HB 128/17
HC (CRB) 68/17

THE STATE

Versus

POLITE TEKWANE

IN THE HIGH COURT OF ZIMBABWE
MAKONESE J with Assessors Mrs Baye and Mr Matemba
GWERU CIRCUIT COURT 18 MAY 2017

Criminal Trial

T. Mupariwa for the state
C. Mhuka for the accused

MAKONESE J: This matter is a classic example of a youthful prank that went horribly wrong. The accused who was aged between 13 and 15 years appears in court on a charge of murder. The allegation being that on the 12 September 2010 the accused caused the death of Zanele Ngwenya by burying her in the sand alive. The accused pleads not guilty to the charge and tenders a plea of guilty to the lessor charge of culpable homicide. The state accepts the limited plea. A statement of agreed facts has been tendered in the record as exhibit 1. The brief facts as outlined in this statement are that the accused was at the relevant time aged between 13 and 15 years old. The deceased was aged 8 years old and she attended the same school with the accused. On the 12th September 2010 the accused, deceased and other learners were expelled from school for non-payment of school fees. As they left the school premises they passed through a spot along Mandisarura River were they engaged in a game of burying each other in the sand. When everybody had had their chance to be buried, the accused dug a pit in the sand and placed the deceased inside the pit. The accused laid the deceased on her stomach and proceeded to sit on her back. Accused covered the deceased's body with sand covering her head. One of the pupils attempted to rescue the deceased when he realised that the deceased's head was being submerged in the sand. The accused threatened him. The accused buried the deceased alive and left the scene. The deceased's lifeless body was discovered by other pupils who then made a report to the police leading to the arrest of the accused.

The state tendered a post mortem report compiled by Dr E. T. Manyarara at Gokwe District Hospital on the 15th November 2010. The cause of death is reflected in the report as suffocation.

The last exhibit tendered by the state is a Dental Certificate compiled by Dr P. Chikara on the 15 November 2010. The age of the accused was estimated to be between 13 and 15 years at the time of the commission of the offence. This certificate was marked as exhibit 3.

From the evidence placed before the court we are satisfied that the accused did not have the requisite *mens rea* to commit the crime of murder. We are however in agreement with state and defence counsel that accused is guilty of the lessor charge of culpable homicide for negligently causing the death of the juvenile.

In the result, the accused is found not guilty and acquitted on the charge of murder and convicted of culpable homicide.

Sentence

An offence which involves a loss of human life is always viewed seriously by our courts. In this instance the accused has been convicted of culpable homicide involving the death of a juvenile who was aged 8 years. The accused was aged between 13 to 15 years at the relevant time. He was attending grade 5 at Nyambi Primary School in Gokwe. As indicated earlier this is a classic case of a youthful prank that went terribly wrong. It is clear that the conduct of the accused must be assessed by taking into account his age at the time of the commission of the offence. The moral blameworthiness of the accused is on the low side by reason of youthfulness. The court's approach to sentence in these cases is to impose a rehabilitative as opposed to a punitive sentence. The courts have a duty to ensure that youthful offenders are spared the rigours of a prison sentence whenever it is possible to do so. In this instance this case has taken an inordinate period to finalise. The accused's right to a fair trial and within a reasonable time as enshrined in the Constitution of Zimbabwe Amendment (No. 20) 2013 under section 69 has been infringed. I do not consider it appropriate at this stage to impose a sentence that would lead

accused to serve a term of imprisonment. The recommendation by the probation officer to place the accused in a Special Institution in terms of section 351 (2) (b) of the Criminal Procedure and Evidence Act (Chapter 9:07) has since been overtaken by the passage of time. Accused is now between 20 and 22 years old.

In the result the only appropriate sentence is a wholly suspended prison term. This sentence would serve to deter the accused from engaging in any nefarious and unlawful activities for the duration of 5 years. The court is of the view that the polluting environment of prison is not suitable for youthful first offenders.

The following sentence is therefore imposed.

"Accused is sentenced to 4 years imprisonment wholly suspended for 5 years on condition that within that period accused is not convicted to any offence involving violence on the person of another and for which he is sentenced to a term of imprisonment without the option of a fine.

Accused is entitled to his immediate release."

The National Prosecuting Authority, state's legal practitioners
Kwande Legal Practitioners, accused's legal practitioners