

THE STATE

Versus

X (A Juvenile)

HIGH COURT OF ZIMBABWE

MUZOFA J

CHINHOYI, 20 July 2023

Date of written judgment 14 September 2023

Assessors

Mrs Mawoneke

Mr Manyangadze

G. T. Dhamusi, for the State

U. Saizi, for the accused

MUZOFA J: At the age of 15 a person is considered a child. Children at that age all things being equal are expected to be busy with their education in preparation for their future lives. It was not so for the accused who shall be referred to as X. He was so in love with a girl in their community, he was prepared to fight and kill for her. On 22 February 2022, the accused struck one G.K with a half brick once on the head leading to his death for the simple reason that the deceased described the accused's girlfriend as the ugliest girl in their community. For his misdirected expression of love the accused was arrested and charged with murder in contravention of s 47 (1) of the Criminal Code.

The accused denied the offence but pleaded guilty to the lesser offence of culpable homicide.

The State accepted the plea and the matter proceeded on a statement of agreed facts. The State produced the statement of agreed facts which summarised the facts as follows:

1. The deceased was a male adult who was aged 23 years old. The accused is a male juvenile who was aged 15 years when the offence was allegedly committed.
2. The deceased and the accused resided in the same compound.

3. On the 22nd of February 2022 and at Jonga Compound Tuckshop, the accused and the deceased had a misunderstanding after the deceased mocked the accused that he had the ugliest girlfriend in the compound.
4. The accused and the deceased engaged in a fist fight and the accused was overpowered.
5. The accused rushed to a neighbouring house and picked a full brick and struck the deceased once on the left side of his head.
6. The deceased fell unconscious and his friends, Knowledge December, James Gwaze and Mathew Biliat rendered first aid to him.
7. The deceased regained consciousness and went home.
8. On the 23rd of February 2022, the deceased was taken to Darwendale Hospital for treatment. He was referred to Banket Hospital.
9. On the 24th of February 2022, he succumbed to the injuries while receiving medical care at Banket Hospital.
10. Dr. Masiye Frankson conducted a post-mortem examination and concluded that death was due to **intracranial bleeding (head injury)**.
11. The State and the defence submit that the accused did not form the specific intention to cause death but he was negligent when he threw the brick in the direction of the deceased.
12. The State and the defence submit that the accused ought to be convicted of Culpable Homicide as defined in section 49 of the Criminal Law (Codification and Reform) Act, Chapter 09:23.'

The post mortem report prepared by Doctor Frankson and the broken brick weighing 2.659kg used to assault the deceased were produced by consent of the defence. A probation officer's report was also produced by consent.

The accused's warned and cautioned statement was also produced by consent. His response to the caution was recorded as follows: -

"I admit the charge levelled against me that I hit the deceased with a farm brick on the left side of the head causing him to die because he is the one who grabbed me"

Having considered the facts particularly that the accused and the deceased fought. He was the younger one of the two so he was overpowered. In the heat of the moment, he looked

for a brick and hit the deceased once on the head. A combination of anger for being overpowered and the insult led him to act at the spur of the moment. The court is careful not to place an old head on young shoulders. An adult and a child would certainly react differently when under pressure. It is important to acknowledge that children often do act irrationally and make premature decisions at times. Their limited capacity for understanding, or developmental constraints render them less able than adults to exercise self-control or make (good or bad) moral judgements¹.

Taking into account all the facts and the circumstances under which the offence was committed the accused could not have formulated the actual or constructive intention to commit the offence as envisaged in s47 (1) of the Criminal Code. In view of the foregoing the court found the concession properly made.

The accused was born on the 29th of May 2006 which means he was 15 years 10 months at the time he committed the offence. He was still a child in terms of section 2 of the Children's Act. The section defines a child as any person under the age of 18 years. The legislature having defined a child as such, deliberately categorised these children in respect of criminal capacity. Part 1 of the criminal code deals with criminal capacity. This part codified the common law position on presumptions in respect of criminal capacity.

Criminal capacity is defined in relation to the ability to formulate the necessary mental element (*mens rea*) to commit an offence. This is understandable because an offence consists of both the physical element and the mental element. The physical element can be committed by anyone despite their age. For the requisite mental element some ages are deemed incapable of formulating such intention.

In terms of s2 of the Criminal Code children under 7 years of age are irrebuttably considered incapable of formulating an intention. They are *doli incapax*, they cannot be prosecuted for any crime. Between the ages of 7 and 14 years a rebuttable presumption operates. This means children between the ages of 7 and 14 years can be prosecuted provided the State can prove beyond reasonable doubt that they had the necessary criminal capacity at the time of the commission of the offence.

In this case the accused was over 14 years. No presumption operates in his favour. It is competent therefore to find him liable for offences of specific intention or negligence.

¹ Smith, R. (2010) *A Universal Child?* Basingstoke, Palgrave Macmillan

The plea to the lesser charge of culpable accepted by the state is based on negligence. It is competent for this court to convict the accused on the charge.

Accordingly, the accused is found guilty of culpable homicide in contravention of section 49 (1) of the Criminal Code.

Sentence

In assessing sentence the court considered the accused's personal circumstances as submitted by his legal practitioner and the probation officer's report. A probation officer's report is important in any prosecution of a juvenile offender. It is critical in explaining the special circumstances of the juvenile. Courts must seriously consider the probation officer's recommendations in the disposal of cases involving juveniles.

The report shows that the accused has both biological parents. He is the first born in a family of seven. He does not go to school. He did not proceed with his education from grade seven due financial constraints. The father is the only bread winner who struggles to meet the family needs. They occupy two rooms in the farm compound where they live. As properly pointed out by the probation officer, there was lack of parental supervision and guidance in the family. The accused, who was aged 15 years was out at the shops as late as 12 midnight at large to engage in anything.

The accused stands convicted of a serious offence. He will live with the stigma of having killed someone for the rest of his life. The deceased was his friend and what started as a jovial conversation among friends ended up in a fatality. Although the accused has been convicted of the lesser offence of culpable homicide society knows no distinction between culpable homicide and murder. His family too will partake of the community stigma for his conduct.

The accused is now aged 17 years and remains a child. In sentencing the accused the court must be guided by the Children's Act (Chapter 5:06) 'the Act'. Although the court is not sitting as a Children's court, the High court as the upper guardian of all minors has overall inherent jurisdiction to deal with cases involving children. See *Chiwenga v Mubaiwa* SC 86/20. The inquiry required to be made in terms of the Act was done by the probation officer and that information coupled with the court's assessment should meet the justice of the case which is the paramount consideration.

The probation officer recommended that the accused be committed to a training institution for further management and training in terms of s20 (1) (b) (vi) of the Act. Since the court had no capacity to assess which training centre the accused must be referred to, the probation officer was requested to make further recommendations as to the specific institution. The court is grateful for the prompt response. The accused shall be committed to an institution in terms of subsection (i) as opposed to subsection (iv) of s20 cited by the probation officer since the accused has to be committed to an identified institution.

Accordingly the following order is made.

The accused is committed to Blue Hills Training Institution in terms of s20 (1) (b) (i) of the Children's Act (Chapter 5:06).

The National Prosecuting Authority, the state's legal practitioners.

Saizi Law Chambers, the accused's *pro deo* legal practitioners.