

THE STATE
versus
MATTHEW JOSIAH

HIGH COURT OF ZIMBABWE
MAWADZE J.
MASVINGO, 28 July 2023

Criminal Trial: - Sentence

Assessors

1. Mr Gweru
2. Mr Mutomba

B E Mathose for the State
Ms Y Chandata for the accused

MAWADZE J: The facts of this matter call for a delicate balance between the mitigating and aggravating factors of this case in assessing appropriate sentence.

The 30 year old accused was initially facing the charge of murder as defined in Section 47 (1) of the Criminal Law [Codification and Reform] Act [*Chapter 9:23*]. However both counsel found each other and agreed that the appropriate charge is culpable homicide as defined in Section 49 of the Criminal Law [Codification and Reform]Act [*Chapter 9:23*]

The accused negligently caused the death of his 22 year old sibling.

The agreed facts as per the statement of agreed facts are as follows;

Both the accused and the now deceased were residing at village 5 Musapasi, Chief Gudo in Mkwesine, Chiredzi. The accused was employed as a game scout at Humane ranch in Mkwesine.

On the dates unknown to the prosecutor but between August and September 2020 the accused left his work place proceeding to his home. Upon arrival home he found one Maxwell Mukuwe a suspected poacher at his workplace in the company of accused's young brother Zacharia, the now deceased. The accused decided to arrest Maxwell Mukuwe for poaching. The now deceased and his wife Cleopatra Atiwana would have none of it. They both fought in the corner of the accused poacher Maxwell Mukuwe. A wrestling match ensued as the accused tried to apprehend Maxwell Mukuwe and the now deceased and his wife tried to free him.

The now deceased's wife and Maxwell Mukuwe left the house they were in but accused and the now deceased remained in a scuffle. The now deceased's wife had cut a rope accused has used to tie Maxwell Mukuwe using a knife. The knife remained in the house. The accused and the now deceased wrestled for the possession of the knife. As they so wrestled the accused stabbed the now deceased under the armpit and inflicted serious injuries.

The accused realized the now deceased was seriously injured. He tried to ferry him to a local clinic on a motor bike but the now deceased could no longer be able to sit on the pillion seat. Accused had to use a scotch cart to ferry the now deceased to hospital.

The now deceased and the whole family decided not to reveal how the now deceased had been injured. They lied to both the health officials and the police. The now deceased was falsely alleged to have fallen on to the knife by error. However it was only on 30 January 2021 that the now deceased's wife Cleopatra Atiwana disclosed the truth leading to the accused's arrest.

When the remains of the now deceased were examined by Dr Zihove the following was noted;

“External noted severe pallor of mucous membrane with huge mass extending from axilla to chest wall. Huge haematoma evacuated with clot and laceration axillary artery noted and a wound noted axillary region 1cm wide but 5cm deep The cause of death is said to be severe anaemia secondary to penetrating injury.”

The offence of culpable homicide arising from violent conduct is a very serious offence. Generally in the absence of very persuasive mitigating factors it attracts a lengthy custodial sentence.

The courts have a duty to protect life. *In casu* the now deceased's life was needlessly lost.

The accused was simply overzealous in his bid to arrest an alleged poacher. Once the accused realized there was some resistance he should have let go or involve other game ranchers or members of ZRP.

A knife without doubt is a lethal weapon. The now deceased was seriously injured although it is not clear as to how long he nurtured the fatal injuries.

As a result of the accused's conduct the now deceased wife is now a widow and the child has lost a father.

While the accused could be commended in his zeal to enforce the law he should have done so within the confines of the law.

The court cannot however ignore the mitigating factors.

The accused is a 34 year old first offender. He pleaded guilty to the charge he now stands convicted of despite the initial lies he and the whole family peddled.

The accused who is married with two wives and 8 minor children have other dependants who include Accused's 48 year old mother his 52 year old father and 3 nephews who are all minors. The accused had been taking care of the now deceased's widow and minor child. Maybe as the only person employed and with such responsibilities the family initially decided to lie as to how the now deceased had died to ensure the accused their sole provider is not arrested.

The accused is employed as a game scout earning US\$130 and Zimbabwean \$230 000. This is the sole income which sustains his many dependents.

It is clear that the accused was very remorseful. After realizing he had injured the now deceased he ferried him to hospital. The accused paid the now deceased's medical bills amounting to US\$350 from his meagre salary. He carried the larger burden of the funeral expenses of the now deceased. It is the accused who paid for transport costs of the now deceased's body from Masvingo to its burial place in Mkwesine Chiredzi. He bought the coffin and provided 2 beasts for consumption by mourners. Indeed he did take care of other incidental expenses.

The accused shall forever live with the fact that he is responsible for his young brother's death. There are also mitigating factors surrounding the commission of the offence.

Both accused and the now deceased were overzealous and engaged in an unnecessary brawl. The now deceased was protecting a suspected criminal, who was being lawfully arrested thus contributing to this unfortunate incident.

According to the State the now deceased was complicit in hiding the truth of how he had been injured. Until he breathed his last he was protecting the accused. He was unwilling to tell the truth to the nurses, the Doctors and the police. As a result one may infer that he was at peace with what had happened and did not want accused to be imprisoned.

The facts show that the accused was effecting a lawful arrest. Indeed if the victim was one Maxwell Mukuwe the suspected poacher the accused would have been indemnified or absolved of criminal conduct.

It is important to note that the fatal assault itself was more accidental than anything else. It arose from a scuffle as both accused and the now deceased sought to take possession of the knife.

At the end of the day the question to be asked is what is in the interest of justice in this case in relation to the sentence.

The mitigating factors clearly far outweigh the aggravating factors. As a result an effective custodial sentence is inappropriate. On the other hand a wholly suspended sentence would trivialize the offense. The option of community service would burden the accused who has work commitments and huge dependants.

At the end of the day a fine which would hit the accused's pocket coupled with a wholly suspended prison term would meet the justice of the case.

In the result the accused is sentenced as follows;

"The accused is to pay a fine of US\$500[or payable in equivalent Zimbabwean dollars at prevailing interbank rate] OR in default 12 months imprisonment. In addition 12 months imprisonment is suspended for 5 years on condition accused does not commit within that period any offence involving the use of violence upon the person of another and or negligently causing the death of another through violent conduct and for which accused is sentenced to a term of imprisonment without the option of a fine."

*National Prosecuting Authority, counsel for the state
H Tafa & Associates. Pro deo counsel for the accused.*