

THE STATE
versus
JAMES SIKILA

HIGH COURT OF ZIMBABWE
MWAYERA J
MUTARE, 6 June 2018

Criminal Trial (murder reduced to culpable homicide)

ASSESORS: 1. Mr Chipere
2. Mr Magorokosho

M Musarurwa, for the State
T Sigauke and *C Ndlovu*, for the accused

MWAYERA J: The matter came up for trial with accused being charged for murder as defined in s 47 (1) (a) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. When the charge was put to the accused he proffered a limited plea of guilty to culpable homicide as defined in s 49 of the Code. The State accepted the limited plea of culpable homicide. This occasioned the matter to be stood down for the State and defence counsels to come up with the Statement of Agreed Facts. The Statement of agreed facts for completeness sake reflected the following common cause aspects:

“STATEMENT OF AGREED FACTS

1. The accused is a male adult aged 33 and a part time farm labourer. He resides in Muradzi Village Chief Tandri Rusape.
2. The deceased was a 49 years old woman who was customarily married to the accused. They stayed together as husband and wife in Muradzi Village Chief Tandri Rusape.
3. The accused and the deceased had an uneasy marriage burdened with unresolved matrimonial disputes.
4. On the 14th of April 2017, accused received word of illness from the deceased. The accused returned home from his workplace. He discovered that the deceased had induced an abortion. A misunderstanding arose and the deceased became violent. The accused sought refuge from a neighbour who intervened and calmed the situation.
5. Later that night the accused confronted about the pregnancy and abortion and the misunderstanding deteriorated into a fight.

6. The deceased used a button stick and clenched fists to assault the accused. The accused responded by using clenched fists to assault the deceased. The accused then bolted out of their bedroom and fled from the homestead.
7. The deceased pursued and caught up with the accused and their fight resumed. The deceased was armed with an iron bar which they ordinarily used to secure their bedroom door with.
8. The accused wrestled the iron bar from the deceased and struck the deceased once on the head and she fell down. The accused left the scene without checking on the condition of the deceased.
9. As a result the deceased sustained injuries and later passed on.
10. On the 26th April 2017 the severely decomposed remains of the deceased were found and Doctor Roberto Trecu conducted a post mortem examination of the deceased remains and his findings on the cause of death were inconclusive. The post mortem report shall be produced as an exhibit.
11. The accused negligently caused the death of the deceased in that:-
 - a) He struck the deceased once on the head with an iron bar.
 - b) He ought to have foreseen that serious injury or death could occur.
 - c) He failed to act reasonably and ought to have exercised restraint.
 - d) He ought to have sought medical assistance for the deceased.
12. In the circumstances the accused may be properly found guilty of culpable homicide.”

The post mortem report reflecting examination of human remains in advanced stage of decomposition was also tendered in evidence as exh 1. There being no contentious aspects and having been satisfied that the accused was genuinely pleading guilty to the essential elements and or components of the offence of culpable homicide, we returned a verdict of guilty of culpable homicide as prayed for by both counsels.

Both the State and defence counsels addressed us in mitigation and aggravation as a presentencing exercise. Our reasons for sentence are captioned herein.

Sentence

Sentencing is a delicate exercise which calls for the judicial officers to judiciously and cautiously exercise the sentencing discretion. The sentencing court has a duty to operate on sound principles of sentencing and be above being swayed by personal feelings. At the end of it all the end product that is the sentence should not put the administration of justice into on disrepute and should not break the offender in a progressive and democratic society which emphasises rehabilitation more than retribution.

We subscribe to the sentiments echoed by HOLMES JA in *S v Rubie* 1975 (4) SA 855 at 862 when he stated:

“Punishment should fit the criminal as well as the crime, be fair to society and be blended with a measure of mercy according to the circumstances of the case” (underlining my emphasis).

In the case of *State v Fortunate Nsoro* HH 190/16 CHITAPIJ emphasising on sentencing principles and the need to balance out societal interests, the accused’s interests and the interests of the administration of justice, cited the case of *S v Harrison* 1970 SA 684 (A) at 686 where ANDERSON J at 686 stated

“Justice must be done, but mercy not a sledge hammer is its concomitant.”

In this case, the accused pleaded guilty to culpable homicide as defined in terms of s 49 of the Criminal Law (Codification and Reform) Act. The accused as correctly pointed out by the State counsel Mr *Musarurwa* stands convicted of a serious offence where precious human life was lost in domestic violence. The accused unlawfully caused the death of his wife in circumstances where this human life loss could have been avoided. Paragraph 8 of the statement of agreed facts states:

“The accused wrestled the iron bar from the deceased and struck the deceased once on the head and she fell down. The accused left the scene without checking on the condition of the deceased.”

Given this was in open space the accused could have, after disarming the deceased made good escape. The accused’s degree of negligence in the circumstances is high given he struck his wife with an iron bar on the head, a vulnerable part of the body and the body was only discovered later in an advanced state of decomposition as evidenced by the post mortem report by Dr Roberto exh 1. The moral blameworthiness of the accused in this case cannot be minimised by the fact that the statement of agreed facts reveals that the couple lived a marital relationship characterised by matrimonial disputes and domestic violence. The society condemns violence of all forms given the social ill that go with domestic violence. It is not in dispute that in most cases where there is a cycle of domestic violence, the situation rarely gets better but gets worse. The accused and deceased took as normal living in a domestic violence infested matrimony and the end result was the loss of precious human life. Such conduct should be frowned at.

The sanctity of human life cannot be whisked away by alleged acceptance of an abnormal family set up by the accused whose counsel Mr *Sigauke* properly advanced in

mitigation that the accused had always been the victim and suffered the battered man syndrome. However, nothing was however placed before the court to substantiate this alleged condition.

However, from the statement of agreed facts it is clear the accused came back home and at night confronted the deceased about some pregnancy and abortion after the accused had received word of illness of the deceased. A misunderstanding then arose leading to the fight and eventually the fatal blow para 4 to 8 of the statement of agreed facts. The accused was not portrayed as strictly a victim. In passing sentence the court is alive to all mitigatory factors advanced by Mr *Sigauke* that accused is a family man with responsibilities that he pleaded guilty to culpable homicide and that he is a first offender. Further, the accused has been in custody for a year awaiting the finalisation of this matter. He will also live with the stigma of having killed his wife as clearly the society does not consider the legal definitions of murder and culpable homicide. The accused is also said to be of poor health as he is HIV positive. I have also considered the aggravatory factors advanced. Section 48 protects right to life and clearly no one has the right to take away another's life. I am alive to customary compensation to the bereaved family but it should be noted that no amount of compensation can restore a lost life.

Accordingly accused is sentenced as follows:

7 years imprisonment of which 2 years is suspended for 5 years on condition accused does not

National Prosecuting Authority, State's legal practitioners
Mutungura and Partners, accused's legal practitioners