

THE STATE
versus
ASHTON MUSINDO

HIGH COURT OF ZIMBABWE
MAWADZE J
MASVINGO, 15 June 2020

Criminal Trial - Sentence

Assessors

- 1. Mr Nish**
- 2. Mrs Chademana**

E. Mbavarari, for the State
K. Mabvuure, for the accused

MAWADZE J: Initially the accused was charged for contravening section 47(1) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] which relates to murder. The accused was jointly charged with 7 other accused persons. However the 7 other accused persons pleaded not guilty to the charge after which the State withdrew charges against them after plea hence all the 7 accused persons were found not guilty and acquitted.

The accused offered a limited plea of contravening section 49 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] which relates to culpable homicide which limited plea was accepted by the State. The accused was therefore duly convicted for contravening

section 49 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] which relates to culpable homicide.

The 42 year old accused resides in Masherema Village, Headman Gororo, Chivi, Masvingo. The now deceased was 72 years old at the time of his death and was the accused's uncle.

The agreed facts are that on 14 April 2019 the accused and other relatives convened a meeting at the now deceased's homestead. The relatives alleged that the now deceased was practising witch craft and demanded that he produces the paraphernalia used in the said witchcraft activities. It is said the now deceased initially professed ignorance and was assaulted by the accused which culminated in him producing a piece of white cloth, a horn and a clay pot allegedly used for witchcraft. The now deceased had been assaulted by accused with mulberry tree switches all over the body. The accused and other relatives left but demanded that the now deceased should surrender all the paraphernalia he allegedly used for witchcraft, and promised to return the following day to further assault him if he did not acceded to the demand.

The next day on 11 April 2019 the accused returned to the now deceased's homestead and further assaulted him using mulberry switches. A report was made to Ngundu police resulting in the accused's arrest. The now deceased was taken to Ngundu clinic after which he was transferred to Masvingo General hospital where he was treated and discharged. The now deceased passed on at his homestead on 13th April, 2019.

A post mortem examination done by Dr Pesanai in Bulawayo shows that the now deceased's death was due to "*bronchial aspiration, mild subarachnoid haemorrhage and head injury*" arising from assault.

In assessing sentence this court has to achieve a balance between both the mitigatory and aggravating factors.

In the case of *State v Shingirai Hamunakwadi* HH 323/15 Hungwe J (as he then was) discusses the question of belief in witchcraft and how the criminal jurisprudence has grappled with this issue both within and without our borders. At page 5 of the cyclostyled judgement the learned JUDGE said;

"The attempts of the common law courts to address witchcraft inspired violence differed markedly from the suppression tactics of various legislative initiatives. Whereas

legislation recognises the wide spread violence and seeks to curtail it, the criminal law has often recognised the belief that gave rise to the violence and carved witchcraft provocation defence that could be offered as a mitigating factor in cases of witchcraft related violence.

Under this theory accused persons could reduce their crimes or punishments upon proof that they, or persons under their immediate care, were being bewitched and that this belief caused them to temporarily lose self control. In some ways, this theory provokes tacit recognition that in certain communities killing a "witch" is not merely explainable, or excusable but praise worthy."

In terms of section 101 of the Criminal Law (Codification and Reform) Act chapter 9:23 the belief in witchcraft operates as a mitigating factor rather than a defence to crime. It provides as follows;

" 101 Belief in witchcraft to operate in mitigation and not as defence to crimes

It shall not be a defence to murder, assault or any other crime that the accused was actuated by a genuine belief that the victim was a witch or wizard, but a court convicting such persons may take such belief into account when imposing sentence upon him or her for the crime."

In casu it was submitted on behalf of the accused that two family members had mysteriously died and the family blamed the now deceased for causing their death through witchcraft. The accused's belief can be discerned from his demand that the now deceased should produce his paraphernalia used for witchcraft. The situation was not helped when the now deceased produced the piece of cloth, a horn and clay pot. Despite having attained 'O' level he is a rural person who strongly believed in witchcraft.

The accused is married with 2 young children. His family solely relies on his manual labour as he is unemployed.

As a first offender this court is enjoined to treat him with some measure of leniency.

The accused's plea of guilty is an important mitigatory factor. He did not deny assaulting the now deceased and cooperated with the police upon his arrest. He should be rewarded for not having wasted state resources by raising any frivolous defence.

The fact that the accused negligently caused the death of the 72 year old should haunt him forever. That social stigma would be part of his life.

On the other hand the offence of culpable homicide arising from violent conduct is inherently a serious offence which invariably contracts a custodial sentence. This court abhors violence as a means of resolving any dispute, worse still when it results in loss of life. The duty

of the courts is to protect human life. No person has the right to take the life of another whether intentionally or negligently.

It is saddening to note that offences of this nature are prevalent in Masvingo province. This calls for deterrent sentences in order to protect life and limb.

Despite the accused's belief in witchcraft he should not have taken the law into his own hands. If such conduct remain unpunished it would not only lead to break down of law and order but would lead to chaos in the villages as those suspected of being witches or wizards would be lynched.

The accused's degree of negligence is evidently high. The assault itself was persistent and prolonged lasting for two days. The now deceased was in the afternoon of his life at 72 years of age. Serious and fatal injuries were inflicted as the degree of force used was very high. This calls for a custodial sentence.

In the result the accused is sentenced as follows;

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

Effective: 3 years imprisonment "

National Prosecuting Authority, counsel for the State

Chihabakwe Law Chambers, pro deo counsel for the accused