

THE STATE

Versus

LYDIA CHENYIKA

IN THE HIGH COURT OF ZIMBABWE

DUBE-BANDA J with Assessors Mr Matemba and Ms Baye
GWERU 17 MAY 2021

Criminal Trial

Ms N. Chikuni, for the State

L. Mudisi, for the accused

DUBE-BANDA J: The accused was arraigned before this Court on the 5th October 2020, on a charge of murder as defined in section 47(1) of the Criminal law [Codification and Reform] Act [Chapter 9:23]. It being alleged that on the 28th November 2019, and at Dunning Farm, Mberengwa, the accused person unlawfully caused the death of Memory Shumba (deceased), by assaulting her all over the body with switches, a strap and axe handle intending to kill her or realising that there was a real risk or possibility that her conduct may cause death and continued to engage in such conduct despite the risk or possibility.

The accused tendered a plea of guilty to a lesser charge of culpable homicide. The State accepted such a plea of guilty to culpable homicide. The State tendered into the record of proceedings a statement of agreed facts, which is before court and marked Annexure A. The statement reads as follows:

1. Lydia Chenyika (accused) was aged 34 years at the time of the commission of the alleged offence. She resides at stand number D47 Dunning Farm, Mberengwa in Midlands Province.
2. Memory Shumba (deceased) was aged 15 years at the time she met her death. She was doing form 2 at Dove Secondary School, Mberengwa.
3. The deceased was accused's biological daughter.
4. On 28th November 2019, at around 1800 hours, the accused and deceased were at home together with deceased's three younger siblings.

5. A misunderstanding arose between accused and deceased. The deceased had confirmed to accused that she was indulging in sexual acts with men.
6. This angered accused and she began to assault the deceased with a strap and switches all over the body until the switches broke into pieces.
7. The deceased staggered and went into the bush where she hid herself. The accused searched for the deceased in the bush but could not find her.
8. The following morning accused made a search for the deceased and found her lifeless body lying in the bush.
9. Accused alerted her husband and other villagers and a report was made to the police leading to accused's arrest.
10. The deceased's remains were ferried to United Bulawayo Hospitals where a post mortem report examination was conducted on 2 December 2019 by Dr Juana Rodriguez Gregori. He concluded that the cause of death was: -
 - Cerebral oedema
 - Encephalic contusion
 - Head trauma
11. The accused accepts the evidence of the State witnesses and contents of the post mortem report. The accused denies having requisite intention to kill in the form of *dolus directus* or *dolus eventualis*. Rather, the accused acknowledges that by her conduct aforesaid, she was negligent in causing the death of the deceased.
12. The State concedes to the fact that the accused was negligent in the manner she assaulted the deceased, and therefore accepts the accused's plea of culpable homicide.

Further, the State tendered a post mortem report compiled by a pathologist, Dr. Juana Rodriguez Gregori at United Bulawayo Hospital, on the 2nd December 2019. The post mortem report number 2019, was received by consent and marked Exhibit 1. The findings in the post mortem report list the cause of death as: cerebral edema; encephalic contusion and head trauma. Further the State placed before court the weapons used to assault the deceased. These are: a strap, brown in colour, made of animal skin, measurements: weight - 0,102kgs and length - 0,67m, marked as Exhibit 2. Nine switches, made of wood and dry, marked Exhibit 3A to 3I respectively, with the following measurements: Piece 1: weight - 0,052kgs; length - 0,30m; Piece 2: Length - 0,38m, weight - 0,056kgs; Piece 3: length - 0,44m , weight - 0,054kg; Piece 4: length - 0,32m, weight - 0,054kg; Piece 5: length - 0,38m; weight - 0,032kgs;

Piece 6: length - 0,37m, weight - 0,0330kgs; Piece 7: length - 0,46m, weight - 0,022kgs;
Piece 8: length - 0,49m, weight - 0,022kgs; Piece 9: length - 0,39m, weight - 0,018kgs.

The facts show that the injuries sustained by the deceased were caused by the accused. The post mortem report shows that the injuries inflicted by the accused caused the death of the deceased. In accepting a limited plea of guilty to culpable homicide, the State is conceding that the accused neither had the requisite intention to kill the deceased; nor realised that there was a real risk or possibility that her conduct may cause death. The facts of this case show that the accused assaulted the deceased, first with a strap, and later with nine switches. By assaulting the deceased in the manner she did, the accused negligently failed to realise that death may result from her conduct; or realised that death may result from her conduct and negligently failed to guard against that possibility.

