

STATE
versus
NEMARAMBA BEAVEN SOVENES

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 25 and 26 July 2016

Assessors: 1. Mr Chogugudza
2. Mr Chakuvinga

Criminal Trial

F Zacharia, for the state
S. Mangenya, for the accused

CHITAPI J: The accused was charged with murder as defined in s 47 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. He was alleged to have unlawfully caused the death of Joseph Gavani whom he struck with an iron bar on the nose bridge resulting in Joseph Gavani's suffering injuries from which he died. The offence is alleged to have occurred on 15 November, 2015 at 4th Street Bus Terminus, Murehwa route loading bay area.

The accused pleaded not guilty to the murder charge and tendered a plea of guilty to the charge of culpable homicide. The state agreed to the plea to the lesser charge. State and defence counsels presented a statement of agreed facts. The statement which the court accepted as Annexure A reads as follows:

“STATEMENT OF AGREED FACTS

1. The accused person is a male adult aged 24 years and resides at 07 Cleveland Road, Greendale, Masasa. Harare and is a tout operating at Simon Muzenda Bus Terminus.

2. The now deceased person is Joseph Gavani aged 27 years residing at Matuku Village, Chief Nyajina Mutawatawa, Murehwa, during his lifetime. He was a conductor with Muponda Transport Murewa Centre.
3. On the 15th of November 2015 at about 1600hours at Murewa loading bay, Simon Muzenda bus terminus, the now deceased was loading goods into a commuter omnibus and was in the company of Tapfuma Kapfidza who is also a conductor.
4. Accused person came and started to tout for passengers for another commuter omnibus written "BABA KELLY" at the back which was not in the rank but was parked opposite Murewa loading bay.
5. Tapfuma Kapfidza then asked the driver of the BABA KELLY omnibus as to why he was loading his vehicle outside the rank.
6. This did not go well with the accused, who picked a metal rod and swung it towards the direction where the deceased, Tapfuma and other conductors were.
7. The top part of the metal rod detached and hit the now deceased on the nose bridge between the eyes. The deceased sustained a cut on the nose, fell down and died instantly.
8. The now deceased was ferried to Parirenyatwa Hospital and was certified dead on arrival. On the 19th of November 2015 Doctor Gonzalez conducted a post mortem. It was established that the cause of death was *subarachnoid haemorrhage and head trauma*. The post mortem report is to be produced as an exhibit.
9. The police recovered the two pieces of metal bars. The one which struck the now deceased weighed 0.324kg and measured 92cm in length. The square metal bar which the accused was holding on to weighed 0.280kg and measured 1.67cm. the metal bar pieces are to be produced as exhibits.
10. The accused person denies having the intention to kill the now deceased person or having realized that there was a real risk or possibility that his conduct might cause death and then continued to have engaged in that conduct despite the risk or possibility.
11. The accused person tenders a plea of 'guilty' to culpable homicide as defined in Section 49 of the Criminal Law (Codification and Reform) Act [Chapter 9:23] and the State accepts the limited plea."

The court proceeded to convict the accused of culpable homicide in terms of s 271 of the Criminal Procedure and Evidence Act, [*Chapter 9:07*].

The state counsel with the consent of the defence counsel produced as exh 1 the 3post mortem report. The report was prepared by Dr. Mauricio Gonzalez upon an examination of the deceased's remains on 19 November, 2015 at Parirenyatwa Hospital. He noted that the deceased

was a well-nourished 80kg male adult 182cm in height. The body was bleeding from the mouth and nostrils. The body had a surface wound 2cm in extent on the frontal sinus. There were no skull fractures or any other abnormalities noted. He concluded that the cause of death was head trauma and subarachnoid hemorrhage which basically connotes bleeding in the subarachnoid space or the area between the brain and the thin tissues which cover the brain.

