

THE STATE
versus
SILENT KAZEMBE

HIGH COURT OF ZIMBABWE
MUSAKWA and MAFUSIRE JJ
HARARE, 15 April 2015

Criminal Review

MAFUSIRE J: The accused pleaded guilty to, and was convicted of, culpable homicide by the regional magistrate court. He was sentenced to seven years imprisonment of which one year was suspended on condition of good behaviour.

I feel the sentence was so manifestly excessive as to induce a sense of shock if regard is had to the circumstances of the offence and the mitigatory features.

The deceased was 66 years old. The accused was 30. Both had been at a beer drink. There had been several other people. The deceased had been drunk. The accused had slightly been drunk. The accused had struck the deceased on the head with a ½ kg piece of rock. According to the post mortem report, death had been due to severe head trauma with intracranial haemorrhage.

It seems the assault had not been premeditated. It had followed what to me had been sustained provocation of the accused by the deceased. At an earlier occasion the deceased had himself assaulted the accused by kicking him in the leg. However the issue had been resolved amicably. The deceased had ended up apologizing to the accused. The deceased had left the beer drink for home but had later come back. Upon arrival at the beer drink he had called out the accused from the kitchen where the accused had been dancing to some music. As the accused came out, the deceased had struck him with a chain on the head. This had caused a cut. It had led to severe bleeding. The accused had gone back into the kitchen and had shown the other patrons the blood that was oozing from his head. He had then come out and gone after the deceased. He had caught up with the deceased just on the edge of the homestead. He had picked the ½ kg granite rock and had struck the deceased once on the forehead. The deceased had died in hospital the following day.

It seems to me the court *a quo* paid little attention to the aspect of provocation. As the court probed that issue, the accused stated that he was slightly drunk and that if he had been completely sober he probably would have managed to control himself and would not have succumbed to the provocation. The court said that the accused had been negligent; that he had struck the deceased on a sensitive part of the body; that people should be discouraged from taking the law into their own hands and that the accused could have reported the matter to the police if he had felt aggrieved.

Ideally the accused should have controlled himself. He did not. But that is why he had pleaded guilty and had been convicted. In mitigation, the issue of provocation should have loomed large. In assault and murder cases provocation, where established, assumes great importance. In murder cases in particular, the charge reduces to culpable homicide even where the killing is intentional: see *S v Nangani* 1982 (1) ZLR 150 (SC) and *Tenganyika v R* 1958 R & N 228 (FSC). Provocation reduces the mental element. Where it does not amount to a defence, it may be an extenuating circumstance and a mitigating factor; see *Nangani's* case, at p 159.

A provoked man loses the power of self-control. In *Nangani's* case it was noted that provocation may go beyond a man's endurance. It may render a man unable to form an intention to kill. The court, at p161, said:

“The provocation must be such as to have actually caused the accused to have lost his self-control, though not necessarily his capacity to intend to kill. The provocation must also have been such that in the circumstances an ordinary man would have lost his self-control and acted in such a manner.”

In that case a verdict of murder and a sentence of seven years' imprisonment on the man who had intentionally shot and killed his customary law wife whom he had found in bed with another man, was, on appeal, reduced to culpable homicide and the sentence to five years imprisonment.

In *S v Nhongo & Ors* HH 52 – 03 the three accused were each sentenced to two seven year terms of imprisonment for the two counts of culpable homicide which had arisen out of an unprovoked but sustained and brutal assault on the two deceased persons at some political gathering.

In *S v Burdett* 1996 (2) ZLR 658 (S), a fine of \$1 500 or three months' imprisonment, plus two months imprisonment which had wholly been suspended was confirmed on appeal

for a charge of culpable homicide where the accused, a farmer, had shot and killed a poacher on his farm who had been running away.

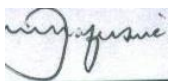
In *S v Badza* HH 73/2001 two years' imprisonment of which one year was suspended was imposed for the negligent discharge of a fire-arm.

In the present case there had been no premeditation. The violence had happened on impulse. Furthermore, the accused had been in a state of moderate drunkenness as a result of the alcohol he had taken. That would have diminished his sense of judgment.

Furthermore, not only had the accused assisted at the deceased's funeral with cash and a beast, but also he had been charged three beasts as compensation. He did not waste the court's time as he had pleaded guilty. In my view, if all such aspects had been given due weight the appropriate sentence should have reduced considerably. I consider that the failure by the court to give due weight to the mitigatory features was a misdirection.

In the premises the sentence of seven years' imprisonment of which one year was suspended for five years on condition of good behaviour is hereby set aside and substituted with a sentence of three years imprisonment of which one year imprisonment is suspended for five years on condition that during that period the accused does not commit any offence which involves the perpetration of violence on the person of another and for which, upon conviction, he is sentenced to a term of imprisonment without the option of a fine.

15 April 2015



MUSAKWA J: agrees