

STATE  
versus  
ERIAH ZINAKA  
and  
NYASHADZASHE SHANAPINUKA

HIGH COURT OF ZIMBABWE  
TSANGA J  
HARARE, 30 October 2017 & 31 October 2017

**Assessors**     1.     Mr Mtambira  
                     2.     Mr Kunaka

### **Criminal Trial**

*A Muziwi*, for the State  
*D C Ngwerume*, for the 1<sup>st</sup> and 2<sup>nd</sup> accused persons

TSANGA J: The accused persons Erizah Zinaka and Nyashadzashe Shanapinuka who were initially facing a charge of murder pleaded guilty to culpable homicide. This was after the State agreed to amending the original charge to reflect the lesser offence following consultations with the accused persons' defence counsel.

The allegations were that on 8 November 2016 at Chitombo Business Centre, Chief Madziwa in Mt Darwin, they had assaulted the deceased Nyashadzashe Msipa with wooden sticks and open hands all over his body causing injuries from which he died. The State having accepted the limited plea a summary of the agreed facts was placed before the court. (Annexure 1)

The deceased had been employed by the first accused as a metal detector prior to his death and had been had operating in Munyati Gold Planning site in Kwekwe. He had, however, stolen the metal detector and investigations had revealed that he was now at Chine Mine in Mt Darwin. He had been followed there and when apprehended by the two accused

persons, had been assaulted by a mob of people following revelations that he was a thief. Whilst initially both accused persons too had assaulted the deceased with open hands and booted feet, they had later refrained the mob from further assaulting the deceased.

The stolen metal detector had been recovered and they had both taken the deceased to Kwekwe using a commuter omni bus which they had. However, by the time they arrived at Kwekwe Police station the deceased's condition had deteriorated from the assault. They had handed the accused to the police but because of his state the police had taken him to hospital where he was pronounced dead on arrival.

On 8 December 2016, a post-mortem examination had been carried out on the deceased and concluded that the death was due to severe cerebral oedema, subarachnoid haemorrhage contusions, and severe head trauma due to assault. The statement of agreed facts concluded that the accused had negligently caused the death of the deceased in circumstances where his death was foreseeable. Both accused persons realised that death may result from their conduct but negligently failed to guard against that possibility.

The post mortem report was admitted in evidence and marked as exhibit 1. On the evidence the court convicted the accused persons on the charge of culpable homicide. The court was satisfied on the facts that a concession of culpable homicide had been properly made. The report also described marks of violence on his body. He was 29 years old.

### **Mitigation and aggravation**

In mitigation the two accused were said to be 24 years old and both family men who were fending for their families at the time of the incident. Moreover, the deceased had been employed as a result of their endeavours. As they had pleaded guilty to the offence thereby saving the court a protracted trial, a rehabilitative approach in view of their circumstances was urged. Drawing on *S v Shariwa* 2003 (1) ZLR 314 H, it was further argued that as first offenders, a non-custodial sentence of community service would be appropriate.

As aggravation, the State pointed to the fact that the accused persons had taken the law into their own hands when they could fairly easily have surrendered the deceased to a police station for justice to be done. The evidence of taking the law into their own hands was said to be manifest from the post mortem report. Undoubtedly a needless loss of life had occurred which the State argued should not be countenanced by skirting over the appropriate sentence. The State also highlighted the fact that in cases of culpable homicide the appropriate sentence can range anywhere from a fine to a stipulated level or to life imprisonment at the extreme end.

Indeed the actual sentences vary and factors such the exact nature of circumstances of the culpable homicide in question are always considered since such cases are not in the nature of one size fits all. In arriving at an appropriate sentence courts generally strike a balance between the seriousness of the offence, the interests of justice and the interests of the accused persons. For instance, a fine was imposed in *S v Peter Paulos Mkhothando* HB-203-16 where a traditional healer had administered a deadly concoction to a seemingly pregnant woman. In *S v Weston Mombeshora* HH 435-16 where accused had struck the deceased six times with a rubber baton, a four year sentence was imposed with 2 suspended. A reading of that case also shows that the lesser sentence was imposed because the accused had already been incarcerated for one and a half years and the court also took into account that he was 26 years old. In *S v Phillip Mashava* HH 482-16 three and half years were suspended from a six year sentence because the accused had again already spent a year in custody. In *S v Kingdom Hlahla* HMA 01-16, the deceased had been struck once with a log on the side of the head. A three year sentence with one year suspended was imposed taking into account that the accused had since paid nine head of cattle out of the twenty that the deceased's family had asked for. This was considered as mitigatory. The long of the short is that each case is dealt with according to the facts and circumstances peculiar to it.

What is particularly striking about the case before us is the involvement of the mob apart from the accused persons in assaulting the deceased. Such cases have been observed to call for special attention when it comes to moral blameworthiness and sentencing. As observed by Beadle CJ as he then was in the case of *S v X* 1974 (1) SA 344 (RA) at 348D-G

“The fact that an accused is a socius and not a principal offender is always an important factor to be taken into account in assessing his moral blameworthiness and the principal factor to be taken into account here is the extent to which the socius makes common cause with the principal offender, as there is a very wide range of moral blameworthiness in cases of this sort. The position of the socius might be that he played a very unimportant part in the actual commission of the crime but was nonetheless a socius. In such a case the moral blameworthiness of the socius would be very much less than that of the principal offender. In another case the part he played in the offence might be so great as to identify him completely with the principal offender, in which case his moral blameworthiness could be considered to be as great as that of the principal offender.”

Whilst the two accused were not the sole assailants of the deceased since a mob was also involved, this court however cannot ignore the fact that they were in fact the ones who set in motion the attack on the deceased by naming him a thief. Their moral blameworthiness is in fact very high. They had a car and yet chose to instigate instant justice when they could have taken him to a police station from the outset for the law to take its course. In coming to

an appropriate sentence, this court notes that they are fairly young first offenders. They are said to have shown contrition in that they had gone to pay their condolences to the deceased's family after they were released from a three week stint in custody. They had also left \$200.00 with the family. Their relative lack of maturity may have influenced their overzealousness in seeking to mete out instant justice. The accused persons however cannot escape a term of imprisonment since to give them a sentence of community service under the explained circumstances, would send a wrong message on how courts deal with those who take the law into their own hands. It would undermine the rule of law given that our Constitution is very clear in s69 that every accused person has a right to be brought properly before the courts of law for a hearing.

### **Sentence**

In the circumstances each accused person is accordingly sentenced as follows:

3 years imprisonment of which 6 months is suspended for five years on condition that the accused person does not during that time commit a crime involving violence for which he is sentenced to a period of imprisonment without the option of a fine.

*National Prosecuting Authority, State's legal practitioners  
Mkwewa & Ngwerume Law Chambers, 1<sup>st</sup> and 2<sup>nd</sup> accused's legal practitioners*