

THE STATE
versus
LEARNMORE MAREGA

HIGH COURT OF ZIMBABWE
MAWADZE J
MASVINGO, 15 September 2023

Assessors 1. Mrs Chademana
2. Mr Mutomba

Criminal Trial

Ms M. Mutumhe, for the state

Ms F. Ndlovu, for the accused

MAWADZE J: The accused was initially arraigned for murder as defined in section 47 (1) of the Criminal Law [Codification and Reform] Act [*Chapter 9:23*] but was convicted of contravening section 49 of the same Act [*Chapter 9:23*] which relates to culpable homicide. This was after counsel found each other at the commencement of the trial and the matter proceeded on the basis of a statement of agreed facts.

The accused is 29 years old. The now deceased was 41 years old. They are not related but stayed in the same area under Chief Nyajena, Masvingo, *albeit* different villages.

The agreed facts are as follows;

The accused's bicycle was stolen at his homestead on 1 May 2023. The accused had bought it for R8969 in South Africa on 6 August 2022 as per the receipt Exhibit 3. Previously the now deceased has offered to buy the same bicycle from the accused for R2000; an offer the accused took as an insult. Needless to say the accused turned down the offer.

The accused suspected that it is the now deceased who had stolen the accused's bicycle. The rather warped reasoning of the accused was that the now deceased was the last person to see the accused parking the same bicycle at the accused's residence on 1 May 2023. In his report to the police at ZRP Renco the accused mentioned the now deceased as a suspect in the said theft. There were also unsubstantiated rumours that the now deceased had sold the said stolen bicycle to some artisanal miners in Chehudo. The police apparently were not convinced. They thus did not arrest the now deceased. This inaction did not sit well with the accused. The accused approached the now deceased's father with the same allegation against the now deceased. The now deceased's father had a protection order issued against him in relation to the now deceased. He too could therefore not help the accused as he had been barred from talking to the now deceased, his son.

On the May 2023 at around 1930hrs both accused and the now deceased were at a local bottle store called Matsvaire drinking beer. The now deceased offered beer to the accused and both of them started to drink together. The now deceased later inquired from the accused if the accused had subsequently recovered his stolen bicycle. The accused who regarded the now deceased as the prime suspect felt insulted. The accused was incensed and without uttering a word stood up and advanced towards the now deceased. Sensing danger the now deceased stood up and tried to flee.

In a fit of rage, the accused picked up a bar stool. Exhibit 2 weighing 5,850kg and 75cm in height. The accused struck the now deceased who fell down. Before he could rise up the accused kicked the now deceased thrice in the face causing him to bleed. The accused then left.

The now deceased was taken to the local Musvovi clinic. By then he was unconscious. As a result, he was transferred to Masvingo General Hospital where he died 2 days later on 11 May 2023.

The post mortem report Exhibit reflects the following injuries;

- "1. Bruising on left frontal area with underlying bone fracture
2. Right peri orbital haematoma
3. Bleeding from mouth and both ears. "

The cause of death is said to be "head injury" arising from "blunt trauma. "

There is no doubt that the accused stand convicted of a very serious offence involving loss of life through violent conduct, *albeit* as a result of his negligence. Cases of this nature remain quite prevalent and deterrent sentences are unavoidable. Life is precious. It is sacrosanct. The duty of the courts is *inter alia* to protect life.

The accused's moral blameworthiness is high. He decided to take the law into his own hands, something akin to being a judge and executioner in one's case. There are no cogent reasons why the accused believed the now deceased is the one who stole his bicycle. Even if he was the one, the accused was to allow lawful and due process to take its course. Further, no matter what value accused placed on his stolen bicycle it can never be equated to human life.

The degree of negligence by the accused was quite high. The accused used a steel stool on the now deceased who was already fleeing. As if that was not enough he then brutally kicked him in the face. While it is unclear as to which blow caused the fractured skull or the proximate cause of that fracture the blame remains squarely on the accused's shoulders. The degree of force used was high as the now deceased fell unconscious and died within two days despite the medical intervention. Such resort to use of blatant violence deserves censure and punishment.

The are indeed persuasive mitigating factors.

This is the accused's first brush with the law. The accused pleaded guilty and did not raise any flimsy defences. No time was wasted in disposing of this case. The witnesses were not called and less expenses were incurred in prosecuting the accused. The administration of justice has been very smooth. The accused should be given his due and deserved reward.

The accused is married with a very young family. The eldest child is 7 years and the youngest is just 3 months old. The family relies on his manual labour. The accused's incarceration would obviously adversely affect this young family.

There is no doubt that the accused regrets his conduct and is contrite. The accused provided transport to ferry the now deceased's remains from the hospital to its final resting place. He bought the coffin. He contributed to the food for the mourners. As per Exhibit 4 the accused has since paid 8 beasts as compensation to the now deceased's family. In fact, the accused had to sell his rural home and rendering his own young family homeless in order to raise money for the 8 beasts.

To that extent the accused has genuinely tried to atone for his wrongful conduct. The court can not turn a blind to such a gesture in assessing sentence. The accused actually did all this when he was in prison as he was not released since his arrest in May 2023 to date, a period of about 4 months. Again, as per Exhibit 4 the now deceased's family has embraced the accused's gesture and seem to have accepted the reconciliation between the two families. This is the essence of restorative justice.

To some extent the accused's conduct can be understood in the context of his misplaced conviction that the now deceased had stolen his bicycle. The accused felt aggrieved by the police inaction. He found no joy in trying to engage the help of the now deceased's father. While this can not justify the accused's conduct, he subjectively felt let down by all those he thought could assist him. The inquiry by the now deceased on that fateful day in the bottle store in all probabilities triggered the accused's bottled anger.

At the end of the day the following sentence should be appropriate;

"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 the person of another or negligently causing the death of another through violent conduct for which the accused is sentenced to a term of imprisonment without the option of a fine.

Effective sentence is 3 years imprisonment. "

National Prosecuting Authority, counsel for the state

H. Tafa & Associates, pro deo counsel for the accused.