

THE STATE

Versus

CHENJERAI MANDIZIVA

IN THE HIGH COURT OF ZIMBABWE
DUBE-BANDA J with Assessors Mr A.B. Mpofu and Mr E. Shumba
GWERU CIRCUIT COURT 16 & 17 MAY 2023

Criminal trial

Ms. L. C. Mamombe, for the State
Ms. A. Mugari, for the accused

DUBE-BANDA J:

[1] The accused is appearing before this court charged with the crime of murder as defined in section 47 of the Criminal Law (Codification and Reform) Act Chapter 9:23. It being alleged that on 8 November 2020 the accused unlawfully caused the death of Takunda John Murahwa (deceased) by striking him several times all over the body with switches, intending to kill him or realising that there is a real risk or possibility that his conduct may cause the death of the deceased and continued to engage in that conduct despite the risk or possibility.

[2] The accused pleaded not guilty to the crime of murder and pleaded guilty to the lesser charge of culpable homicide. The State accepted the plea of guilty to the lesser charge of culpable homicide. *Ms Mugari* defence counsel confirmed that the plea was in accordance with instructions her instructions. The State tendered into the record of proceedings a statement of agreed facts, which is before court and marked Annexure "A". The statement reads as follows:

- i. Chenjerai Mandiziva (hereinafter called the accused person) was aged 40 years at the time of the commission of the alleged offence. He resides at Plot 27, Edward Farm Shurugwi in the Midlands Province. He is unemployed.
- ii. Takunda John Mandiziva (hereinafter referred to as deceased) resided at Plot 27, Edward Farm, Shurugwi during his lifetime. He was aged 13 years old at the time he met his death.
- iii. Deceased was accused's biological son.
- iv. On the 8th day of November 2020, the accused arrived home and overheard the deceased chatting with his stepmother Berita Mapiye who is accused's wife about

the accused's infidelity. The accused then indicated that he intended to discipline the deceased to stop him from gossiping. He ordered the deceased to get into the house and proceeded to detach a switch from a nearby tree. The accused then followed the deceased into the house, ordered him to lie down on his stomach and started assaulting him on the back and on his buttocks with the switch.

- v. The deceased was then ordered to go outside and he went and lay on his back in the yard. The deceased then asked the accused to pour water on his body and he complied. The deceased requested for more water and the accused's wife gave him water to drink. At around 1630 hrs the accused person's wife examined the deceased and observed that he was now unconscious.
- vi. The matter was reported to the police and the accused handed himself to the police.
- vii. The deceased's remains were ferried to United Bulawayo Hospitals where a post mortem examination was conducted on 16th November 2020 by Dr Juana Rodrigueez Gregori. He concluded that the cause of death was;
 1. Traumatic Shock
 2. Thoracic and abdominal trauma
- viii. The accused accepts the evidence of the state witnesses and contents of the post mortem report. The accused person denies having requisite intention to kill in the form of *dolus directus* or *dolus eventualis*. Rather the accused person acknowledges that through his conduct aforesaid, he was negligent in the causing the death of the deceased.
- ix. The State concedes to the fact that the accused person was negligent in the manner he assaulted the deceased and therefore accepts the accused person's plea of culpable homicide.

[4] The State tendered a Confirmed Extra Curial Statement (Exhibit 1). In the statement the accused admits that he assaulted the deceased to teach him a lesson to stop gossiping. The deceased had told his step mother (accused's wife) about the accused's infidelity, and the accused assaulted him to discipline him. He got a switch and ordered the deceased to get into house and made him lie on the floor, and started the assault him. He assaulted him on the back and buttocks, he took a second switch and continued assaulting him until he realised that he had injured him. The State further tendered a Post Mortem Report (Exhibit 2) compiled by Dr. Juana Rodriguez Gregori who opined that the cause of death was traumatic shock and thoracic

and abdominal trauma. The State produced and place before court as real exhibit four switches with the following measurements: switch 1 -66cm; switch 2-59cm; switch 3-74cm; and switch 4-45cm. These switches were broken to seventeen pieces during the assault of the deceased by the accused.

