

STATE
versus
EDMORE KARADZANGARE

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 18, 19 & 20 July 2016

Assessors: 1. Mr Chidyausiku
 2. Mr Barwa

Criminal Trial – Murder

Ms *F Zacharia*, for the State
Ms *S Evans*, for the accused – *pro deo*

CHITAPI J: The accused was charged with murder as defined in s 47 of the Criminal Law [Codification & Reform] Act, [*Chapter 9:23*]. It was alleged against the accused that on 24 December 2015 at Muringamombe Primary School, Shamva, he unlawfully assaulted Meggie Mariko with open hands, pushed her against the wall and strangled her resulting in her death.

When the charge was put to the accused and the court thereafter asked him whether he understood it, he responded as follows; “Yes, but it was not my intention to kill her”. The court entered a plea of not guilty. Ms *Evans* for the accused tendered on behalf of the accused a guilty plea to the lesser offence of culpable homicide which is also a competent verdict on a charge of murder. Ms *Zacharia* accepted the tendered plea of guilty to culpable homicide.

Both counsel advised the court that they had crafted a statement of agreed facts which they tendered to the court. The statement of agreed facts was read into the record and accepted as Annexure A. The court sought and received confirmation from Ms *Evans* that she had explained the elements of the charge and the agreed facts to the accused and his agreement with the same. The court formally convicted the accused of culpable homicide as defined in s 49 (a) of the

Criminal Law (Codification and Reform) Act. In addition to the statement of Agreed facts, the State also produced with the consent of the accused person given through his counsel the autopsy or post-mortem report compiled by the doctor after examining the remains of the deceased.

The post-mortem report was produced in terms of s 278 (1) of the Criminal Procedure & Evidence Act [*Chapter 9:07*]. The report which the court accepted in evidence as exh 1 was prepared by Doctor T Jabangwe following his examination of the remains of the deceased on 20 February 2016 at Parirenyatwa Hospital. The request for examination was made by Zimbabwe Republic Police Officers from Shamva Police Station and deceased's family members who identified the remains of the deceased. The doctor is employed as Registrar, Pathology. The highlights of the doctor's report are that:

- the deceased's body was wrapped in 3 layers of sheets tied with a rope 3 X 1cm in thickness
- the body parts were in various degrees of decomposition with maggots coming out of the body and also moving round the sheets
- the elbow bone was exposed with the skin eaten up by maggots
- the skull bones were exposed and there was no bleeding from the skull
- the cause of death was indeterminate because of the advanced state of decomposition of the remains

The material facts of the case which arise from the statement of agreed facts can be summarized as follows:

1. The accused and the deceased were of about the same age (32 years). The accused was unemployed whilst the deceased was a student teacher at Maringamombe Primary School Shamva. The two stayed together at the school and were husband and wife with the latter being heavy with child and in her eighth month of pregnancy.
2. On 24 December 2015 the couple had a domestic altercation which started around 5:00pm and continued during the night extending into the morning of the following day. What triggered the dispute was not quite disclosed to the court even when it put questions to the accused during mitigation and aggravation.
3. Albeit the trigger of the domestic quarrel not having quite been established it was accepted in the agreed facts that in the course of arguments between the couple, the

deceased accused the accused of being infertile. The accusation infuriated the accused who all along held the belief that he was responsible for the deceased's pregnancy and was looking forward to fatherhood of his first child.

4. Following the verbal exchanges, the accused decided to take leave of the house and the deceased and started to pack his clothes. The deceased then ordered him not to remove any clothing from the house since the clothes had been bought by her as the accused was unemployed.
5. In a fit of anger, the accused then turned physical on the deceased. He assaulted the deceased with open hands and threw her against the wall. When she hit against the wall, the deceased fell down. When she had fallen down the accused throttled her on the neck until she was still. He then left her lying on the mattress.
6. The accused proceeded to the local business centre and spent the day drinking alcohol. He returned to the couple's house at night and discovered that the deceased had died. The accused wrapped the deceased's body in sheets and secured the wrapping using a rope. He carried the deceased's body out of the house and buried it in shallow grave which he dug some 80 – 100 metres away from the house.
7. The body of the deceased was discovered by another person on 18 January 2016. Investigations were then carried out and they culminated in the arrest of the accused on 19 January 2016.

It was on the basis of the summarized facts above that the plea bargaining between the State and defence counsels and the grounding of a plea of guilty of culpable homicide was based and the court recorded and accepted the facts as such.

