

THE STATE

versus

THULANI NCUBE

HIGH COURT OF ZIMBABWE
MAWADZE J,
MASVINGO, 8 MARCH, 2018

Assessors

1. Mr Dauramanzi
2. Mr Nish

Criminal - Sentence

Mrs Busvumani for the state
N. Mazula for the accused

MAWADZE J: The accused was initially facing a charge of murder as defined in s 47(1) of the Criminal Law (Codification and Reform Act) [*Cap 9:23*] but now stands convicted of a permissible verdict of contravening section 49 of the Criminal Law (Codification and Reform Act) [*Cap 9:23*] which relates to culpable homicide. This was after both counsel found each other and the matter proceeded by way of a statement of agreed facts.

The agreed facts which inform the charge are as follows;

The 43-year-old accused who had gone to a local hospital with his sick child returned home to midnight in Tagovegwa Village, Sorelele, Chief Mazhetese, Mwenezi, Masvingo. The 21-year-old now deceased was apparently in love with the accused's 20-year-old daughter Sithulisiwe Ncube who was married and had a child. The accused's said daughter had been

returned to her parents' home due to some undisclosed issues with her husband, which issues were yet to be resolved. She was therefore committing adultery right under the nose of the accused her father at the accused's homestead.

The now deceased on that night of 8 August 2017 had sneaked into the bedroom of accused's daughter in the absence of the accused and his wife. When the accused and his wife returned home at midnight unannounced the accused's daughter panicked and covered the now deceased with a dish and a blanket. Unfortunately, the accused upon entering his daughter's bedroom with a torch to leave his sick son who shared the same bedroom with his daughter he found the now deceased whom he did not know. A scuffle ensued as the now deceased tried to escape unsuccessfully.

The accused's wife brought some mopani tree switches which the accused used to assault the now deceased all over the body. The now deceased fought back to free himself without success. The assault continued unabated until a neighbour Loyekai Bhamule arrived and identified the now deceased. By then the now deceased had been fatally injured as he had sustained extensive whip last marks on the trunk, buttocks and lower limbs. He had bruises on the neck which was now loose, deformed and hyper mobile. The now deceased passed on at dawn. As per the post mortem report the cause of death is cervical spine fracture and neck trauma.

There is no doubt that this is very serious case of culpable homicide which may be borderline with a case of murder with constructive intent. It entails violent conduct resulting in the loss of now deceased's young life. The sacred nature of human blood cannot be over emphasised and it behoves upon the court to always uphold the sanctity of human life. It is a fact that once a life is lost it cannot be replaced.

It is clear from the nature of the injuries sustained by the now deceased that accused's degree of negligence is very high. Clearly severe force was used to inflict such injuries causing cervical spine fracture and neck trauma. The assault itself was prolonged.

While accused was clearly provoked by the now deceased's conduct public policy demands that people should be able to rein in their temper even under such provocation and avoid such conduct leading to loss of life. The accused should therefore remain accountable for his conduct. It should have dawned upon the accused that it is his daughter who should have invited the now deceased into her bedroom. In any case the accused's daughter was not a

juvenile who was being sexually molested but an adult married woman. This makes accused's reaction or conduct inexcusable and totally unjustified. There is therefore the need for the court to send a loud and clear message to society that violent conduct would never be tolerated and would be met with the full wrath of the law. A deterrent sentence is called for in the circumstances.

We have however not lost sight of the mitigatory factors in this case which were impressively articulated by *Mr Mazula* for the accused with admirable clarity.

The accused's personal circumstances were ventilated. The accused has 3 children, being Sithulisiwe from his first marriage and two other children aged 11 years and 5 years. The family solely survived on his manual labour as he has no meaningful assets or savings. He also was looking after Sithulisiwe's one year one son upon Sithulisiwe's return to his home. The accused's wife is of ill health as she suffers from epilepsy. His absence would greatly compromise her medical condition as he is solely responsible for her medical bills.

In terms of s 238 of the Criminal Law (Codification and Reform Act) [*Cap 9:23*] provocation is indeed a mitigatory factor in assessing sentence in a case of culpable homicide. The accused was indeed provoked when he discovered an intruder inside his married daughter's bedroom who was a stranger to him. The attacked upon the now deceased was therefore not pre-planned or pre-meditated. The accused was just confronted by a provocative situation and acted at the spur of the moment.

The now deceased did not also help matters by trying not only to hide but to escape and thereafter fight back. This should have incensed the accused who felt challenged at his own homestead and in relation to his own married daughter.

It is clear that the accused is contrite. He apologised to the now deceased's family and paid compensation in the form of 12 beasts.

The accused who is a first offender did not waste the court's time raising flimsy defences. The witnesses present did not go through the inconvenience of testifying. The state resources have been saved. This matter has been resolved in a very short space of time. Accused therefore deserve some measure of leniency.

It is also a mitigatory factor that accused has suffered pre-trial incarceration for a period of about 8 months. This should reduce the sentence the court would impose.

We accept that the accused who had no misunderstanding with the now deceased prior to this incident simply found himself in a situation which he could not countenance. The loss of life was therefore not intentionally but a result of negligence. We have been referred to the cases of *S v Abel Sibanda* SC-5-14; *S v Nxobile Ncube* HB 162-15 and *S v Shingirai Hamunakwadi* HH 323-15 to guide us in assessing the appropriate sentence.

It is our view that the following sentence would meet the justice of this case;

The accused is sentenced to 6 years imprisonment of which 2 years imprisonment are 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 accused would be sentenced to a term of imprisonment without the option of a fine.

Effective term: - 4 years imprisonment.

National Prosecuting Authority – counsel for the state

Tsara & Associates – counsel for the accused