

THE STATE
versus
FELISTER SHINYIRA

HIGH COURT OF ZIMBABWE
MAWADZE J
MASVINGO, 15 June 2023

ASSESSORS: Mr Mutomba
Mr Chikukwa

Criminal Trial - Sentence

Ms M Mutumhe, for the state

M Mureri, for the accused

MAWADZE J: Determining an appropriate sentence generally is not a easy task for any judicial officer. It entails making a delicate balance between competing interests. It is much easier where the statute prescribes a minimum mandatory sentence in which case the discretion of the court is ousted.

In the circumstances of this case, it is even more onerous as the accused is a female first offender who negligently but violently took away the life of an innocent 6-year-old child to whom the accused was in *loco parentis*. Be that as it may the court is nonetheless enjoined to remain rational, dispassionate and objective lest it falls into the trap of passing an instinctive sentence. See *State v Harrington* 1998 (2) ZLR 344 (5); *State v Mukombe* 2008 (2) ZLR 83 (H); *State v Shariwa* 2003 (1) ZLR 314 (H).

The 38-year-old accused who is a female first offender stands convicted on her own plea of guilty of the charge of culpable homicide as defined in section 49 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*].

Initially the accused was arraigned for murder as defined in section 47 (1) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. However, at the commencement of the trial

both counsel for the State and the accused found each other. The matter therefore proceeded on the basis of a statement of agreed facts.

In order to contextualise the sentence imposed by this court it is imperative to first summarise the agreed facts.

The then 34-year-old accused was a step mother to the 6-year-old now deceased. The accused's husband had passed on in 2015. As per the rather archaic African custom the accused was "inherited " as a second wife by a brother to her deceased husband, one Mugove Magumise. Mugove Magumise is the now deceased Talent Magumise's father. He was employed in Harare whilst the accused and the rest of other family members were staying in Joromu village, Chief Chitsa, Gutu in Masvingo. The accused was in *loco parentis* to the now deceased.

The accused was generally abusive to the now deceased child.

Sometime around 29 April 2019 the accused assaulted the now deceased, a 6-year toddler several times by kicking him at the back, then using a cooking stick and a switch. When the now deceased went to school the class teacher noticed that the now deceased was unwell on 29 March 2019 and had to send him back home. Unperturbed by all this the accused who seemed to have an insatiable abusive attitude proceeded to assault the now deceased again on 30 March 2019. The accused used a mulberry switch. Exhibit 4 which is 65cm long. The cooking stick initially used was tendered as Exhibit 3.

The assault with the mulberry switch on 30 March 2019 was all over the body several times. The now deceased bled from the nose and mouth. That evening the now deceased could not eat.

The following day on 31 March 2019 the condition of the now deceased deteriorated. Sensing danger the accused on 1 April 2019 decided to seek help from her father-in-law one Tinashe Magumise in order to take the now deceased to hospital. Tinashe Magumise proceeded to the accused's home to check on the now deceased that very same day 1 April 2019 and found that the now deceased had passed on.

The accused in a bid to conceal her culpability started to shed crocodile tears. As that was not enough the accused telephoned her husband (one who had inherited her) who is the now deceased's father in Harare and lied that the now deceased had died as a result of some snake bite. However, as they say lies have very short legs. Tinashe Magumise the father-in-law did not buy

this false story. Instead, he checked the now deceased's body and observed the bruises all over the body. There was also blood clots on the mouth and nose. Tinashe Magumise alerted the father of the now deceased. Meanwhile one of the children Nyasha Magumise disclosed that accused had assaulted the now deceased. The accused was arrested.

The post mortem report compiled by the doctor on 4 April 2019 reveals the following observations;

- "1. *Extensive head face, neck, trunk and limb bruises*
2. *Neck is loose and moves with crepitus*
3. *massive abdominal distension with peritoneal blood, ruptured spleen. "*

The doctor concluded that the cause of death was;

- "1. *Cervical spine fracture*
2. *Haemorrhagic shock*
3. *Ruptured spleen. "*

It is clear that the accused was negligent in the manner she fatally assaulted the now deceased. This informs her conviction on a charge of culpable homicide.