In mitigation the accused's defence counsel submitted that the accused was a first offender and last born in a poor family of six siblings, the accused's parents being both alive but above 70 years of age. The parents are invalids in that the accused's father suffered a stroke and the accused's mother suffers from swollen legs. It was however not submitted nor suggested that the accused was responsible for the upkeep and welfare of his parents. In such circumstances it is the view of the court that the accused's incarceration would not affect the livelihoods and

welfare of the parents. The accused himself does not have any children of his own nor other dependants.

It was further submitted that he accused loved his wife dearly. He was not a person of violent disposition and was not previously involved in domestic violence. It was submitted that his relationship with the deceased was admirable and that the accused was sorry for the incident. He blamed his out of character reaction on provocation and that in assaulting his wife, death was a consequence that the accused did not contemplate. When the deceased lay still after the accused had assaulted her, he thought that she was feigning her condition. He only panicked when upon his return, from the beer drink, he found the deceased in the same position that he had left her. He then in that state of panic wrapped up the deceased, carried her out of the house and buried her in a shallow grave.

It was also submitted on the accused's behalf that the accused was sorry and remorseful. He was suffering psychological trauma. He had hoped to be a father to his first child but his dreams had been shattered. He has been in custody since his arrest in January 2016. He however had requested his family members to approach his in-laws and try and make peace between the families. His family and himself were persons of poor backgrounding and efforts to compensate the deceased's family were hampered by poverty. The accused however wished for forgiveness from his in-laws.

The accused's counsel whilst acknowledging the sanctity of human life submitted that a proper sentence would be one which should rehabilitate the accused. It was also submitted that the accused was HIV positive. It was also argued that a rehabilitative sentence would afford the accused a timely release from prison so that he makes peace with his in-laws. The accused's counsel referred the court to the following decided cases in this jurisdiction: *S v Mbano* HB 114/2015; *S v Makombe* HB 110/2015; *S v Nkomo* HB 68/2015; *S v Sibanda* SC 245/13 and *S v Siluli* SC 1/2016. Counsel for the accused advocated for a prison term of 3 – 4 years as befitting in this case.

Ms *Zacharia* for the State submitted in aggravation that the accused had committed a very serious offence of taking away his wife's life unlawfully. She argued that the accused failed to behave as a gentleman or to keep his emotions under control. Although the accused was a first offender, he had started at the deep end. Counsel submitted that the accused's degree of moral

blameworthiness was high because he tried to conceal the offence and buried the deceased in a shallow grave. Counsel further submitted that the negligence of the accused did not only manifest itself in the manner of assaulting the deceased but in not taking steps to satisfy himself whether or not the deceased needed medical attention. He just abandoned the deceased after she had fallen down from the assault and was lying still. Counsel urged the court to impose a custodial sentence on the accused, such sentence being in the range of 10 years as a mark of disapproval of people who resolve disputes through violent means. Counsel referred the court to the cases of *S v Ncube* HB 162/2015 and *S v Sibanda* (*supra*) cited by defence counsel.

After the State counsel had rested her submissions in aggravation, the court considered it necessary for purposes of gathering more information which would assist it to properly assess sentence to put questions to the accused. Such a procedure is provided for in s 271 (5) of the Criminal Procedure and Evidence where an accused has been convicted of an offence following a guilty plea. The section provides as follows;

“271 (5) where an accused has been convicted in terms of this section, the prosecutor and the court may, whether or not he gives evidence, question him with regard to sentence and, if the accused is represented by a legal practitioner, his legal representative may thereafter question him subject to the rules applicable to a party re-examining his own witness.”

Note must be taken that the questions which the prosecutor and the court may put to the accused in terms of this section must be relevant to sentence and not conviction. The provisions of this section must be used sparingly and only in circumstances where the prosecutor or the court hold the view that there are pertinent facts relative and material to the assessment of sentence which the accused needs to shed light on. If not properly invoked and utilized, there is a danger that the procedure may degenerate into a mini trial and some questions if not properly measured may solicit answer which may lead the court to reconsider its verdict as the answers may raise a defence. It is also admissible where the accused is represented to elicit the relevant facts which need filling up by directing questions to the accused's counsel who can always be approached by his counsel with the leave of the court to solicit the answers. Lastly where the provisions of the section have been invoked and the accused as in *casu* is represented, defence counsel should strictly be guided by rules relating to re-examination. The questions which defence counsel may ask the accused should arise from questions by the prosecutor or the court as the case may be by way of clarifying any points or facts adduced during questioning by the

prosecutor or the court. The procedure is not designed to give the accused's defence counsel a second bite of the cherry to mitigate on sentence or elicit from the accused new facts in mitigation save as the same may arise from questions put to the accused by the prosecutor or the court.

