

THE STATE
versus
GREAT CHINEMBIRI

HIGH COURT OF ZIMBABWE
MUREMBA J
HARARE, 11 & 19 March 2024

Criminal trial

Assessors: Mr. Chakvinga
Mr. Mpofu

D Chesa, for the State
Z Dumbura & Ms R Madembo, for the accused

MUREMBA J: The accused person stood trial before this court on a charge of murder, as defined in Section 47(1) of the Criminal Law Codification and Reform Act [*Chapter 09:23*] (the Criminal Law Code). The charge stemmed from the death of Hillary Bhenge, which occurred on the 20th of November 2022 at Mashona Queen 2, Mukaradzi, Mt Darwin. The accused entered a plea of not guilty to the charge and also tendered a limited plea of culpable homicide, as defined in section 49 of the Criminal Law Code. During the proceedings, the parties engaged in further deliberations and reached an agreement on certain facts that were common between them. These facts were duly recorded as follows.

1]

“The accused admits to assaulting the deceased on four different occasions on the 20th of November 2022, at Mukaradzi Area Mt Darwin. He assaulted the deceased together with Boyka and Rami, at the deceased’s place of residence; along the way to one Junior’s place; at Brighton Kamunhenga’s place of residence and; at Mashona Queen 2 Mine.

2]

On the 20th of November 2022, the accused, received information that the deceased had stolen his electric cable. The accused then teamed up with one Boyka (true name not known). When the

accused and Boyka arrived at the deceased's place of residence, the deceased tried to run away. He was apprehended by a group of people about 100 metres away from his place of residence. The accused, Boyka and the mob assaulted the deceased indiscriminately all over his body, using open hands, fists and booted feet.

3]

The accused and Boyka then took the deceased to Junior's place. They continued to assault him all over his body using open hands, fists and booted feet, until he confessed that indeed he had stolen the cable and sold it to Brighton Kamunhenga.

4]

The accused and Boyka then marched the deceased to Brighton Kamhunenga's place. Along the way, they met Rami who joined in the assault. The accused, Boyka and Rami took some switches from a nearby Mususu tree and continued assaulting the deceased on the upper part of his body using the sticks and open hands.

5]

The accused was restrained by Honest Mberengwa who was in the company of Bonface Chataika. When Honest Mberengwa and Bonface Chataika left, the accused, Boyka and Rami proceeded to Brighton Kamunhenga's place but did not recover the stolen electric cable. Brighton Kamunhenga denied ever buying an electric cable from the deceased.

6]

Infuriated by not finding the cable, the accused then ordered the deceased to lie on his stomach and they used sticks to assault him on the back.

7]

The Accused in the company of his accomplices, frog marched the Deceased to Mashona Queen 2 Mine. When they arrived, they further ordered him to lie down and assaulted him on the back using the wooden sticks.

8]

After assaulting the deceased, the accused ordered him to leave. The deceased failed to go far and fell about 50 meters from Mashona Queen 2 Mine. He was discovered dead by Maggie Chatizembwa, early in the morning of the 21st of November 2022.

9]

A post mortem examination conducted on the remains of the deceased established the cause of death as right brain hemisphere with subarachnoid haemorrhage and severe head trauma. A report compiled by the doctor will be produced in court as an exhibit.

10]

The death of the deceased was a direct result of the assault he faced at the hands of the accused, Boyka, Rami and the mob. Owing to the circumstances mentioned above, the accused neither had the intention to kill the deceased, nor the realization of a real risk or possibility that his conduct may cause death, and continuing to engage in that conduct despite the risk or possibility. The accused wanted to recover the cable the deceased was alleged to have stolen. From the onset of the assaults, the accused lacked the requisite mens rea to kill the deceased.

11]

In the circumstances the accused was negligent in that he continued to assault the deceased even though it was clear that the deceased was denying the offence of stealing the cable. Further, the accused was negligent in that he continued to assault the deceased when it was clear that he had been seriously injured. Further, he was negligent in that even though the deceased was injured, he did not try to help him get medical attention. The death could have been avoided had the accused not assaulted the deceased or offered help to him upon noticing that he had been seriously injured.

