

THE STATE

Versus

ZITHELO NDLOVU

IN THE HIGH COURT OF ZIMBABWE

DUBE-BANDA J with Assessors Mr T.E Ndlovu and Mr S.L Bazwi
HWANGE 9 MARCH 2022

Criminal trial

Mrs M. Cheda, for the State

Ms C. Manyeza, for the accused

DUBE-BANDA J: The accused appears before this court on a charge of murder as defined in section 47 of the Criminal law [Codification and Reform] Act Chapter 9:23. It being alleged that on the 4th December 2020, accused unlawful caused the death of Mbekezeli Moyo (deceased) by striking him with a shovel once on the head, intending to kill him or realising that there is a real risk or possibility that his conduct may cause the death of deceased and continued to engage in that conduct despite the risk or possibility.

The accused pleaded guilty to a lesser crime of culpable homicide. The State accepted the limited plea of guilty to culpable homicide. State counsel tendered into the record of proceedings a statement of agreed facts. The statement is before court and marked Annexure A, and it reads as follows:

The state and the defence are agreed that the following issues are common cause being that:

1. The accused was aged 21 years at the time of the commission of the offence and resides at Retinah Sibanda's homestead, Stand number 37, Village 2, Dromoland, Inyathi.
2. The deceased was aged 24 years at the time he met his death. He used to reside at Damba 10 Mine, Dromoland Compound, Inyathi.
3. On the 4th December 2020, and at 1000 hours, the accused, the deceased and one Nkosana Moyo were working at a shallow pit in Damba Mine, Dromoland, Inyathi.

4. The deceased the requested the accused to go to the Mine offices and get a metal detector but the accused refused indicating that he was not authorised to carry such equipment.
5. This annoyed the deceased, and he stated that the accused was stubborn and a difficult person to work with. Subsequently, the deceased slapped the accused once on the cheek and told the accused that he should listen to him.
6. The accused who was holding a shovel struck the deceased once on the head using the shovel.
7. The deceased fell to the ground and bled from the wound on the head.
8. The deceased was ferried to Inyathi district hospital where he was pronounced dead upon arrival.
9. The accused person pleads not guilty to murder but pleads guilty to culpable homicide in that he negligently caused the death of the deceased.

The State tendered into evidence the post mortem report. It is before court and marked Exhibit 1. The post mortem report lists the cause of death as subarachnoid hemorrhage and head trauma. The State tendered into evidence the shovel that was used to strike the deceased, it is before court and marked Exhibit 2. It has the following measurements: weight 2.3kg; length of shovel 91cm; length of handle 59cm; length of blade 32cm; circumference of handle 11cm; width of blade (wide part) 23cm; and width of blade (narrow part) 4cm.

The facts of this case show that the deceased slapped the accused once on the cheek and accused who was holding a shovel struck him once on the head using the shovel. The deceased fell to the ground and bled from the wound on the head. He was ferried to Inyathi district hospital where he was pronounced dead upon arrival.

Deceased did not use a weapon against the accused. He slapped him with an open hand. Accused and a shovel and struck the deceased on the head. Accused used excessive and disproportionate force in averting the attack from the deceased. The pathologist observed the following injuries on the deceased: contused wound in right parietal region; and excoriations in right frontal region. The skull was fractured.

The facts show that the injuries sustained by the deceased were caused by the accused. The post mortem report shows that the injuries inflicted by the accused caused the death of the deceased. It was objectively foreseeable or within the range of ordinary human experience that

accused's actions would lead to the death of the deceased. It therefore means that the accused acted negligently by assaulting the deceased in the manner he did. A reasonable person placed in a similar situation would have avoided acting in the manner the accused did. Accused negligently failed to realise that death may result from his conduct; or realising that death may result from his conduct and negligently failed to guard against that possibility.

In the circumstances of this case, we are satisfied that the State's concession has been properly made, it accords with the facts of this case and the law. It cannot be said that the accused is guilty of the crime of murder, however he used excessive and disproportionate force in averting the attack.

In the result, the accused is accordingly found not guilty of murder and found guilty of a lesser crime of culpable homicide in terms of section 49 of the Criminal Law (Codification and Reform) Act [Chapter 9:23].

Sentence

The accused has been convicted of the crime of culpable homicide. This Court must now decide what sentence is appropriate for the offence for which he has been found guilty. To arrive at the appropriate sentence to be imposed, this Court will look at his personal circumstances, take into account the nature of the offence he has been convicted of, and factor in the interests of society.

We factor into the equation the personal circumstances of the accused which are as follows: he is 22 years old. He is not married. He has no children. He was employed at a mine and earning USD200.00 per month.

We also take into account that he is a first offender and he has been in pre-trial custody for approximately five weeks. He pleaded guilty to the crime of culpable homicide. We factor into the equation that the deceased requested the accused to go to the Mine offices and get a metal detector but the accused refused indicating that he was not authorised to carry such equipment. This annoyed the deceased, and he stated that the accused was stubborn and a difficult person to work with. Subsequently, the deceased slapped the accused once on the

cheek and told the accused that he should listen to him. This shows that the deceased was himself the aggressor in this case.

We factor into the equation that the accused has been convicted of a serious offence. A life was ended. It is incumbent on this court to emphasize the sanctity of human life. Society frowns at the taking of another human being's life. The courts must send a loud and clear message that the killing of a fellow human being will not be tolerated. Notwithstanding his youthfulness, and the circumstances of this case, accused cannot avoid imprisonment. Any sentence less than imprisonment would trivialise an otherwise serious case.

Taking into account the facts of this case we are of the view that the following sentence will meet the justice of this case, the accused is sentenced to 5 years imprisonment of which 2 years imprisonment is suspended for 5 years on condition the accused does not within that period commit an offence of which an assault or physical violence on the person of another is an element and for which upon conviction he is sentenced to a term of imprisonment without the option of a fine.

National Prosecuting Authority, state's legal practitioners
Mvhiringi and Partners, accused's legal practitioners