

THE STATE  
versus  
DENFORD CHINEMBIRI

HIGH COURT OF ZIMBABWE  
MAWADZEJ  
HARARE, 4 November 2015

ASSESSORS:           1. Mr Kunaka  
                              2. Mr Chakvinga

### **Sentence**

*N Mazvimbakupa*, for the State  
*I A Kurawley*, for the accused

MAWADZEJ: The accused who was initially facing the charge of murder as defined in s 47 (1) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] 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 and the defence drafted a statement of agreed facts.

The agreed facts are as follows;

The accused and the deceased were husband and wife residing at Glendower Muponda Farm in Mhangura. On 29 October 2014 at about 0900 hrs the accused and the deceased were preparing to go the hospital when a dispute arose following the deceased's refusal to give the accused some sandals he wanted to wear. The accused tried to wear the sandals but the deceased would have none of it. A struggle ensued causing the deceased to drop the couple's child. The accused picked the child and safely put the child down after which he reprimanded the deceased for her conduct. The deceased reacted angrily stating that she had transmitted to the accused the HIV virus and that accused was just "a walking grave". In anger the accused who is HIV positive picked a piece of wood to hit the deceased. The deceased picked up a hoe and a scuffle ensued between the two as accused tried to disarm the deceased. In the ensuing scuffle the accused hit the deceased with the hoe once on the head and she fell down.

Accused ran to his neighbours to look for help. The deceased died thereafter. The cause of death as per the post mortem report is severe head injury due to assault on the occiput with a sharp object.

In assessing the appropriate sentence we have taken into account the accused's personal circumstances. The accused is 30 years old and a first offender. He now has the responsibility of looking after his two children aged 3 years and 5 years who are now in the custody of accused's parents. We have considered that the accused is HIV positive and that the rigorous prison life may be detrimental to accused's health. The accused discovered his HIV status when his wife the deceased fell pregnant with their third child, which child is now deceased. The accused is of no means as he is just a peasant farmer with neither savings nor assets.

The accused has suffered from pre-trial incarceration of only 11 weeks. The accused was granted bail pending trial after 7 weeks and he has been in custody for 4 weeks after being indicted. In our view the pre-trial incarceration period is not very long.

It is in accused's favour that he pleaded guilty to the charge of culpable homicide. The accused is therefore contrite and did not waste this court's time. A lot of state resources have been saved in prosecuting this case. Although state witnesses were present they were not called to testify. This matter has been finalised in a very short period of time. We take note that this is a case where there were no eye witnesses to the assault. The accused could have wasted time by making stories in order to deflate blame and raise frivolous defences. Instead the accused took responsibility and admitted to the charge. A plea of guilty contributes immensely to swift administration of justice. We have therefore considered the plea of guilty in this case as a weighty mitigating factor.

It is clear from the agreed facts that there is an element of provocation in this case. The accused should have been angered after being verbally abused by the deceased who mocked him in relation to his HIV status. This was after accused had simply reprimanded the deceased for dropping the couple's child. The accused picked a piece of wood intending to assault the now deceased and the now deceased picked a hoe. The single fatal blow was delivered as the accused and the deceased were engaged in a scuffle over the hoe. Upon realising that the deceased had been injured the accused immediately looked for help. The facts of the matter clearly show that the accused is not an inherently wicked person but that this was a tragic accident. We have been referred to the cases of *S v Mbanjo* HB 114/15 and *S*

v *Dube* HB 50/14 in order to assess the appropriate sentence.

In aggravation we have considered that the relationship which was between the accused and the now deceased. They were husband and wife. Cases of domestic violence are prevalent and we note that this court deals with a lot of cases where lives are lost through domestic violence. It is unfortunate that many spouses share violence instead of love and a number of people have lost their lives at the hands of their loved ones. The promulgation of the Domestic Violence Act [*Chapter 5:16*] seems not to have the desired effect. It is therefore incumbent upon the courts to hand down deterrent sentences in cases of domestic violence especially where a precious life is needlessly lost.

In this case the accused negligently caused the death of his wife leaving the two children without a mother. This court has the duty to uphold the sanctity of human life. The message should be sent clearly and loudly that no person has the right to take the life of another whatever the circumstances.

It is important that the accused and like-minded persons should learn to control their temper and not to take the law into their own hands by resorting to violence which does not solve but compounds the problem.

After weighing both the mitigatory and aggravating factors in this case we believe the following sentence would meet the justice of this case;

The accused is sentenced to 6 years imprisonment of which 2 years imprisonment are suspended for 5 years on condition accused does not commit within that period any offence involving the use of violence upon the person of another for which upon conviction the accused is sentenced to a term of imprisonment without the option of a fine.

*National Prosecuting Authority*, counsel for the State  
*Gallop & Blank*, counsel for the accused