12]

In the circumstances, the accused cannot be found guilty of murder as defined in terms of section 47 (1) of the Criminal Law Codification and Reform Act. The facts reveal a contravention of section 49 of the same Act. Accused therefore has tendered a limited plea of culpable homicide instead of murder and, the State accepts the limited plea. WHEREFORE, the accused prays that he be acquitted on a charge of murder and found guilty of culpable homicide.”

The State accepted the accused’s limited plea of culpable homicide.

Based on the aforementioned facts, we convicted the accused after Mr. *Dumbura* asserted that he had thoroughly explained the essential elements of the offence of culpable homicide to the accused. Mr. *Dumbura* confirmed that the accused fully understood these elements and was unequivocally admitting to the charge of culpable homicide.

Sentencing judgment

Introduction

The accused is a male adult who is aged 32 years. He was charged with the offence of murder as defined in s 47(1) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*].

The Plea

The accused pleaded not guilty to the charge of murder but tendered a plea of guilty to the charge of culpable homicide as defined in s 49 of the Criminal Law Code which plea was accepted by the State. Resultantly, the accused was convicted of culpable homicide.

The relevant facts

The State counsel and the defence counsel prepared a statement of agreed facts which we outlined above and it is on the basis of these facts that we convicted the accused.

The Law

In terms of s 49 of the Criminal Law Code, a person convicted of culpable homicide is liable to imprisonment for life or any definite period of imprisonment or a fine up to or exceeding level fourteen or both. The Third Schedule of Statutory Instrument 146 of 2023 sets the presumptive penalty of 5 years' imprisonment for culpable homicide with aggravating factors and 3 years' imprisonment for culpable homicide with mitigating factors.

The offence in this matter was committed on the 20th of November 2022, before the presumptive penalty came into force on 8 August 2023. It is an accepted rule of statutory construction that enactments which provide for purely procedural matters are not affected by the presumption against retrospectivity and are *prima facie* deemed to apply to both pre and post enactment matters. See *Honda Sales (Pvt) Ltd v Commissioner of Taxes* 2000 (1) ZLR 468 (H). In that case the court addressed the application of legislative provisions related to procedural matters. The applicant company, Honda Sales, had overpaid taxes to the respondent and sought a refund. Initially, the claim for a tax refund had to be brought within three years according to section 7(4) of the Income Tax Act. The applicant missed the deadline. Later, an amendment to s 7(4) extended the claim period to six years and the applicant applied for its tax refund. The question was whether the amendment to section 7(4) applied only to overpayments made since the amendment came into effect or also to claims made before the amendment. The court held that the amendment had

retrospective effect and allowed the refund claim. It held that legislative provisions dealing with procedural matters are taken to have retrospective effect. The amendment to s 7(4) of the Income Tax Act was held to be a procedural law and that as such it operated retrospectively. Referring to Kellaway *The Principles of Legal Interpretation* at p 324, the court said,

“There is a general rule that legislation does not have retrospective effect. Nevertheless: there is an exception to this rule where the legislation deals with the procedural matters which are taken to be retrospectively operative. For instance, where a statute effects procedural changes in actions brought before the court, such changes would apply prima facie to court actions pending and to future ones unless the context of the statute clearly provides otherwise. (my underlining)

The court also referred to the case of *Curtis v Johannesburg Municipality* 1906 TS 308 at 312 where INNES CJ held that:

“[Every] law regulating legal procedure must, in the absence of express provision to the contrary, necessarily govern, so far as it is applicable, the procedure of every suit which comes to trial after the date of its promulgation... Whether the expression is an accurate one is open to doubt, but it is a convenient way of stating the fact that every alteration in procedure applies to every case subsequently tried, no matter when such case began or when the cause of action arose.”(my underlining)

The court went on to say that our Supreme Court has accepted in principle that a law of procedure operates retrospectively. It said that in *Henks Construction (Pvt) Ltd v Zimbabwe Defence (Pvt) Ltd* 1998 ZLR 49 (S), the Supreme Court cited, with approval, the statement by LORD BLACKBURN in *Gardner v Lucas* (1878) 3 App Cas 582 at 603, that:

“Alterations in the form of procedure are always retrospective, unless there is some good reason or other why they should not be....”

