THE STATE
versus
JOHANNES PAUL

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 27 June 2019 & 28 June 2019

Criminal Trial - Murder

Assessors 1. Kunaka
2. Chakuvinga

S.W Munyoro, for the State
F.M Katsande, for the accused (Pro-deo)

CHITAPI J: The accused appeared before the court charged with murder as defined in s 47 of the Criminal Law (Codification & Reform) Act [*Chapter 9:23*. The charged alleged that on 3 November 2009 at Bosbury Farm Chegutu, the accused acting with intent or realizing a real risk or possibility that his conduct might result in death and nonetheless persisting in that conduct, struck Shepherd Fombe on the head with a brick and an iron bar thereby inflicting injuries from which Shepherd Fombe died. At the commencement of trial and before entering a plea, counsel indicated that they were in the process of engagement in plea bargaining and interviewing the accused and witnesses whom counsel had not had occasion to interview prior to the trial date. The court on request postponed the trial to the following day, 28 June 2019.

On 28 June 2019, the court was advised that consequent on the plea bargaining exercise, agreement had been reached that the accused would offer a plea of guilty to culpable homicide and that the State counsel had agreed that the trial should proceed on the lesser charge of culpable homicide. The trial commenced and when the charge of murder was put to the accused, he pleaded not guilty and added that he had no intention to kill the deceased. Mr *Katsande* offered that the accused was pleading guilty to culpable homicide and Mr *Munyoro*

accepted the limited plea. Counsel advised that they had drafted a statement of agreed facts in relation to the facts supporting the charge. The statement of agreed facts was admitted in evidence as exh 1 by consent. No other exhibits were produced by the State and when the court enquired whether there was a post-mortem report, Mr *Munyoro* did not have a copy of the post-mortem to hand. When the court pointed out that it was necessary to have the report placed before it if in fact the deceased's remains were examined by the pathologist, Mr *Munyoro* did not appear to appreciate why the court was insistent on the report in circumstances where the accused admitted that his conduct resulted in death. Fortunately, Mr *Katsande* happened to have a copy of the post-mortem report and the court accepted it in evidence as exh 2. Upon being satisfied that the deceased did not die a natural death and further accepting that from the agreed facts, the accused's conduct resulted in injuries which caused the death of the deceased, albeit inflicted unintentionally, the court convicted the accused of culpable homicide.

For completeness of record, the agreed facts drafted and signed off by counsel were very brief and consisted in 9 paragraphs whose contents are reproduced below

1. The accused and deceased both attended a beer party on 3 November 2009.
2. They were involved in a quarrel and started fighting.
3. The accused armed himself with a piece of rock to brandish at the deceased to forewarn the deceased not to attack him.
4. The accused had left the scene briefly to return moments later.
5. After a short altercation, the accused threw the place of rock in the dark in the direction of the deceased.
6. The rock struck the deceased on the left side of the head.
7. The deceased did not immediately succumb to the blow.
8. The deceased was taken to hospital while unconscious where he died the following morning.
9. The accused ought to have reasonably foreseen the possibility that by throwing the missile, at random, it might result in the death of the deceased.

In regard to exh 2, the post-mortem report, the deceased's remains were examined by Dr Estrada on 9 November 2009 at Harare Central Hospital. The deceased was recorded as being aged 34 years, measured 160 cm and weighed 60 kg. Both the external and internal examinations did not reveal anything extra-ordinary as detracted from the admitted facts of the case and the charge. The doctor noted surface wounds, being a laceration on the face and trauma on the head. The internal examination showed subgalial haemorrhage of the head and

haematoma. The skull had a fracture of the parietal temporal bone on the left side. The brain had a subdural haematoma. The doctor recorded the cause of death as subdural haematoma and head injury due to assault.

A perusal of the agreed facts shows that the cause of the deceased's death was not captured. It is the reason why the court needed evidence of the post-mortem report so that the chain of causation would be completed. Murder is a serious offence and all relevant facts which would place the court in the best position to make informed determinations is regard to both conviction and sentence must be provided to the court. The agreed facts as clear therefrom are very brief in content. Notably, apart from omitting to capture the cause of death, they do not capture that the accused admits being the one whose actions caused injury which led to death. Mr *Munyoro*'s seeming confusion as to why the court was enquiring on the post-mortem report should be very clear to him on the explanation given herein. A case is determined on the proven facts or evidence with the relevant law then applied to the proven set of facts. Without relevant and material facts on which the charge can be determined to be proven and an appropriate verdict being passed before the court, then an irregularity in the proceedings will have been committed leading to a failure of justice.

