THE STATE

Versus

LYNET MUJUMBE

HIGH COURT OF ZIMBABWE

MAWADZE J

MASVINGO, 15 November, 2021

Assessors

1. Mr Chikukwa
2. Mr Mutomba

Mr B. E. Mathose, for the state
Mr T. Sibanda, for the accused

Criminal Trial - Sentence

MAWADZE J: The accused who was then 17 years old female took the life of her 3½ years old sibling, *albeit* negligently. To properly assess the appropriate sentence in such a matter can never be an easy task. My brother Mafusire J in the matter of Anesu Mharapara v The State HMA 26/17 apply put this into perspective when he said;

> *"Sentencing is a complex exercise. It is a balancing act. From time to time jurists have espoused brilliant philosophies around it. Guidelines have been developed. The legislature sometimes weighs in with mandatory minimum sentences for certain offences. There are certain basics. The penalty must fit the crime. The interest of the offender must be balanced against those of justice. It is not right that someone who has wronged society should go*

scot free, or escape with a trivial sentence. But at the same time he should not be punished beyond what his misdeeds deserves. Punishment should be less retributive and more rehabilitative. "

The accused was initially arraigned for murder as defined in section 47 (1) of the Criminal Law (Codification and Reform) Act *[Chapter 9:23]*. However at the commencement of the trial a statement of agreed facts was tendered after both counsel found each other. The agreed facts are as follows;

The accused then 17 years (now 19 years) is currently writing her 'O' level examinations at Majijimba Secondary School in Chikombedzi, Chiredzi. At the material time she was residing with her parents and the 3½years old now deceased (her sibling) Mary Mujumbe at Bhisani Village, Chief Sengwe, Chikombedzi, Chiredzi.

On 28 October 2019 the accused and the now deceased were looking for firewood at a bush close to their homestead. Whilst in the bush the now deceased indicated that she wanted to defecate. The accused inexplicably was incensed by that call of nature.

The accused in a rather cruel and bizarre manner plucked some switches from a mopani tree. The accused proceeded to brutally and mercilessly assault the hopeless toddler indiscriminately and all over the body until the now deceased fell unconscious. Realising the gravity of the situation the accused carried the unconscious now deceased home. The now deceased was immediately rushed to the local Damarakanaka clinic but was unfortunately pronounced dead on arrival.

The post mortem report reveals the following injuries;

"1. facial, scalp and chest bruised
2. hyper mobile and loose neck
3. moves with crepitus "

The cause of the deceased's death is said to be neck fracture arising from the blunt trauma(assault).

The three switches used by the accused were tendered in court and the certificate of weight shows their combined weight as 0.23kg. They are broken and moderately thick switches.

In assessing the appropriate sentence, the court has taken into account submissions by counsel inclusive of the probation offer's report Exhibit 3. I am much indebted to *Mr Sibanda* for the accused who filed very detailed written submissions in mitigation.

Culpable homicide arising from violent conduct remain a serious offence. In the absence of persuasive factors the court would invariably impose custodial sentences. The sanctity of life as protected by section of 48 of the Constitution can not be over emphasised. Human blood remains sacred and no one has the right to take the life of another even negligently. The simple logic is that once a life is lost it can not be replaced.

In this case the 3½year old now deceased had her life prematurely terminated at the accused's brutal hands. The now deceased's "crime" was to answer the call of nature. The mind boggles as to what really incensed the accused. This was in the bush. The accused herself is not immune to such call of nature. The now deceased was accused's sibling. The accused who is much older should be expected to protect her sibling like the now deceased. The bottom line is that the accused had not been wronged at all. What triggered accused's violent conduct really beats one's mind.

The assault itself was brutal and indiscriminate. A number of switches were used. Severe force was applied. This resulted in a broken neck. This helpless toddler was trashed to the point of unconsciousness. There is no doubt therefore that the accused's conduct deserves censure. Her behaviour which is akin to a vile creature can not be condoned. She should be punished.

In the midst of all this the fact of the matter remains remarkable. It should always be borne in mid that at the material time the accused was a juvenile first offender.

