

THE STATE
versus
TENDAI MONALISA NCUBE
and
OLIVIA GWATI

HIGH COURT OF ZIMBABWE
MAWADZE J
MASVINGO, 28 February 2022

Assessors 1. Mr Gweru
 2. Mr Chikukwa

Criminal Trial - Sentence

Ms M. Mutumhe for the State
C. Ndlovu for 1st accused
T. Chikwati for 2nd accused

MAWADZE J: Sentencing is a complex exercise.

It entails achieving a delicate balance between competing factors. These are aggravating and mitigating factors. It is a function of judicial discretion which is exercised judiciously and not capriciously.

Both accused were jointly charged with the then accused 3 Linear Vushe aged 21 years of Plot 9, 'A' Farm, Zvamahande in Mashava. A separation of trial was granted and charges against Linear Vushe were withdrawn before plea.

The 30 year old accused 1 Tendai Monalisa Ncube hails from Telezio Village, Chief Moyo, Banket and the 37 year old accused 2 Olivia Gwati is from Zvamahande, Plot 9, Lochinvar 'A' Farm in Mashava. The two are friends.

Initially both accused persons were arraigned for murder as defined in s 47(1) of the Criminal Law (Codification and Reform) Act [*Cap 9:23*]. They were however both convicted of culpable homicide as defined in s 49 of the same Act [*Cap 9:23*]. The matter proceeded on the basis of a statement of agreed facts.

The agreed facts in this matter make sad reading and to some extent mirror the decay in our moral fabric.

These facts can be summarised as follows;

The then 25 years old now deceased Rosemary Chakanaka was a student at Great Zimbabwe University. She hailed from Ranganai Village, Headman Mpapa, Chief Sengwe in Chiredzi. The now deceased fell pregnant. Apparently it was an unwanted pregnancy. She decided to abort the pregnancy illegally. Accused 1's late mother was a traditional healer who apparently practised illegal abortions. Accused 1 and accused 2 were friends and neighbours in Mashava although accused 1 at the material time was employed as a house maid in Rhodene, Masvingo.

The now deceased approached accused 2 to procure an illegal abortion. Accused 2 then roped in his friend accused 1 since accused 1's late mother is said to have been engaged in such illegal activities. Both accused persons were enticed by a fee of US\$50 by the now deceased. They decided to terminate the now deceased's pregnancy whilst in Mashava. However none of the accused persons possessed any skills to procure such an illegal abortion.

The illegal abortion was done in a crude and ghastly manner. An auger (*muwururo in Shona*) was inserted into the now deceased's uterus. Things went terribly wrong on that day 5 December, 2019. The now deceased bled profusely. The accused persons decided to ferry the now deceased in a scotch cart to Zvamahande Clinic. However for unclear reasons this trip was aborted and they decided to take the now deceased to their home. Things got worse and the now deceased passed on. The accused persons were shocked and panicked. As a result they decided to dump the now deceased's body in a disused mine.

On 10 December, 2019 five days later, one Dickson Sungai who was looking for his cattle stumbled upon the now deceased's body and alerted the police at ZRP Mashava. Botha accused were arrested as a result of police investigations.

On 12 December, 2019 Dr Godfrey Zimbwa carried out a post mortem examination on the remains of the now deceased. He observed the following;

- “1. *Body in advanced state of decomposition, full of maggots.*
2. *Grand distention of abdomen.*”

The cause of death was endorsed as unknown as the now deceased's body had decomposed. However there was evidence that the now deceased was pregnant at the time of death.

Indeed whilst both accused persons did not have the requisite intention to cause the now deceased's death, it is clear that they were negligent in the manner they terminated the deceased's pregnancy. A conviction on the charge of culpable homicide is therefore appropriate.

In assessing the appropriate sentence there is no objective basis to treat both accused persons differently. They both acted in common purpose despite their minor different personal circumstances.

The accused persons' ages are different but they are both middle aged women. They are both mothers. Accused 1 has one 10 year old child and is a single mother. Accused 2 is married and has four minor children. Accused 1 is on ART (HIV drugs) and was employed as a house maid earning a paltry RTGs\$300 per month. Accused 2 is just a house wife. As already said they are friends and neighbours.

Both accused persons are female first offenders. They deserve some measure of leniency. The accused persons pleaded guilty to the charge. They owned up to their wrong doing without wasting time and resources in prosecuting them. Upon their arrest they fully co-operated with the police. Indeed they could have denied the charge as there was no eye witness to the illegal abortion and the cause of death was indeterminate.

An important mitigatory factor is that they have both suffered pre-trial incarceration of 26 months. This matter was hovering above them as they awaited their fate. They are therefore entitled to a proportionate reduction of their sentence.

A case was made on their behalf as to whether abortions should be legalised as in South Africa in order to curb such tragic incidents arising from “back door abortions”. The Termination

of Pregnancy Act [*Cap 15:10*] was said to be restrictive and in conflict with s 76 of the Constitution which provides for the right to health care. In the absence of full argument and well-structured research on this subject which raises both moral and legal issues I decline to swallow this bait and engulf myself in such uncharted waters. This may be food to be digested on a different day or forum. The fact remains that any abortion outside the ambit of the Termination of Pregnancy Act [*Cap 15:10*] remain unlawful in our country.

There is no doubt that the accused persons' degree of negligence in this matter is very high.

The accused persons did not act out of some moral persuasion but sheer greed. Some US\$50 was dangled before them and they simply lost their minds and sense of morality.

None of the accused persons had even the requisite knowledge or skill in these so called illegal or "back door" abortions. The love of money enticed them and they threw any caution to the wind.

The manner in which they carried out this illegal abortion is shocking to say the least. It was equally primitive and crude. An auger (*muwururo in Shona*) was simply inserted into the now deceased's uterus. This is ghastly to contemplate and sends shivers down one's spine.

The accused persons upon realising the folly of their criminal enterprise decided not to seriously seek any medical help. The now deceased should have suffered a painful death.

The conduct of the accused persons after the now deceased's death elevates their moral blameworthiness and deserves censure. They decided to dump the now deceased's body in a disused mine. They left the now deceased's body at the possible mercy of wild animals. It did not matter to them that the now deceased deserved at least a decent burial by her loved ones. They simply left the body to decompose in the bush. This is quite callous and inhuman.

The accused person acted in this manner because they simply wanted this matter to die a natural death. It was fortuitous that someone stumbled upon the now deceased's maggots infested body otherwise it could have sufficiently decomposed beyond any recognition. One hopes the now deceased ultimately got a decent burial.

It is conceded that the now deceased indeed contributed to her demise. She is the one who looked for the accused persons in order to procure the illegal abortion and was willing to pay for it in foreign currency. Be that as it may I do not believe that a sentence of a fine, community service

or a wholly suspended prison term as prayed for would properly mirror the aggravating factors in this case. Such penalties would send wrong and harmful signals.

All things equal I would have imposed a sentence in the region of 4 years imprisonment. However in light of the lengthy pre-trial incarceration period I am inclined to reduce such a sentence.

In the result each accused is sentenced as follows;

“2 years imprisonment of which 1 year imprisonment is suspended for 5 years on condition each accused does not commit within that period any offence involving the unlawful killing of another person and or contravention of the provisions of the Termination of Pregnancy Act [Cap 15:10] for which each accused is sentenced to a term of imprisonment without the option of a fine.

Effective for each accused is 1 year imprisonment.”

*National Prosecuting Authority, counsel for the State
Ndlovu & Hwacha Legal Practitioners, pro deo counsel for accused 1
Matutu & Mureri Legal Practitioners, pro deo counsel for accused 2*