A post-mortem report is important even in guilty plea proceedings because where the accused has confessed to the charge before the court, there must be placed before the court evidence *aliunde* the confession to prove that the offence to which the accused will have confessed to was actually committed. The provisions of s 273 of the Criminal Procedure and Evidence Act, [*Chapter 9:07*] relating to convictions based on confessions made by the accused are apposite. Further s 272 of the same Act places a duty upon the court in plea proceedings to be satisfied that the plea has been knowingly made, and is genuine and that the accused has no valid defence to the charge to which the accused has pleaded guilty. The court has power to alter the guilty to not guilty where it has doubt as to the genuineness and veracity of the plea. It can require that the prosecution should lead evidence on any matter on which the court requires clarification upon or require that the charge be proven by the State through trial in the usual manner subject to the proviso that properly admitted facts and essential elements by the accused up to the stage when the court alters the plea or requires evidence on any material matter to the charge, shall be deemed proven. The court was thus within its right and powers to require that the medical report evidencing the cause of the death of the deceased be made available or evidence led to that effect.

A post-mortem is also important in the assessment of sentence. In assessing sentence for culpable homicide, the central consideration or overriding factor which must be balanced against other factors that surround the commission of the offence and those personal to the accused is to a large measure, the level or degree of negligence proven to have been exhibited by the accused when committing the offence. The post-mortem report will invariably provide details of the injuries sustained by the deceased. The nature and extent of the injuries have a direct relationship with the degree of negligence exhibited. Since sentencing is a discretion where it cannot be said that a particular sentence imposed is the correct one, all relevant facts which are appropriate to consider when assessing sentence must be placed before the court. I would therefore for posterity state that the post-mortem report where such process was carried out should always be produced to the court as evidence whether or not the charge be one of murder or culpable homicide because it is a material piece of evidence relevant to the determination of both conviction and sentence.

Reverting to the case at hand Mr *Katsande* submitted in the main that the accused used moderate force to inflict the injuries. The court however noted that the accused used a stone which he blindly threw in the direction of the deceased. The stone landed on the deceased's head with disastrous consequences. The use of a weapon on another person is risky and invariably results in serious injury or death. It is for the reason that a weapon is dangerous that its use aggravates the moral blameworthiness of the accused. The use of the rock by the accused substantially increased his degree of negligence and in turn his level of blameworthiness. The blow to the head resulted in the deceased suffering a skull fracture. The force used can only have been moderate to high. A fracture can only result from the use of an appreciably high degree of force. Mr *Katsande* submitted that the accused was aged 37 years. He therefore would have been aged 28 years when the offence was committed. Whilst Mr *Katsande* acknowledged that the sanctity of human life should not be overlooked where a life has been lost, he submitted that the shortest possible imprisonment term which allowed for the rehabilitation of the accused should be imposed. Counsel cited the case of *State* v *Gumbo* HB 119/18 in which the accused was convicted for culpable homicide and sentenced to 5 years imprisonment with 2 years suspended on conditions of future good behaviour. The accused in that case accosted the deceased for not having attended a funeral and assaulted him. There was an element of bullyism by the accused.

State counsel Mr *Munyoro* whilst acknowledging that the accused was a first offender who exhibited contrition by pleading guilty submitted that the fight which the accused engaged

in was unnecessary. He submitted further that the offence which the accused committed was prevalent and that a message should be sent to like-minded persons that the use of violence has no place in our society. He advocated for an effective imprisonment term with a portion suspended.

There is no doubt that the offence of culpable homicide is a very serious offence. In terms of the provisions of s 49 of the Criminal Law (Codification and Reform) Act the sentencing range which a court may impose upon an offender convicted of culpable homicide extends from life imprisonment in the worst case scenario, to a lesser imprisonment term or a fine of up to level fourteen or both. The circumstances of each case will inform the appropriate level of sentence.

The scanty facts of this case were that there was an altercation between the accused and the deceased who were attending a beer party on the day in question. The two ended up fighting each other. In the course of the fighting the accused picked up a stone to scare off the deceased and stop him from continuing to attack him. The accused then left the scene briefly before returning. One would have thought that the accused would have used the opportunity to cool down. The accused however upon his return to the scene threw the stone in the direction of the deceased. The stone struck the deceased causing the fatal injury. The court considered that the unfortunate incident arose from a drunken brawl. The court was not made privy to what sparked the altercation or who between the accused and the accused started it. It is not known just how drunk the protagonists were or which of them was the worse for the better.