The present matter pertains to sentencing guidelines. These guidelines constitute a system of recommended sentences based on the nature of the offence, mitigating and aggravating circumstances. They help ensure consistent penalties for similar offences, promoting fairness and transparency in the criminal justice system. When examining the provisions of the Sentencing Guidelines Regulations S.I. 146 of 2023, there is no indication that they impact substantive rights. On the contrary, it is evident that they address purely procedural matters. This clarity arises from their stated purpose in section 2: ‘to foster public confidence in the criminal justice system by promoting consistency and transformative justice in sentencing and eliminating unwarranted disparities in the punishment of offenders.’ Essentially, the guidelines crystallize pre-existing

sentencing principles and do not introduce new substantive principles into our sentencing laws. Their role is to provide a framework for consistent and fair sentencing decisions. Consequently, the sentencing guidelines fall squarely within the realm of procedural law. This conclusion is further supported by two key points. Firstly, their purpose is to guide judicial officers in determining appropriate sentences, ensuring uniformity by considering factors such as the nature of the offence, the mitigating and aggravating circumstances. Secondly, they prescribe the process for sentencing, obliging judicial officers to adhere to these guidelines during the sentencing procedure to achieve a fair and consistent outcome.

The sentencing guidelines being a procedural law, they therefore operate retrospectively to offences that were committed before their publication. In any case the Criminal Procedure and Evidence Act which is the statute which provides for their promulgation provides in s 334A (9) that:

“As soon as practicable after approving the draft sentencing guidelines, with or without amendments, the Judicial Service Commission shall, subject to subsection (10), submit them to the Minister for publication as regulations in terms of section 389, and upon such publication the courts shall pay due regard to the applicable sentencing guidelines when sentencing offenders and, while not being bound by the guidelines, must, when departing from them in any case, record the reasons for doing so.”

The provision stipulates that upon publication (official release) of the sentencing guidelines, courts must consider and give appropriate weight to the applicable sentencing guidelines when sentencing offenders. In essence, these guidelines serve as a reference point for judicial officers during the sentencing process, ensuring consistency and fairness in the outcomes. The provision explicitly states that upon publication, courts are obligated to pay due regard to the applicable sentencing guidelines when sentencing offenders. Importantly, it does not limit the application of these guidelines to cases committed only after their publication. Instead, I interpret the provision to mean that all offences, regardless of when they occurred, fall under the purview of the sentencing guidelines. Rejecting retrospective application would undermine the very purpose of achieving uniformity and consistency in punishing offenders. By applying the guidelines retrospectively, we maintain fairness and consistency in sentencing. Otherwise, if similar offences committed at different times result in disparate sentences due to changes in guidelines, public trust in the justice system could be compromised. This would defeat the objective to foster public confidence in the criminal justice system by promoting consistency and

transformative justice in sentencing and eliminating unwarranted disparities in the punishment of offenders that is outlined in section 2 of the Sentencing Guidelines Regulations (S.I. 146 of 2023).

I also draw inspiration from the Tanzanian case of *Zadock Maende Elphace v Bunda Town Council* Misc. Land Appeal No. 108 of 2021 on the same subject matter. It further elucidates the point. In that case the appellant, Zadock Maende Elphace, filed a claim of land ownership against the respondent, Bunda Town Council, at the District Land and Housing Tribunal (DLHT) in Musoma. While the suit was pending, the Miscellaneous Amendment Act, No. 1 of 2020 came into effect, amending the Government Proceedings Act under section 6(3). This amendment impacted local government authorities. The court considered the retrospective effect of the amendment and its implications for ongoing cases.

