

THE STATE
versus
WEBSTER BOPERA

HIGH COURT OF ZIMBABWE
MUREMBA J
HARARE, 24 November 2014

Review Judgment

MUREMBA J: The accused was charged with and convicted of culpable homicide as defined in s 49 of the Criminal Law Code. He was convicted on his own plea. I find the conviction proper and it is hereby confirmed.

What causes disquiet though is the sentence that was imposed. The accused was sentenced to a wholly suspended prison term of 24 months on condition of good behaviour. The facts are that the deceased and the accused were at a beer drink. The accused struck the deceased's brother on the eye with a clenched fist. The deceased intervened as he asked the accused why he had assaulted his brother. The people who were there stopped the deceased and the accused from fighting. The accused left for his home. The deceased followed him demanding that he should foot the medical bill for the treatment of his brother. The two started arguing. As they were arguing the accused struck the deceased in the face with a clenched fist. The deceased fell on the tarmac on his back and sustained a cut on the back of his head. He was ferried to hospital there and then. He died in hospital on the next day.

In sentencing the accused the court took into account the following mitigatory factors. The accused is a 25 year old first offender who pleaded guilty to the charge. He is a family man. He is employed by the Zimbabwe National Army, but it is not stated in what capacity he is employed. The court went on to say that the only aggravatory factor is that human life was lost, otherwise it was never intended. The accused only assaulted the deceased once with a clenched fist after some argument. It was also said that the accused did not use any dangerous weapon. The trial magistrate further said that since the complainant had been drinking he must have been drunk which might have contributed to his loss of balance. He said this factor works in favour of the accused.

The trial magistrate said that imprisonment was appropriate but sentencing the accused to effective imprisonment would make it appear as if the accused had intentionally caused the death of the deceased. He said that the negligence was ordinary. He went on to say that sentencing the accused to effective imprisonment meant that the court would have failed to give effect to the mitigatory features such as the guilty plea, that the accused is a first offender, that he is a family man and is gainfully employed.

It was also taken into account that the accused made contributions towards funeral expenses and that it took the State three years to prosecute the accused.

It is my considered view that a wholly suspended sentence is not a sentence that can be imposed willy-nilly especially in serious offences where effective imprisonment is expected or appropriate. For the court to impose such a sentence, it should show that special circumstances exist which justify the sentence. While I accept that *in casu* there are very high mitigatory factors, I am not convinced that the accused deserved to get away with a wholly suspended sentence. The trial magistrate is a regional magistrate with a jurisdiction of up to 10 years in such cases. The highly mitigatory factors could have had the effect of reducing the sentence drastically from 10 years, but they did not justify the imposition of a wholly suspended sentence. The court over-emphasised the mitigatory factors to the extent of totally turning a blind eye to the fact that the accused had caused the death of the deceased even if it was through negligence.

For a start, the magistrate said that because the deceased was drinking beer he must have been drunk and the drunkenness contributed to his fall when he was struck by the accused. This is just an assumption which was made by the magistrate simply because the deceased had been drinking beer. The extent of the deceased's drunkenness was never established. The accused himself never said that the deceased was so drunk that he might have contributed to his fall. It was therefore a misdirection on the part of the trial magistrate to make a finding in accused's favour on this aspect.

The trial magistrate reasoned that imprisonment was appropriate but effective imprisonment would make it appear as if the accused had intentionally caused the death of the deceased. I find this reasoning flawed for the simple reason that in every culpable homicide case there is no intention to cause death. Death is due to negligence. If the courts were to employ this reasoning then it means that no offender convicted of culpable homicide would be sentenced to effective imprisonment.

The court was over-influenced by the fact that the accused had delivered only one blow and failed to pay sufficient attention to the fact that for the deceased to follow the accused it is him who had assaulted the deceased's brother on the eye with a clenched fist. The brother must have been injured because the deceased wanted the accused to foot the medical bill. In any case even when the two started quarrelling the deceased did not physically attack the accused. It is the accused who just struck the deceased. Nothing justifies the accused's actions, moreso considering that he had just injured the deceased's brother on the eye.

I hold the view that a sentence in the region of 4-5 years with half of it suspended on condition of good behaviour would have met the justice of this case. I cannot certify that the proceedings are in accordance with real and substantial justice. I therefore withhold my certificate.