The state counsel produced by consent of the defence counsel a steel round bar, a steel square bar and a weighing certificate as exh 2a, 2b and 2c. As accepted in the agreed facts, the round bar weighs 0.324kg and measures 92cm in length whilst the square bar weighs 0.280kg and measures 1.67metres long. Apparently, the round bar retracts into the square bar and when the accused swung the square bar which he was holding in the direction of or towards the deceased, the round bar came off from the square bar and struck the deceased whilst the accused remained holding onto the square bar. The foregoing therefore constitute the facts which were presented to the court.

In mitigation it was submitted that the accused was 24 years old, married with one child. He is the sole breadwinner for his family. He is an A-Level school leaver who was due to join the military ranks in January 2016 but for this case. He pleaded guilty showing contrition. It does not however appear to the court that the accused had any choice in the circumstances than to plead guilty. It was submitted that the death of the deceased resulted from a freak accident and that the accused owned up to this misdeed and did not seek to run away from the scene. The case was said to have been publicized extensively in the local media and that such publication constituted a form of mental punishment. Reliance was placed on the case of *S v Richards* 2001 (1) ZLR 129. In the view of the court, publication of a matter of public interest and reporting it correctly and fairly should be encouraged. In the present matter the accused was the author of his misdeed and should not cry foul when his misdeed which happened in the public domain was published. The defence counsel submitted that an appropriate sentence in the matter would be community service. Counsel argued for a rehabilitative sentence and asked the court to exercise mercy.

Ms *Zachariah* submitted that the accused had been convicted of a very serious offence and that a sentence of community would trivialize the enormity of the accused's transgressions. She submitted that the accused was in the wrong because he sparked the altercation or

commotion by seeking to load his vehicle from a bay where he was not authorized to. In so doing the accused showed no respect for his workmates who were trying to stop him from loading his vehicle from an area which he was not authorized to load. Counsel submitted that the accused by insisting on loading from an unauthorized area was disregarding the city – by – laws. She submitted that it was necessary for the court to pass a sentence which would deter errant drivers and touts. She lastly submitted that an effective sentence of 5 years would in the circumstances be fair. Counsel referred to the cases of *S v Mbanjo* HH 114/15 and *S v Nyoni* HB 201/15.

The sentence for culpable homicide is codified in s 49 of the Criminal Law (Codification & Reform) Act. The maximum sentence which can be imposed upon an offender convicted of culpable homicide is imprisonment for life and cascades downwards to a lesser defined length of imprisonment including a fine of up to or exceeding level 14 or both such fine and such imprisonment. There is therefore no gainsaying that the offence is viewed seriously by the legislature and so it is. Once life is lost, it cannot be restored. Section 48 of the Constitution entrenches the right to life as the first fundamental human right which should be safeguarded. The courts are expressly mandated in s 46 of the constitution to give full effect to and promote the rights given to all persons as enshrined in the constitution. The sanctity of human life should be respected lest we end up without a society if people are allowed to take matters in their hands and take other people's lives without lawful cause.

Culpable homicide tends to operate with hardness on the offender who has caused the death of another because no greater moral blameworthiness attaches or arises from the fact of death having come about through negligence. The basic criteria which courts have had regard to in assessing an appropriate sentence for culpable homicide has and continues to be the degree of negligence exhibited by the accused in the circumstances of each case. It is for this reason that precedent or decided cases will normally not be helpful as barometers of what an appropriate sentence should be. This is so because circumstances obtaining in culpable homicide cases hardly co-relate. A useful expose on the difficulties which a court faces in relation to assessing sentence in culpable homicide cases can be found upon a reading of *S v Naidoo & Anor* 2003 (1) SACR (SCA) at 361 h- 362 e where the court stated as follows:

