

THE STATE
versus
TARUZIVA SITHOLE
and
SHACKMORE DUBE

HIGH COURT OF ZIMBABWE
MAWADZE J
MASVINGO, 12, 13 May & 3 June, 2022

B. E. Mathose for the state
J. Mpoeri for accused 1
Ms I. Moyo for accused 2

Assessors

1. Mr Mutomba
2. Mr Gweru

Criminal Trial

MAWADZE J: The two accused persons were facing a charge of murder as defined in s 47(1) of the Criminal Law (Codification and Reform Act [*Cap 9:23*]). The charge being that accused 1 Taruziva Sithole (hereinafter accused 1) and accused 2 Shackmore Dube (hereinafter accused 2) both age 38 years and 28 years respectively and in Village 3, Wedza block, Chief Mazhetese, Mwenezi, Masvingo unlawfully caused the death of Irene Sithole (hereinafter Irene) a juvenile aged 7 years by assaulting her all over the body with switches intending to kill her or realising that their conduct may cause death and continued to engage in that conduct despite the risk or possibility.

After the state finished calling witnesses and just before the state case was closed *Mr Mathose* for the state properly and wisely conceded that there was no evidence at all led by the state implicating accused 2 Shackmore Dube. There was therefore no factual or legal basis to place accused 2 on his defence. In the proper exercise of his wisdom *Mr Mathose* for the state proceeded to withdraw the charge against accused 2 Shackmore Dube after plea. At law accused 2 Shackmore was therefore entitled to a verdict hence he was found not guilty and duly acquitted. This judgment therefore relates to accused 1 Taruziva Sithole only.

Be that as it may at this initial stage we shall outline the alleged facts as they included both accused and also allude to both accused's defence outlines simply for clarity purposes and putting the whole matter in its proper context.

The now deceased Irene was a daughter to accused 1's brother. She was a juvenile aged 7 years. Accused 1 Taruziva Sithole was in *loco parentis* of the now deceased. The now deceased's parents had divorced and her father had migrated, like many Zimbabweans, to South Africa in search of the proverbial green pastures. The now deceased's mother had returned to her maternal home in Zaka.

Accused 1 Taruziva Sithole was staying with his wife Sitshengisiwe Mpofu together with their three minor children Thabani Sithole aged 8 years, Mostaff Sithole aged 5 years and Paida Sithole aged 2 years. The now deceased was therefore the fourth child in their custody.

Both accused 1 and accused 2 reside in the same village, being Village 3, Wedza block, Chomotambe area, Chief Mazhetese, Mwenezi in Masvingo. Accused 2 is not related to either accused 1 or the now deceased.

It is common cause that on 29 December, 2020 late in the afternoon around 1700 hrs accused 1, his wife Sitshengisiwe Mpofu and their son Thabani Sithole were busy in their field. The now deceased and accused 1's other two children Mostaff and Paida were herding accused 1's cattle near the fields. The now deceased and accused 1's other two children started to play collecting caterpillars, a delicacy in Mwenezi called "madora" in Shona. The cattle eluded them and were heading for accused 1's fields when accused 1's and his son Thabani intercepted them before they grazed his field. Both accused 1 and his son Thabani drove away the cattle and located the two other children. Accused 1 was not amused. He was enraged and decided to chastise the

now deceased for this misdemeanour using switches thus inflicting serious injuries on the now deceased.

What may be in issue is the manner accused 1 assaulted the now deceased and the resultant injuries he inflicted. However in his closing written submissions *Mr Mpoperi* for accused 1 rightly conceded that from the evidence led from state witnesses and accused 1 himself accused 1's defence outline was left in tatters and could not be sustained. *Mr Mpoperi* for accused 1 conceded that from the evidence on record there is a clear nexus between the assault perpetrated on the now deceased and the now deceased's death. Thus the only issue therefore which falls for determination is whether accused 1 intentionally caused the now deceased's death thus being guilty of murder or negligently caused her death thus being guilty of the lesser charge and permissible verdict of culpable homicide as per s 49 of the Criminal Law (Codification and Reform) Act, [Cap 9:23]. We shall revert to this critical issue later after outlining and analysing the relevant evidence adduced.

It is clear from the evidence that after the said assault and whilst at home around 1900 hrs the now deceased passed on succumbing to the injuries inflicted by accused 1.

