

THE STATE
versus
ALEXANDER GANDA

HIGH COURT OF ZIMBABWE
MUZENDA J
MUTARE, 11 June 2019

Criminal Appeal

ASSESORS: 1. Mr Chagonda
2. Dr Sana

Ms TL Katsiru, for the State
P Makombe, for the Accused

MUZENDA J: The accused, Alexander Ganda, 73 years, was charged with murder of Gibson Kwambana, aged 57 years. The accused pleaded not guilty to murder. The accused and the deceased had been friends and regular companions for some time.

Statement of Agreed Facts

On Christmas day, 25 December 2018, the accused in the company of the deceased left Bethania Business Centre after some beer drinking. Along the way, they met up with Learnmore Chipangura who was in the company of his wife Anyway Tariro Nyamuponza, Ronald Phiri and the latter's wife Tanyaradzwa Kachera when Learnmore Chipangura started to call the accused person by his nickname. The accused person started to shout at Learnmore not to call him by his nickname but he kept on doing so and a fight ensued. Learnmore then punched the accused who fell down and the accused then drew an okapi knife and the deceased approached the accused person to stop accused from further assaulting Learnmore and the accused subsequently stabbed the deceased once on the chest. The deceased and the accused both fell.

It appears the accused was negligent in his conduct and cannot have formulated intent (actual or constructive) to kill the deceased. Deceased sustained a chest stab wound and died on the spot. A post mortem examination concluded that death was due to haemorrhagic shock due to the stab wound. The accused acted negligently in his conduct owing this drunkenness and provocation by Learnmore and poor sense of judgment and thus caused deceased's death. Both State and defence opined that the accused be found guilty of culpable homicide.

The charge of culpable homicide was put to the accused and he pleaded guilty. The defence was asked whether it had explained the essential elements as well as the agreed facts to the accused and Mr Makombe confirmed. Accused was accordingly found guilty of culpable homicide. Mr Makombe in mitigation cited the recently decided case of *State v Fredrick Chafadza*¹. Whose facts are almost on all fours with the case in *casu*. The deceased in that case was a friend to the accused, and deceased died as a result of a deflected blow aimed at a third party. There was provocation and an unlawful attack by a third party on the person of the accused. The accused in the Fredrick Chafadza matter was sentenced to a monetary penalty and a suspended prison term on condition of future good behaviour. The court will consider that case in its assessment of sentence in this case.

In assessing sentence, the court has taken into account the mitigatory features and aggravatory factors submitted by *Ms Katsiru* on behalf of the State. They include the following circumstances personal to the accused:

- (a) he is aged 73 years, first offender, he was 72 years at the time of the commission of the offence. Given his advanced age, he has been a law abiding citizen for the greater part of his life.
- (b) he is married and has five children who are all grown-ups.
- (c) he is unemployed, he was retrenched in 1996, he was formerly employed by ZUPCO bus company as a general hand, he has no fixed assets, no meaningful savings.
- (d) he is sorry to what happened, deceased was his friend and now blames himself for causing a friend's death. On the day in question he had taken the okapi knife to peel mangoes. He had partaken a lot of both traditional brew and castle lager. He was ridiculed by a young man Learnmore by calling him by his nickname "*Feyo*" he was punched by the young man when he remonstrated him. He did not plan the offence.
- (e) the accused met all the funeral expenses as well as food. He is still willing to pay damages to the deceased's family since earlier efforts to do so were stopped by the local Chief. He has suffered a social stigma for causing someone's death.

¹ HMA 27/18 per MAFUSIRE J

On the other hand in aggravation, accused caused the death of a 57 year old unnecessarily, that was in the process of deceased trying to stop accused from assaulting Learnmore. These courts should uphold sanctity of life and the constitutional right to life. The State further submitted that although the accused was advanced in age it urged the court to look at the matter of *S v Chitanga* HH 578/16 where a 94 year old man who had been found guilty of culpable homicide was sentenced to 9 years imprisonment. The State submitted that in this case a custodial sentence was unavoidable.

After taking all the above aspects into account, we have settled for a non-custodial sentence and accordingly accused is sentenced as follows:

The accused is sentenced to a fine of One Thousand Dollars (RTGSS\$1 000-00) or in default of payment, 6 months imprisonment. In addition the accused is sentenced to 1 year imprisonment wholly suspended for 5 years on condition that during that period he is not convicted to an offence involving violence for which he is sentenced to a term of imprisonment without the option of a fine.

National Prosecuting Authority, State's legal practitioners
Makombe & Associates, Accused's legal practitioners