

THE STATE
versus
JERICHO ZUNGULA

HIGH COURT OF ZIMBABWE
MAWADZE J
HARARE, 8 March 2016

ASSESSORS 1. Mr Msengezi
 2. Mr Chivanda

Sentence

A Muziwi, for the State
P Chakanyuka, for the accused

MAWADZE J: The accused was initially facing the charge of murder as defined in s 47 (1) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. He was convicted on his own plea of guilty of contravening s 49 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] which relates to Culpable Homicide after both the state counsel and the defence counsel drafted a statement of agreed facts.

The agreed facts which inform the accused's conviction are briefly as follows;

The accused is the owner of Zungula bottle store, Donain in Battlefieds and deceased's father also owns a butchery at the same Business Centre.

On 20 April 2015 at about 0001 hrs the accused was selling beer to patrons at his bottle store when he was approached by the deceased who was consuming opaque beer. A misunderstanding arose between the two as the deceased wanted to know why the accused had removed a gate erected by deceased's father between the accused's bottle store and deceased's father's butchery to bar patrons from using a passage between the two as a toilet. The accused and deceased started to shove each other in accused's bottle store and the patrons present failed to restrain them. The deceased tried to pull the accused but was pushed outside where he fell to the ground.

The deceased then picked some stones outside the bottle store and returned to the bottler store to attack the accused who was behind the counter. The accused then produced his licenced Beretta pistol from his trousers pocket and fired towards the deceased and he hit him on the head. The deceased died instantly. The post mortem report shows that the gun shot fractured the skull and caused brain damage. It is therefore agreed that the accused who was acting in self-defence negligently caused the death of the deceased in circumstances where the risk of death was foreseeable and that the accused realised that death may result from his conduct but negligently failed to guard against that possibility.

In arriving at the appropriate sentence we have endeavoured to balance both the mitigatory and aggravating factors in this case.

The personal circumstances of the accused are that he is 42 years old, married and has 7 children. The accused is the sole breadwinner as he supports his family from the proceeds of the bottle store he operates and is also involved in gold mining. The accused's business interests are likely to suffer and thus adversely affecting his family if he is incarcerated. The accused has no savings but owns 12 heard of cattle, some goats and sheep. This may not be sufficient to sustain his big family in his absence.

It is in accused's favour that he is a first offender hence he is likely to reform and desists from further crime. Further accused deserves to be treated with some measure of leniency.

We have considered that the firearm the accused used was licenced and had been issued to him for his personal protection and that of his business interests. In addition to that the Forensic Ballistics Report shows that the firearm is not linked to any other scenes of crime.

The accused's plea of guilty is an important mitigatory factor. See *S v Katsaura* 1997 (2) ZLR 102 (H). A plea of guilty besides being a sign of contrition immensely contribute to the swift administration of justice. The accused may have opted to raise triable issues but decided not to waste the court's time and the state's resources in prosecuting him. The matter has been finalised in a very short period of time. Although the witnesses were present they have been saved from testifying. The court should therefore properly reward the accused for tendering a plea of guilty.

The accused through Mr *Chakanyuka* apologized to the court and the deceased's family for his wrongful conduct. The accused further stated that he had offered to meet the deceased's burial expenses and pay compensation to deceased's family. This was however

spurned by the deceased's family although the accused is still willing to pay compensation in line with the African custom and practice. In our view this gesture is a sign of contrition.

It is clear that the accused will always suffer from the psychological trauma that he caused the deceased's death. This will always weigh heavily on his conscience and is a form of punishment.

In our view it is mitigatory to some extent that the deceased was the aggressor in this case. The deceased was the author of the misunderstanding between him and the accused as he provoked the dispute.

Be that as it may the offence of Culpable Homicide arising from violent conduct as exhibited by the accused remains a very serious offence. This court has the duty to protect the sanctity of human life. No person has the right to take the life of another whatever the circumstances. Life is precious and once it is lost it cannot be replaced.

It is saddening that cases of violence resulting in loss of life are increasingly prevalent. Precious lives are being lost through minor misunderstandings and many people find it very easy to resort to violence to resolve disputes. While it is accepted that deterrence should not lead to disproportionate sentence. See *S v Bherro & Anor* 1994 (2) ZLR 66 (S), it is important that this court should send a loud and clear message to the public that violence will never be tolerated especially when it results to loss of life. People should learn to control their temper and be able to walk away from provocation.

It is clear that the means the accused used in defending himself are clearly disproportionate to the harm or the aggression he was facing from the deceased. It is most likely that the deceased was drunk. The deceased had armed himself with stones and in response the accused saw it fit to pull out of fire arm and shoot the deceased. A gun is a very lethal weapon. There is no indication that the accused fired any warning shots. Worse still he did not aim to shoot at the legs or some other none delicate parts of the body. Instead he shot deceased in the head causing a skull fracture and brain damage. The deceased died instantly. In our view this is a very border line cause between murder and culpable homicide. The degree of negligence is very high and amounts to recklessness. This calls for a harsher penalty.

We have been referred to a number of cases by both counsel which include *S v Mpofu* 1985 (1) ZLR 187 (S); *S v Dube* HB 507/14; *S v Kazembe* HH 378/15 and *S v Trymore Murisi* HH 12/15. Our view however is that all these cases are not on all fours with the facts of this case are not very useful in guiding this court on the appropriate sentence.

The accused should not be allowed to keep the fire arm as it is clear that he has abused it.

It is our view that the following sentence would meet the justice of this case.

The accused is sentenced to 7 years imprisonment of which 2 years imprisonment are suspended for 5 years on condition the accused does not commit within that period any offence which involves the use of violence upon the person of another for which the accused upon conviction is sentenced to a term of imprisonment without the option of a fine.

The Beretta pistol serial number 12879 is forfeited to the State.

National Prosecuting Authority, Counsel for the State
Chakanyuka & Associates Attorneys, Counsel for the accused