

THE STATE
versus
PHILLIP DUBE

HIGH COURT OF ZIMBABWE
MAWADZE J
MASVINGO, 20 May 2022

Assessors: 1. Mr Mutomba
2. Mrs Chademana

Ms M Mutumhe, for the state
Mr T Mpofu, for the accused

Criminal Trial - Sentence

MAWADZE J: The accused who was arraigned for murder as defined in section 47 (1) of the Criminal Law (Codification and Reform Act) [*Chapter 9:23*] was subsequently convicted on his own plea of guilty of culpable homicide as defined in section 49 of the same Criminal Law Code [*Chapter 9:23*]. This was after both counsel agreed that culpable homicide was the appropriate charge.

After submissions by both counsel in mitigation and aggravation the court realised of the need to lead evidence from the accused in order to have a better understanding of the facts of this matter which are not apparent from the statement of agreed facts.

The 41 year old accused and the then 38 year old now deceased hail from Simbi Village, Chief Mazhetese, Mwenezi.

The now deceased was a son of the accused's brother. The following emerged from evidence adduced from he accused in mitigation by the court. Sometime in August 2021 a son of the accused's brother died in South Africa. Some family members believed the accused had

bewitched that child. They decided to discipline the so called wizard. As a result the now deceased teamed up with one News Dube, Mike Dube and Simbarashe Mapingure at the funeral of the said son and severely assaulted the accused with logs. The now deceased and Simbarashe Mapingure thereafter fled but News Dube and Mike Dube were arrested and charged with the attempted murder of the accused. This matter is yet to be finalised.

The assault perpetrated on the accused was very severe. The accused fractured both forearms, fractured the left hip and sustained a head injury above the left eye. The accused had to be hospitalised at Neshuro hospital and Masvingo General hospital. As at now the accused's left hand is non-functional and he can not do any meaningful manual work with either hand. The accused now walks with a limp as a result of the hip injury and feels excruciating pain while walking. Currently he suffers from constant headaches as a result of the injury on the head which is above the left eye. The court indeed observed the accused's deformed forearms and the scar above the left eye.

We now turn to the statement of agreed facts relevant to the charge in *casu*.

On 29 December 2021, some six months after the brutal assault of the accused the now deceased who was one of the culprits emerged from his hibernation and proceeded to the accused's homestead. Apparently the now deceased wanted the accused to withdraw the attempted murder charge against the now deceased as he pleaded for forgiveness. However, the accused was still nursing the injuries arising from the previous brutal assault. A misunderstanding ensued. The accused said the now deceased became unapologetic. As a result, the accused believed he could be attacked again. In a pre-emptive move the accused assaulted the now deceased using a walking stick which weighed 0,0034kg. The assault was indeed brutal and in-discriminate as the blows landed on both knees, the head, legs and the back. Several blows were delivered inflicting serious injuries on the now deceased who was virtually incapacitated.

The accused realised the severity of the injuries he had inflicted on the now deceased and asked Polite Dube and Phillinon Dube to ferry the now deceased in a donkey drawn scotch cart to Mlelezi police base for the now deceased to be taken to the clinic. However, the now deceased died at the said police base before he could be taken for medical treatment.

The post mortem report indeed confirms the serious and fatal injuries inflicted upon the now deceased. They are listed as follows;

- "1. *Facial and scalp bruising*
2. *Depressed fracture right temporal bone*
3. *extensive bruising of both upper limbs*
4. *multiple lacerations lower limbs.* "

The cause of the now deceased's death is the head injury arising from the assault.

There is therefore no doubt that the accused was negligent in the manner he assaulted the now deceased fatally. The degree of negligence is clearly very high. There is a nexus between the assault and the demise of the now deceased. The conviction on a charge of culpable homicide rather than murder, is appropriate.

In assessing the appropriate sentence, a balance should be struck between the mitigation and aggravating factors.

The accused is a first offender who deserves some measure of leniency. His wife and the three minor children survive on his manual labour. He is a peasant farmer with no meaningful savings or assets.

After realising that he had seriously injured the now deceased the accused tried to ensure that the now deceased got medical help. Further the accused cooperated with the police. In court the accused did not waste time as he pleaded guilty to the charge of culpable homicide which is a sign of contrition.

The accused would forever be tormented by the fact that he caused the now deceased's death who is a close relative. This stigma may live with him forever.

It is aggravating that a life was lost through the accused's violent conduct. While the accused may have felt provoked and threatened by the now deceased this nonetheless should not distract from the sanctity of human life. The duty of the court is also to protect life and dissuade the public from resorting to violent conduct.

The assault the accused perpetrated on the now deceased was brutal, indiscriminate and severe.

The blow on to the now deceased's head was fatal as severe force was exerted. The now deceased succumbed to injuries the same day of the assault. All things equal a deterrent custodial sentence would be appropriate.

The important consideration in our view is whether it serves any purpose to impose an effective custodial sentence on the accused nomatter how minimal. This is in light of the background facts of this matter as already outlined.

To a great extent the now deceased is the author of his demise. After brutally maiming the accused and fleeing from the long arm of the law the now deceased decided to approach the accused.

The accused rightly felt threatened, cornered and provoked. While the accused's conduct can not be condoned it is understandable and well within the frailties of human experience. Further there is no useful purpose which can be achieved by sending the accused to prison. The accused is virtually "a cabbage " so to say. He can no longer perform any meaningful manual labour in prison. He needs constant medical care. Prison officers would simply be burdened by his presence. The accused is also a burden to the fiscus, and he offers no value to our already congested prisons.

In light of all this a wholly suspended prison term is appropriate.

Consequently, the accused is sentenced as follows;

"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 and or negligently causing the death of another through violent conduct and for which accused is sentenced to a term of imprisonment without the option of a fine. "

*National Prosecuting Authority, counsel for the state
Pundu & Company, pro deo counsel for the accused*