THE STATE

Versus

TRUST NDLOVU

IN THE HIGH COURT OF ZIMBABWE
MOYO J with Mr P. Damba and Mr O. Dewa
BULAWAYO 15 FEBRUARY 2024

Criminal Trial

K. M. Goveya for the state
V. Dlamini & T. Ncube for the accused

MOYO J: Accused faces a charge of murder it being alleged that on the 13th of May 2021 between Matankeni and Mafa Village, Chief Marupi in Gwanda, he unlawfully caused the death of Previous Moyo by assaulting her all over the body several times with some switches.

Accused denied the charge and tendered a plea to a limited charge of culpable homicide. The following were tendered into the court record:

a) State summary

b) Defence outline

c) Post mortem report

d) Accused's confirmed warned and cautioned statement

e) 7 switches

They were all duly marked. Accused gave evidence for the defence.

The evidence of all state witnesses was admitted into the court record as it appears in the state summary:

The facts of this matter are largely common cause. Accused and deceased, who was his wife, had a misunderstanding over funds to take care of their children which funds accused had given to deceased and which accused felt deceased had not properly used. Along the way between Matankeni and Mafa Villages, accused assaulted deceased with 7 switches. Deceased later told accused she felt exhausted and complained of her feet being heavy. They decided to

rest. Whilst looking for a place to rest deceased fell on a slope and sustained an injury on the forehead. They later fell asleep, upon waking, accused then discovered that deceased had died.

The post mortem report gives the cause of death as poly trauma, assault. From the facts before us which are all common cause, the accused person cannot be held to have had the requisite intention to commit murder as such intention must be deduced as a matter of inference from the proven facts. The reason for the assault, i.e the weapon used, which is not considered lethal, the fact that the deceased allegedly fell on the ground and hit her head, all cannot mean that as a matter of inference the only reasonable conclusion to draw would be that accused intended death or that he foresaw the possibility of death from his actions but he conyinued nonetheless resulting in deceased's death.

Proven facts from this case are that;

1. That there had been a misunderstanding
2. That he used a certain number of switches. The tendered switches whose thickness or diameter was not given were very thin sticks befitting the typical definition of a switch.
3. That the assault was not prolonged (a fact that the state has not disproved)
4. That after the assault deceased also fell on a slope hitting her head and possibly sustaining further injuries.
5. The marks of violence detailed which are consistent with a switch do not give any serious and obviously fatal injuries for an inference to be drawn that accused must have at that stage had the realization of the risk and possibility of death.
6. The injuries on the head per accused were possibly sustained when the deceased fell down hitting her head.

The online Oxford Dictionary defines echynosis as discolouration of the skin resulting from bleeding underneath typically caused by bruising. Excoriations are defined in the online Oxford Dictionary as a place where your skin is chaffed or scrapped. Looking at all the injuries sustained by the deceased as given in the post mortem report they were all largely bruises, chaffing and scrapping. There are no deep lacerations stated. Haemorrage is bleeding and the parietal and occipital regions are in the head. Whilst this is a serious injury, the state has not

adduced any evidence of how it was inflicted by accused and his version that deceased fell thereby possibly sustaining them stands undisputed. An accused's version is not dismissed merely because he is an accused. In fact an accused person just has to come up with an explanation that is reasonably possible true in the circumstances, it is the state that carries a heavier burden of proof. The state case must be proven beyond any reasonable doubt that accused committed the crime of murder. The state does not do so by building up on assumptions and inferences drawn only with an aim of securing a conviction. Instead, the state must adduce clear and concrete evidence that excludes any other possibility except intention, legal or otherwise.

Professor Feltoe in the *Guide to Criminal Law and Zimbabwe Statutes* 5th Edition at page 96 on the distinction between homicide and culpable homicide that;

> "The question is whether as a matter of inference he did have such foresight despite his denial. He can only be convicted of murder if the only reasonable inference that can be drawn from the facts is that he had legal intention to kill. If there is a reasonable doubt as to whether he had legal intention, he must be given the benefit of the doubt and can only be convicted of the lesser crime of culpable homicide"

In this particular case accused is not even benefiting from any doubt, there is clearly no single fact that the court finds pointing to murder. This is a straight forward matter of negligence where the accused in assaulting the deceased was negligent from the proven facts.

Sentence

The accused is convicted of culpable homicide. He is a first offender. He is a family man and a breadwinner. The deceased was his wife. He has spent nearly 3 years in remand prison since May 2021. The accused assaulted deceased with switches, deceased then fell sustaining further injuries. These courts frown at the loss of life through violence. Members of our society must heed the call on the sanctity of life. Appropriate sentences must be given to ensure that the message is sent out loud and clear. Be that as it may this court has to come up with a sentence that befits the offender, the interests of society and the interests of justice. A sentence in the region of 5 years with a suspended portion would meet the justice of this case. Sentencing is a matter of discretion on the part of the court and each case depends on its own facts. No one jacket fits all kind of sentence can be meted.

In the case of *S* v *Maketo* HB-188-11 the court held that:

> "In my view the appellant has suffered enough and that pre-trial incarceration should be credited to him so that he does not have to serve any further sentence."

In the case of *S* v *Hlahla* HMA-1-21 the court held that:

> "In a proper case where an accused person has suffered from a lengthy pre-trial incarceration period the court would reduce the sentence to be imposed."

The principle was clearly enunciated in the case of *S* v *Difiri* 2001 (2) ZLR at page 411 where it was held that before passing sentence in all cases, the court should enquire whether the accused has been on bail pending trial or on remand. If the accused has been in custody for a lengthy period awaiting trial, that should be taken into account in determining sentence.

In this case the accused has weighty mitigation in his favour *vis-à-vis* the circumstances of the commission of the offence and accused's personal circumstances. Of particular note and importance is that he has already spent 2 years and 8 months in remand prison. He is entitled to that discount lest the ultimate sentence becomes too harsh and disproportionate. Whatever sentence this court imposes, the 2 years and 8 months already spent in pre-trial incarceration must be discounted for the overall sentence to be fair and in line with other cases.

5 years imprisonment with 2 years suspended on the usual conditions would have been the proper sentence but for the time he has already stayed in remand prison which must be discounted. This means that from the effective sentence he would otherwise have gotten, 2 years 8 months should be taken off. That leaves him with 4 months outstanding. An accused person must not suffer a longer jail time at the end of his trial simply because the trial did not commence promptly and he had to spend a long period in pre-trial incarceration.

The accused person was going to have an overall time of 3 years behind bars had he been tried promptly, it does not matter that his trial took long to take off he must still face the same practical punishment he would have been given had he been tried promptly. Of the 3 years he would have faced, he has already done 2 years and 8 months and justice demands that the court factors into the sentence such period. It is for these reasons that he shall be sentenced as follows:

Order

The accused is sentenced to 2 years and 4 months imprisonment. 2 years imprisonment shall be suspended for 5 years on condition that accused is not within that period convicted of an offence involving violence whereupon conviction he shall be sentenced to imprisonment without the option of a fine, that leaves him with 4 months effective.

National Prosecuting Authority, state's legal practitioners
Dube-Banda, Nzarayapenga & Partners, accused's legal practitioners