VIOLA MOYO

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
KAMOCHA AND MATHONSI JJ
BULAWAYO 21 FEBRUARY AND 3 MARCH 2011

S Chamunorwa for appellant
T Makoni for respondent

Criminal Appeal

KAMOCHA J: The appellant appeared in the regional court facing a charge of culpable homicide to which she pleaded not guilty but was found guilty despite her protestations. She was sentenced to undergo six years imprisonment of which two years imprisonment was suspended for a period of four years on the customary conditions of future good behavior. Aggrieved by the decision of the regional court she appealed to this court against both conviction and sentence.

After listening to arguments by both her defence counsel and respondent's counsel we dismissed the appeal in its entirety and indicated that our full reasons for so doing would follow. These are they.

In her grounds of appeal against conviction the appellant complained that the regional court did not establish a *nexus* between the death of the deceased and her actions more particularly in that:-

"1. the appellant was in lawful pursuit of the deceased who had broken into her home. At all material times, the appellant's intention was to apprehend the deceased;

2. the evidence presented did not show that the appellant ought to have foreseen that when in lawful pursuit of the deceased, he would enter the dam to avoid apprehension;

3. the choice to enter the dam or not was made deliberately by the deceased juvenile. In this regard, the deceased could have continued on land and gone to his home;

4. there is no evidence that the appellant prevented the deceased from coming out of the water. In the circumstances therefore, the honourable court erred in holding that the appellant had prevented the deceased from coming out of the dam;

5. the honourable court *a quo* erred in finding that the appellant had thrown stones at the deceased when the sole state witness failed to state in clear terms how the appellant had picked up stones in the water while holding her shoes. The state had an opportunity to call further evidence from one Thubelihle Ndlovu to clarify on this issue but did not do so. With respect, there is nothing to choose between the version of the appellant and the state witness, more so when the honourable court *a quo* did not make any findings on the appellant or witness' credibility and demeanor;

6. alternatively, the state did not establish that the effect of the alleged wrongful act of throwing stones towards the deceased was the drowning of the deceased. In this regard, the record indicates that the deceased went under the water twice, after that stones had been thrown towards him, and that he drowned when he went under water for the third time when the appellant was on the other side of the dam;

7. further, the state did not place before the honourable court *a quo* sufficient detail about the size and depth of the dam, the deceased or appellant's familiarity with it. This would have informed the court on the foreseability of death occurring. The evidence suggests that neither the deceased nor the appellant appreciated the likelihood of the deceased drowning. This would explain why the appellant ran to the other side of the dam to wait and apprehend the deceased upon his emergence from the dam; and

8. the honourable court *a quo* misdirected itself in convicting the appellant "because she was an incredulous witness who showed no sign of contrition during the whole trial."

The sentence imposed on her was assailed on the grounds that it was too severe and induces a sense of shock in that:-

"1. the court *a quo* did not place sufficient weight on the mitigatory factors of this matter, and did not consider alternative forms of punishment;

2. the court *a quo* erred in finding that "human life (was) lost deliberately due to conduct (of the accused). By using the word "deliberately" the court *a quo*

elevated the crime of culpable homicide to that of murder and punished appellant as if she had been convicted of murder;

3. the sentence imposed is not in line with other decided cases;

4. the court *a quo* erred in finding, as an aggravating factor, that the deceased's intrusion was innocuous when it was undisputed that the deceased had damaged the appellant's kitchen door;

5. the inquiry into the mitigatory factors was done in a perfunctory manner such that the court *a quo* did not consider the following:-

   (i) that the appellant had been wronged by the deceased juvenile, and was consequently feeling aggrieved which could have clouded her judgment;

   (ii) that the pursuit of the deceased by the appellant was otherwise lawful;

   (iii) whether there was any psychological link between the fact that the appellant is married, aged 32 years and childless in a rural set up and her reaction to the intrusion by the deceased;

   (iv) The appellant's level of education;

   (v) the trauma and stigma associated with a conviction for killing a juvenile neighbour; and

   (vi) the appellant is the sole breadwinner taking care of her blind husband and two orphans."

The deceased was a small boy aged 10 years at the time he met his death. His name was Honest Moyo. The appellant is a woman offender aged 32 at the time she allegedly committed the crime. The deceased was attending school at a school known as Mvundlana Primary School in Tsholotsho.

On 8 May 2009 at about 1100 hours the deceased who was coming from school on his way home broke into the kitchen of the appellant but did not steal anything from there. He was, however, seen by the appellant leaving the kitchen. On realizing that he had been discovered, the deceased ran away in the direction of his parent's home. The appellant gave chase until they got to where the road passes near Manzimahle dam where Pauline Ndlovu and her 10 year child called Thubelihle Ndlovu was washing her clothes.