Article 17 of the African charter on the rights and welfare of the child provides as follows;

> *"Every child accused or found guilty of having infringed penal law shall have the right to special treatment in a manner consistent with the child's sense of dignity and worth and which reinforces the child's respect of human rights and fundamental freedoms of others."*

In terms of Section 2 of the Children's Act *[Chapter 5:06]* the accused at the material time was a child. It is this youthfulness which denotes immaturity and which should always weigh heavily on the mind of the court.

In the case of *State v Ncube & Others 2011 (1) ZLR 608 (H)* at 612A - 613A. I made the following remarks in respect of juvenile offenders;

> *"The common thread which runs through both matters in casu is the failure by the magistrate to properly deal with cases involving children in conflict with the criminal law. Judicial officers should always understand and bear in mind that children in conflict with the criminal law are a special category of offenders for which there are specific and peculiar legislative provisions designed to deal with such offenders both within our jurisdiction and other international conventions. "*

I made reference to the United Nations convention on the Rights the Child (1990) African Charter on the Rights and welfare of the child (1999).

At the material time the accused was just 17 years old. As a juvenile she may not have fully appreciated the consequences of her wrongful and violent conduct. In addition to that she is a female first offender for which what I can term to be ″positive discrimination‟ would be appropriate.

As an elder sibling the accused may have laboured under the mistaken belief that she had a right to chastise her younger sibling the now deceased.

The accused has pleaded guilty to the charge. She cooperated with investigations and did not waste the court's time and state resources. This matter has been finalised in the shortest possible period. Our courts suffer from huge criminal backlogs. Those who admit to their wrong doing immensely contribute to the swift administration of justice. Unnecessary and burden some trials are avoided. See also *State v Sidat at 1997 (1) ZLR 487*.

As already said the now deceased was the accused's young sister. Reality should have sunk on the accused when after the madness she now carried her unconscious sister all the way home. This should have been a traumatic experience. Further, the accused's life will be shadowed with this dark cloud that she has the blood of her young sibling on her hands. The accused has to live with this. She will be forever be tormented. This stigma can not be wished or washed away. It shall remain embedded in accused's conscience.

This unfortunate incident happened on 28 October 2019. It has taken almost two years to have the matter finalised. The accused was out of custody but she still agonised awaiting her fate. This mental trauma on a juvenile can not be overlooked.

Although the accused conduct should be viewed with abhorrence and rightly deserve condemnation by all right thinking and moral upright people, the remarks by Holmes JA in *State v Sparks 1972 (3) SA 396 (A)* at 410 H remain important where the learned Judge sad;

"punishment should fit the criminal as well as the crime , be fair to the state and to the accused and be blended with a measure of mercy"

At the end of the day a proper balance should be achieved. As a general rule juvenile first offenders should be spared the agony of imprisonment, unless there is no other suitable punishment for the particular offence. See *State v Zaranyika 1995 (1) ZLR 270.*

The community service officer just like the probation officer recommended for a non custodial sentence. There is no good cause as to why I should not accept these recommendations. A rehabilitative rather than retributive sentence is called for.

In the result the accused is sentenced as follows;

" 2 years imprisonment of which 1½ imprisonment is 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 she is sentenced to a period of imprisonment without the option of a fine.
The reminder of 6 months imprisonment is suspended on condition the accused performs 840hours of community service work under the following conditions: -

(i) *the community service shall be performed at Malisanga primary school Chikombedzi, Chiredzi.*
(ii) *the community service shall commence on 1 February 2022 (accused is currently writing her 'O' level examinations) and to be completed on or before 30 July 2022.*
(iii) *the community service shall be performed starting at 0800hrs to 1300hrs <u>AND</u> 1400hrs to 1600hrs everyday between Monday to Friday excluding weekends and public holidays*
(iv) *the community service shall be performed to the satisfaction of the head of the said primary school or his or her assignee.*
(v) *The accused shall be granted leave absence by the head of the institution or his or her assignee on good cause shown and such leave of absence shall not count as work done. "*

National Prosecuting Authority, counsel, for the state
Chinawa Law Chambers, pro deo counsel for the accused