

THE STATE
versus
ANNA KANONGE

HIGH COURT OF ZIMBABWE
MAWADZE J
MASVINGO 19 NOVEMBER, 2020

Assessors

1. Mrs Chademana
2. Mr Mutomba

Criminal Trial - Sentence

E. Mbavarira, for the State
Ms I. Moyo, for the Accused

MAWADZE J: The 50 year old accused was initial arraigned for causing the death of her 36 year old mentally ill and HIV positive daughter in contravention of s 47(1) of the Criminal Law (Codification and Reform) Act, [*Cap 9:23*]. However the matter proceeded on the basis of a Statement of Agreed Facts on a charge of culpable homicide as defined in s 49 of the Criminal Law (Codification and Reform) Act, [*Cap 9:23*] for which the accused was duly convicted.

The only issue which then exercised the mind of the court relates to what is the appropriate sentence.

The agreed facts which inform the charge are briefly as follows:-

The 50 year old accused was residing with her 36 year old mentally ill and HIV positive daughter at House Number 200 Cheetah Road, Tshovani, Chiredzi. They occupied one rented room.

On 9 April 2020 at about 0500 hrs whilst in their rented room the now deceased (who is the accused's daughter) just started to scream at the top of her voice trying to leave their rented room by forcefully opening the door. This incensed the accused who did not want her to leave as the now deceased had the habit of deserting their residence. The accused took a cooking stick Exhibit 2 weighing 0.14 kg and 40 cm long and assaulted the now deceased indiscriminately all over her body. As per the post mortem Exhibit 1 the doctor noted the following injuries;

- “- multiple abrasions and lacerations all over the body*
- notable laceration on scalp with underlying skull fracture.”*

The cause of the now deceased who died soon after this assault is head injury. There is therefore no doubt that the accused was negligent in the manner she assaulted her mentally challenged and HIV positive daughter, the now deceased, causing her death.

Culpable homicide arising from violent conduct is generally a very serious offence punishable with a lengthy custodial sentence. Life is sacrosanct and precious. Once a life is lost it cannot be replaced or retrieved. The duty of the courts therefore is to protect life by handing down deterrent sentences.

Although the accused is the mother of the now deceased she has no right to take away her life. It is important to note that that the now deceased was inflicted with a number of ailments. Besides being mentally ill and a perpetual minor she was also HIV positive. The accused was well aware of all this. As a mother and a care giver the accused had the duty to protect the now deceased not to harm her. No one else could do this nor could the accused outsource this responsibility to anyone else. The conduct of the now deceased which incensed the accused should have been well understood by the accused on account of the now deceased's mental state. In that vein therefore assaulting her or chastising her as the accused prefers to call it would not achieve anything positive from such a well-known mental patient.

It is aggravating that the assault itself was severe and prolonged. The accused exerted a lot of force on a defenceless mental patient. Besides being indiscriminate the blows also landed on the now deceased's head causing a skull fracture and instant death. The cooking stick itself was

broken into two pieces (see Exhibit 2). Further, after such a brutal assault the accused did not help the now deceased in any manner. The accused's degree of negligence is therefore high just like her moral blameworthiness. This is not expected of a mother who should know better the pain of giving birth.

Be that as it may there are indeed mitigatory factors.

The 50 year old accused is a female first offender who deserves to be treated with some great measure of leniency. She now has to live with the pain and stigma that she took the life of her own daughter whom she had cared for since birth for 36 years until this mishap. Her conscience should be torturing her and she may never find peace with such a misdeed. In addition to that society may be unforgiving as it would view her as a murderer because the general public make no distinction between murder and culpable homicide.

It may well have been in the accused's misplaced belief that she had the right to chastise her daughter despite the now deceased's age and mental state. In the absence of evidence of prior ill treatment of the now deceased, the accused's conduct on this day may well be regarded as out of character.

The accused admitted to her wrong doing. She did not waster the court's time. The witnesses who were present were spared from testifying. Less resources were therefore used in prosecuting the accused. This matter has been finalised in a short period of time without much ado thus contributing to the swift administration of justice.

Our respectful view is that no useful purpose may be achieved in sentencing the accused to an effective custodial sentence. A proper balance of the mitigatory and aggravating factors demands that a wholly suspended prison term be imposed. In the result the accused is sentenced as follows;

“3 years imprisonment which is wholly suspended for 5 years on condition the accused does not commit within that period any offence involving assault, or the use of violence upon the person of another or the unlawful killing of a fellow human being for which the accused is sentenced to a term of imprisonment without the option of a fine.”