

THE STATE
versus
ZIVANAI KARUGA

HIGH COURT OF ZIMBABWE
MAWADZE J
HARARE, 15 March 2016

ASSESSORS 1. Mr Mhandu
 2. Mr Barwa

SENTENCE

G. Guni, for the State
P Mashiri, for the accused

MAWADZE J: The accused facing the charge of murder as defined Criminal Law (Codification and Reform) Act [*Chapter 9:23*] but pleaded guilty to the charged of Culpable Homicide as defined in s 49 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. The limited plea of guilty was accepted by the State and the matter proceeded on the basis of statement of agreed facts.

The agreed facts can be summarised as follows;

On 13 December 2011 the 41 year old accused left his wife at their residence at Tengwe Farm in Hurungwe intending to visit his brother's rural home in Guruve but failed to get bus fare and returned home. Meanwhile the accused's wife had invited the 60 year old deceased to the matrimonial house believing that her husband had gone to Guruve and the two were locked in accused's house in one of the rooms. The accused knocked at the room for some time and when his wife opened the door she sensibly fled from the scene leaving the accused to confront the paramour. A fight ensued between the accused and the deceased. The deceased used handcuffs and clenched fists to attack the accused and in turn the accused used a wooden log and a brick. In the ensuing fight the deceased was pushed by the accused and his head hit against the wall. The deceased fell unconscious and efforts by the accused to

resuscitate him by pouring buckets of water were futile as deceased was pronounced dead on arrival at the hospital. The cause of death was the head injury as per the post mortem report.

In assessing the inappropriate sentence we have endeavoured to balance both the mitigatory and aggravating factors of this case.

The offence of culpable homicide arising from violent conduct remains a very serious offence. This court had the duty to protect life as enshrined in s 48 (1) of our Constitution. It goes without saying that once a life is lost it cannot be replaced. No person therefore has any right to take the life of another whatever the circumstances are.

It is accepted in terms of s 239 (1) of the Criminal Law (Codification and Reform Act) [*Chapter 9:23*] that provocation is a partial defence to the charge of murder. Further it is also a mitigatory factor. However it is important that people should be encouraged to overcome emotions and not to act outside the law as a result of provocation. While adultery remains a civil wrong it can never be a justification to take the life of another. There are legal remedies provided in our law for adultery like divorce and or a claim for damages rather than to resort to take the law into one's hands causing the loss of life. This would not solve but compound the problem. There is therefore great need to pass a deterrent sentence in this case.

Be that as it may we have considered the mitigatory factors in this case which include the accused's personal circumstances and factors surrounding the commission of the offence. The accused pleaded guilty to the charge and did not waste the court's time. An unnecessary trial has been avoided and witnesses have been excused thus saving the State's resources. This matter has been finalised in a short period of time hence contributing to the swift administration of justice. It is also a sign that accused is contrite and he offered to pay compensation to the deceased's family.

The accused is a first offender and the hope is that he would reform and desist from further crime. A rehabilitative rather than a retributive sentence is called for. The accused's marriage has collapsed as a result of this case thus adversely affecting the accused's three children who are all minors. It has been submitted in accused's favour that his ex-wife is currently in hospital hence he is the one looking after the children.

As a peasant farmer with neither savings nor assets the accused's children survives on his manual labour. A custodial sentence would adversely affect his dependants who also include three children of his late brother.

While the pre-trial incarceration period of 7 months the accused suffered cannot be said to a very weighty mitigatory factor the court will nonetheless consider it.

The facts of this case are clear that the accused was greatly provoked. The infidelity of accused's wife was laid bare before the accused. This court cannot turn a blind eye to the frailties of human kind especially in relation to matters of the heart. It would therefore be wrong to adopt an armchair approach and treat the accused as a super human being who would not have succumbed to such provocation. It is clear that the accused was betrayed by his wife who broke their marital vows the very same day the accused left the matrimonial home. To make matters worse the accused's wife invited another man into their bedroom.

The facts of that case show that the deceased was not only a victim of accused's aggression but he fought the accused. It is therefore rather unfortunate that during the fight deceased was pushed and he fatally hit his head against the wall. It is in accused's favour that after he realised that deceased had been severally injured he tried to offer help but this was unhelpful.

In that view this is a rather unusual case which calls upon this court to temper justice with mercy. The frailties of human character are very clear in this matter. A sentence of a fine or community service would trivialise a rather serious offence and send wrong and harmful signals to the public. On the other hand an effective custodial sentence would amount to turning a blind eye to very important mitigatory factors.

In the result the accused is sentenced to 3 years imprisonment wholly suspended for 5 years on condition the accused does not commit within that period any offence involving the use of violence upon the person of another for which the accused is sentenced to a term of imprisonment without the option of a fine.