

IN CAMERA

THE STATE

Versus

JOHN DINGANI

And

TIMOTHY CHAVURURA

HIGH COURT OF ZIMBABWE
MAWADZE J
MASVINGO, 1 & 4 AUGUST, 2017

ASSESSORS

1. MR MUSHUKU
2. MR GWERU

SENTENCE

Mr T. Bhunu, for accused 1

Mr O. Mafa for accused 2

MAWADZE J: Both accused persons are juveniles. They both initially faced the charge of murder as defined in s 47(1) of the Criminal Law (Codification and Reform) Act [*Cap 9:23*].

They were however both convicted of assault as defined in s 89(1) of the Criminal Law (Codification and Reform) Act [*Cap 9:23*], a permissible verdict. This was after the State conceded that there is no evidence to support the offence of murder.

Both accused persons who appeared in court with their respective mothers as support persons were convicted on 1 August 2017 and were out of custody. Thereafter counsel for accused persons requested successfully that the matter be postponed to 4 August 2017 for counsel to prepare submissions in mitigation.

We wish to heartily thank both *Mr Bhunu* and *Mr Mafa* for their unprecedented kind gesture to offer to meet the transport costs for both accused persons and their support persons to Zaka their rural home and back to court for sentence on 4 August 2017. Both *Mr Bhunu* and *Mr Mafa* are *pro deo* counsel for the accused persons. They had no legal obligation to shoulder this burden, more so with the current cash crisis. This show of compassion and moral responsibility should be well appreciated and possibly emulated in deserving cases by fellow members of the legal profession. This in our view shows that some of our legal practitioners take the administration of justice seriously with admirable passion. Indeed, both counsel have been very professional and should be commended. We now turn to the case.

The agreed facts in this matter are as follows;

Both accused persons reside at the same homestead at Masvovere Village, Chief Nhema in Zaka. Accused 1 who is now 16 years old was then aged 15 years. Accused 2 is now 15 years was then 14 years. Accused 1 is now in Form 1 at Chivamba Secondary School in Zaka whereas accused 2 is in Form 2 at Zaka High School. The now deceased was a toddler aged 4 years.

On 4 December 2015 the now deceased was left in the custody of both accused persons by accused 1's mother one Esther Mberengo at their homestead. Esther Mberengo who is also a grandmother to accused 2 had attended to a funeral at the neighbouring village.

On 5 December 2015 the now deceased who apparently was not feeling well soiled his pants. Both accused persons were not amused and decided to chastise the now deceased. They took turns to assault the now deceased each time he soiled his pants oblivious of the fact that the now deceased may have been unwell suffering from a running stomach. They used an electric cord and switch to assault the now deceased all over the body. In the aftermath of the assault the now deceased who was seemingly weak staggered and fell knocking his head on to the doorstep. The now deceased was fatally injured on the head and passed on.

The post mortem report compiled after the examination of the now deceased's body on 16 December 2015 does not show any other injuries besides the head injury. The doctor concluded that the cause of death was the head injury.

The state in our view correctly conceded that there is no nexus between the assault perpetrated on the now deceased by the accused persons and the head injury. This informs the verdict on the charge of assault. It would have been an insurmountable task for the state to prove the charge of murder.

It is not an easy task for any court to assess an appropriate sentence which involves juveniles like the accused persons. This is so because juveniles should never be treated as adults for obvious reasons. Immaturity plays a key role in their conduct and they generally have no full appreciation of the consequences of their conduct. This is precisely why our Constitution has special provisions relating to children or juveniles.

Section 81 of our Constitution provides as follows:

“81. *Rights of children*

- (1) *Every child, that is to say every boy and girl under the age of eighteen years has the right –*
 - (a) irrelevant
 - (b) irrelevant
 - (c) irrelevant
 - (d) irrelevant
 - (e) irrelevant
 - (f) irrelevant
 - (g) irrelevant
 - (h) irrelevant
- (i) *not to be detained except as a measure of last resort and, if detained –*
 - (i) *to be detained for the shortest appropriate period;*
 - (ii) *to be kept separately from detained persons over the age of eighteen years; and*
 - (iii) *to be treated in a manner, and kept in conditions, that take into account the child's age*
- (2) *A child's best interests are paramount in every matter concerning the child.*

(3) *Children are entitled to adequate protection by the courts, in particular by the High Court as their upper guardian.”*

These constitutional provisions are in line with international instruments which deal with the rights of children in conflict with the criminal law. The United Nations Convention on Rights of the Child (1990) and the African Charter on the Rights and Welfare of the Child (1999) are pertinent. These international instruments set out minimum standards to be met by the criminal justice system in dealing with the juveniles in conflict with the criminal law. Further s 351 – s 353 of the Criminal Procedure and Evidence Act [*Cap 9:07*] prescribe the manner of dealing with convicted juveniles.

It is notorious fact that most of our prisons do not have relevant facilities to cater for the needs of convicted juvenile offenders. The problem is compounded by the lack of resources. In that vein it is imperative that other forms of punishment other than custodial sentences should always be considered.

We have considered that both accused persons are still at school. It is important that they should continue with their education in a proper and conducive environment.

Both accused persons in essence pleaded guilty to the charge they now stand convicted of. This shows that they are contrite and did not waste the court's time. They were no eye witnesses to the assault perpetrated on the now deceased. The accused persons could well have denied the assault. This matter has thus been finalised in the shortest time without wasting state resources. See *S v Katsaura* 1997 (2) ZLR 102 (H), *S v Munechavo* 1998 (2) ZLR 508 (H); *S v Bhuka* 1995 (2) ZLR 130 (S).

We are satisfied that due to immaturity and youthfulness both accused persons wrongly believed that they were entitled to discipline the now deceased for soiling his pants. They may not have realised that the toddler was in fact unwell and should not have been brutally assaulted.

It is a fact that the accused persons will forever live with the stigma that they somehow caused the now deceased's death after their arrest on the charge of murder. Very few people in their area would appreciate that they were subsequently convicted of assault. Consequently, they are likely to be ostracised and this may have far reaching psychological effects on the accused persons. This social stigma is punishment on its own. In fact, we would dare to say the accused persons need counselling themselves if they are to overcome these negative psychological effects.

The reports prepared by the probation officer in respect of both accused persons are fairly detailed and comprehensive. The conduct of both accused persons was out of character as it were. We find no cause not to accept the recommendations of the probation officer.

It is however important that both accused persons should learn from this misdemeanour and desist from further crime. They should behave like other juveniles who are law abiding and at school not in the criminal courts. This cannot be a proper place for accused persons to shape their future.

The moral blameworthiness of both accused persons is nonetheless quite high. The now deceased was a toddler of just 4 years and very young compared to accused persons. He may well have been sick. By assaulting him in the manner they did the accused person exasperated the situation. The now deceased had been left in their custody and they should not have harmed him in any manner.

It is clear from the facts that the assault was severe and prolonged. An electric cord produced in court and a switch were used to inflict pain on this toddler. Our hope is both accused persons have learnt their lessons. They should reform and desist from further crime of any nature.

In the result each accused person is sentenced as follows;

“The passing of sentence is suspended for 5 years on condition each accused does not commit within that period any offence involving the use of violence upon the person of another for which each accused is sentenced to a term of imprisonment without the option of a fine.”

National Prosecuting Authority, counsel for the state

Bhunu & Associates, pro deo counsel for accused 1

Mutendi, Mudisi & Shumba, pro deo counsel for accused 2.