The state alleges that accused 1 realising what he had done took the now deceased's body, put in a canvas bag and went into the bush where he burnt the now deceased's body beyond recognition. The accused's wife Sitshengisiwe Mpofo who was shocked by accused 1's conduct alerted their neighbour Mupandasekwa Zhou and advised him to report to the police resulting in accused 1's arrest that very next day on 30 December, 2020.

Upon his arrest accused 1 implicated accused 2 Shackmore Dube in the death of the now deceased. This is amplified in accused 1's confirmed warned and cautioned statement in which accused 1 stated as follows;

“It is true I beat Irene Sithole using a switch I picked under a mango tree. I used a switch to beat her all over her body until she lied on the ground in pain. When I was beating her, my aim was that she will try to run away in the direction were Shackmore Dube was so that we could catch her outside my homestead; but she did not run away. When I stopped beating her she was no longer breathing well. When I was beating her I was alone, but later finished her off with Shackmore Dube who removed Irene Sithole's vagina with a knife. Shackmore Dube is the one who knows where Irene Sithole's vagina is. It is the love of money and the car that I was promised by Shackmore Dube that drove me to commit this offence.”

It is on the basis of the above statement by accused 1 that the police arrested accused 2 and also charged accused 2 of this offence of murder.

Accused 1 in his defence outline while admitting chastising the now deceased on the day in question for failure to properly look after the cattle denied that he inflicted fatal injuries. Infact accused 1 said he was surprised to be arrested and being questioned about the death or whereabouts of the now deceased. Accused 1 dismissed the evidence of his wife Sitshengisiwe Mpofo as false and accused her of infidelity and conniving with her boyfriends to falsely implicate accused 1 peddling falsehoods. Accused 1 said he had no hand in the alleged death of the now deceased. Lastly, accused 1 denied ever implicating accused 2 in any manner and proffered ignorance as to why accused 2 was arrested.

In his evidence accused 1 valiantly maintained this rather bizarre defence and went a gear up. Accused 1 said the now deceased is in fact alive and that his wife and other unnamed people caused the now deceased to go to Kadoma or Chipangayi where the now deceased is hiding. It is not surprising however that accused 1 provided no such evidence but continued to rumble in an incoherent manner. This is the evidence accused 1's counsel *Mr Mpoperi* rightly stated that it is false and cannot be sustained.

Accused 2 Shackmore Dube who has since been acquitted in his defence outline states that he is not a friend of accused 1 and not related to him. He denied acting in common purpose with accused 1 before, during or after the assault of the now deceased. In fact he said on the day in question 29 December, 2020 he was at his home. Accused 2 denied removing any part of the now deceased's body pointing out that he had no criminal association of any manner with accused 1 and completely knows nothing about the now deceased's death.

Accused 2 maintained this thrust in exhibit 3 his confirmed warned and cautioned statement.

None of the state witnesses implicated accused 2 Shackmore Dube. Accused 1 in his evidence in court mad a volt face and denied ever implicating accused 2. *Mr Mathose* for the state therefore had no choice except to withdraw the charge against accused 2 after plea leading to accused 2's acquittal of the charge.

From the evidence led it is clear that the now deceased is not alive as alleged by accused 1. The cause of her death while not discernible fully from the post mortem report it can safely be inferred that she succumbed to the injuries inflicted by accused 1 on 29 December, 2020.

As per exhibit 1(a) the post mortem report Dr Olay Yoandry Mayedo whose evidence was admitted in terms of s 314 of the Criminal Procedure and Evidence Act [*Cap 9:07*] stated that only a blue plastic bag with multiple fragments of human bones of a child were brought to the doctor for examination to determine the cause of death. The doctor said the cause of death could not be determined as is amplified in an affidavit exhibit 1(b) because the remains were severely burnt.

The link of accused 1 to these severely burnt remains is derived from the evidence of the Investigating Officer D/Ass Inspector Richard Mharakurwa who said accused 1 led him to a place in the bush some 1.5 km from accused 1's homestead where he found smouldering logs of fire and burnt bones of a human being which accused 1 said belonged to the now deceased. Despite the absence of forensic results it is clear that accused 1 burnt the now deceased's body.

D/Ass Inspector Richard Mharakurwa's evidence is largely undisputed. He took over the matter after the arrest of both accused 1 and accused 2 after which he recorded their warned and cautioned statements exhibit 2 and exhibit 3 which were confirmed. Thereafter he took both accused 1 and accused 2 for indications but accused 2 declined stating that he had no indications to make.

