

THE STATE
versus
INNOCENT SHONGENI MUTAYI

HIGH COURT OF ZIMBABWE
MWAYERA J
MUTARE, 11 June 2018

Criminal Trial – Murder reduced to culpable homicide

ASSESORS: 1. Mr Raja
2. Dr Sana

J Chingwinyiso, for the State
Ms T Jaricha with Ms Madingwa, for the accused

MWAYERA J: The matter came up for trial. Initially the State prepared a charge of murder against the accused. On reflection before commencement of trial the State reduced the charge to culpable homicide. The State and defence came up with a charge of culpable homicide and a Statement of Agreed Facts. The accused pleaded guilty to culpable homicide, wherein, it is the State's contention that on 9 November 2017 at Maronga Village, Chief Musikavanhu, Chipinge, the accused unlawfully caused the death of Onai Chinondida by striking him with a brick once on the head negligently failing to realise that death might result from his conduct resulting in injuries from which Onai Chinondida died.

The statement of agreed facts revealed among other common cause aspects that on 9 November 2017, the accused and deceased were at Ndashuwa homestead for a beer drink. Further that at around 1500 hours, an altercation arose between the deceased, accused and accused's young brother one Trymore Chinondida. The altercation was over accused's persistence to have more beer and that Trymore owed the deceased 50 cents. The deceased struck the accused once on the back of the head with a stone propelled from a catapult. This then led to Trymore Chinondida and Gift Tendai joining in and striking the accused with logs. The accused produced a knife and picked a brick and then charged towards the deceased. Amos Makuyana restrained the accused and dragged him out of the homestead but the accused could not have any of that, he broke free and ran back to the yard and picked a stone which he threw towards Gift Tendai but missed and struck another. The accused picked another brick and

struck the deceased on the head. The deceased sustained a depressed skull and fracture from which he died.

There being no disputed facts the following exhibits were tendered as evidence by consent.

A confirmed warned and cautioned statement by the accused exh I, The post mortem report by Dr Tapi and affidavit showing cause of death exh 2 and exh 2 (a) respectively.

A weight certificate showing weight of the brick used to strike the deceased exh 3 and pieces of the broken brick exh 3a and finally the sketch plan and key drawn by sergeant Zvenyika, exh 4.

The circumstances surrounding the matter having been already captured in the statement of agreed facts and supported by the documentary evidence tendered having been accepted and admitted to by the accused we found no reason to question the stance of both the State and defence counsel who sought for a conviction of culpable homicide. Accordingly the accused is found guilty of culpable homicide.

No record.

We were addressed in mitigation and aggravation by both State and defence counsel and we came up with sentence.

Sentence

In reaching at an appropriate sentence we have considered all mitigatory and aggravatory factors advanced by Ms *Jaricha* and Mr *Chigwinyiso*. We are indebted to both counsels for their submissions on principles of sentencing, personal circumstances of the accused and circumstances of the matter. Both counsels referred us to fairly old cases in the 60s in bringing to light what the court should consider in passing sentence. The cases although old were not irrelevant as clearly the universal nature of sentencing principles has not changed. We must mention reference to recent cases and cases of circumstances of similar nature would however, be appreciated in assisting the court to exercise its sentencing discretion in a manner that will balance the interests of the criminal, matching these to the crime and at the same time be fair to society whose interests is anchored on the administration of justice. We have considered that the accused pleaded guilty to culpable homicide thus showing remorse and genuine penitence. As correctly stated by the defence counsel Ms *Jaricha* the accused will forever live with the stigmatisation of having killed someone. The accused has been in custody for about 7 months while awaiting the finalisation of this matter. For that period the accused

had the charge of murder hanging above his head and the trauma that goes with facing such serious allegations cannot be ignored. In considering an appropriate sentence to impose it was further submitted that the accused is a young adult aged 27. Although an adult, he is fairly young and at the time of commission of the offence fell into the bracket of youthful offender cannot be ignored as it is a mitigatory factor. The accused further has a young wife and 2 young children who are all dependant on him for sustenance. The defence counsel at length urged the court to consider a short imprisonment term for deterrence as opposed to a long imprisonment term. See *S v Teburo* HH 517-87, *S v Wood* 1973 (1) RLR 11. The State counsel agreed with the defence counsel that a long imprisonment term was unwarranted.

However, in aggravation Mr *Chingwinyiso* emphasised correctly the sanctity of human life. On that point he referred us to an old South African case *R v Branard* 1960 SA (1) 552. It is clear in the Zimbabwean Constitution s 48 (1) that every person has a right to life. As such the court has a duty to protect the said right. Therefore a person who unlawfully takes away another's life deserves to be punished adequately not only to deter the offender and likeminded people but to ensure that the society retains confidence in the justice delivery system.

As correctly pointed out by Mr *Chingwinyiso* the court in considering the personal circumstances of the accused should not lose sight of the attendant personal circumstances of the deceased whose loss of life will occasion undue hardship on his own family and dependants. The deceased lost life at a tender age of 38 in circumstances where it could have been avoided given the accused had earlier been restrained by one Amos Makuyana who acted as a pacifier but the accused persisted on the violence. The sentence has to reflect that resolution of disputes by resorting to violence is not acceptable in a civilised society. We are not blind to the fact that the accused was under attack from three people and that this was at a beer drink. This reduces the accused's moral blameworthiness. However, the accused having been restrained was negligent when he picked a brick and struck the deceased on the head which is a vulnerable part of the body. The deceased died as a result of a head injury as outlined in the post-mortem report by Dr Tapi.

Upon considering all the mitigatory factors and aggravatory factors we agree that a short imprisonment term will meet the justice of the case. The universal principle is that the punishment should fit the criminal as well as the crime and be fair to society while at the same time being reflective of a blend of a measure of mercy given the circumstances of the case.

Accordingly the accused is sentenced as follows.

4 years imprisonment of which 1 year imprisonment is suspended for 5 years on condition accused does not within that period commit an offence involving the use of violence on the person of another for which he is sentenced to imprisonment without the option of a fine.

*National Prosecuting Authority, State's legal practitioners
Mhangu & Associates, accused's legal practitioners*