[5] The totality of the facts and the evidence adduced show that the injuries sustained by the deceased were caused by the accused. The facts of this case show that the accused ordered the deceased to lie down on his stomach and assaulted him several times on the back and on his buttocks with the switch. The injuries inflicted by the accused caused the death of the deceased.

[6] In terms of s 241 of the Criminal Law (codification and Reform Act) [Chapter 9:23] (Criminal Code) a parent has authority to administer moderate corporal punishment for disciplinary purposes upon his child. The accused exceeded the bounds of moderate punishment in that used four switches which broke to seventeen pieces during the assault, severe force was used to assault a thirteen-year-old child, and the reason for the assault was merely to cover for his own misconduct. Corporal punishment administered by the accused upon the deceased could not be said to have been moderate. It was immoderate and excessive in its nature and degree and was protracted beyond a child's power of endurance. The accused exceeded the limits of reasonable chastisement and his conduct fell outside the corporal punishment authorised by s 241 of the Criminal Code. Section 241 does not permit assault. Assault is unlawful. It authorises moderate corporal punishment, and no more. And this provision must be interpreted narrowly to arrest the tide of child abuse in the name of moderate chastisement and to promote the fundamental rights of children to human dignity and equality.

[5] In assaulting the deceased in the manner the accused did a reasonable man placed in the same circumstances as the accused would have foreseen the possibility of death and would have guarded against it. The conduct of the accused shows that he fell below the reasonable person standard.

[6] On the basis of the facts and the evidence of this case, we are satisfied that the State's concession is properly taken, it accords with the law and the facts. In the circumstances, we are satisfied that on the facts of this case, it cannot be said that the accused is guilty of the crime of murder.

In the result: the accused is accordingly found not guilty of murder and found guilty of the lesser crime of culpable homicide.

Sentence

[7] Mr. Mandiziva, this Court found you guilty of the crime of culpable homicide arising from the death of your thirteen-year-old son. It is now the unenviable but necessary task of this court to impose an appropriate sentence. In sentencing you this court has to take into account all relevant factors, afford each the appropriate weight thereto and strike a balance between the various interests. In determining a sentence which is just and fair, this court will have regard to the triad of factors that have to be considered as set out in case law, e.g., in the case of *S v Zinn* 1969 (2) SA 537 (A). This Court must therefore take into account your personal circumstances, the nature of the crime including the gravity and extent thereof and the interests of the community. Whilst it is so that a court must always endeavour to exercise a measure of mercy, however, sight must not be lost on the purpose and objectives of punishment. See: *S v Rabie* 1975 (4) SA 855 (AD) at 862G-H.

[8] This means that a court should consider the objectives of punishment which is that of prevention, deterrence, reformation and retribution and a court must decide what punishment would best serve the interests of justice. A court should also be cautious in weighing the elements under consideration and not unnecessarily elevate one element of above others, rather, a balance must be struck amongst these factors and between the interests of the accused and that of society.

[9] We will now turn to the facts of this case and the submissions made by your Counsel and Counsel for the State.

[10] In mitigation of sentence, your Counsel addressed the court and placed factors which she urged this court to take into account in order to impose a lesser sentence to you in respect of the crime of which you had been convicted. Your personal circumstances are as follows: you were forty years old at the time of the commission of this offence, and you are now forty-three years old. It was also submitted that you are the father of three minor children, the youngest of which is three years old. Two attending school. Your wife is also expecting. You are the sole provider of your family. Your Counsel submitted further that you are remorseful of having caused the death of your first-born child. And the stigma of having caused the death of your child will always haunt you.

[11] Further in mitigation this court has been urged to take into account that you are a first offender. You pleaded guilty to the offence of culpable homicide. And that you have been incarcerated for a period of one year two months whilst awaiting the finalisation of this matter,

having been arrested in November 2020 and released when you were placed off remand. Your Counsel proposed a sentence of Community service.