The indications by accused 1 are captured in exhibit 5(2) to (7) which are photographs taken by the police during indications. We pause to briefly comment on exhibit 5, the photographs.

Exhibit 5(1) is the photographs of the now deceased possibly taken during her ECD graduation which exhibits her tender age and innocence.

As per exhibit 5(2) accused 1 is making indications at the place he plucked the switches he used to assault the now deceased and in exhibit 5(3) accused 1 indicates the place he hid the broken switches in a field after assaulting the now deceased. In exhibit 5(4) accused 1 is holding the recovered broken pieces of the said switches.

In exhibit 5(5) accused 1 is indicating the hut in which the now deceased and the rest of accused 1's family slept after accused 1 had assaulted the now deceased which is the same hut the now deceased was in when she passed on and from where accused 1 later retrieved her body.

It is exhibit 5(6) which is very important as accused 1 indicates a place in the bush some 1.5 km from his homestead where he burnt the now deceased's body. As per D/Ass Inspector Richard Mharakurwa this place is in a dense bush near an anthill. One can actually see the smouldering logs.

Lastly, exhibit 5(7) shows accused 1 indicating the burnt remains of the now deceased.

The state led evidence from accused 1's son Thabani Sithole (in camera), accused 1's wife Sitshengisiwe Mpofo and accused 1's neighbour Mupandasekwa Zhou. I have already alluded to the evidence of the Investigating Officer D/Ass Inspector Richard Mharakurwa and Dr Mayedo.

Accused 1 gave evidence and did not call any witnesses.

The testimony of Mupandasekwa Zhou is inconsequential save to explain how accused 1 was arrested. He was advised by accused 1's wife Sitshengisiwe Mpofo what had happened the previous night on 29 December, 2020 and requested to report to the police which he did culminating in accused 1's arrest. Probably of more importance is that he was present when accused 1 led the police to the place where accused 1 had burnt the body of the now deceased. He described this place as quite far from accused 1's homestead and that it is in a bush at a place where there are tall trees and an anthill. He observed that logs were cut for firewood and that upon their arrival the now deceased's body had been consumed by the fire and the fire was still smouldering. He made it clear that it is accused 1 who led the way into the bush. No useful questions were put to him.

We now turn to the critical issue relating to how accused 1 assaulted the now deceased in order to determine accused 1's intention. In this regard focus will be on the evidence of accused's son Thabani Sithole and accused 1's wife Sitshengisiwe Mpofo.

Thabani Sithole (Thabani)

The 9 year old Thabani said upon finding the now deceased accused 1 ordered the now deceased to lie down but the now deceased unsuccessfully tried to flee. He said accused caught up with her and plucked switches which accused 1 used to assault the now deceased.

Thabani said the now deceased was assaulted lying down, at times standing and at times her head was put in between accused 1's legs (thighs). He said accused 1 used severe degree of force in delivering numerous blows which Thabani who is in grade 4 did not count.

After the assault Thabani said the now deceased went home as it was after sunset. At home he said his mother Sitshengisiwe Mpofu was not amused as to how accused 1 had assaulted the now deceased.

Thabani said that night the now deceased was just lying down and refused to have supper. At some point he said accused 1 poured water on to the now deceased as the now deceased just lay quietly. He said it is accused 1 who lifted the now deceased and put her on her normal bedding as the now deceased made no movements.

The next morning Thabani said the now deceased was not at home and no one could proffer any answer as to the now deceased's whereabouts.

Despite his tender age Thabani gave his evidence well. He impressed us as a bright young boy. He gave a clear and coherent account of how accused 1 his father assaulted the now deceased. That account cannot possibly be fabricated by such a young boy. Further he explained, in his youthful way, the events he perceived later that night. We find no reason as to not accept Thabani's evidence.

From Thabani's evidence the assault was very severe and many switches were used.

Sitshengisiwe Mpofu (Mpofu)

Due to abundance of caution accused 1 and his counsel consented to accused 1's wife giving evidence in this matter as provided in s 247(2) of the Criminal Procedure and Evidence, Act [*Cap 9:07*].

Accused 1's wife did not witness the assault. Her evidence is important as regards what happened while at accused 1's home after the assault.