Pauline Ndlovu – "Pauline" who was the sole state witness told the court that the appellant was her neighbour. She knew deceased as a local child who used to pass near her

home to and from school. She knew his parents. The father worked as Manda Secondary School.

As she was washing her clothes at the dam on the fateful day she saw the boy running with the appellant in hot pursuit. The appellant called at her to catch the boy but Pauline was not prepared to do that. She replied that she was busy with her washing, instead she advised the appellant to give up the chase. She suggested that if the boy had done anything wrong appellant should report him to his father. If she wanted to be compensated for whatever wrong the boy had done she should talk to the father about it. Appellant knew the father.

Her response to such sound piece of advice was that the boy had broken into her kitchen. She said she would not give up the chase before catching the boy and venting her anger, as she went past in hot pursuit. The terrified boy ran into the dam. She still followed him into the water. The witness said she left the point where she had been washing clothes and walked for 10 metres. She called out to the boy to come out of the water when the water was at waist level. The boy heard the witness calling and turned to go back but came face to face with the appellant. He then said "Sister I am sorry, I apologise".

The appellant was angry and would have nothing of that. She picked up two stones the size of a half adult fist and threw them at the boy. She missed her target. The terrified child turned to go towards the deep water in the dam. The appellant went out of the water and said she was not giving up the chase but was going to the other side of the dam to way lay him and catch him if he emerged there.

The witness said the boy went under the water and resurfaced on two occasions but did not resurface when he went under for the third time.

The appellant did not return to where the witness was washing her clothes. On her way home as she was going past the appellant's home she heard her talking from the kitchen to her husband who was combing his hair outside. She asked her what had happened to the boy. She said she did not know as she had not seen him on the other side of the dam where she had waylaid him.

The witness told the court that the appellant's home was about 500 metres from the dam. Meaning that the appellant pursued the boy for 500 metres. She estimated the dam as being 80 metres wide at the point the boy attempted to cross it.

Under cross examination the witness told the court that appellant was very angry as she pursued the deceased. When asked if any of the stones she threw at the deceased hit him she fairly maintained that none of them did but they landed near him. When asked what she herself did to avert the danger to the deceased she said she realized the appellant was very

angry and did not want to get into trouble herself. The appellant had already said she wanted to vent her anger. The witness told the appellant that the boy would not have drowned had she not prevented him from coming out of the water by throwing stones at him. She finally reiterated that if she (appellant) had listened to her advice when she advised her to give up the chase the boy would not have died. The witness testified that there was no bad blood between her and appellant. So she had no reason to give false testimony against her.

In her evidence appellant said all she wanted to do was to catch the deceased and take him to his father. That is clearly false. The reason why she wanted to catch him was to vent her anger by beating him up. She does not deny that she was angry and wanted to vent her anger.

The state's case shows clearly that the appellant having driven the terrified child into the dam went further and prevented him from coming out of the water by throwing stones at him. The child turned from the deep water of the dame and came face to face with the 32 year old appellant and apologized and asked for forgiveness. The child was more reasonable than the appellant who behaved like a heartless mother. One would have expected her to persuade the child to come out of the water when he ran into the dam. Instead she followed him into the water and threw stones at him causing him to flee towards the deep water where he finally drowned. Her actions verge on murder with constructive intent. She must consider herself lucky that she was charged with culpable homicide.

The court *a quo* was correct in preferring the evidence of Pauline to that of the appellant. It was the court's finding that the appellant was very negligent by throwing stones at a terrified 10 year old boy, in deep water and preventing him from coming out of the water.

Pauline was a good witness who had no reason to tell lies against her neighbour. Her evidence reads well. The appellant's complaints in her grounds of appeal are without merit. For instance it was not true to say she did not prevent the deceased from coming out of the water. Neither was it true to say she had not thrown stones at the deceased. Pauline's evidence established these points.

A person guilty of culpable homicide is liable to imprisonment for life or any shorter period. The trial court had contemplated imposing a term of 10 years imprisonment but reduced it to 6 years imprisonment with 2 years imprisonment being suspended on conditions of future good behavior. The sentence cannot be said to induce a sense of shock. It is quite appropriate. A very young life was unnecessarily lost. The offender needed to be adequately punished.

Other forms of punishment would have been inappropriate in the circumstances as they would have tended to trivialise the offence.

This is why we dismissed the appeal in its entirety.

Mathonsi J …… I agree

Calderwood, Bryce Hendrie & Partners appellant's legal practitioners
Criminal Division of the Attorney General's Office respondent's legal practitioners