The court held that the 2016 Amendment Act was substantive and not impliedly retrospective. Since there was no express provision for retrospective operation, the court concluded that retrospectivity did not apply to the case. The appellant's claim for land ownership proceeded without the retrospective application of the amendment. This judgment also clarified the stance on retrospective application of procedural law in Tanzania. Reference was made to a plethora of cases on this issue and we refer to the cases hereunder.

In *Benbros Motors Tanganyika Ltd. v. Ramanlal Haribhai Patel* [1967] HCD n. 435 it was held that: -

"When a new enactment deals with rights of action, unless it is so expressed in the Act; an existing right of action is not taken away, but when it deals with procedure only, unless the contrary is expressed, the enactment applies to all actions, whether commenced before or after the passing of the Act." (my underlining)

In *Makorongo v. Consiglio* [2005] 1 EA 247, the Court of appeal quoted with approval the statement of principle made by NEWBOLD J.A. of the defunct East Africa Court of Appeal in the case of *Municipality of Mombasa v. Nyali Limited* [1963] EA 372, at 374 that:

"Whether or not legislation operates retrospectively depends on the intention of the enacting body as manifested by legislation. In seeking to ascertain the intention behind the legislation the Courts are guided by certain rules of construction. One of these rules is that if the legislation affects substantive rights, it will not be construed to have retrospective operation unless a clear intention to that effect is manifested; whereas if it affects procedure only, prima facie it operates retrospectively unless there is good reason to the contrary. But in the last resort it is the intention behind the legislation which has to be ascertained and a rule of construction is only one of the factors to which regard must be had in order to ascertain that intention." (my underlining)

In the *Director of Public Prosecutions v. Jackson Sifael Mtares & Three Others*, Criminal Application No. 2 of 2018 (unreported), the Court of Appeal referred to a passage in a book by A.B. Kafaltiya *Interpretation of statutes* 2008 Edition, Universal Law Publishing Co., New Delhi – India at page 237:

"No person has a vested right in any course of procedure, but only the right of prosecution or defence in the manner prescribed for the time being, by or for the court in which he sues. When the legislature alters the existing mode of procedure, the litigant can only proceed according to the altered mode. It is well settled principle that 'alterations in the form of procedure are always retrospective, unless there is some good reason or other why they should not be.' The rule that 'retrospective effect is not to be given to laws' does not apply to statutes which only alter the form of procedure or the admissibility of evidence. Thus, amendments in the civil or criminal trial procedures, law of evidence and limitation etc; where they are merely the matters of procedure, will apply even to pending cases. Procedural amendments to a law, in the absence of anything contrary, are retrospective in the sense that they apply to all actions after the date they come into force even though the action may have begun earlier or the claim on which action may be based accrued on an anterior date. Where a procedural statute is passed for the purpose of supplying an omission in a former statute or for explaining a former statute, the subsequent statute relates back to the time when the prior statute was passed. All procedural laws are retrospective, unless the legislature expressly says they are not."(my underlining)

In *Joseph Khenani V. Nkasi District Council*, Civil Appeal No. 126 of 2019, CAT at Mbeya (unreported) the Court of Appeal held that:

"Whether or not legislation operates retrospectively depends on the intention of the enacting body as manifested by legislation. In seeking to ascertain the intention behind the legislation the Courts are guided by certain rules of construction. One of these rules is that if the legislation affects substantive rights, it will not be construed to have retrospective operation unless a clear intention to that effect is manifested; whereas if it affects procedure only, prima facie it operates retrospectively unless there is good reason to the contrary. But in the last resort it is the intention behind the legislation which has to be ascertained and a rule of construction is only one of the factors to which regard must be had in order to ascertain that intention."