Accused 1's wife said upon arriving home she found the now deceased lying down groaning in pain. Accused 1's wife lifted the now deceased's dress and observed severe bruises on her buttocks; skin was peeling off from the swollen buttocks; deceased could not sit and her pants were blood stained.

Accused 1's wife said the now deceased was in a sorry state. The following emerged from her evidence;

- (i) Accused 1 realised the severity of the injuries he had inflicted on the now deceased but did not seek any medical help

- (ii) When accused 1 realised the now deceased was losing consciousness or was already unconscious that night accused 1 poured cold water on the now deceased to ostensibly resuscitate her
- (iii) Before the now deceased lost consciousness accused 1 frantically tried to appear or act as if all was normal by asking the now deceased to do dishes (but she could not sit and collapsed) and forced her to tell accused 1 folk tales (ngano) in Shona when aware she was in dire pain
- (iv) Due to the severity of the injuries inflicted upon her the now deceased could not partake her supper, could not sit and was groaning in pain telling accused 1's wife that she was injured even at such tender age
- (v) Clearly after realising that the now deceased was unconscious that night or had passed on, accused 1 is the one who literally lifted her and put her on her normal bedding. By then she could not talk and accused 1's wife realised too she was dead as she had no pulse and her body was cold. This explains as to why accused 1 warned his wife not to disclose to anyone the demise of the now deceased

Accused 1's wife explained what accused 1 later did that night in a bid to conceal evidence of the now deceased's death. She said the following;

- (a) Accused 1 woke up at night, took two sacks and slid one from the head downwards and the other from the legs upwards on the now deceased's body after which he took a rope and tied the sacks both on the now deceased's neck and waist
- (b) Accused 1 took a big canvas "shangani" bag and put the deceased's body inside
- (c) Thereafter accused 1 carried the concealed body away into darkness, briefly returned and disappeared again only to return at dawn. The rest is now history as already explained.

The evidence of accused 1's wife was not meaningfully challenged. Allegations of alleged infidelity made against her even assuming are true remain inconsequential and do not distract from what accused 1 did that night. The same goes for the fact that another man sired a child with her after accused 1's arrest and incarceration.

The impression she gave was that accused 1 was or is a very temperamental and abusive person as he gratuitously assaulted not only her but also their kids and the now deceased. She was

literally scared stiff off the now deceased hence her inability to question him on the severity of the assault on the now deceased, failure to suggest that they seek medical help and her conduct of stealthily alerting neighbours as to what had happened. She was virtually powerless and was in an abusive relationship, or was a battered wife herself. Credit however is due to her for the courage to ensure police were alerted of what had happened. Again we find her to be a credible witness.

The accused has not proffered any meaningful defence in this case. It is therefore our finding that the assault perpetrated on the now deceased and the resultant injuries inflicted caused her demise.

Finally, this leads us to the legal question as to whether accused 1 intended to cause death. Put differently the question is did he have actual intent to cause death or subjectively foresaw at the time of the assault that death would result (legal or constructive intent). In answering this question we should not confuse ourselves with accused 1's conduct *ipso facto* (i.e. after the assault) which conduct would be relevant to his moral blameworthiness and not his state of mind at the time of the assault.

Accused 1's conduct after the now deceased's death of disposing of her body by burning it was informed by the foolish desire to hide incriminating evidence rather his intent (*mens rea*) at the time he assaulted the now deceased.

Indeed the assault on the now deceased was brutal and severe. The now deceased was a very young girl aged 7 years. It was a prolonged assault all over the body whilst she was lying down, standing or trapped in between accused 1's legs. The injuries inflicted were not only severe but fatal as he died few hours later. Accused 1 despite inflicting such serious injuries on the child did not seek medical help. Given all this can one say accused 1 did foresee at the time of the assault that death would or may result (constructive intent)?

