

THE STATE
versus
KINGDOM HLAHLA

HIGH COURT OF ZIMBABWE
MAWADZE J.
MASVINGO, 15TH SEPTEMBER, 2016

Assesors

Mr S. Mutomba
Mr E. Gweru

Criminal Trial – Sentence

MS S. Busvumani, for the State
Mr F.R.T. Chakabuda for the Defendant

MAWADZE J: The accused who was initially facing the charge of murder as defined in s 47(1) of the Criminal Law (Codification and Reform Act) [*Chapter 9:23*] was subsequently convicted on his own plea of guilty of contravening s 49 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] which relates to culpable homicide. The matter proceeded on a statement of agreed facts.

In summary the agreed facts are as follows:

On 7 August 2015 at about 16.30 hrs the accused, together with his cousin Natasha Maradza, were walking through a flea market in Chiredzi called Messina flea market. They passed near the now deceased who was drunk and the now deceased for no good cause started insulting them using vulgar and obscene language. The accused tried to rebuke the now deceased to no avail. In a fit of rage, the accused picked a log which was in a wheel barrow pushed by one Emmanuel Munyeiwa and struck the now deceased once on the left side of the

head. The now deceased fell down and was bleeding from the head. The now deceased was ferried to Chiredzi General Hospital where he was pronounced dead on arrival. The post mortem report shows that the now deceased sustained a depressed skull fracture on the left temporal region with subdural haematoma. The now deceased died as a result of the head injury.

We are very grateful to *Mr Chakabuda* for the accused who agreed to take this matter at a very short notice after the *pro deo* counsel allocated the matter played truant with the Court. The prejudice likely to arise from the postponement of the matter was thus avoided. In addition to that *Mr Chakabuda* made a very detailed, well researched and meaningful submissions in mitigation despite the limited time he had to prepare the case. Such conduct should be acknowledged and applauded.

In assessing the appropriate sentence, we shall endeavour to balance the mitigatory and aggravatory factors of the case. We have considered the accused's personal circumstances. The accused is 28 years old and single. He is unemployed and is a holder of an Accounting Degree. Accused possesses neither savings nor assets.

It is clear from the agreed facts of this case that there are mitigatory factors surrounding the commission of the offence as forcefully and passionately submitted by *Mr Chakabuda* for the accused.

It is trite that the rationale in punishing the accused for culpable homicide is not based on accused's evil intent as accused had no intention to kill the now deceased. The accused is being punished for being careless and or negligent. See *S v Richards 2001 (1) ZLR 129 (S)*. The idea is to encourage the accused and the general public to be cautious at all times in dealing with others and be wary of the safety of fellow human beings. The accused failed in this regard and undertook an act which resulted in unnecessary loss of life. The most pertinent aspect to note however is that the accused acted negligently.

The facts of this case clearly show that the accused was provoked. This explains the reason why the accused committed the offence. The motive or reason for committing an offence always assists the Court to properly assess the sentence in a meaningful, humane and fair manner. See *S v Ngulube 2002 (1) ZLR 316 (H)*. *In casu* the accused and his cousin were insulted in a public place persistently for no apparent reason by the now deceased. The accused tried to reason with the now deceased to no avail and he lost his temper. At the spur of the moment he picked a log nearby and delivered a fatal single blow. While the accused's

conduct can never be condoned it is understandable. He reacted to the uncalled for affront to his dignity and that of his cousin. In our view this is a mitigatory factor.

It is in accused's favour that he pleaded guilty to the charge. As was pointed out in the case of *S v Katsaura 1997 (2) ZLR 102 (H)* a plea of guilty immensely contributes to the swift administration of justice. We have been able to finalise this case in a very short period of time without further waste to the State's resources. The State witnesses although present were spared of the possible trauma of testifying and spending further time at Court. By admitting to the charge the accused is clearly contrite. We shall therefore give due weight to this factor by according the accused a meaningful reduction of the sentence to be imposed and impose a minimum possible sentence.

