* 2002 (1) ZLR 574 (S) in which murder was reduced to culpable homicide and a sentence of 7 years was imposed.

Cases of this nature in which bricks are hurled at others by those who would have imbibed too much are not uncommon. The case of *S v Mhlanga* above is distinguishable in that a hoe handle had been used and the matter had proceeded to full trial in arriving at the verdict of culpable homicide.

With regards to the matter before us, the accused's own circumstances as narrated to the court are nothing out of the ordinary. Our criminal courts hear much of the same circumstances. Nonetheless they are important to consider in arriving at a just sentence but they certainly do not mean that the accused should not be given an effective term of imprisonment. The accused's age in particular has been emphasised as important to consider. It is true that our courts have been cautious of imposing long imprisonment terms on first offender is in order to avoid hardening them and also as a much necessary act of tampering justice with mercy. In arriving at what would be a proper punishment in this instance I have looked at similar cases where drunk youths have been involved in altercations and how the courts have sentenced them in recognition of the need for them to take responsibility for their actions. If a young man or woman is going to go drinking and thereafter engage in anti-social behaviour which poses a risk to others, he or she must take responsibility. Thus a person who throws a stone or a brick at another must always realise the high risk of negligence in such conduct and must take responsibility in the event that the stone hits the targeted person with whatever consequences including death.

In *S v Karonga* HH 604/17 the accused had hurled a stone at his friend following a fight. They belonged to the same *nyawo* dance group. A fight had ensued on the way from the performance and in the process the accused had thrown a stone at the deceased. The deceased had sustained a head injury from he later died. The accused who was 22 years at the time he committed the offence received a sentence of 6 years of which three years were suspended.

In *S v Mutayi* HMT 2/18 again following an altercation at a beer drink, the accused had picked up a brick and thrown it at the deceased hitting him on the head with fatal consequences. The accused was a young offender. At the time of committing the offence he was 26. At the time of sentencing he was 27. The court sentenced him to 4 years with one year suspended on the usual conditions of good behaviour.

In the case of *S v Vengesa* HH 185/16 which was another case involving brick hurling with fatal consequences the accused who was 32 received a 7 year sentence with two years suspended. The dominant thread in these cases in which bricks have been hurled with gay abandon but negligent drunkards who could not care less about what they do when in a drunken stupor is that the courts have always been clear that a term of imprisonment is apt even where the accused have been found guilty of culpable homicide. See *S v Nicholas Mutendera* HMA 01/17 where an 8 year sentence with three suspended was imposed.

The personal circumstances of the accused person have been noted and though mitigatory, are found not to be out of the ordinary. He is a young first offender who acted highly negligently whilst voluntarily drunk and caused the loss of life of his own 23 year old brother. The accused indeed will have to live the rest of his life with the knowledge that he killed his own brother. It is a life term burden for him to carry but a term of imprisonment is still proper for taking a life. I would have been inclined to give him a sentence in the region of 7 to 8 years but for his age at the time that he committed the offence. A prison sentence that gives him a chance at rehabilitation is indeed called for.

In the circumstances this court sentences him as follows:

5 years imprisonment of which 2 years is suspended for 5 years on condition accused does not within that period commit an offence involving the use of violence on the person of another for which he is sentenced to imprisonment without the option of a fine.

Effective sentence: 3 years

National Prosecuting Authority: State's Legal Practitioners
Mufadza & Associates: Accused's Legal Practitioners: Pro Deo