In this case the Court of Appeal was persuaded by the principle as laid down in the decision of the Privy Council in *Yew Bon Tew v. Kendaraan Bas Mara* [1983] 1 AC 553 in the following terms:

"Apart from the provisions of the interpretation of statutes, there is at common law a prima facie rule of construction that a statute should not be interpreted retrospectively so as to impair an existing right or obligation unless that result is unavoidable on the language used. A statute is retrospective if it takes away or impairs a vested right acquired under existing laws, or creates a new obligation, or imposes a new duty, or attaches a new disability in regard to events already past. There is, however, said to be an exception in the case of a statute which is purely procedural, because no person has a vested right in any particular course of procedure, but only a right to prosecute or

defend a suit according to the rules for the conduct of an action for the time being prescribed."(my underlining)

The foregoing Tanzanian cases cement the position that if a law affects procedure, it applies retrospectively, unless the contrary is expressed or unless there is good reason to the contrary.

Reports

The only report that was furnished during the trial proceedings was the post mortem report which showed that the cause of death was right brain hemisphere with subarachnoid hemorrhage and severe head trauma.

The normal range of sentence

In terms of the penalty provision under section 49 of the Criminal Law Code if a person is convicted of culpable homicide, they can be sentenced to imprisonment for life or a specific duration. The court has the discretion to determine the length of the imprisonment based on the circumstances of the case. Alternatively, the convicted person may face a fine. The maximum fine can reach or exceed level fourteen. The specific amount of the fine depends on the severity of the offence and other relevant factors. In other words, section 49 provides for both imprisonment and fines as penalties for culpable homicide convictions. This means that an individual may receive a fine, community service, a specific period of imprisonment, or life imprisonment. The court considers various factors to determine the appropriate punishment. These include the severity of the crime: The seriousness of the offence plays a crucial role. More severe crimes often result in harsher sentences. Past criminal history: an accused's prior criminal record is considered. Repeat offenders may face stiffer penalties. Circumstances surrounding the crime: the context, motives, and impact of the crime are evaluated. Factors like premeditation, violence, and harm caused to victims matter. The court considers the unique circumstances of each case, as well as precedents from similar cases. There should also be adherence to sentencing guidelines: Judicial officers follow sentencing guidelines, ensuring consistency and fairness in punishment. According to the sentencing guidelines, the presumptive penalty is 5 years for offences committed in aggravating circumstances and 3 years for offences committed in mitigating circumstances. The bottom line is that the court's discretion is extensive, given that the penalty provision allows for fines up to life imprisonment.

The mitigating factors

The following mitigating factors were submitted in defence of the accused. The accused is a married man with three children, aged 7 years, 5 years, and one year and four months old. He operates a Gold Mine at Mukaradzi, Mt Darwin, employing 5 full-time workers. Despite his wife's employment, he remains the primary provider for the family. Additionally, he cares for his aged mother, following the passing of his father. Furthermore, the accused supports 5 orphans residing at his mother's place. As a first-time offender, the accused pleaded guilty to the charge, demonstrating contrition. His willingness to negotiate with the deceased's family for damages as compensation reflects remorse and a sense of responsibility. The accused extends his apology to the family, the State, and the court, promising to control his temper in the future.

The aggravating factors

The State presented the following aggravating factors. The accused's conduct led to the unnecessary loss of human life—an innocent person was killed. The deceased suffered through a prolonged attack, enduring assaults on four separate occasions. He was indiscriminately beaten with various weapons, including open hands, fists, booted feet, switches, and sticks. The cruelty and inhuman treatment inflicted upon the deceased were evident. The motive for the assault was the accused's suspicion that the deceased had stolen his electric cable, although no incriminating evidence was found on the deceased. Sensing danger, the deceased attempted to escape but was apprehended by the accused and the pursuing mob. Efforts by Honest Mberengwa and Bonface Chataika to halt the accused's further assault proved futile. The accused disregarded their intervention, displaying a high level of blameworthiness bordering on recklessness. In her affidavit, the deceased's mother expressed immense pain due to the accused's negligent actions. Losing her beloved son, who was also the family's breadwinner, has left her responsible for herself, the deceased's wife, and their three children. The absence of an apology from the accused or sympathy from his family compounds her grief. Although the accused indicated an intention to pay customary damages to the deceased's family, no payments have materialized. Despite the offence occurring in November 2022, the accused's commitment to compensation remains uncertain. The deceased's family recalls indications from the accused's family regarding a customary settlement, but no follow-up occurred. Mr. Farai Charakatenda, the councilor for Ward 12 in Chegutu, had initially agreed to preside over the meeting but the meeting never materialised.

