

THE STATE
versus
SHEPHERD MUSHURWA

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 23 September, 2020

Criminal Trial - Murder

T. Kasema, for the State
J. T Fusire for the accused

Assessors: Mr Chitsiga
Mr Gweme

CHITAPI J: The accused pleaded not guilty to a charge of murder wherein it was alleged that:-

“On the 31st day of August, 2018 at number 14604, Unit ‘O’ Seke, Chitungwiza, Shepherd Mushurwa strangled Prosper Mushurwa and punched him thrice with fists on the stomach realizing that there was a real risk or possibility that his conduct may cause death, and continued to engage in that conduct despite the risk or possibility thereby causing his death.”

The deceased was a 12 year old son of the accused.

The accused filed a defence outline. The long and short of the defence outline was to the effect that the deceased had stolen and squandered \$20.00 which the accused kept under the pillow in his bedroom. The accused then confronted the deceased about the missing money. The deceased confessed to have taken the money. The accused did not take immediate retaliatory action but instead, he proceeded into the kitchen to prepare supper. The deceased remained standing in the passage. Upon seeing the accused moving towards the kitchen, to check on the cooking pots, the deceased then suspected that the accused was coming for him to assault him. The deceased tried to run away but must have slipped and hit his head against the door because the accused heard a loud bang after which he then rushed to check the source of the sound only to find the deceased sprawled on the floor. In short therefore the accused’s defence was that the

deceased died as a result of an accidental fall for which the accused was not responsible or had nothing to do with. The issue for determination in this trial was whether or not it is the accused who caused the death of the deceased and if so, how?

The post mortem report prepared by the forensic pathologist Dr Iglesias Capetitto was produced as exhibit 1. The cause of death was recorded as “mechanical asphyxia, chest compression and suffocation.” The report was compiled at Chitungwiza Hospital following the examination of the deceased remains carried out on 5 September, 2018. An issue arose on the production of the post mortem report with the accused’s counsel opposing the production thereof as the accused person wanted the forensic pathologist to be called to testify. Counsel however resolved the issue and the report was produced through another doctor who relied on hospital records to reach his opinion.

The first state witness was 16 years old Prince Mushurwa, who is the surviving son of the accused. The deceased was his younger brother and they stayed the two of them into the accused. He indicated that he was comfortable to testify in court and in front of the accused. He was admonished to tell the truth. He confirmed that he understood truth from lies and the need to tell the truth.

The witness testified that he was in form 3 and that the accused was his father. In relation to the events of 31 August, 2018, he testified that the accused confronted him to enquire whether the witness knew about the accused’s \$20.00 which had gone missing. The witness denied knowledge of the missing money. The accused ordered him to call the deceased who was at a prayer meeting some houses away from their house. The deceased came home with the witness. The witness then asked the deceased about the money. The deceased confessed to taking the money but exhorted the witness not to disclose the confession to the accused. On arrival at the house the accused asked the deceased about the missing money and twice the deceased denied any knowledge of the money. On the third occasion, the accused asked the deceased about the money in a harsh voice and the deceased admitted to taking the money. When asked whether there was any change left, the deceased led the accused to the back of the house where 60c was recovered from a hole which the deceased had dug as a secret hiding place where he kept the money.

The witness testified that the accused ordered the deceased to get into the house but the deceased was hesitant and remained outside. The witness got into the house with the accused and the witness sat on the sofa. The witness then persuaded the deceased to get into the house. The deceased entered the house and stood by the door. The accused then asked the deceased as to why he took the money but the deceased did not respond. The accused then harshly asked the deceased the same question. The deceased on being harshly confronted by the accused then tried to leave. The accused however slammed the door into the deceased resulting in half of the deceased body being inside the house and the other side outside of the entrance.

The witness continued in his testimony that the accused then got hold of the deceased's hand and pulled him to the bedroom. The door to the bedroom was closed. When the accused reached for the door of the bedroom to open it whilst at the same time dragging the deceased, the deceased fell to the floor as the door was pushed open. The witness did not see how exactly the deceased fell to the floor although he noticed that the accused was pulling the deceased holding on to the deceased's shirt by the chest area. The accused then pushed the deceased on to the bed and started strangling the deceased using both hands as he sat atop the deceased. The deceased continued the assault by hitting the deceased twice on the chest with one hand whilst the other hand was throttling the deceased on the neck.

