

THE STATE
versus
JOSIAH TAVARWISA

HIGH COURT OF ZIMBABWE
ZHOU J
HARARE, 6 & 7 June 2016

Assessors: 1. Mrs Shava
 2. Mr Mhandu

Criminal Trial – Sentence

H. M. Muringani for the State
B. Chideme for the Accused

ZHOU J: The accused person pleaded guilty to and was convicted of culpable homicide as defined in s 49 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. The facts upon which the conviction arose are that on 24 January 2007 and at Village 1, Ringari Farm, Chinhoyi, the accused person unlawfully and negligently assaulted the deceased Fungai Ziki with an axe handle on the head and all over the body several times thereby inflicting injuries as a consequence of which the deceased died on 27 January 2007. The deceased was the accused's wife. On the date of the assault the accused person and his brother were at their fields guarding crops from baboons while the deceased had remained at home. At about 1400 hours on the same day the accused returned from the field and found the deceased not at home. The accused looked for the deceased until he located her at a nearby hill where he found her having sexual intercourse with another man. The man ran away. The accused then assaulted the deceased with an axe handle as described above until she could hardly walk on her own. He assisted her to walk home. On 25 January 2007 the deceased was taken to Chinhoyi hospital for treatment but was referred to Parirenyatwa where she died on 27 January 2007. A post-mortem report prepared by Doctor Homerto Morales concluded that death was due to "*epidural haematoma, head injuries and assault*".

The accused person is aged forty-five years and has no previous conviction. He has four children with the deceased. All the children are majors. He has since remarried. The current wife is pregnant. The offence was committed some nine and a half years ago. Mr *Muringani* for the State advised that he was not in a position to give any meaningful explanation regarding the delay in the commencement of the accused's trial. He submitted, however, that the accused stands convicted of a very serious offence in which a life was needlessly lost. In view of the long delay in the finalisation of the matter both counsel urged the court to consider imposing a wholly suspended sentence of imprisonment.

The court notes that the accused person is a first offender who has lived a crime-free life for forty-five years. It is the policy of the law to treat first offenders with leniency in order to encourage them and give them an opportunity to reform. The fact that the accused person pleaded guilty is an indication of his contrition. Indeed, even after the assault the accused person assisted the deceased to walk home. He arranged for her to be taken to hospital, and met the funeral expenses. Also, by pleading guilty the accused spared the court the need to go through a full trial. Time was therefore saved. Due weight must be given to that conduct on his part. There is also the factor that the offence was not premeditated and was a consequence of provocation of a very high degree. Significantly, the delay of close to ten years is not only inexcusable but constitutes a violation of the accused person's right to a fair trial within which is enshrined in s 69 (1) of the Constitution of Zimbabwe. This is a matter that has caused a lot of anxiety to and has exercised the mind of this court. There is a catena of cases in which the courts have either found it unjust to sentence an accused person to an effective imprisonment term or have stayed prosecution as a result of the delay in the commencement or finalisation of a prosecution. See *S v Dube* 1989 (3) ZLR 245, *S v Chikwinya* 1997 (1) ZLR 109. The court was also referred to the case of *S v Kazembe* HH 378 – 15 in which the accused struck the deceased with a stone. The deceased died the following day as a result of the injuries caused by the stone. This court on review found that a sentence of 3 years imprisonment of which one year was suspended, leaving an effective 2 years imprisonment, was warranted. If this was a matter involving any other offence the court would have had no difficulty in imposing a wholly suspended imprisonment sentence as urged by both counsel.

However, this is a matter in which a life was lost. While there was the inordinate and unexplained delay in bringing the matter up for trial the imposition of a non-custodial penalty might send a wrong message to society in the light of the new norm created by the current

Constitution. The provisions of s 48 as read with s 86 (3) (a) permit the taking of a human life only where a person has been convicted of murder in aggravating circumstances. The new value system which underpins the new constitutional order must thus be reflected in the sentencing approach to matters involving loss of human life. The simple message to society is that no person is allowed to end another person's life other than as provided for in the provisions cited above. It is therefore the view of the court that an effective period of imprisonment, however, short, is warranted in the instant case in order to uphold the value of life espoused by the new constitutional dispensation. The court must emphasise that the period imposed is short only because of the weighty mitigating circumstances of this matter, especially the provocation and the delay involved in the commencement of the trial of the accused person. The very peculiar circumstances of this matter present no precedent for persons to disregard the lives of other persons or to resort to violence as a means of resolving disputes. In this respect, the court should point out that the offence has the dimensions of domestic violence which is an offence which the law views seriously as evidenced by the penalties prescribed by the relevant legislation. Society must learn to resolve disputes, domestic and otherwise, other than through violence.

The court is mindful of the fact that in culpable homicide cases based on negligence the rationale for the penalty is not to punish evil but to inculcate caution in members of society. See *S v Richards* 2001(1) ZLR 129 (S). The sentence must nevertheless meet the justice of the case in the sense of it not being unduly harsh but also not trivialising an otherwise serious offence.

In the present case, the Court considers that the following sentence would meet the justice of the case:

“FOUR years imprisonment of which TWO years imprisonment are suspended for five years on condition that within that period the accused person does not commit an offence involving violence upon the person of another and for which upon conviction he is sentenced to a period of imprisonment without the option of a fine. EFFECTIVE: TWO years imprisonment.”

National Prosecuting Authority, legal practitioners for the State
Mavhunga & Associates, Accused person's legal practitioners