

THE STATE  
versus  
ITAYI MUROMBEDZI

HIGH COURT OF ZIMBABWE  
CHITAPI J  
HARARE, 25 September & 26 September, 2017

**Criminal Trial – Culpable Homicide**

Assessors:     1. *Mhandu*  
                  2. *Kunaka*

*A Muziwi*, for the State  
*S. Chikatora*, for the accused

CHITAPI J: This murder case was set down on 25 September 2017 for trial. The case was at the instance of counsel postponed to today. The reason given for the postponement was that the counsel had discussed the evidence and wanted to be granted an opportunity to prepare and file a statement of agreed facts in order to curtail the duration of the trial. Counsel also wanted to plea bargain in the light of agreed facts. As the reason for the postponement had merit, the court convened and witnesses were advised of the developments. State counsel also requested the court to formally dismiss the witnesses who had come to court on subpoenas and this was done.

On resumption of trial today, the indictment of murder was put to the accused. It was alleged against him that on 27 November, 2016 he unlawfully and with intent to kill assaulted the deceased Innocent Sevenzo with open hands and booted feet on his head thereby causing injuries from which the deceased died. The indictment alleged in the alternative that if the accused did not act with intent to kill, he must be held to have realised a real risk or possibility that death might result from his conduct but nonetheless continued to engage in the conduct.

The accused pleaded not guilty to the indictment of murder. The defence counsel tendered a plea to the lesser charge of culpable homicide. The state prosecution accepted the limited plea. A statement of agreed facts was produced to the court and marked Annexure “A”. Its contents are as follows:

1. The accused is employed by Print Light Company in Harare and is not related to the deceased.
2. On 27 November at around 2100 hours. The deceased was at Chadcombe Shopping Centre, Harare where he was drinking beer.
3. The accused arrived at the shopping centre driving his motor vehicle, a silver Toyota Sienta registration number ADH 1085.
4. When the accused parked his motor vehicle in front of the deceased, the deceased insulted the accused. The accused was incensed and he disembarked from his vehicle and confronted the deceased.
5. The accused slapped the deceased twice on the face using open hands whilst telling the deceased that he had no right to tell him how and where to park his motor vehicle. After that the accused went back to his motor vehicle.
6. However, the deceased challenged the accused for a fight.
7. The accused disembarked from his vehicle for the second time. Accused confronted the deceased and tripped him. The deceased fell down with the back of his head hitting the tarmac surface.
8. The accused drove off from the scene. Later on, on the same date the deceased died.
9. On 29 November 2016 an autopsy was conducted on the remains of the deceased. A post mortem report was compiled by Doctor Gonzalez who concluded that cause of death was subaracnoid haemorrhage head trauma due to assault. The port mortem report will be produced in court as evidence.
10. The accused negligently caused the death of the deceased in circumstances where the risk of death was foreseeable. Accused realised that death may result from his conduct but negligently failed to guard against that possibility.

The state counsel produced by consent the post mortem report compiled by Doctor Gonzalez after examining the remains of the deceased on 29 November, 2016. The report was marked Exhibit 1. The notable observations made by the Doctor were as follows:-

(a) Externally

- bruises on the occipital area.
- bruises on the right fore-arm
- bruises on the right elbow

The injuries were recorded as being ante-mortem

(b) Internally

- subgaleal haematoma on the occipital area
- no skull fractures
- brain:- subarachoid haemorrhage

(c) Cause of death

- subarachoid haemorrhage
- head trauma
- assault

The court confirmed from the defence counsel that the accused appreciated the elements of the offence of culpable homicide to which he pleaded guilty. On the basis of the accused's plea, the agreed facts and the post mortem report confirming the death of the deceased, the court formally convicted the accused of the offence of culpable homicide.

In mitigation of sentence it was submitted on the accused's behalf that he was employed as a salesman, the only surviving sibling of his parents who are late and had heavy family in that responsibilities since he looked after his own family and that of his late siblings. Counsel correctly submitted that as a first offender, the accused deserved to be treated with some leniency. He submitted that first offenders are usually spared effective custodial sentences. I would say that whether or not to effectively imprison a first offender is a variable informed by the circumstances of each case. The principle that first offenders be spared jail time is not a rule of thumb.

The accused pleaded guilty to the offence. A plea of guilty shows contrition by the accused. It means that the accused appreciates his wrong and does not waste the time of the court. Due weight must be given to guilty pleas and this case is not an exception.