The witness testified further that the deceased convulsed and this forced the accused to let go of the deceased who fell off the bed onto the floor. The accused then called out to the deceased but the latter responded in a faint voice. The accused lifted the deceased and poured some water on him 'as' well as rubbing salt under the deceased's feet. The deceased was no longer talking. The witness was asked by the accused to cover the deceased's nostrils and blow into his mouth. The witness said that he placed his mouth by the deceased's chest to check for breathing and he did not feel any breathing. He suggested to the accused that the now deceased had died and the accused was upset with the comment by the witness. When the accused suggested that the deceased should be taken outside the witness suggested that the deceased should be taken to the hospital instead. It was then that the accused arranged for transport from a neighbor and the accused, the deceased and neighbor referred to as Enock's father proceeded to the hospital.

When asked whether there were issues between the accused and the deceased and whether their relationship was cordial, the witness responded that the deceased had sticky fingers. The deceased would steal money from the house or from the accused to buy food for himself if there was no food in the house. The deceased used to tell the witness that it was better to be beaten with a full stomach than when hungry. When asked whether he was influenced to tailor his testimony by his aunt, he denied the suggestion and stated that following the departure of the accused and deceased to hospital, the accused's older brother and wife came. They suggested that the witness' mother's relatives be advised since her mother was in South Africa. The witness' maternal aunt was then told of the occurrence and she threatened to report to the police on the following morning as the events had occurred at night.

Under cross examination the witness agreed that he was now staying with his aunt. He denied visiting the accused occasionally but agreed that he would when sent on errands just pass by to greet him. He denied that he confessed to the accused that he was under influence to give a different version of events of the fateful night. The witness maintained his testimony that he did not see how the deceased fell but he saw the accused lifting the deceased and throwing him on the bed. He denied that the accused tried to administer first aid on the deceased as he lay on the bed. The witness persisted in his evidence that the accused sat atop the deceased whilst strangling him and assaulting him. When asked how long the strangling took, the witness did not give a time estimate but stated that the accused stopped strangling the deceased when the deceased looked weak and fainting. When asked whether the accused did not assist the deceased to breathe, the witness responded that the accused went outside the house and it was then that the deceased started having convulsions until he fell off the bed onto the floor. The witness stated that he and the deceased had been staying with the accused since 2008 and their mother was in South Africa where she works. The witness gave his evidence very well if one may say. Listening to the lucid manner in which he testified, one could not believe that the witness was a minor of only 16 years. He gave a graphic and coherent account of what transpired. He was not overawed by the court room situation nor intimidated by the accused's presence. The cross examination did not break him and his story remained intact. The court felt very comfortable to accept the witness evidence. The witness was without reserve, a very credible and honest witness.

The second witness was the accused's neighbour. Nathan Saruchera. He is the one who provided transport to ferry the deceased and the accused to the hospital. He testified that on arrival at the accused's residence, the deceased was lying on the floor. When he asked the accused what had taken place, the accused only responded that the child had stolen money. The witness noted that the deceased's condition was critical and resolved to dash the deceased to the hospital rather than continue to interrogate the accused on what had happened. He testified that the accused appeared to be in shock and was unsettled and so was the last witness Prince.

The evidence of the witness was not contentious and on the periphery in regard to resolving the issue for determination since he attended the scene *ex post facto* the fatal events. His evidence was useful in completing the chain of causation. The evidence was clear and the court accepted it.

The last state witness was doctor Javangwe. He is a specialist pathologist. He was called to explain the post mortem report and answer issues which Mr *Fusire* intended to raise on the report. The witness took the court through the report. Under cross examination Mr *Fusire* suggested that the deceased could have experienced a basal or skull fracture. The doctor quickly discounted the suggestion having noted that there were no fractures of bone or limb noted in the post-mortem report. The doctor's evidence was in the end not really shaken and he testified that the run through of the report and conclusions on the case of death were in support of each other. There being no issue of contention raised with the doctor the doctor's evidence remained clear and unscathed. The court accepted the evidence again without reservation. The state closed its case.

