THE STATE
versus
MUTEURO MUNYUKI

IN THE HIGH COURT OF ZIMBABWE
TSANGA J
HARARE 29 & 30 May 2017

ASSESSORS: 1. Mr Barwa
2. Mr Gweme

Criminal Trial

T Kasema, for the State
T Garabga, for the accused

TSANGA J: The accused was charged with murder, it being alleged that on the 4th day of December 2014 at around 23:00 hours at Kimcote 2, Beatrice he unlawfully and intentionally killed Lovemore Mutaramutswa by striking him all over his body using sticks thereby inflicting injuries from which the said Lovemore Mataramutswa died. He pleaded not guilty to murder but pleaded guilty to culpable homicide.

A statement of agreement facts was submitted by the state and defence counsel which was as follows:

1. The accused and the deceased were not related and were not known to each other. They were introduced to each other by the first state witness Charles Ropowa on the fateful day the 4th of December 2014.
2. They were drinking alcohol together from 4.30pm in the afternoon to 9:30pm in the evening that is Chibuku mixed with spirits.
3. On their way home the accused gave the deceased his Nokia 1200 cell phone and as they approached Zururu plot Kimcote 2, the accused asked from the deceased to give him back the cell phone. However, the deceased Lovemore Mutaramutswa failed to produce the cell phone and a misunderstanding arose.
4. Upon the deceased failing to produce the cell phone and insisting he did not know where he had put it, the accused person commenced assaulting the deceased using a stick that he had plucked from the nearby bushes.

5. The deceased pleaded with the accused to stop assaulting him undertaking to show him where his cell phone was and the accused stopped assaulting the deceased.
6. The deceased failed to produce the phone whereupon the accused unplucked another stick from a nearby bush and resumed assaulting the deceased all over his body. Again the deceased pleaded with the accused to stop assaulting him, again undertaking to produce his cell phone.
7. The deceased again failed to produce the cell phone and accused unplucked a third stick from a nearby bush and resumed assaulting the deceased with it demanding production of his cell phone and tearing his clothes in the process.
8. The accused stopped assaulting the deceased upon realising that he had stopped responding to his demands to produce his cell phone.
9. At this point the accused used the 1st state witness's cell phone to dial his number and his phone rang from some nearby bushes from where he retrieved it and he went home and left the deceased in the bush lying naked and motionless.
10. The following day on the 5th of December 2014 at around 08.00 state witnesses Charles Kopowa and Ashton Chakwenya passed through the scene and saw the body of the deceased upon which they alerted the police.
11. Sergeant Basira attended the scene and caused the body to be conveyed to Chitungwiza Hospital for a post mortem. Sergeant Basira also arrested the accused on the same day the 5th of December 2014.
12. The post-mortem for Lovemore Mutaramutswa and the three sticks used to assault him will be produced as exhibits by consent.
13. From the onset the accused admitted to causing the deceased's death by assaulting him all over his body using the three sticks.

It was agreed that the accused negligently caused the death of the deceased.

Several exhibits were tendered as evidence. The post-mortem report by Dr Roberto Trecu was admitted as exh 1. It showed that the deceased had died of subdural hematoma, subarachnoid haemorrhage, and severe head trauma consistent with assault. The three sticks used to assault the deceased measuring 2m, 84 cm and 76 cm were admitted as exh 2 (a), (b) and (c) respectively. The deceased's tattered clothes from the assault which included a shirt, short and trousers were admitted as exhibit 3.

Defence counsel confirmed that all the essential elements of the culpable homicide had been explained to the accused who had understood them and that the limited plea of guilty to culpable homicide was genuinely made. The court therefore returned a verdict of guilty to the lesser charge of culpable homicide as pleaded on the basis of the agreed statement of facts which showed negligence on the accused's part in causing the death of the deceased.

The accused was said by the state to be a first offender. His defence counsel Mr *Garabga* addressed the court in mitigation. He submitted that the accused had pleaded guilty to culpable homicide and that to that extent he had demonstrated some contrition. This was

also said to be a factor that the court was urged to take into account in arriving at an appropriate sentence. Mr *Garabga* further highlighted on behalf of the accused that he has a daughter who is residing with his maternal grandmother. He has been out of employment from December 2014 when the incident occurred. Furthermore, his state of mind at the time of commission of the offence was also said to be a factor to be taken into account in that together with the deceased they had consumed at least 5 chibuku "scuds" with each scud being 2 litres. Moreover, they had mixed this with spirits. He therefore submitted that there was a strong element of drunkenness at the time the offence was committed. Compounding this drunkenness was said to be provocation arising from deceased's failure to return the accused's phone when requested.

Two case authorities were relied on for persuasive guidance on sentence. *S* v *Chiperi* HH 966/2015 where the accused had struck the deceased with a metal object and had been sentenced to 4 years of which two years was suspended on the usual conditions of good behaviour. The other was *S* v *Kazembe* HH 378 -2015 where an altercation had occurred at a beer drink resulting in the accused hitting the deceased with a stone. The trial magistrate had sentenced the accused to seven years with one year suspended. This had been reduced by the High Court to three years imprisonment of which one year was suspended for five years. The emphasis was that the effective sentence there had been 2 years. As such the sentence urged by counsel for the accused was no more than an effective sentence of three years.

