

THE STATE

vs

REKAI MABONGA

and

SILENCE CHANDIREKERA

HIGH COURT OF ZIMBABWE
MAWADZE J
MASVINGO, 18 January 2018

ASSESSORS:

1. Mr Mutomba
2. Mr Dhauramanzi

SENTENCE

Ms Busvumani for the State
C Ndlovu for both accused

MAWADZE J: Both accused were initially charged with the crime of murder as defined in s 47(1) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. The state and the defence found each other and the matter proceeded by way of agreed facts. Consequently, both were convicted of culpable homicide as defined in s 49 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*].

In brief are the agreed facts are as follows:-

The 53-year-old accused 1 and 27 years old accused 2 resided in the same Mandivenga village, Chief Mukanganwi, Bikita, Masvingo with the 50-year-old now deceased. The now deceased was accused's cousin and an uncle to accused 2.

On 19th July 2013 the accused persons and the now deceased were drinking traditional beer at Chenjerai Tichaenzana's homestead at about 0700 hours. At about 1600 hours the now deceased who apparently was believed to be practising witchcraft told accused 2 that accused 2 should not marry as the now deceased wanted accused 2 to take over the now deceased's tools of trade relating to witchcraft and to be in control of the whole family. Accused 2 was unimpressed and advised accused 1. Both accused persons then asked the now deceased to go with them to their home to discuss what the now deceased had said. The now deceased refused but insisted he would not reverse the pact he had made with the underworld in relation to accused 2. This infuriated accused persons who proceeded to assault the now deceased with fists and a switch. The now deceased fell down but the assault continued until the owner of the homestead ordered the accused persons and the now deceased to leave his homestead. The three of them left and the now deceased was later found unconscious by the road side at about 1808 hours. The now deceased was rushed to hospital as his condition worsened and he passed on the next day on 20 July 2013.

As per the post mortem report by Doctor Zimbwa compiled on 23 July 2017 the now deceased had the following injuries;

- i) multiple bruises and whip lash marks on lower limbs and trunk.
- ii) multiple haematomas and injuries on the head and face.
- ii) dislocation of the right sternoclavicular join.

The cause of the now deceased's death was severe head injury.

In assessing the appropriate sentence we shall consider both the mitigatory and aggravating features in this case. The mitigatory factors were outlined with consummate skill and tenacity by *Mr Ndlovu* for the accused persons. He canvassed virtually every aspect of this case and prayed that we impose a fine coupled with a wholly suspended sentence or at worst that we impose community service. Indeed, we were cuddled and persuaded by *Mr Ndlovu* in a very remarkable and impressive manner.

In arriving at this appropriate sentence we did consider the personal circumstances of both accused persons. These include inter alia their ages, marital status, employment status and their dependants. We note that accused 1 is much older as compared to accused 2. Accused 2 is still single with no family responsibilities. He is also unemployed. On the other hand accused 1 is married with 7 children and is employed at Glen View Home Industry in Harare as a carpenter realising monthly income of US\$30. None of the accused persons has

any meaningful assets or savings. Despite these differences we find no rational and objective basis to treat the accused persons differently in respect of sentence as they are both adult men and their moral blameworthiness is the same.

It is in accused persons' favour that they are both first offenders. To that extent they deserve to be treated with some measure of leniency. They have the potential to reform and can only be sent to prison if it is necessary. Our prisons are currently overpopulated and we take judicial notice of the government's intention to reduce this over ballooning prison population by granting presidential amnesty to some of the prisoners. Indeed there are no resources to fend adequately for the prisoners and judicial officers should be alive to such constraints and challenges. This means that prison sentences should be imposed sparingly and as a last resort only in deserving cases.