The accused elected to testify in his defence. He adapted his defence outline. He testified that he used to keep money in a pillow. On 31 August 2018 when checking on the money, he noticed that it was short by \$20-00. He enquired from Prince the first state witness whether he knew about the missing money and Prince denied any knowledge thereof. He caused the deceased to be summoned from a church gathering in the neighborhood where he had gone for church. The deceased returned with Prince who had already told the deceased about the missing money and that the accused would assault him. On arrival at the house with Prince, the deceased remained outside. He testified that he then asked the deceased about the money and the deceased denied knowledge of it. He then asked the deceased whether it was good for a person who had

come from church to lie at which point the deceased confessed to taking the money. The deceased stated that there was a small amount remaining. He then took a light and accompanied the deceased to the back of the house where the deceased dug out 65c from a hole in the ground. When he asked the deceased whether that was all that remained of the money, the deceased responded that he had spent the rest of the money with friends. The accused testified that he then told the deceased that he would not assault him since the deceased had confessed. He stated that at that time he had left cooking pots on the stove as he had been in the process of preparing to cook sadza for supper.

The accused continued his narration that the deceased after the recovery of the 65c remained outside the house. He was asked to enter the house and he did so. He however stood by the passage. Prince then alerted the accused that something was burning on the stove. The accused stood up from the sofa dashing into the kitchen to remove the pots whose contents were burning. He then heard a noise and asked what it was. Prince responded that it was Prosper. The accused then took some plates intending to dish out supper. He did not suspect that anything was untoward. Prince then asked him to lower the volume of the radio or television. It was at that point that the accused then noticed that the deceased was lying on the floor with his head by the bedroom door and the rest of his body in the passage. He went to where the deceased lay, called out his name and held the deceased by the armpits. The deceased was sweating. When he tried to speak with him, the deceased failed to respond although there were signs that he could hear the accused. When he tried to help the deceased up, the deceased could not stand on his own. The accused then took the deceased to bed. He testified that he called Prince and advised him that the child was hurt. He held the deceased by the hands and shook him. He also held the deceased's heart and felt that the deceased had a fast heartbeat. He held the deceased from the back and whilst hitting the deceased on the chest. Upon noticing that there was no change, the accused testified that he then sat on the deceased's torso straddling body. He then compressed the deceased's chest to induce breathing.

The accused testified further that he asked Prince to bring a towel which he then wrapped around the deceased's head. He then performed mouth to mouth resuscitation procedure. The deceased then experienced convulsion and the accused panicked. He then asked Prince to bring salt water. He held the deceased close to him because of the convulsions which the deceased was

experiencing. Prince was pouring water on the deceased. The deceased appeared to breath but in long breaths. The accused then sought assistance from his neighbor Saruchera and ferried the deceased to hospital. It is common case that the deceased passed on the same day

The cross examination of the accused was brief. He was asked whether he was not angry with the deceased for stealing the money and he denied being angry. He however did not have an explanation for the reluctance of the deceased to enter the house nor to avoid him by standing by the passage and not getting into the living room whether the accused and Prince sat on the sofas. He however admitted that he had previously beaten the deceased for an unrelated incident. He suggested that Prince's evidence was tailored to implicate him as having strangled the deceased. He testified that Prince tailored his evidence at the instance of Prince's aunt. He however agreed that Prince had given his statement to the police before the alleged influencing of Prince to give false evidence.

When questioned by the court to confirm that he did not witness what happened to the deceased to make him fall, the accused confirmed so. When asked what Prince had reported to him, the accused stated that Prince had reported that the deceased had hit his head against the door.

The accused showed signs of panic and being unsettled when he was testifying. The court formed the impression that the accused told half-truths in regard to what happened to the deceased. The accused did not therefore impress the court as a credible witness. The post mortem report which was the only independent evidence available was corroborative of the evidence of Prince to the effect that the deceased was strangled. The only other question which arises is who then strangled the deceased. As there were only two people in the house other than the deceased, there can only be three possibilities. These possibilities would be firstly that the deceased strangled himself, if not, then secondly Prince strangled the deceased, and if not, then it is the accused who strangled the deceased. From the evidence led, the deceased did not have a motive to want to end his life. Prince did not have a motive to end the deceased's life. The accused equally would not have had a motive let alone a direct intention to kill the deceased. However, the accused would have had the motive to punish the deceased for the deceased's transgression in stealing the money. It will in this regard be noted that the accused caused the deceased to dig out the remainder of the money late at night from the back of the house.

