

THE STATE
versus
MCDONALD CHIVETO

HIGH COURT OF ZIMBABWE
MUNGWARI J
HARARE, 15, 24 February & 4 March 2022

Criminal Trial

Assessors: *Mr Kunaka*
Mr Chakuvinga

L Chitanda, for the state
C T Manyani, for the accused

MUNGWARI J: A 22 year old pregnant woman, lost her life at the hands of her husband who was of a violent disposition. Domestic violence in the form of sporadic physical assaults is what caused her demise. As a result her husband the accused was indicted before this court to answer to a charge of murder as defined in s 47(1) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*].

On these facts, the accused denied the charges of murder. He instead tendered a limited plea of guilty to a lesser charge of culpable homicide.

The state accepted the limited plea. In pursuit of the plea of guilty the parties came up with a statement of agreed facts outlining all common cause facts. The statement was admitted into court and marked Annexure 1 to the record.

STATEMENT OF AGREED FACTS

A summarised version of the statement of agreed facts lays out the following facts:
That the deceased and accused lived together as husband and wife. Accused was 30 years old at the time, whilst deceased was only 22 years of age. The relationship was characterised by domestic disputes and accused had the habit of assaulting deceased as on 14 February 2021 he had hit her with an iron bar. On 28 February he again hit her but this time he did so with fists and open hands all over the body. He even poured a bucket of water all over her body. On this day was when the deceased decided to take action as she reported the matter to the police. This did not deter the accused as 14 days later and on 14 March 2021 he again assaulted deceased

this time with a dolphin pot on her head and body. She was medically examined two days later on 16 March. Barely two days after she was medically examined she started vomiting blood and later on collapsed as she bled from the mouth. Her aunt took her to the hospital and on the way was convinced by the accused and his parents to go to their house for spiritual cleansing. She died during the spiritual healing session. A post-mortem was conducted on 20 March 2021 by Doctor Ephraim Sunhwa and he concluded that the cause of death was due to subdural haemorrhage. It was agreed that accused negligently caused the death of the deceased when he assaulted the deceased with a dolphin pot and by doing so ought to have foreseen that serious injury or death could occur.

EXHIBITS TENDERED

With the consent of the accused's defence counsel the post-mortem report was tendered as Exhibit 1 Dr Ephraim Sunhwa examined deceased body at Sally Mugabe Central Hospital in Harare and observed that the deceased was pregnant at the time of her death. After conducting an internal examination he observed intra muscular haemorrhage on the head but no obvious fracture on the skull. He observed a right subdural on the brain. He concluded that the cause of death was due to subdural haemorrhage.

Prior to this a medical examination had been carried out arising from the assault on deceased on 14 March 2021 by Doctor Edmore Gwizo at Sally Mugabe Central Hospital .The medical affidavit was adduced into evidence and was tendered as Exhibit 2. The affidavit detailed observations by the said doctor and these were to the effect that she had a bruise on the left arm and lower jaws amongst other injuries noted. A blunt force instrument had been used to perpetrate the trauma. Dr Gwizo concluded that five or more blows must have been applied to elicit such injuries. He also observed however that the injuries sustained were moderate with no likely possibility of permanent injury.

After the exhibits had been tendered, Mr *Manyani* for the accused confirmed to the court that the essential elements of culpable homicide had been explained to the accused who understood them and that his plea of guilty had been genuinely made.

In view of the state outline, the statement of agreed facts together with the exhibits tendered and defense counsels' unequivocal statement of accused's understanding the court therefore accepted a limited plea and was satisfied that the concession made by the state was proper.

DISPOSITION

Accordingly the court finds the accused not guilty of murder but guilty of a lesser charge of culpable homicide.

SENTENCE

In arriving at the appropriate sentence, the court took into consideration the mitigating factors as advanced by Mr *Manyani* for the accused person. The court also considered the aggravating factors advanced by the state counsel, Miss *Chitanda*.

Mr *Manyani*, for the accused, urged the court to take into account that the accused is a fairly young person. He is 31 years old. Following the demise of the deceased person, he has turned into a single parent with attendant family responsibilities which include taking care of their son who turns three years in May 2022. He is also formally employed as a landscaper. Most importantly, he is a remorseful first offender.

The emphasis was on giving the accused a second chance in life as he is still in his productive years. Moreover, it was argued that the circumstances of the crime reduce his blameworthiness in that this was a crime of passion committed by a young person and which occurred between a couple which had a long history of marital disputes and fights. The fights bordered on accusations of infidelity on either party.

In addition to this, accused it was argued, had been convinced by mature adults within the family setup not to take deceased to the hospital. The elders equally contributed to her demise particularly since the first medical report alludes to the injuries sustained posing no danger to her life. Defence Counsel argued that were it not for the mature adults imposing themselves and dictating that deceased be attended to spiritually, deceased's life could have been saved by taking her to the hospital.

It was therefore argued on accused's behalf that a wholly suspended sentence would meet the instance of justice in this case.

Despite the plea of guilty to culpable homicide, the fact is that a life has been lost. The state emphasised the sanctity of life and loss of human life. The state bemoaned the fact that accused had a history of domestic violence and consequently this offence was committed within a domestic setting when in fact a home should be a peaceful sanctuary of abode. Also as highlighted by the state, there had been alternative ways of settling these domestic disputes other than through the use of violence. It was the state's view that a custodial sentence with a portion suspended would suit the justice of the case.

The facts of the matter however make it improper for the accused's counsel to suggest the imposition of a suspended sentence and deem it appropriate. The 31 year old accused intermittently and often times consistently assaulted his 22 year old pregnant wife. Yes, pregnant wife as the post mortem report revealed in Exhibit 1. He on three different occasions indiscriminately assaulted her. Firstly, on 14 February 2021, with a metal bar. Secondly, on 28 February 2021 with open fists all over. On the 14 March 2021, he pummelled her all over the body with a dolphin pot until she reported the matter and was medically examined.

The callousness displayed by the accused towards his own pregnant wife is more than shocking. It is also alarming. More so, downing two buckets of water upon her person is the highest lack of respect and self-control. Pregnancy connotes fragility of the female body. The persistent prolonged and intermittent assaults upon her person dictate that she could not have survived. The very act of using violence at all, let alone on a pregnant woman is an act of gross negligence.

No matter how angered the accused may have been over any perceived infidelity issues, assault upon her person leading to her collapse and subsequent demise due to subdural haemorrhage was not commensurate. The factual circumstances suggest that the accused is a character that has a lot of anger issues and requires a lot of maturing. His personal circumstances are those where the accused needs to consciously rehabilitate himself towards non-violence. The court is in agreement with the state that this is a crime that warrants a term of imprisonment and not a suspended prison term as prayed for by the accused's counsel.

It should be made clear to the society that disputes of whatever kind and manner cannot and should not be resolved by violence as this in most instances results in the loss of life as occurred here. There is therefore need for a deterrent sentence that will send word to men in the society that courts do not condone the battering of their wives. The consideration of the totality of the circumstances of the commission of the offence, the personal circumstances of the accused person and the public interest at large therefore lead the court to arrive at the considered view that the following sentence would suit the instances of justice:

4 years imprisonment of which 1 year is suspended for 5 years on condition accused does not, within that period, commit any offence involving use of violence upon the person of

another and or negligently causing the death of another through the use of violence and for which upon conviction, he is sentenced to imprisonment without the option of a fine.

National Prosecuting Authority, state's legal practitioner
T H Chitapi & Associates, defence's legal practitioner