

THE STATE  
versus  
EVANS GAPARE

HIGH COURT OF ZIMBABWE  
MAWADZE J  
MASVINGO, 4 June 2020

**Criminal Trial – Sentence**

**Assessors**

- 1. Mr Gweru**
- 2. Mr Mutomba**

**E. Mbavavarira, for the State**

**J. Ruvengo, for the accused**

MAWADZE J: Sentencing in any criminal matter, entails a delicate balancing act between mitigatory and aggravating factors in each case. It is a matter of discretion which can never be as precise as any mathematical calculation. It should however not be capriciously done but should generally capture the set legal guidelines. Above all punishment should be less retributive and more rehabilitative.

The now 20 year old accused was arraigned initially for contravening section 47(1) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] but was subsequently convicted on his own plea of guilty of contravening section 49 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] which relates not to murder but to culpable homicide. Indeed all the evidence

support the lesser charge of culpable homicide. The concession by both counsel is therefore well informed.

As per the statement of agreed facts both the 20 year old accused and the 22 year old now deceased were friends residing in Village 3 Mukosi, Chief Mapanzure in Masvingo. On 16 November 2019 both the accused and the now deceased decided to proceed to Maringire business centre in Chivi in the afternoon to enjoy themselves in the afternoon. They consumed copious quantities of opaque beer from the afternoon until late into the night at Zizhou bar. For unclear reasons the now deceased took accused's cellphone stealthily. He refused to hand it back. A misunderstanding between the two ensued. It degenerated into fist fight. The accused was over powered and fell down. The accused then picked a stone weighing 2,725 kg and bashed the now deceased three time on the back of the head until the now deceased was unconscious. The accused triumphantly left the now deceased lying on the ground. The now deceased died moments later and his body was only discovered the next morning.

The post mortem report shows that the following injuries were inflicted;

- “1. *Left sided haematoma on occipital area*
2. *underlying depressed occipital skull fracture*”

The cause of death was severe head injury caused by blunt trauma of the head.

Our task is to assess the appropriate sentence in this case.

The accused stand convicted of a very serious offence which invariably attracts a custodial sentence unless there are other important mitigatory factors. This is so because the offence of culpable homicide entails use of violence leading to the loss of life. The sanctity of human life cannot be over emphasised. No one has the right to take the life of another whether intentionally or negligently. *In casu* a young life was needlessly lost due to the accused's negligence. It is very disturbing to note that such offences remain very prevalent in Masvingo province. Worse still such offences are being committed by young persons. The mind boggles as to why young persons readily resort to deadly violence and resort to the use of all manner of weapons at the slightest provocation. In most cases this arises after the abuse of alcohol and/or drugs. A loud and clear message should therefore be sent by the courts that such conduct would be visited with the full wrath of the law. Deterrent sentences are called for.

The degree of negligence in this matter is quite high. The accused decided to use a stone almost 3 kg to bash the now deceased's head after coming second best from the fist fight. The accused did not deliver a single blow but 3 blows. He directed three blows to the back of the head, a vulnerable part of the human anatomy housing the brain. It is clear severe force was used as the now deceased's skull was fractured. After fatally injuring the now deceased the accused simply walked away as if nothing serious had happened. He offered no help to his friend. The accused's moral blameworthiness is therefore very high. As per s 221 (2) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] voluntary intoxication cannot be a mitigatory factor.

On the other side of the divide we noted that the accused at 20 years age is a youthful offender. It would be remiss to condemn accused to a lengthy custodial sentence and totally ruin his life. The accused is yet to marry. He is still to have children. He is unemployed without any savings or assets. Infact he is still under the care of his parents whom he assists with manual labour.

As a first offender he deserves leniency and one hopes he has learnt his lesson.

The plea of guilty tendered by the accused is a sign of contrition. He admitted causing the death of his friend the now deceased from the time of his arrest. It is in his favour that he did not waste the court's time. Less resources were used in prosecuting him. The State witnesses present were saved the time to testify. This matter has been finalised expeditiously thus contributing to the swift administrations of justice. Indeed the court should reward the accused for all this by being lenient.

The general public makes no distinction between the offence of murder and that of culpable homicide. In the court of the public the accused would still be viewed as a murderer. This stigma shall forever torment the accused and is punishment on its own. In addition to that accused has to live with the fact that he caused the death of his friend. That mental torture may forever haunt the accused.

The accused has suffered from pre-trial incarceration of seven months. During that period accused remained anxious unaware how this matter would unfold. He could not plan his life whilst behind prison walls before trial.

From the agreed facts the now deceased should also take some blame leading to this tragic event. It is the now deceased who started this dispute when he took the accused's cellphone and proceeded to refuse to hand it back. The attack perpetrated on the now deceased with the stone

was preceded by a fist fight which the accused lost. In that vein the accused deserves some measure of leniency.

In the result the following sentence is appropriate;

*“5 years imprisonment of which 1 year imprisonment is suspended for 5 years on condition the accused does not within that period commit any offence involving the use of violence upon the person of another and/or negligently causing the death of another through the use of violence and for which accused is sentenced to a term of imprisonment without the option of a fine.*

**Effective**

*4 years imprisonment.”*

*National Prosecuting Authority, counsel for the State  
Ruvengo, Maboke & Company, pro deo counsel for the accused*