In the circumstances, we are satisfied that the State's concession was properly made, it accords with the facts of this case and the law. On the facts of this case, it cannot be said that the accused is guilty of the crime of murder. In the result; the accused is accordingly found not guilty of murder and found guilty of the lesser crime of culpable homicide.

Sentence

The accused has been convicted of the crime of culpable homicide. This court must now decide what sentence is appropriate for the offence for which accused has been found guilty. To arrive at the appropriate sentence to be imposed, this court will look at her personal circumstances, take into account the nature of the offence she has been convicted of, and factor in the interests of society.

In determining an appropriate sentence, we are guided by section 49 of the Criminal Law [Codification and Reform] Act [Chapter 9:23]. The accused did not lead evidence in mitigation of sentence. She placed the following personal circumstances before the court through the medium of her legal practitioner. She is 35 years old, married, with four minor children, the eldest being 14 years old and the youngest being 1 and ½ months old. She has 5 head of cattle, and a grinding mill. She is not formally employed. She is a first offender. The

court must weigh these mitigating features against the aggravating factors and the interests of justice.

The deceased was only 15 years old at the time she met her death in the hands of the accused. She was accused's daughter. Doing Form 2 at a local secondary school. Accused and deceased had a misunderstanding over the latter's indulging in sexual acts with men. The accused assaulted deceased with a strap and switches all over the body until the switches broke into pieces. The deceased staggered and went into the bush where she hid herself. The accused searched for the deceased in the bush but could not find her. The following morning the accused made a search for the deceased and found her lifeless body lying in the bush.

The post-mortem report shows that the deceased suffered the following injuries, which caused her death: marks of violence: excoriation that extends from the right cheek to the front region of the same side; long ecchymoses in the right side region of the thorax; redounded ecchymosis in the left cheek; to the dissection of the muscles of the thigh right, great hemorrhagic infiltrate was observed. Internal examination: Scalp: Hemorrhagic infiltrate in frontal, temporal and occipital right region. Brain: Encephalic contusion, and signs of Cerebral edema. These are serious injuries indeed. Excessive force was used to cause such injuries.

We factor into the sentencing equation the fact that the accused has been convicted of a serious offence. A life was ended. It is incumbent on this court to emphasize the sanctity of human life. Society frowns at the taking of another human being's life. We note that the accused committed a barbaric act of mindless brutality directed at a helpless and vulnerable child. The crime is rendered all the more serious by the fact that she betrayed the relationship of trust that existed between her and the deceased by turning on her when she was helpless, brutally assaulting her, which assault led to her death. The manner of the beating and the weapons used place this crime on the side of seriousness. The post mortem report shows the seriousness of the assault perpetrated on the deceased. The assault was indeed heavy. The moral blameworthiness of the accused is very high. No child should be subjected to such violence.

In *S v Agnes Chipika* HB 129/17 the court in dealing with an accused mother convicted on culpable homicide for the death of her 14 year old child said:

Her moral blameworthiness is excessively high. She not only assaulted the child for a sustained and prolonged duration. She throttled the child and he eventually fell unconscious. The behaviour is not expected from parents. Parents stand in loco parentis to their children. Parents are the last shelter for their children. The abuse displayed by the accused in this matter is shocking and alarming. There can be no human being, let alone, a parent who would administer such rigorous physical punishment on a juvenile of 14 years. I reject the notion that it is our tradition to chastise young children in order to correct them but subjecting them to extreme punishment. This is not acceptable in a modern society. Parents who are convicted of such offences must invariably expect custodial sentences. This court would be setting a wrong precedent if a sentence other than a custodial one were imposed. These courts would fail in their duty of upholding the sanctity of human life if a sentence of community service were imposed in this matter. The sentence this court imposes must be just and fair and must meet the ends of justice.

I agree with this observation and it applies with equal force in this case.

The sentence serves also to signal that such crimes will not be tolerated, that there is a significant and serious consequence to be suffered by the perpetrator. In the circumstances, a non-custodial sentence will trivialize an otherwise serious case. Notwithstanding the presence of mitigatory factors, and being a mother of a young baby, a sentence of effective imprisonment is warranted in this case.

We are of the view that the following sentence will meet the justice of this case: the accused is sentenced to 3 years imprisonment of which 1 year imprisonment is suspended for 5 years on condition the accused does not within that period commit an offence of which an assault or physical violence on the person of another is an element and for which upon conviction she is sentenced to a term of imprisonment without the option of a fine.

National Prosecuting Authority, state's legal practitioners
Mutendi, Shumba, Mudisi Legal Practitioners, accused's legal practitioners