Given these facts outlined above there is no doubt that the accused's moral blameworthiness is very high.

The offence of culpable homicide arising from violent conduct is inherently a very serious offence. In *casu* the life of an innocent 6-year-old toddler was callously taken away by the accused who was in *loco parentis* to the now deceased. The now deceased looked for protection and not harm from the accused.

The sanctity of human life can not be over emphasised. Human blood remains sacred. It is the duty of the courts to protect life and where necessary to descend heavily on those who have no respect for life.

The accused's conduct entails both domestic violence and child abuse. Her conduct is neither feminine nor does it reflect what is expected of a mother. The accused's sadistic inclinations are mind boggling and puzzling. There is no discernable reason as to why she brutally assaulted the 6-year-old now deceased who was defenceless.

The assault itself was brutal and indiscriminate. It was perpetrated at least twice on different dates. The post mortem report makes sad reading. The whole body was bruised including

the face. It is clear that severe force was used as the cervical spine was broken and the spleen was ruptured.

The accused did not immediately take the severely injured now deceased to the hospital. Instead, the accused sought to mislead other family members that the now deceased had died of snake bite! What crass dishonesty and sheer callousness!! This is all coming from a mother.

The accused's degree of negligence is very high. Her conduct deserves censure. The assault itself goes well beyond the right of a parent to chastise an errant child. It is criminal, pure and simple.

The court should nonetheless not lose sight of the mitigating factors.

The personal circumstances of the accused should be considered. She is now 38 years old and is a mother of three children two of whom are minor children. Currently she is the only parent looking after these children.

After the death of her husband in 2015 she was "inherited" by a family male member of her late husband's family as a second wife. However, after the commission of this offence she has now been chased away, ostracised and condemned. She is currently living with her brother in Chinhoyi.

Clearly the accused is a woman of no means. This explains as to why after being granted bail pending trial when she had spent three months in prison, she could even not raise bus fare to attend her routine remand in Masvingo from Chinhoyi. A warrant of her arrest was then issued and she has now been in custody for about four months. Despite her lack of means the accused is said to have contributed some food at the funeral of the now deceased.

Ultimately the accused pleaded guilty to the charge of culpable homicide. The two state witnesses who were in attendance including a juvenile Nyasha Magumise were saved the agony of reliving this tragic incident. She should be rewarded for showing contrition and accepting her wrong doing. See *State v Katsaura* 1997 (2) ZLR 102.

The accused is a female first offender. Generally, first female offenders are treated leniently than their male counter parts despite the concept of equality before the law. The rationale for this has found traction in our jurisdiction. See *State v Malunga* 1990 (1) ZLR 124 (H). This positive discrimination is informed by a number of reasons. Statistics supported by the prison population show that males commit more offences than females despite that females constitute a bigger

percentage of our national population. The rate of recidivism amongst females is less compared to males. The other gender dynamic is that females have most of the times the extra burden of looking after young children. The accused is no exception to this.

The accused will forever live with the fact that she took away the life of a 6-year-old toddler. As already said she is ostracised and society may remain unforgiving. This may weigh heavily on her conscience.

After all is said and done there is no doubt that despite being a female first offender the accused can not escape imprisonment. The facts of this case point to a prison term. While imprisonment should be the last resort it is clearly appropriate in this case. Justice is not only done but must seen to be done. See State v Mpofu (2) 1985 (1) ZLR 285 (H)

Accordingly, the accused is sentenced as follows;

"6 years imprisonment of which 2 years 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.

The effective sentence is 4 years imprisonment. "

MAWADZE J

National Prosecuting Authority, counsel for the state

Matutu & Mureri, legal practitioners pro deo counsel for the accused