It is in accused's favour that he is a first offender. In principle therefore he should be treated with some measure of lenience.

It has been submitted on accused's behalf that the accused and his family engaged the deceased's family who demanded payment of 20 herd of cattle as compensation. The accused has since paid 9 herd of cattle to deceased's family. In our view this gesture will go a long way to appease the now deceased's family and reconcile the two families. Indeed, our criminal justice system should embrace these positive customs in our African traditional life. While this will not bring back the lost life, sending accused to prison on its own may not serve the wide interests of justice. This is an aspect one may meaningfully consider after hearing full argument on the need to pay compensation to the deceased's family where a life has been lost. The pros and cons should be carefully weighed. For now, we however take this gesture as a mitigatory factor.

The accused did not suffer much from pre-trial incarceration. In a proper case where as accused person has suffered from a lengthy pre-trial incarceration period the Court would reduce the sentence to be imposed, see *S v Difiri 2001 (2) ZLR 411 (H)*. *In casu* the accused was in prison for only two months after which he was granted bail pending trial and had been in custody for less than a month after his indictment. We shall therefore not place much weight on this factor.

The offence of culpable homicide arising from violent conduct remain a very serious offence which should generally attract a custodial sentence. A proper balance should however be struck between the interests of the accused and those of the society, see *S. v Mukome 2008 (2) ZLR 83 (H)*. This is not an easy task to achieve a delicate balance between the conflicting interests. The cardinal rule is that the Court should strive to strike such a balance in the most

human, rational and dispassionate manner. Each case should be assessed on its own merits as a one size fits all approach is undesirable. The public in this case expects the accused to be punished adequately for causing the unnecessary loss of life lest the criminal justice system is put into disrepute. We are mindful of the fact that we cannot overlook accused's interests or personal circumstances lest the sentence we impose becomes unduly harsh, capricious and draconian. A proper delicate balance should be achieved.

We totally agree that we should pass a deterrent sentence in order to discourage the accused and others of like mind from needlessly resorting to violence to resolve disputes or misunderstandings. Such an exemplary sentence is called for. We are however mindful of the fact that we should guard against excessive devotion to deterrence which may lead to disproportionate sentence. See *S v Bhero 1994 (2) ZLR 66 (S)*. As the saying goes, the accused should simply get his just desert. While it remains important to punish the accused in this matter for reasons already stated we are cognisant of the fact that retribution is no longer the underlying principle in our criminal justice system. An eye for eye makes everyone blind, so they say. The sentence we shall impose should be rehabilitative so that the accused who is fairly educated can come back and be useful to society. The thrust should be to encourage reformation, see *S. v Chera & Anor. 2008 (2) ZLR 58 (H)*.

In our assessment the accused's degree of negligence is high. The accused used a weapon described as a log despite that it was not produced in Court. It is clear accused used severe force as the post mortem report shows that accused fractured deceased's skull. The single blow was aimed at the delicate part of the body which is the head. The consequences were fatal as deceased passed on within a short period of time.

In our view a fine coupled with a wholly suspended prison term as submitted by *Mr Chakabuda* is inappropriate. This is a serious offence where a life has been lost through violent conduct. The sanctity of human life cannot be over emphasised. No one has the right to take the life of another whatever the circumstances. The accused should know that self-control is important and be able to walk away from any provoking situation. In the same vein community service which is preserved for non-serious offences would trivialise this offence and send wrong and harmful signals to the accused and the public.

In the result the accused is sentenced to 3 years' imprisonment of which 1-year imprisonment is suspended for 5 years on condition the accused does not commit within that period any offence involving the use of violence upon the person of another for which the accused is sentenced to a term of imprisonment without the option of a fine.

National Prosecuting Authority – Counsel for the State

Ruvengo Maboke and Company – pro deo Counsel for the accused.