In the courts assessment of the evidence and the surrounding circumstances, the evidence of Prince clearly described the events of the fateful night. The accused lied that the deceased fell on his own. There was no other evidence of any fall injury suffered by the deceased. Strangulation resulting in asphyxia comes about through a direct application of force. The accused did not suggest how the deceased could have been strangled and by whom. The only evidence to that effect is that of Prince. The court must pit the evidence of Prince against that of his father the accused. The court has made positive credibility findings of the evidence of Prince and made negative findings of the credibility of the evidence and demeanour of the accused. Wherever the evidence of the accused contradicts that of Prince, the evidence of Prince will be preferred.

The accused did not rely on provocation as his defence and inadvisedly decided to deny the obvious. The accused was undoubtedly angered by the theft by the deceased of the \$20. He allowed his emotions to get the better of him and acted in a precipitate manner in an all out attack on the deceased in blind fury. The accused conducted himself negligently in attacking the deceased who was just a child of 12 years in the manner that he did. A reasonable person and a father placed in the same position of the accused wherein a child had stolen would understandably be angry. However the reasonable person or father would not engage in a physical attack on the child as did the accused. The accused went overboard. He had time to reflect especially after the deceased's confession. There would have been no justification to the forcibly pull the child into the bedroom and strangle him. The State's submission that the accused intended to kill the deceased is too stretched. There was no planning or premeditation established. Equally so the accused cannot be guilty of murder with constructive intent. The accused in the court's judgment could be said to have foreseen that his conduct may result in death but however it could not be said that he continued to engage in the conduct nonetheless. In fact the moment that he realized that the deceased appeared to be hurt, the accused panicked and did not continue in the conduct. He quickly engaged in adopting life serving measures. In the circumstances the verdict of the court will be as follows:

Verdict: 1. The accused is not guilty to murder and is acquitted.

2. The accused is guilty of culpable homicide as defined in section 49 (a) of the Criminal Law (Codification Reform) Act in negligently failing to realize that death could result from his conduct.

SENTENCE

The accused negligently caused the death of his 12 year old son. Customarily an incident like this one was expressed as an instance where a hen eats its egg. Society accepted them that the parent who kills his or her own child bears the agony of the loss and has no one to blame except himself or herself. This perception is one sided in that it focuses on the wrong doer parent and sympathises with him or her. The correct approach in my view is to consider both the child who is killed and the killer parent as individuals, each of whom has a right to life in terms of section 48 of the constitution. The right to life can only be abrogated from in circumstances set out in the same section of the constitution when a penalty of death may be imposed. Children have as much a right to life as an adult. Children are not any inferior to adults in regard to the right to life. The court does not condone the negligent killing of another human being, be it a child or an adult. In terms of section 81 (3) of the Constitution, “Children are entitled to adequate protection by the courts, in particular by the High Court as their upper guardian.” This court therefore as upper guardian of minor children does not countenance their ill-treatment, let alone assaulting and / or killing them. In this regard therefore the accused committed a very serious offence, for which he must be adequately punished.

The starting point in assessing sentence should be to consider the penal section where an offender has been convicted of culpable homicide. Section 49 of the Criminal Law (Codification & Reform) Act, [*Chapter 9:23*] provides that a person convicted of culpable homicide shall be “liable to imprisonment for life or any definite period of imprisonment or a fine up to or exceeding level fourteen or both.” The penal provision shows the serious view which the law takes where the offence of culpable homicide has been committed. Life imprisonment is the next highest sentence which can be imposed short of the death penalty. A level fourteen fine is the highest fine which can be imposed. The provision of imposition of a fine which exceeds the highest level implies that the offence of culpable homicide should not be taken lightly. The court therefore is dealing with a serious offence which must be treated as such.

Counsel for the accused quoted various case authorities to support his mitigation of the commission of the offence and the accused's conduct. I do accept as the Supreme Court stated in *S v Richards* 2001 (1) ZLR 129 (S) that in a case of culpable homicide; the offender is punished for carelessness as opposed to acting intentionally. It is correct that the punishment for culpable homicide is intended to inculcate in the citizenry the need to be attentive and astute in what people do. This is because death through culpable homicide is accidental or caused through carelessness in the form of negligence.