We do not believe so for the following reasons;

- (i) Evidence led shows that accused 1 was not only temperamental but of violent disposition who was in the habit of assaulting or chastising not only the now deceased but also his own very young children for minor transgressions including his wife. On this particular day he may have just thought that the now deceased deserved the normal punishment for failure to look after the cattle

- (ii) The type of switches exhibit 4(a) and (b) are not of such size and nature that one cannot say they are not of the size used to chastise a child. It cannot be inferred that accused intended to cause death or did foresee that death could result from using such switches
- (iii) It is not clear from the evidence as to were accused directed the blows but emphasis was on the buttocks and not any other vulnerable part of the body. It is probable that accused 1 may have inadvertently fatally injured the now deceased when he placed her neck in between his thighs. Accused 1 should be given the benefit of the doubt
- (iv) What the evidence show beyond reasonable doubt is that accused 1 was indeed negligent in how he assaulted the 7 year old now deceased. The degree of negligence was very high in relation to the manner the assault was perpetrated, the degree of force used and failure to seek medical help after realising the severity of the injuries

It is our finding that accused 1 at the time of the assault lacked the requisite *mens rea* whether actual or constructive to cause the now deceased's death.

The finding which can be made from all the evidence is that he negligently caused the now deceased's death and should be absolved of the charge of murder and be found guilty of the permissible verdict of culpable homicide.

VERDICT

Accused 1 Taruziva Sithole: Not Guilty of Murder but Guilty of contravening section 49 of the Criminal Codification and Reform, Act [*Cap 9:23*]:- **Culpable Homicide.**

Accused 2 Shackmore Dube: Not Guilty and Acquitted.

SENTENCE

Sentencing is indeed a complex process which entails balancing mitigating and aggravating factors. Often times the balance cannot be achieved with mathematical precision. We are however indebted to the crisp and useful submission by both counsel.

At 38 years of age the accused is middle aged hence he has the whole future to look forward to. A lengthy custodial sentence may spell doom for his productive life.

The accused has family responsibilities of a wife and three very young children. His incarceration is likely to be adverse to their well-being more so as they rely on his manual labour. The accused has no meaningful assets besides two beasts. He has no savings so they have nothing to fall back on.

We appreciate that it was painful for the accused to learn during the trial that his wife may have already moved on during his absence as another man sired a child with her. The accused's marriage may well have collapsed.

As a first offender the accused deserves some measure of mercy. Already he suffered pre-trial incarceration of one year and 5 months. This anxiety should have adversely affected him.

It cannot be denied that the accused is an unsophisticated rural person who is barely literate. He only attained grade 4. His appreciation of children's rights may well be archaic and believes that he had unfettered right to chastise such children for any misdemeanour.

The fact that accused is responsible for the death of his brother's child may haunt him. This social stigma may be stuck on him forever. Family relations may well be strained and accused may be viewed as an outcast and ostracised.

This case brings to the fore the debate on the desirability of parental corporal punishment. This debate has divided our society and no ready answer is available.

It should be noted that the accused is being punished not for his inherent wickedness but his failure to live up to the standard of a parent in *loco parentis*.

Be that as it may the accused stand convicted of a serious offence. Section 49 of the Criminal Code [*Cap 9:23*] provides for imprisonment for life or any other less penalty or a fine not exceeding the highest threshold of level 14. Indeed courts have been reluctant to impose sentences like imprisonment for life for contravening section 49 of the Criminal Law Code [*Cap 9:23*].

The sanctity of human life cannot be over-emphasised. The courts rightly frown upon loss of life through violent conduct.

It is aggravating that accused was in *loco parentis*. The now deceased was just a 7 year toddler who looked up to the accused for protection. Instead the accused harmed her.

The accused subjected the now deceased to brutal and prolonged assault. It is baffling as to why the accused used many switches on such a defenceless female child of 7 years. Severe injury which was fatal was inflicted.

The conduct of accused after assaulting the now deceased is aggravatory. The lack of care the accused exhibited towards the now deceased is astounding. It never bothered the accused that the now deceased should get medical care due to the severity of injuries.

The manner in which the accused sought to hide incriminating evidence sends a chill feeling down one's spine. The accused decided to burn to ashes the now deceased's body. It never occurred to the accused that this toddler the now deceased deserved at least a decent burial.

The lack of contrition on accused's part throughout this matter is astounding. The accused was never compassionate towards the now deceased even after severely injuring her. As if this was not enough the accused had the temerity to insist in court that the now deceased is still alive. What a callous and unfeeling person!

The accused's degree of negligence is of the highest order. His level of moral blameworthiness is exceedingly very high. This warrants me to depart from the threshold of sentences imposed in culpable homicide cases.

In the result the accused is sentenced as follows;

“16 years imprisonment of which 3 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 with the option of a fine.

Effective sentence: - 13 years imprisonment”.