The sentence

This case involves culpable homicide committed in aggravating circumstances. The State's evidence highlights significant factors that outweigh any mitigating elements presented by the defence. The accused's conduct bordered on recklessness. The assault on the deceased was prolonged, occurring between 9:00 p.m. on November 20, 2022, and 2:00 a.m. of the following day. During this time, the deceased suffered four severe assaults, including indiscriminate blows with switches, sticks, open hands, and booted feet. The cause of death was a subarachnoid haemorrhage and severe head trauma in the right brain hemisphere. The motivation behind this brutal assault was the accused's suspicion that the deceased had stolen his electric cable. However, the basis for this suspicion remained undisclosed. Instead of reporting the matter to the police, the accused and his accomplices took the matter into their own hands—an action that defies legal norms. The police are trained to investigate such cases, yet the accused chose a different path, resulting in the tragic death of the deceased. Surprisingly, even when the deceased denied stealing the cable, the accused persisted in the assault until the deceased confessed to selling it to Brighton. However, upon questioning Brighton, he denied any involvement in purchasing the electric cable from the deceased. Despite Brighton's denial, the accused and his accomplice continued to assault the deceased twice more before finally releasing him to go away on his own in the middle of the night. The fact that the deceased managed to walk only a short distance of 50 meters before collapsing indicates severe injuries from the assault. Unfortunately, nobody witnessed his fall due to the darkness. It was only at daybreak that a certain woman discovered his lifeless body. The exact time of his death remains unknown. The tragedy lies in the suspicion that the deceased had stolen the accused's electric cable. However, despite the relentless assaults, there was no concrete evidence linking the deceased to the theft. Furthermore, the defence failed to explain the basis for suspecting the deceased in the first place. Ultimately, the deceased lost his life merely as a suspected thief. Even in death he remains a suspected thief.

The accused does not merit the court's leniency due to the brutal and cruel treatment he inflicted upon the deceased. The severity of the offence demands a more stringent penalty. The defence's suggestion of community service would undermine the justice system, and even a 4-year prison term proposed by the defence would fall short of addressing the aggravating factors. Merely

citing precedent, such as the sentence in *State v Mupakati & Anor* HMT 50/19, is insufficient. A comprehensive comparative analysis of similarities and differences should inform our decision. Given the recklessness and potential murder implications under section 47(1)(b) of the Criminal Law Code, a sentence significantly exceeding the presumptive 5-year imprisonment is warranted. While the accused is a first-time offender, this should not diminish the gravity of the crime. Precedent shows that first offenders can receive custodial sentences, as demonstrated in *State v Zvioneso Chaira & Ors* HH 829/18 (page 17) and *State v Machamba* 1992 (1) ZLR 102 (H). Considering the circumstances of the present case, we will impose a 13-year imprisonment, with a portion suspended pending future good behaviour—a sentence consistent with the State’s recommendation of 10 years’ imprisonment.

Accordingly, the accused is sentenced to 13 years’ imprisonment of which 3 years’ imprisonment is suspended for 5 years on condition the accused does not within that period commit an offence involving violence on the person of another and for which upon conviction he is sentenced to imprisonment without the option of a fine. Effective 10 years’ imprisonment.

National Prosecuting Authority, State’s legal practitioners
Zimudzi and Associates, accused’s legal practitioners