The court considered the provisions of s 221 of the (Criminal Law Codification and Reform) Act in relation to the effect of voluntary intoxication on sentence. The law provides that voluntary intoxication may be treated as a mitigatory factor in assessing sentence where the accused has been charged with a crime of intention and the effect of the intoxication did not render the accused incapable of forming the requisite intent, knowledge or realization. However where the accused is charged with a crime requiring proof of negligence as *in casu*, voluntary intoxication is neither a defence nor a circumstance of mitigation. Imbibers of alcohol and other intoxicants who voluntary partake of the wise waters must stand warned that if they commit crimes requiring proof of negligence, the court will not consider as mitigatory the fact that their faculties were impaired by alcohol when they committed the crime of negligence as may be charged. Thus in this case and acting in compliance with the provisions of the law as set out above, the court did not take into account as mitigatory the fact that the accused acted under the influence of alcohol. If anything, the taking of alcohol voluntarily and

allowing oneself to engage in a crime of negligence aggravates the moral blameworthiness of the accused. The voluntary consumption of beer should not be used as an excuse to commit crime. The court took a dim view that accused sought to blame voluntary intoxication for his conduct.

That said, the court was of the view that the imposition of an effective term of imprisonment with part suspended would not have been inappropriate taking into account the facts and circumstances surrounding the commission of offence and the personal circumstances of the accused. The accused used a weapon which he then indiscriminately towards the deceased without regard to where it would land at a time when the accused was no longer under attack. The accused and the deceased were no longer engaged in fighting at that stage meaning that the accused allowed his emotion to override reason. In *S* v *R O and Anor* 2000 (2) SACR 248 (SCA) at para 30 HELIER JA stated:

> "Sentencing is about achieving the right balance or in more high flown terms; proportionality. The elements at play are the crime, the offender, the interests of society with different nuance, prevention, reformation and deterrence. Invariably there are overlaps that render the process unscientific, even a proper exercise of the judicial function allows reasonableness to arrive at different conclusions."

The above pronouncement is articulate and lucid. I am persuaded to then hold that precedent in regard to sentencing plays little part in the process because of the unscientific nature of the process of assessing sentence unless the facts are similar as well as the convicts' personal circumstances. In the same vein, the court postulates that in striking a balance of the competing considerations which inform sentence, it is important to emphasize that every person has the right to life. Section 48 of the Constitution provides so. The right to life is the number one or mother of all human rights. This right cannot in terms of s 86 (3) of the Constitution be abrogated by any law save as provided for in s 48 which permits the passage of a law that allows for the passing of the death penalty for murder committed in aggravating circumstances and for such law to give the appropriate court the discretion whether or not to pass the sentence of death. That is the extent to which the right to life may be abrogated. It follows therefore using deductive reasoning that, where a life has been lost the interests of society to safeguard life must override other considerations in the triad of the elements at play.

The judge in relation to sentence is endowed with a wide discretion in the assessment and imposition of sentence. The appropriate sentence in the exercise of the discretion becomes to all intents and purposes a subjective judgment which mirror the views of the sentencing judge within a particular set of factors and circumstances. This makes "sentencing at best of

times an imprecise and imperfect procedure and there will always be a substantial range of appropriate sentences". (see *S* v *Martin* 1996 (2) SACR 378 (W) at 380 A-B, *Smith* v *Queen* 1987 (34) CCC (3d) 97 at 109 and *S* v *Voies* 1996 (2) SACR 638 (Nm) at 643 F-G).

In the case of *R* v *Karg* 1961 (1) SA 231 (A) SCHREINER JA stated at p 236 A-C-

> "While the deterrent effect of punishment has remained as important as ever, it is, I think correct to say that the retributive aspect has tended to yield ground to the aspects of prevention and correction. That is no doubt a good thing but the element of retribution, historically important, is by no means absent from the modern approach.
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> It is not wrong that the natural indignation of interested persons and of the community at large should receive some recognition in the sentences that courts impose, and it is not irrelevant to bear in mind that if sentences for serious crimes are too lenient the administration of justice may fall into disrepute and injured persons may incline to take the law into their even hands. Naturally righteous anger should not becloud judgment."

The upshot of the learned judge's remarks is that in assessing sentence where a life has been lost, in considering the interests of society, the feelings of the deceased's family should be given proper weight and recognition lest the family members do not feel that courts have done justice and may resort to metering their own punishment. In assessing sentence in this matter, it is noted that the court has considered that the deceased's relatives lost one of them and the deceased is gone forever. Their grief pain and anger would naturally be understandable. The court and the law exist for justice dispensation. In this regard, whilst the accused would by virtue of the commission of the crime be expected to receive his just desserts, he still is entitled to his fair trial rights and to his dignity.

