

THE STATE
versus
SHEPHERD TOFARASEI

HIGH COURT OF ZIMBABWE
MAWADZE J.
MASVINGO, 7TH February, 2022

Criminal Trial: - Sentence

Assessors

1. Mr Mutomba
2. Mrs Chademana

E. Mbavarira for the State
Ms C. Chuma for the accused

MAWADZE J: The concession by the state to a lesser charge of culpable homicide as defined in s 49 of the Criminal Law (Codification and Reform) Act [*Cap* 9:23] is understandable.

There was no eye witness to the tragic events leading to the now deceased's demise. It is the accused himself who can possibly explain what exactly happened. The post mortem report is of no use as the now deceased was found in a state of advanced decomposition. The cause of death could not be ascertained. The available state witnesses cannot take the matter any further.

The facts as to what could have happened on the fateful day can be discerned from the statement of agreed facts as follows;

The then 54 year old accused who runs a number of grocery shops in Bikita resides in Zimhunga Village, Chief Marozva, Bikita. Despite being married the accused was cohabiting with the then 46 year old now deceased at Sosera business centre, in Bikita. The accused and the now deceased were having this illicit relationship for 6 years.

On 12 October, 2018 the accused travelled to Masvingo to attend a workshop for 3 days and was to return after 3 days. However the meeting in Masvingo ended earlier and the accused returned without notice only to find his girlfriend the now deceased in the comfortable hands of a paramour Tongai Guru in accused's bedroom. The paramour tried to hide in the wardrobe but was betrayed by his mobile cellphone which the paramour could not hide. A fight ensued and the now deceased took a knife but was disarmed by the accused. The accused picked the knife and tried to stab the paramour but ended up fatally injuring the now deceased. The paramour had provoked the accused by insisting that he was the "father of the house" as it were when confronted by the accused.

The paramour Tongai Guru managed to escape. The now deceased was stabbed to death in the melee. The accused panicked. He wrapped the now deceased's body in a blanket after which he locked the house. The now deceased's decomposing body was discovered on 18 October, 2018 some 4 days later. The cause of death could not be ascertained due to the decomposed state of the body.

The charge of culpable homicide is informed by the fact that when the accused stabbed the now deceased he had been provoked by the presence of Tongai Guru in his house. The state counsel and defence counsel agree therefore that the accused's actions were a result of provocation which provocation was sufficient to make a reasonable person in accused's position and circumstances to lose self-control as is defined in s 239(1) of the Criminal Code [*Cap 9:23*].

Be that as it may, the accused is facing a very serious offence involving loss of life albeit through negligence. The sanctity of human life cannot be emphasized. Once lost lie is irreplaceable.

Infidelity on the part of a spouse or lover can never justify taking away the life of the offending party. *In casu* the now deceased was not even accused's wife but a girlfriend. The mind boggles as to why the accused demanded faithfulness from the now deceased in an adulterous affair with the now deceased. The accused has a wife and 7 children. If the accused

found it unpalatable to condone the now deceased's infidelity he should have simply walked away.

It is saddening to note that offense of this nature is prevalent. A number of people have perished at the hands of those who purport to love them.

Despite the inconclusive findings in the post mortem report the accused's moral blameworthiness remain high. The accused used a lethal weapon, a knife. The degree of force was severe as per accused's own admission the now deceased died immediately. The blow or blows should have been directed at the vulnerable part of the deceased's body.

The accused's conduct after fatally injuring the now deceased elevates his moral blameworthiness. He offered no possible help. Instead he simply wrapped the lifeless body of the now deceased with a blanket, locked the door and left as if nothing happened. The accused was determined to conceal this heinous act. Worse still the accused attended the now deceased's funeral just like other mourners pretending to be aggrieved. Thereafter his conscience was not even pricked as he fled to his son in law in Mhondoro. The accused only owned up after being cornered by the police and was arrested in Mhondoro. Credit should therefore be due to the police.

In mitigation one should not lose sight of the mitigating factors.

The accused who is in the afternoon of his life has a large family of 7 children. After his incarceration his wife and children may not be able to run his many grocery shops and grinding mill. As at now he has no savings for his family to fall back on.

The court should exercise some measure of leniency as accused is a first offender.

To his credit the accused upon arrest owned up of what he did. In court he pleaded guilty to culpable homicide without raising flimsy defences as there was no eye witness to the incident. The accused did not waste time in court and less resources were used in prosecuting him.

The stigma that he caused the death of his girlfriend of 6 years may forever haunt the accused.

The accused was denied bail pending trial and has been in prison for almost two years.

There are mitigating factors surrounding the commission of the offence. The accused found an unrepentant paramour in his house. Both the accused's girlfriend who is the now

deceased and the paramour to some extent were not contrite. The element of provocation is therefore very clear.

After assessing the accused's moral blameworthiness and the high degree of negligence he exhibited the following sentence is appropriate,

“10 years imprisonment of which 2 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 and/or any offence involving negligently causing the death of another for which the accused is sentenced to a term of imprisonment without the option of a fine.

Effective:- 8 years imprisonment.”

*National Prosecuting Authority, counsel for the state
Chuma, Gurajena & Partners, pro deo counsel for the accused*