

THE STATE

versus

TOBIAS MANZVENGARUFU

And

TADIUS SHERENI

HIGH COURT OF ZIMBABWE
MAWADZE J
MASVINGO, 6 June, 2017

Assessors

1. Mr J. Mushuku
2. Mr P.N. Dauramanzi

Sentence

Ms S. Busvumani, for the State

Mr S. Sibanda, for the 1st accused

Mr J. Maweni, for the 2nd accused

MAWADZE J: The concession by *Ms Busvumani* for the State at the close of the state case that the State had not been able to prove the charge of murder as defined in s 47(1) of the Criminal Law (Codification and Reform) Act [*Cap 9:23*] is not only properly

made at law but professional. After all the State witnesses had testified it was clear that a charge of murder was not sustainable in the circumstances.

The bare bones of the matter are that both accused persons and the now deceased were drinking beer in Nganda bottle store situated in Chief Shindi's area in Chivi, Masvingo until the bar closed. The evidence led clearly shows that both the accused persons and to some extent the now deceased were so intoxicated that they could hardly walk. Both the accused were throwing each other to the ground in a manner one of the witnesses described as similar to what happens in the popular TV programme of wrestling known as WWE Wrestling. It is not surprising that they even quarrelled on the route to use as they departed for home. There is no witness as to what happened as the three walked together but the now deceased who had just returned from South Africa was found injured and barely conscious by the road side the next morning on 14 June 2016. He was taken to Shindi Clinic and was transferred to Masvingo General Hospital where he passed on 15 June 20-16 due to a skull fracture.

Both the accused persons admitted having fought the now deceased on their way home but indicated that they were all heavily intoxicated to such an extent that they could hardly appreciate what was happening. Indeed, this degree of intoxication was confirmed by all witnesses who saw them and that they had taken copious amounts of opaque beer virtually the whole day.

In their respective defence outlines both accused person tendered pleas of guilty in respect of contravening section 49 of the Criminal Law (Codification and Reform) Act, which relates to culpable homicide. Initially the State was not prepared to accept this limited plea but at the close of the prosecution case the State accepted the limited plea. This is in order after considering the provisions of both s 221(1) and s 221(2) of the Criminal Code [*Cap 9:23*].

Section 221(2) of the Criminal Law (Codification and Reform) Act, [*Cap 9:23*] provides as follows:

- “(2) Where a person is charged with a crime requiring proof of negligence, the fact the person was voluntarily intoxicated when he or she did or omitted to do anything which is an essential element of the crime shall not be a defence to any such crime, nor shall the court regard it as mitigatory when assessing the sentence to be imposed.”

The offence of culpable homicide for which both accused persons stand convicted of requires proof of negligence.

In assessing the appropriate sentence, we have weighed both the mitigatory and aggravating features of this case as was submitted by counsel.

The personal circumstances of both accused persons are almost the same and we therefore find no basis to differentiate their sentences.

Accused 1 is 31 years old and accused 2 is 30 years old. Both of them are married. Accused 1 has one child and accused 2 has 2 children. The accused persons are of no means as they are not employed with no savings. At least accused 2 owns 3 cattle and 5 goats.

We are bound to exercise some degree of leniency as both accused persons are first offenders. The fact that both accused persons were voluntarily intoxicated is immaterial and would not assist their cause in any manner.

Although this matter proceeded to trial, the accused persons, as already stated were admitting to the charge of culpable homicide. This in our view shows that both accused persons were not keen to waste the court's time.

It is an important mitigatory factor that both accused suffered from pre-trial incarceration from June 2016 to March 2017, a period of 9 months before they were admitted to bail pending trial.

The offence of culpable homicide arising from violent conduct remains a serious offence. It generally attracts lengthy custodial sentence unless there are special reasons or circumstances. The reason for this approach is that it entails loss of life. The sanctity of human life cannot be over-emphasised.

It is saddening to note that offences of this nature committed after beer drink are very prevalent. Our young people seem not to value human life especially after taking to the bottle. The court has to play its role by handing down deterrent sentences in order to restore the moral fibre of our society and discourage such conduct. In most cases the disputes leading to loss of life are petty like in the instant case where both accused persons and the now deceased haggled over the route to use to their respective homes. The consequences are however serious as a precious life has been unnecessarily lost.

The degree of negligence in this case is very high. Severe force was used to assault the now deceased on the head, a delicate part of human anatomy. The now deceased's skull was fractured. Both accused persons simply left the now deceased along the road at night and fled to Beit Bridge. The conduct of both accused persons deserve censure.

In our view the following sentence would meet the justice of this case;

Each accused is sentenced to 8 years imprisonment of which 2 years imprisonment are suspended for 5 years on condition each accused does not commit within that period any offence involving the use of violence upon the person of another for which each accused would be sentenced to a term of imprisonment without the option of a fine.

An effective sentence of 6 years imprisonment is appropriate for each accused person.

National Prosecuting Authority, counsel for the State

Mupindu Legal Practitioners, pro deo counsel for accused 1

Mutendi & Shumba Legal Practitioners, pro deo counsel for accused 2