[12] Counsel for the State on the other hand submitted that you stand convicted of a serious offence. According to Counsel this is a case of child abuse and this court must pass a sentence which reflects this phenomenon. It was submitted further that you caused the death of your own child to save your marriage, and that young life was needlessly lost. It was submitted that a sentence of community service will trivialise this otherwise serious case. The State had called upon the imposition of a sentence not exceeding four years imprisonment.

[13] In considering an appropriate sentence this court takes into account what has been submitted by your Counsel in mitigation of sentence. In particular we take into account that you are a first offender. You pleaded guilty to the crime of culpable homicide. That you have been in pre-trial incarceration for a period of one year two months. You are indeed a family man with minor children and an expecting wife. The stigma of having caused the death of your own son will always haunt you.

[14] On the other hand the aggravating features of the crime which you committed, i.e., arising from the death of your own son are significant and startling. You by means of violence caused the death of your own child who was looking to you for protection. He was just thirteen years old. You assaulted him out of anger or rage. You were angered by the fact that he disclosed your misconduct to your wife. The assault you inflicted on the deceased was immoderate and excessive in its nature and degree and it was protracted beyond the child's power of endurance. It is difficult to conceive the degree of violence that you meted out against the deceased and what he experienced in his last moments. You used switch after switch in assaulting the deceased. What a horrible way to end the life of a child. No child must die under such circumstances.

[15] The Post mortem report shows graphically the viciousness of the assault, it says under "Marks of violence" elongated excoriations in right forehead, left temporal left shoulder, left arm and forearm, left anterior side of thorax, left lateral of the abdomen. Extensive echynosis in thorax. Excoriation in the back and right shoulder. Under "Internal Examination" it is recorded that hemorrhage infiltrate. Lung / pleura: normal size, contused surface in lower lobe of left lung. Intestines: hemorrhage infiltrate, contused surface. Liver / gall bladder: contused surface. Kidney / ureter: signs of shock. Causes of death: (a) Traumatic shock (b) Toracic and abdominal trauma. The assault on the deceased was indeed vicious. After the assault he could

not walk, he had to be carried, and was just asking for water to drink, and he died soon thereafter.

[16] It is clear that you realised that you had inflicted serious and life-threatening injuries on the deceased, but you did not assist him to get urgent medical treatment. You disappeared and left him to just die at home.

[17] Your Counsel submitted that you are remorseful. You might be regretting having caused the death of your son, but regret is not remorse. There is neither factual nor evidential basis for a finding that there is true remorse if you do not step out of the dock and take the witness stand and say what is going on in your inner self. See: *S v Nanyemba* (CC 12/2018) [2021] NAHCNLD 42 (27 April 2021; *S v Martin* 1996 (2) SACR 378 (W) at 383G – H. The fact that you surrendered yourself to the police does not show remorse, it might show regret. It is for these reasons that this court does not attach much weight to the submission by your Counsel that you are remorseful.

[18] A sentence of community service will trivialize an otherwise serious case. Society looks up to the courts to do justice not condone crime in a manner which would intrigue society into losing confidence in the criminal justice system. Children in this country are entitled to parental care and protection and not to abuse in the name of discipline. If convicted persons are punished too lightly for serious offences, society would lose confidence in our courts and so too would law and order be undermined. A sentence other than that of direct imprisonment will send a wrong signal to society. It will open floodgates for abuse of children in the name of chastisement.

[19] On a balanced consideration of the totality of the evidence and the facts of this case, this court considers that the following sentence will meet the justice of this case:

You are sentenced to 3 years imprisonment of which 1 year imprisonment is suspended for 5 years on condition the accused does not within that period commit an offence of which an assault or physical violence on the person of another is an element and for which upon conviction he is sentenced to a term of imprisonment without the option of a fine.