From the agreed facts, the accused person is said to have been incensed “because the deceased insulted him for parking the accused’s motor vehicle in front of the deceased. The exact nature of the insults were not detailed to the court. It was submitted that the accused person had lost his mother three months before the incident. It will be accepted in the accused’s favour that he still had emotional stresses acting on him. The court cannot however place undue weight on this because the accused person was a grown up adult aged about 40 years old. At such a ripe age a person is expected to control one’s emotions and keep them in check. The accused was expected to behave in an exemplary manner.

The accused was the aggressor. He slapped the deceased twice on the face using open hands telling the deceased that he had no right to tell him “how and where to park his motor vehicle.” What was the purpose of slapping the deceased if one may ask other than a demonstration or show of power. The deceased at no stage fought back or retaliated other than to dare the accused to a fight. The accused disembarked from his vehicle after being challenged to a fight by a drunken deceased whom the accused had already slapped twice without relation. One wonders what fight there was for the accused to engage in. The accused instead of just ignoring the deceased, went up to the deceased, and felled him to the ground. Again the deceased did not fight back. He is said to have fallen on his back and hit his head against the tarmac. The accused person drove off without checking on the condition of the deceased who had fallen to the ground.

The defence counsel submitted that the accused person did not use severe force. It is not clear as to what the submission is intended to convey because the accused tripped the accused person to make sure that the deceased would fall down. The two were not engaged in a fight. The accused in effect assaulted a defenceless person who appears to have been nothing but an inebriated chatterbox. Admittedly, whilst no weapon was used by the accused person, the fact remains that the accused clearly displayed a bullish mentality and conduct.

Defence counsel submitted that an appropriate sentence in the circumstances of this case was a fine or a wholly suspended prison term. Reference was made to several decisions of this court where non-custodial sentences were imposed. Counsel could not refer me to a case where the accused was the through and through the aggressor who vented unjustified anger upon a defenceless drunken complainant. The court had to assess the sentence on the basis of an exercise of discretion judiciously exercised taking into account all the material facts of the assault

perpetrated upon the deceased and balancing them against the personal circumstances of the accused person.

The prosecutor submitted that it was aggravating that after felling the deceased, the accused just drove off. His arrest was fortuitous because someone recorded the registration number of his vehicle. Police traced the accused person by checking with Central Vehicle Registry on the registration particulars of the vehicle. Police hunted for the accused and apprehended him in Beitbridge. The accused clearly did not care about his victim whom he had tripped to the ground.

The prosecutor submitted that the offence which the accused stood convicted of was serious. It was committed in a public place in circumstances where the provocation was very slight. He submitted that people should show restraint when dealing with others.

In the court's view, the accused mindlessly caused the loss of human life. Culpable homicide under s 49 of the Criminal Law (Codification & Reform) Act is a serious offence. The court has a wide discretion in imposing sentence which ranges from imprisonment for life or any defined prison term or a fine up to level 14 which is the highest level or both imprisonment and a fine.

It is important that society remains mindful of fundamental rights and freedoms which the Constitution (2013) has provided for. Certain fundamental rights are so entrenched in the Constitution that they cannot in terms of s 86 (3) of the Constitution be limited by anyone nor is any person allowed to violate them. For purposes of this case, the applicable rights would be the right to life save as provided for in s 48, the right to human dignity under s 51 and the right not to be tortured or be subjected to cruel inhuman or degrading treatment or punishment under s 53.

The accused subjected the deceased to inhuman and degrading punishment by assaulting the deceased in a public place and dehumanizing him. The beating up of another person is dehumanizing and degrading. Exemplary and deterrent sentences are called for in such situations. The accused showed scant regard for the rights of the deceased person in circumstances where there was hardly any provocation of note. As already observed, the accused behaved as a bully and in such circumstances to impose a fine or non-custodial sentence would send the wrong signal to society that one can just bully fellow members of society over trivia and just pay their way out of their wrong. In circumstances where death has resulted the court must reflect society's abhorrence for the unnecessary loss of life by imposing exemplary sentences.

The accused was for the above reasons now given in more detail sentenced to 8 years imprisonment with 3 years suspended for 5 years on condition that he is not convicted of any offence of which assault is an element for which upon conviction he is sentenced to a term of imprisonment without the option of a fine.

*National Prosecuting Authority, for the State*  
*Mupindu Legal Practitioners, for the accused.*