“With regard to sentencing, the circumstances in which the crime of culpable homicide may be committed range across a wide spectrum. At one end is the case where a momentary lapse in concentration on the task at hand has a tragic result. Neither the lapse nor the failure to foresee the consequences of it is deliberate. Yet they have resulted in a loss of life. They could just as

easily not have had that result. Sentencing fairly and appropriately in such a case is one of the law's most difficult tasks. The culpa may have been slight but the result stirs an understandable call from society at large (and a fortiori from those close to the deceased) for the sentence to visit tangible retribution upon the culprit. Balancing the need for a sentence that, on the one hand, will not appear to rate the loss of a life with all the attendant trauma to those to whom the deceased was near and dear as not too serious against, on the other, the need to calibrate the degree to which the accused's conduct deviated from the standard of care expected of a reasonable person and, if it is found to be slight, also to reflect that adequately in the sentence to be imposed, is inherently difficult. The outcome will often satisfy neither those close to the deceased nor those close to accused, being too lenient in the eyes of the former and too severe in the eyes of the latter. But that does not absolve a court from its duty to strive as best it can to achieve a proper balance between those objectives. At the other end of the culpable homicide spectrum is the type of case where the accused has deliberately assaulted the deceased but has not been convicted of murder because the State has failed to prove beyond reasonable doubt that death was actually foreseen as a reasonably possible consequence of the assault. Because it should have been foreseen a verdict of culpable homicide is returned. Here there is more involved than culpa. An assault has been committed. Dolus is present. A deliberate attack upon a person's bodily integrity which was intended to harm has resulted in the most irremediable harm of all: death Few would quibble at the justness of substantial custodial sentences for that type of culpable homicide. But even within that class of case there are distinctions to be drawn, such as whether a weapon was used, how obviously potentially lethal it was, whether there was provocation or how great was the negligence in failing to foresee that death might result."

It is also the view of the court that whilst acknowledging the sanctity of human life and its loss which is itself an aggravating circumstances, the extent of the tragedy, which is death should not obscure the true nature of the offence or degree of negligence. See *S v Naicker* 1996 (2) SACR 557.

The facts of this case are tragic. Indeed what happened must have shocked the accused, on lookers and the community in general. The accused intended to threaten or ward off rival touts who were intent on stopping him from loading the combi or bus which was not authorised to load from the place or scene. The accused wanted to have his way and the use of the weapon which he picked up from the ground without even examining it ended in a tragic consequence. If the inner part of the steel bar had not come off, the accused may likely have simply threatened other touts away and in so doing committed just an assault. This notwithstanding, the accused used a dangerous weapon and such weapon was inherently dangerous in that its use can result in serious injury or as in this case, death.

The accused did not aim the weapon at the deceased and when the deceased was struck by the round bar which accidentally came off the flat bar, the two were some 3.5 metres apart. The inner bar came off when the accused swung the flat bar. The accused's degree of negligence

was therefore not gross. The accused however as already indicated used a weapon to scare away the other touts who were ordering him not to load his bus. He was aware that he had picked up a weapon and his aim was to use it to have his way. The actions of the accused were those of a bully. He intended to have his way through the use of force. The accused was not deterred by the touts who were telling him to refrain from loading his combi or bus from their area. His reaction was to dare everyone intent on stopping him from having or doing things his way instead of driving off.

The sentence which the court should pass is one that should punish the accused for his indiscretions and act as a deterrence to other touts that they should respect one another and more importantly orderliness. Section 52 of the Constitution guarantees every person the right to freedom from all forms of violence both private and public. The accused's threats of violence which ended in disaster was conduct in breach of s 52 of the Constitution. It should be deprecated and the court should therefore pass an exemplary sentence.

Taking into consideration all the mitigating and aggravating circumstances of this case, the court considers that a custodial sentence is called for and that community service would be wholly inappropriate and would have the effect of having the public to lose confidence in the criminal justice delivery system. A greater portion of the sentence will however be suspended so that the accused can reintegrate into society and be a useful citizen.

The accused is sentenced as follows:

6 years imprisonment of which 3 years imprisonment is suspended for 5 years on condition that the accused does not within that period commit an offence involving the unlawful killing of another person for which if convicted he is sentenced to serve a term of imprisonment without the option of a fine.

National Prosecuting Authority, for the State
P Takawadiyi & Associates, for the Accused-Pro Deo