The striking of a balance as discussed has in this matter been made complicated by the issue of the delay in bringing the accused to trial. Both counsel did not advert to the issue of the delay in bringing this case to trial. Section 69 of the constitution provides for the right to a fair hearing and specifically provides in subsection (1) that:

> "every person accused of an offence has the right to a fair and public trial within a reasonable time before an independent and impartial court."

Section 86 (3) (e) of the constitution provides that no law may limit and no person may violate the right to a fair trial. The court where it is apparent that there has been a delay of note in bringing an accused person to trial should *mero motu* raise the issue because a failure to do so makes the court complicit in violating the right to a fair trial which is an inviolable human right. Courts are custodians of the law and judges take oath to uphold the constitution and the law. Where on the facts of a matter placed before the court, there appears to be a violation of

the constitution, the apparent violation should be enquired into and appropriate remedies granted.

The legislature mindful of the inviolability of the right to a fair trial or hearing passed s 167 A of the Criminal Procedure and Evidence Act, by s 2 of Act No. 2 of 2016. In terms thereof, the court in which criminal proceedings are pending is mandated and required to investigate any delays in completion of proceedings where the delay appears to be unreasonable. The section qualifies that the delay should appear to the court to be one which "could cause substantial prejudice to the prosecution to the accused or his legal representative, to a witness or other person concerned in the proceedings or to the public interest." The section then lists the circumstances which the court should consider in addition to any others which may be present in the case. Subsection (3) then lists additional orders to any other orders which the court may grant in order to "eliminate the delay and any prejudice arising from it or to prevent further delay or prejudice." Further it provides for the right of appeal by the Prosecutor General against an order of permanent stay of the prosecution of the accused for the offence. One must assume that the other orders would not be appealable. It is also a moot point as to how a delay which has been occasioned can be eliminated. The observations above are made *obiter* and argument would be required to unpack the purport and import of the provisions I have taken note of in passing.

In *casu*, the offence was committed on 3 November, 2009. It was accepted that the accused was arrested on the following day and charged for the murder of the deceased on 9 November 2009. State counsel had no explanation for the delayed trial save to blame the prosecution lapse in that the case appears to have somehow been forgotten or the docket lost. Whilst it is true that the accused on the decided case law is expected to assert his rights to a speedy trial, I must express my reservations on the constitutionality of such a principle. If the accuser is the State and the accused is constitutionally presumed to be innocent until proven guilty and in addition has no onus to prove his innocence, then and with due deference and respect, it does not appear to be legally proper or appropriate that the accused must be expected to assert that he should be tried and that he should drag his accusers to court for him to be tried.

The right to a fair hearing and in particular the right to have a person accused of an offence tried within a reasonable time should be a burden which the State must uphold. In this regard s 44 of the constitution is clear that the State has a duty to respect, protect, promote and fulfil the human rights given by the constitution including the right to a fair hearing. A person is placed under arrest so that he is brought by the State before a court to be tried for the offence

wherewith he or she stands charged. The accused has no duty to assert a right to be tried. On the contrary the accused is expected to apply for the charges to be quashed on account of the failure to try him within a reasonable period. There is just no jurisprudential or logical justification for the accused to stand before the court and ask to be tried. To the extent that the principle that the accused must assert his rights to a speedy trial may be construed to mean that the accused must clamour to be tried, such requirement is inimical is accusatorial and in which the accused provides that a person accused of an offence be speedily tried.

Again reverting to the facts of the case, the delay of about 10 years in having this case tried was inordinate and amounted without explanation to justify it, to a violation of the accused's right to a fair hearing. A lot would have happened in the accused's life in the nearly 10 years between his arrest and the conclusion of the trial. Albeit the facts of the matter having merited the imposition of a custodial sentence, the court was not persuaded that such a sentence would at this juncture be justified nor fair to the accused, the interests of justice and the interests of society. I accordingly determined that an appropriate sentence would be one that would keep the accused out of prison yet onerous enough to keep him in check as he would be imprisoned if he committed a similar or related offence. The following sentence would be appropriate under the unusual circumstances of the unexplained delay in the completion of the matter since the accused's arrest.

> "3 years imprisonment wholly suspended for 5 years on condition the accused is not within that period convicted of any offence in which the use of force or violence is an element for which he is sentenced to serve a period of imprisonment without the option of a fine."

National Prosecuting Authority, applicant's legal practitioners
FM Katsande & Partners, accused's legal practitioners