Having accepted on the authority of *S v Richards (supra)* that the convict for culpable homicide is punished for his or her carelessness, it follows that the level of moral blameworthiness of the convict must be informed by the degree of carelessness or negligence. The higher the degree of negligence, the higher the degree of moral blameworthiness of the convict.

The degree of negligence exhibited by the accused in this case was very high. The accused used his fists to punch the defenceless deceased, only 12 years old, on the chest. He sat on the deceased and strangled the deceased. The accused clearly lost it, went overboard and vented his anger on the deceased in a manner which is not expected of a mature parent like the accused. Strangling someone is inherently dangerous and leads to suffocation. Suffocation or asphyxia results in death. Any reasonable person will appreciate that if you strangle another person, that person may die of asphyxia. The accused was extremely negligent therefore in his commission of the despicable crime which he stands convicted of. Every parent has a duty to ensure the well-being of his or her child. The accused in this case fell far short of societal expectations of how a reasonable parent should react to a theft of property committed by a young child. Even if one were to hold that a beating would though unconstitutional be understandable, the use of combative force would not fall within societal expectations. The accused as with every parent should learn to be exemplary and exercise restraint because children are immature and prone to committing wrongs.

The accused has failed his family immediate and extended, society and this court as upper guardian of minor children. The deceased's life is gone forever. Society is short of one member, the deceased. The deceased's family is one member short. The accused until eternity shall be remembered as a child killer. It also appears that there is now friction between the

accused and his in-law's family over the death of the child. It is hoped that the families will change their attitude and look upon the deceased's death as a unifier event than a destroyer of relationships. This is so because no amount of hatred and ill feelings between the accused, his family and the deceased's mother will change the undeniable fact that the in-laws gave birth to the deceased's mother. The families and society must take the deceased's death to be a learning curve and a reminder to all parents that children should not be visited upon with violence when they have erred because the unexpected, in this case death, can result from the violence and application of physical force on the child.

The State counsel submitted that a sentence in the range of 10 years imprisonment would be appropriate. The defence counsel suggested the imposition of a wholly suspended sentence. Sentencing is a lonely exercise for the judge. Going by Supreme Court authority in *S v Richards* (supra) the main purpose of punishment for culpable homicide to achieve individual and general deterrence. Society is reminded to remain mindful of the duties reposed on parents to adopt corrective measures as opposed to harming children when reacting to provocative acts committed by children. The court must pass a sentence that balances the interests of the accused and society taking into account the circumstances of the commission of the offence. The accused was incensed by the theft of \$20.00 by the deceased. The amount may appear inconsequential. However, it may in the case of the accused have represented a substantial amount given his meagre means. Certainly, the accused's reaction gives some indication that the amount was not a trifle to the accused.

The accused is a family person and still has responsibilities as a father towards the surviving child Prince even though the child may have been taken away from him by the in-laws. The accused deserves a second chance and rather than to condemn him, he deserves to be encouraged to be an exemplary parent after the event. As already indicated the sentence range for culpable homicide is very wide. The correct approach to determining the nature of the punishment is to consider the lowest end penalty first, which is a fine as a stand alone penalty or coupled with a prison term. The facts of this matter make the imposition of a fine inappropriate because of the use of physical force by the accused.

This leaves the imprisonment for any definite period as the second rung in terms of severity. The extreme rung is life imprisonment. This case is not the worst of its kind to warrant

life imprisonment. That leaves imprisonment for a definite period. This option is in the circumstances of this case the most appropriate. The next enquiry is then the length of such imprisonment and whether it should be effective or suspended, wholly or in part. In my view, it is necessary to keep the accused in check so that he becomes an exemplary parent going forward. He should be sentenced to imprisonment wholly suspended on appropriate conditions. The conditions to be imposed shall be very strict to a point that the accused will use his body and limbs for productive activities than application of force on another person. The sentence of the court is thus –

“3 ½ years imprisonment wholly suspended for 5 years on condition the accused is not within that period convicted of an offence of which assault or negligently causing death or injury to another person is an element for which upon conviction, the accused is sentenced to imprisonment without the option of a fine or a fine exceeding level 3 on the standard scale of fines as provided for in the First Schedule section 2 (1) and s 280 of the Criminal Law Codification and Reform Act.”

*National Prosecuting Authority, State’s legal practitioners
Musunga & Associates, accused’s legal practitioners*