It is a fact that there has been a delay of 4 years in finalising this matter despite that the accused persons were not denying the charge of culpable homicide. The blame lays squarely on the shoulders of the state which inexplicably believed a more serious charge of murder was warranted. It is prudent for the state to always carefully consider such cases and ensure that justice is not delayed to the prejudice of the accused persons. Besides ensuring that the rights of accused persons are protected such cases are low hanging fruits which reduce the backlog of cases. In casu both accused persons cannot be blamed for this inordinate delay. They both religiously attended the remand court in Bikita for 4 years incurring expenses. They could not plan their future without knowing how this matter would be finalised. Their lives were put in a freezer as it were. As an example accused 2 may well have decided not to marry for fear that if he did he may nonetheless leave the wife after being incarcerated. While the pre-trial incarceration of one month which the accused persons suffered is insignificant, the delay of 4 years is an important factor.

There are indeed mitigatory circumstances surrounding the commission of this offence.

While in terms of s 221 (2) of the of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] voluntarily intoxication is not a mitigatory factor in assessing sentence on an offence involving negligence (I am still to be educated why this is the case) we nevertheless cannot close our minds to the fact that the accused persons and the now deceased were drinking beer from 0700 hours until 1400 hours when this tragic incident happened. What is indeed mitigatory is the accused persons' belief in witchcraft. Our law as outlined in PART

V1 of the of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. S 97 – 102 in my view recognises the existence of witchcraft. In fact, in terms of S101 of the same Act the belief in witchcraft should be taken as a mitigatory factor in assessing sentence. The accused persons believed that the now deceased practised witchcraft and blamed him for deaths in the family. The now deceased did not help the situation on this day as he seemed to reinforce this idea in the minds of the accused persons. To that extent he was the author of the misfortune which befell him. Allied to this fact is that it is the now deceased who provoked accused persons especially accused 2 initially.

We remain mindful of the fact that the accused persons did not use any dangerous weapons besides their fists and switch. The fact that the accused persons are responsible for the demise of their own relative will indeed haunt them for the rest of their lives. The stigma in this eyes of the public that they have the now deceased's blood in their hands will forever be attached to them.

It is a mitigatory factor that the accused persons paid 2 head of cattle and a goat as compensation to the now deceased's family. While this cannot be equated to the value of the precious life which was needlessly lost, it is nonetheless in line with our african custom and practices.

Having outlined these mitigatory factors we remain mindful of the fact that the offence of culpable homicide arising from violent conduct remains a very serious offence. Invariably it should attract a custodial sentence unless there are special mitigatory factors. Society should always be encouraged to resolve disputes in a non violent manner and should know that violence is not a panacea to whatever problems one may face. The bottom line is that no person has a right to cause the loss of life of another unless in circumstances permitted by the law. The sanctity of human life should be respected at all times.

In our view there was no need for the accused persons to have resorted to such violence on the day in question after the now deceased had refused to go with them to their home. There were other lawful and acceptable means accused persons could have employed to solve this dispute rather that violence. They could have sought the involvement of fellow clan members or the traditional leaders especially when they would be in their sound and sober senses.

The fact of the matter is that this was a gang assault involving two physical fit people. Severe force was used as the now deceased lost consciousness and died the following day

despite being taken to hospital. The assault itself was indiscriminate judging by the injuries reflected in the post mortem report. It was also prolonged. The now deceased sustained multiple bruises on the limbs, trunk, the head and face. The accused persons also targeted the head which is a vulnerable part of human anatomy. As a result death resulted from the severe head injury inflicted. We would have agreed with *Mr Ndlovu* if death arose probably from a single blow with a fist during a beer brawl. In that case a fine or community service would be appropriate.

The degree of negligence by accused persons in this case is very high. The level of their moral blameworthiness warrants punishment with a custodial sentence. The resultant sentence should however reflect the genuine mitigatory factors in this case.

In the result we believe the following sentence meets the justice of this case.

Each accused is sentenced to 3 years imprisonment of which 1 ½ years imprisonment is suspended for 5 years on condition each accused does not commit within that period any offence involving the use of violence upon person of another for which each accused is sentenced to a term of imprisonment without the option of a fine.

The effective term of imprisonment is 1 ½ years for each accused person.

National Prosecuting Authority, Counsel for the state.

Ndlovu & Hwacha, Counsel for both accused.