

THE STATE
versus
HARMONY KAMBASHA
and
MALCOM KAMBASHA

HIGH COURT OF ZIMBABWE
BHUNU J
HARARE, 7 & 26 February 2013, 26 March 2013, 11 & 14 June 2013 & 19 June 2013

ASSESSORS: 1. Mr. MSENGEZI
 2. Mr. MHANDU

Mr. *I. Chingarande*, for the State.
Mr. *Z.R. Kajokoto*, for the Defence.

BHUNU J: Both accused were initially charged with murder but were convicted on their own pleas of guilty to the lesser charge of culpable homicide as defined in s 49 of the Criminal Law (Codification and Reform) Act [*Cap. 9:23*].

Basically the statement of agreed facts is to the effect that the now deceased was apprehended at Tarlington Farm in possession of stolen irrigation pipes on the night of 24 August 2007. Upon apprehension he was subjected to severe assault by members of the public at the farm. After the assault both the now deceased and the stolen pipes were surrendered to the two accused persons at Bodele Farm where the pipes had been stolen from. The now deceased was placed under the custody of a guard.

Realising that the deceased who was now under their detention and control had been seriously injured both accused failed to take reasonable care to avert death. Once the accused had taken the deceased into their detention and control they owed him a duty of care as they had voluntarily assumed control over a dangerous situation in that their captivity had been mortally wounded. In the case of *R v Pattock 1967 RLR 186* a farmer who had electrified his pigsties to protect his pigs against theft and malicious injury negligently failed to warn his employee that power had been switched on resulting in the employee being electrocuted to death. The farmer was held to have been properly convicted on appeal on the basis that he had breached his duty of care.

No matter the gravity of the deceased's moral blameworthiness, he was still a human being entitled to the right to life enshrined in our Constitution. The sanctity of human life is always supreme. Thus the courts always take a serious view whenever precious human blood is

needlessly shed. It is however a strong mitigating feature that apart from their failure to discharge their duty of care towards the deceased, both accused had no hand in his death.

Both accused persons are useful members of society in the prime of their lives aged 33 and 26 years of age respectively. They both do not appear to be men of a violent disposition. It was fortuitous that the deceased a criminal who had stolen valuable irrigation equipment was left in their care hence the commission of the offence. They have already endured 7 months of imprisonment while waiting for trial. Subjecting the accused to further incarceration will not serve any useful purpose apart from brutalising them.

As both accused's moral turpitude is of a *very* low degree indeed, a non custodial sentence is wholly appropriate. In the *Pattock* case (*supra*) the accused was sentenced to a non custodial sentence of \$100 or in default of payment 3 months imprisonment wholly suspended for a period of 3 years on appropriate conditions of good behaviour.

The rationale for taking a lenient attitude in offences of this nature was amply articulated in *s v Richards 2001 (1) ZLR 129* where it was held that:

“In cases of culpable homicide based on negligence, the accused is not being punished for his evil intent, for he had no intent at all, but for being careless. The function of punishment in this situation is not so much to punish wrong doing as to inculcate caution in the citizenry and encourage attentiveness to the safety of others. The function of the crime of culpable homicide is as much educative as it is coercive. In view of the time of the event and the trial, the fact that there was no sensible reason to charge the appellant with murder, the delay in bringing the matter to trial, and other factors, affine would be appropriate.”

Those remarks fit squarely the circumstances of this case. In that the culpable homicide was based on negligence, in circumstance where the deceased was to some extent to blame for his own demise. The crime was committed in 2007. The inordinate delay of 6 years in bringing the matter to finality was due to the accused being wrongly charged with murder in the first instance.

The State should take care not to routinely charge the accused with murder whenever a person is alleged to have killed another. There is need to sift and assess the facts of each case with due care and diligence in order to distinguish murder from culpable homicide and then charge the accused with the appropriate crime. It is prejudicial to charge an accused person with murder in circumstances where the facts obviously disclose the lesser crime of culpable homicide as happened in this case.

There is no doubt in my mind that had the accused been appropriately charged right from the beginning this matter would have been concluded long back about 6 years ago. As I have already said the ends of justice can only be served by imposing a non custodial sentence. In the result the each accused is sentenced to **pay a fine of \$500.00 or in default of payment 3 months imprisonment. In addition 12 months imprisonment the whole of which is suspended for a period of 5 years on condition the accused does not again during that period commit any offence involving assault or the negligent killing of a fellow human being.**

The Attorney General's Office, the State's Legal Practitioners.
Kajokoto and Company, the defendant's Legal Practitioners.