In *casu*, the court exercised its discretion to put questions to the accused and he did respond whilst on oath. In answer to questions by the court the accused stated that he married the deceased in terms of the Marriage Act [*Chapter 5:11*] and the marriage was solemnized by the magistrate on 31 October 2014. He went to school up to O – Levels which he completed in 2001. He did not attain any post O – level qualifications. Asked to shed light on what triggered the altercation between him and the deceased, the accused stated that the two had been scheduled to spend Christmas day at his in-laws place by invitation of the in laws. The deceased woke up very early whilst it was still dark and wanted to start off for her parents' home. The accused tried to persuade her to wait until it was light but the deceased insisted on leaving. This argument then degenerated into further arguments during which the accusations of infertility of the accused were made as well as the allegation that the pregnancy which the deceased was carrying was not fathered by the accused.

Asked to clarify why he buried the deceased instead of simply owning up to other persons since death was unintended, he blamed his actions on fear of his parents, deceased's family, the community and he also blamed his actions on the beer which he had imbibed at the township. He said that he was confused. He only owned up following the discovery of the body by a third party. He said that he used a hoe to dig the shallow grave and buried the deceased's body at night. The defence counsel asked the accused to tell the court what he had to say about his behavior and he said that his actions were unexpected and he needed to compensate the deceased's family.

The sad facts of this case present yet another addition to the endless list of homicide cases arising from domestic violence. Such cases are becoming frequent in this court. On 26 February 2007, the legislature gazetted the Domestic Violence Act [*Chapter 5:16*]. The rationale for enacting the said Act was to protect and also afford relief to victims of domestic violence following the upsurge in such cases. In this court's view, legislation and the courts alone cannot stop or tame the tide of domestic violence. Domestic violence consists in a behavioral pattern of

assertive or coercive behaviors that intimate adults employ against each other as a show of power and/or authority in a relationship. This is done through physical, sexual, emotional and economic abuse among other manifestations. It is this court's view that our society must strive towards achieving a zero tolerance for domestic violence. To achieve this goal communities and institutions across the divide should preach against domestic violence. There should be respect for our cultural values. Spiritual and community support is invaluable as is promotion of counselling and mediation as instruments of dispute resolution. One can end up writing a treatise on domestic violence as it is a topical and varied topic. The bottom line is, in the view of this court, respect for one another and keeping emotions in check. The death of the deceased and the unborn 8 months fetus was tragic in this case and quite unnecessary.

The nature of the quarrel between the accused and the deceased though touchy did not call for the use of violence on the part of the accused. The deceased's verbal outburst that the accused was infertile cannot have been a whole hearted accusation given that the parties were married and had been staying together for a long while. The parties had married officially in October 2014. An accusation that the accused was infertile must have been uttered to simply hurt his ego because it would have been tantamount to confessing that the deceased had an extra marital relationship. Such a confession is not easily made by any sane woman who is married. The deceased also further hurt the accused's ego by demanding that he should not take away any items of clothing because he did not buy the clothes as he was unemployed. The deceased did not chase away or order that the accused should leave. This can only mean that she still was interested in the continuance of the relationship. The accused's use of force was not only uncalled for. It was not measured because he even threw the deceased against the wall. As if this was not enough, he went on to throttle the deceased. Throating a person causes such person not to breathe. The deceased after being throttled became helpless and lost consciousness. The accused thought that the deceased was playing up feigning unconsciousness. It was grossly negligent on the accused's part to think that the deceased was feigning unconsciousness yet the accused had throttled the deceased. It is arguable that the deceased could well not have been convicted of murder as defined under s 47 (1) (b) on the basis that he ought to have realised that by engaging in an assault upon the deceased in which he used his hands, threw the deceased against the wall and proceeded to throttle her, that death could result from his conduct and

proceeded in so acting. The nature of the provocation which the accused alluded to as having made him assault the deceased was not in the circumstances such as should have made him lose his head. In fact he only lost his head it would appear after the deceased had ordered him not to pack his clothes as he had not bought them. His reaction to the accusation of infertility was to decide to take leave of the house which was reasonable. The court will however accept that the totality of the provocative acts or utterances by the deceased would have had a cumulative effect. The circumstances of this case nonetheless remain borderline between murder and culpable homicide and the accused benefited from the doubt.