The state on the other hand, which addressed the court in aggravation, urged the court to take into account the manner in which the offence was committed and that led to the demise of the deceased. The state drew on the case of *S* v *Mugwanda* 2002 (1) 574 (S) where on appeal a sentence of 7 years was imposed for stabbing the deceased over ZW$50.00 allegedly stolen from the accused. State counsel, Mr *Kasema*, also drew on the case *S* v *Fortunate Nsoro* HH-190-16 where a 10 year sentence with two years suspended was imposed on a woman who had fatally stabbed her husband in a dispute over a cell phone. In urging for a sentence within a similar range, he argued that the accused's actions were not those of a person who had intended a simple assault on the deceased. As regards his defence of intoxication, Mr *Kasema* argued that the accused knew what he was doing in that if he could still remember to phone the number to locate the phone then his level of drunkenness could not have been that high.

Mr *Garabga* argued in response that the distinguishing feature with the cases that the state had drawn attention to was that the accused in this case had pleaded guilty.

Indeed it is not in dispute that the accused was reckless in that he intermittently assaulted the deceased only stopping when the deceased was no longer responding to his demands. The tattered clothing of the accused also pointed to a lack of self-restraint on the part of the attacker. In so far as intoxication is put forward as a mitigatory circumstance, the evidence from the agreed facts suggests that it did not in fact colour the accused's reasoning as the accused was perfectly able to reason after assaulting the accused that he could in fact try to locate his phone by ringing it from a witness's number. It is this that he should have done in the first place as opposed to resolving the conflict through violence. What the binge drinking did was to loosen his inhibitions. The fact that he was able to get and use three different sticks against the deceased indeed suggests that he knew what he was doing. As such we do not find that drunkenness is an important factor that is to be taken into account in the determination of sentence in this instance.

However, as stated in *S* v *Mukome* 2008 (2) 83 9 (H) it is desirable for the sentencing court to articulate the competing interests to be balanced. What is of significance is that the accused was a first offender. As such, it would therefore be improper to approach his sentence from a high end without taking this into account. As highlighted in the of *Attorney General* v *Makoni* S–42-88 where an accused is a first offender, in the initial instance a sentence of personal deterrence must be applied. It is only where an accused is an unrepentant offender that that the principle of exclusion from society in order to give society a respite from his anti-social activities should then be applied. A sentence of 10 years as suggested by the state would be a failure to take into account the fact that the accused is a first offender. It would most certainly be on the high side. It would also be a failure to appreciate that having admitted to culpable homicide, ultimately the death occurred as a result of negligence on the part of the accused.

On the other hand an effective sentence of no more than three years as suggested by the accused's counsel is certainly on the lenient side. In those cases where seemingly lenient sentences have been imposed, it is important to understand why. In *S* v *Weston Mombeshora* HH 435-16 where accused had struck the deceased six times with a rubber baton, a four year sentence was imposed with 2 suspended. A reading of that case however, also shows that the lesser sentence was imposed because the accused had already been incarcerated for one and a half years and the court also took into account that he was 26 years old. In *S* v *Phillip Mashava* HH-482-16 three and half years were suspended from a six year sentence because the accused had again already spent a year in custody. In *S* v *Kingdom Hlahla* HMA-01-16,

the deceased had been struck once with a log on the side of the head. A three year sentence with one year suspended was imposed taking into account that the accused had since paid nine head of cattle out of the twenty that the deceased's family had asked for. This was considered as mitigatory. Indeed in *S* v *Kazembe* HH-378-15 which the accused's counsel referred to the accused had compensated the deceased's relatives and assisted at the funeral - factors which clearly persuaded the court to grant a more lenient sentence.

In casu the accused has been out on bail. It was not alleged that he has spent any significant amount of time behind bars awaiting trial. It was however explained that he could not work on customary ways of atoning for the deceased's death because he was forbidden from interfering with witnesses as part of his bail conditions. In most cases, customarily the issue of compensation when taken seriously is instituted at the onset when the crime has been committed and sometimes even before burial. However, failure to do so should may be a question of resources given that it generally the wider family who pull resources together. See in this regard *S* v *Naison Chayambuka & Anor* HH-133-17. It should therefore not weigh against the accused where he has failed to do so as the customary process is merely parallel to the state law under which he is being tried.

In the final analysis taking into account that the accused did show a high degree of recklessness but that he is being sentenced for a crime of negligence, and that he is a first offender who pleaded guilty and did not waste the court's time, the accused is sentenced as follows:

> Seven (7) years imprisonment of which 2 years is suspended for five years on condition accused is not within that period convicted of an offence of which violence is an element and for which he is sentenced to imprisonment without the option of a fine.
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> Effective sentence: 5 years imprisonment.

Criminal Division, National Prosecuting Authority Office, State's legal practitioners
Garabga, Ncube and Partners Legal Practitioners: (Pro deo), for the accused