

THE STATE

Versus

NORMAN MAHACHI

HIGH COURT OF ZIMBABWE

MAWADZE J,

MASVINGO, 25 JUNE, 2018

Assessors

1. Mrs Chademana
2. Mr Dauramanzi

Criminal Trial – Sentence

M. Tembo for the state

Ms T. Munyanyi for accused

MAWADZE J: The accused was initially facing the charge of murder as defined in s 47(1) of the Criminal Law (Codification and Reform) Act [*Cap 9:23*]. However, he was convicted of the permissible verdict of culpable homicide as defined in s 49 of the Criminal Code [*Cap 9:23*] after the state and the defence agreed that it is the appropriate charge. The matter therefore proceeded on the basis of a statement of agreed facts.

The agreed facts are that the accused is the father of the 8-year male now deceased. They were residing at the same homestead at Village TI Nyahombe Resettlement, Chief Shindi, Chivi, Masvingo. Apparently the accused separated from the now deceased's mother and he had custody of the now deceased and had remarried.

On 10 April 2017 the accused alleged that the now deceased was misbehaving and decided to inflict corporal punishment using a mopani stick. The accused took issue with the

now deceased's habit of unpunctuality when sent to on errands at the nearby shops. As the now deceased was being chastised he raised his legs and was hit on the testicles rendering the now deceased unconscious. The accused tried to carry out first aid but the now deceased passed on. The accused thereafter wrapped the now deceased's body in a blanket and buried it in a toilet pit he was working on. Thereafter the accused lied to the persons he was staying with that the now deceased had gone to the now deceased's mother in Chivhu. The now deceased's mother later learnt that the now deceased was being said to be in her custody and she approached the accused about the lie. The accused still could not reveal the whereabouts of the now deceased hence the matter was referred to police leading to accused's arrest 9 months later in January 2018. The accused only pointed to the police on 28 January 2018 the place where he had buried the now deceased after which the police exhumed the skeletal remains of the now deceased wrapped in a blanket. The pathologist could not determine the cause of death due to advanced decomposition.

In assessing the appropriate sentence, we have taken on board the submissions made for and against the accused by both counsel.

The 46-year-old accused is married with a large family of 9 children whose ages range from 2 years to 22 years. The accused is a peasant farmer who specialises in cotton farming and he realised a bumper harvest this year of 30 bales of cotton. His family relied on accused's manual labour hence his incarceration would greatly inconvenience them.

It is an important mitigatory factor that the accused is HIV positive and is on ARV treatment. We take judicial notice that the current economic challenges have not spared our prison facilities. The resources in prison like proper diet and medical care are not easily available. This would greatly compromise the accused's health moreso as he would obviously be stressed by the incarceration.

It is in accused's favour that he pleaded guilty to the charge. This is a sign of contrition. This matter has as a result been finalised in a short period. The state witnesses who are accused's and deceased's relatives have been spared the agony of facing the accused testifying. Consequently, less state resources have been expended in prosecuting the accused. Indeed, the accused could have raised some fanciful defence moreso as there was no eye witness to the assault and the pathologist could not ascertain the cause of death.

As a first offender accused deserves to be treated with some measure of leniency with the hope that he would reform and desist from further crime.

It may well be that accused believed that he was exercising his right as a parent by chastising an errant son and in the process negligently caused his death. All things equal the death of his own son should forever weigh heavily on accused conscience. The accused would not be able to chlorinate the stigma that he caused the death of his son.

On the other hand, the offence of culpable homicide arising from violent conduct is a very serious offence. It is clear that this was a reckless and merciless assault upon an 8-year-old toddler who may well not have fully appreciated whatever wrongful or errant behaviour on his part was being alleged. The now deceased looked for protection from the accused his father.

It is saddening to note that offences involving violence leading to loss of lives are very prevalent. The sanctity of life cannot be over emphasised.

There are a number of factors which elevate the accused's moral blameworthiness. As already said the now deceased was just a toddler of 8 years to whom the accused stood in a protective relationship. The nature of assault was quite reckless as accused ended up directing the blows on the testicles. The accused's conduct after committing this offence is shocking to say the least. The accused had the presence of mind and temerity to bury the body in a toilet pit he was digging at his homestead. One would have expected the accused to have his conscience pricked by what he had done and thus owned up. Instead the accused went on to behave as if nothing amiss had happened. He was able to live with his own flesh and blood buried in an unofficial grave at his homestead! This was for a period of 9 months.

It is indeed baffling that the accused would behave in such a manner. It never dawned upon the accused that his son the now deceased at least deserved a decent burial. Further the accused could not own up for 9 months despite being probed by other relatives and was prepared to lie to the relatives. The moral blameworthiness of the accused without doubt is very high. Clearly the option of a fine or a sentence of community service is inappropriate. The accused without doubt deserves a lengthy custodial sentence.

In the result the accused as follows;

“6 years imprisonment of which 2 years imprisonment are suspended for 5 years on condition the accused does not commit within that period any offence involving the use of violence upon the person of another for which accused is sentenced to a term of imprisonment without the option of a fine.

Effective sentence is 4 years imprisonment.”

National Prosecuting Authority, counsel for the state

T. Munyanyi & Associates, pro deo counsel for the accused