Section 48 of the constitution prescribes that the right to life is a fundamental human right and such right is the first of several fundamental human rights listed in the section. Section 49 of Criminal Law (Codification and Reform) Act complements the importance attaching to the fundamental right to life by providing stiff sentences for culpable homicide. The sentence for culpable homicide ranges from imprisonment for life or any period and includes the imposition of a fine which is up to or exceeds level 14 or both a term of imprisonment and a fine. The offence is therefore viewed seriously by the legislature and it indeed is. A lost life cannot be salvaged once lost. It is therefore important to respect the sanctity of human life.

The court has been referred to several cases by counsel and been urged to use the cases as a guide. The cases have been considered but they deal with different circumstantial scenarios. The court's view is that there is no straight jacket formula for sentencing a convicted person for an offence like Culpable Homicide. This is why the legislature provided a range which however prescribes a maximum penalty being imprisonment for life. The conventional or comparative approach to sentence does not in cases of this nature provide a useful guide. The court is of the view that the comparative approach is more suited to offences of dishonesty like thefts, frauds and kindred offences where value of loss is quantifiable.

In the present case, the court considers that the combination theory in the assessment of sentence will best serve the interests of justice. The combination theory connotes a consideration of the offence, the offender and the interests of society. See *S v Zinn* 1969 (2) SAS 537A. In considering the offence, it is clear that the offence is a serious one. The court has considered the accused's degree of culpability in committing the negligent act. The extent of his deviation from societal norms of reasonable conduct in the circumstances of the case was gross. He beat up his

defenseless wife, threw her against the wall and throttled her. He left the deceased helpless or unconsciousness. Apart from the beating, the accused did not do anything to ascertain whether the deceased had not been seriously injured. The accused did nothing to prevent the consequences of his conduct. It for this and other reasons that the court considered that the accused's degree of culpability or negligence was gross. Relevant to this finding is the fact that such gross negligence necessarily connotes the extent of the accused's deviation from the norms of reasonable conduct in the circumstances and the foreseeability of the consequences of the accused's negligence.

The accused himself was said to be traumatized by the offence. He is HIV positive. Fortunately medicine has now made inroads and there is medication which controls the condition. Being HIV positive is no longer a sure death sentence as it used to be. The accused pleaded guilty and desires to make peace with his in laws. He acted in a very callous manner through. He conducted a private burial of the deceased's body and lied about the incident including reporting that the deceased had visited the accused's sister to collect preparatory clothes for the expected baby. The accused at 32 years still has years of life before him everything being equal. He should be given a chance to reintegrate into the society and hopefully mend his errant behavior.

With regards to societal interests, it must be borne in mind that to a large extent criminal law exists as a body of law which performs the function of being a vehicle to coerce or cajole members of society to abstain from engaging in conduct which injures societal interests. Society expects crime to be investigated, prosecuted and adequately punished. The offence of culpable homicide being based in gauging accused's negligent conduct being measured against what the society would regard as reasonable must of necessity present itself as an offence of public interest. A proper sentence for culpable homicide depending on the circumstances of each case must not be unduly lenient nor unduly harsh. It must mirror the society's abhorrence or disapproval of the accused's conduct. The sentence should be one that reflects that negligent transgressions in the conduct of members of society gets punished adequately.

Sentencing fairly and appropriately in cases of culpable homicide presents a headache for the sentencer because culpa may have been slight yet it results in irreversible harm, being death. Whilst punishment should acknowledge the sanctity of loss of life which is inherently an

aggravating feature, this should not overlook the fact that it is really the degree of negligence exhibited by the accused rather than the consequence which must fall for censure. Those who have lost a relative will always demand retribution. The court whilst sympathizing with them must perform its duty nonetheless of achieving a proper balance between conflicting interests.

The accused's conduct was deliberate. The deceased's death did not come about through the consequences of oversight or carelessness on the part of the accused. The deceased met her death in the course of the unlawful attack perpetrated upon her by the accused. The accused assaulted the deceased with open hands threw her against the wall and choked her. Deceased did not fight back.

As already indicated, there is an upsurge of cases of domestic violence resulting in death. The cases concern men as much as they concern women behaving violently. The courts in such circumstances should be seen to be passing deterrent sentences.

Considering the accused's degree of culpability or level of negligence which has been found to be gross and taking into account all the circumstances of the case involving mitigating and aggravating circumstances and societal interests, an appropriate sentence in this matter is as follows:

The accused is sentenced to 12 years imprisonment of which 4 years imprisonment is suspended for 5 years on condition that the accused is not within that period convicted of an offence involving the unlawful taking away of another person's life for which he is convicted and sentenced to imprisonment without the option of a fine.

National Prosecuting Authority, for the State
Mabuye Zvarevashe, accused legal practitioners pro - deo