

THE STATE

Versus

PERDIAS NDLOVU

IN THE HIGH COURT OF ZIMBABWE

DUBE-BANDA J with Assessors Mr. Ndlovu and Mr. Ndubiwa

HWANGE 5 March 2024

Criminal trial

Mrs *M. Cheda* for the State

Ms. *J. Change* for the accused

DUBE-BANDA J:

[1] The accused is appearing before this court charged with the crime of murder as defined in s 47 of the Criminal Law (Codification and Reform) Act [Chapter 9:23]. It being alleged that on 17 October 2023 he unlawfully caused the death of Bekezela Ncube referred to as deceased by striking him four times on the head with a log intending to kill him or realising that there was a real risk or possibility that his conduct may cause the death of the deceased and continued to engage in that conduct despite the risk or possibility.

[2] The accused pleaded not guilty to the crime of murder and offered a plea of guilty to the lesser crime of culpable homicide. The State accepted the plea of guilty to the crime of culpable homicide. The State tendered into the record of proceedings a statement of agreed facts, which is before court and marked Annexure "A". The statement reads as follows:

The State and the Defence are agreed that the following issues are common cause being that:

- i. The accused was aged 32 years of age at the time of the commission of the offence and he resides at Matshenji Ncube's homestead, Jumbika Village, Chief Mabhikwa, Lupane.
- ii. Deceased was aged 37 years at the time he met his death. He used to reside at his own homestead Jumbika Village, Chief Mabhikwa, Lupane.
- iii. Accused and deceased were cousins.

- iv. On the 17th of October 2023 and at around 1900 hours deceased left home to go and fetch water and left his wife Sibonakaliso Sibanda in the company of Godknows Ndlovu.
- v. Accused is Sibonakaliso Sibanda ex-boyfriend.
- vi. Accused arrived at deceased's homestead carrying two calabash beers and found Sibonakaliso there. He greeted her and asked her what she was doing at deceased's homestead. Sibonakaliso told accused that she was now married to deceased.
- vii. This infuriated the accused and he charged towards Sibonakaliso and she fled to a neighbour's homestead. Accused then accused Godknows of allowing deceased to snatch away his girl friend from him but Godknows disputed the allegations.
- viii. Deceased arrived at the homestead and asked accused why he was shouting within his homestead. Accused turned at deceased and accused him of snatching his girlfriend. Deceased was not amused by the accusation.
- ix. Deceased slapped the accused once on the face. When accused asked deceased why he was slapping him, deceased further assaulted him with a clenched fist and held him by the collar. The two engaged in a fist fight. Deceased picked a wooden pick handle and charged towards the accused and accused ran away.
- x. Deceased gave chase while holding the wooden pick handle and caught up with accused near accused's homestead. The two continued fighting.
- xi. Accused picked a log and struck deceased on the head thereafter fled from the scene.
- xii. Deceased was found lying in a pool of blood. He had sustained a deep cut on the head and was breathing with difficulty.
- xiii. Deceased was taken to St Lukes hospital and Later to Mpilo Hospital where he died the following day.
- xiv. The accused person pleads not guilty to murder but pleads guilty to culpable homicide in that he negligently caused the death of the deceased.

[3] The State tendered the following exhibits; a post mortem report compiled by Dr. I. Jekonya who concluded that the cause of death was intracranial haemorrhages, head injury and assault. And a log broken into three pieces: piece 1: length 125cm; circumference 13cm; and weight 700. Piece 2: length 88cm; circumference 11cm; and weight 300 kg. Piece 3: length 61cm; circumference 10cm; and weight 155g.

[4] The totality of the facts and the evidence adduced in this trial 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.

[5] The accused struck the deceased with a log on the head. The accused exceeded the lawful limits of self-defence. In striking the deceased in the manner he did a reasonable man placed in the same circumstances as the accused would have foreseen the possibility of death and would have guarded against it. The conduct of the accused shows that he fell below the reasonable person standard. The accused ought, as a reasonable man, to have foreseen the death of the deceased and guarded against it. The accused was negligent and it was his negligence that led to the death of the deceased. On the basis of the facts and the evidence of this case, the court is satisfied that the State's concession was properly taken.

In the result: the accused is found not guilty of murder and found guilty of the lesser crime of culpable homicide as defined in s 49 of the Criminal Law (Codification and Reform) Act [Chapter 9:23].

Sentence

[6] In determining an appropriate sentence, a court has regard to the personal circumstances of the accused, the nature of the crime, and the interests of society. The courts have stressed the importance of proportionality and balance between the crime, the criminal and the interests of society. It remains the paramount function of the sentencing court to independently apply its mind to the consideration of a sentence that is proportionate to the crime committed. The cardinal principle that the punishment should fit the crime should not be ignored. This court must also factor into the equation the provisions of the Criminal Procedure (Sentencing Guidelines) Regulations, 2023.

[7] It is trite law that sentencing is about striking the correct balance between the crime, the offender and the interests of the community commonly referred to as the triad. See *S v Zinn* 1969 (2) SA 537 (A). A court should, when determining sentence, strive to accomplish and arrive at a judicious counterpoise between these elements in order to ensure that one element is not unduly emphasised at the expense of and to the exclusion of the others. In its consideration of an appropriate sentence, the court is mindful of the need to apply the established principles of deterrence, prevention, reformation, and retribution.

[8] The personal circumstances of the accused have been conveyed to the Court by your legal representative who informed the court that accused is 32 years old. He is not married. He has two minor children. At the time of arrest, he was employed as a grinding mill operator earning US\$50.00 per month. The court was informed that he paid US\$60.00 towards the deceased's medical expenses and contributed towards the funeral costs. Further in considering sentence it is important to take into account that the accused is not repeat offenders, and he pleaded guilty to the offence of culpable homicide. He is remorseful for having caused the death of a fellow villager. The court further takes into account that the offender tried to flee but the deceased gave chase, and that log used to strike at the deceased was picked from the scene. Again, the offender has been in pre-trial incarceration for nine months.

[9] It is stating the obvious but it bears repeating that culpable homicide is a serious of crime. In wrongfully causing the death of the deceased the accused's actions have impacted on the lives of the deceased's family, relatives and friends. They must now deal with the emotional trauma that his violent and premature death has thrust on them.

[10] The sentence the court imposes must be one that will not only rehabilitate the accused but it should also serve as a deterrent to other likeminded individuals. Members of society must know that the courts will protect their rights. It is the kind of sentence which we impose that will drive ordinary members of our society either to have confidence or to lose confidence in the judicial system. The sentences that our courts impose when offences of this nature are committed, should strive to ensure that people are not driven to take the law into their own hands, but rather to scare away would be offenders. In our constitutional order every person is entitled to expect and insist upon the full protection of the law.

[11] The offender was the overall aggressor. He was former boy-friend of deceased's wife. He went to the deceased's homestead to cause trouble. He charged towards the deceased's wife and she ran away to hide at the homestead of a neighbor. Offender turned to the deceased and accused him of snatching his girlfriend. The offender ran away and when deceased caught up with him he picked a log and struck deceased on the head and caused a deep cut on the head. The offender fled from the scene and did not offer assistance to the deceased who lying in a pool of blood and having difficulties in breathing.

[12] The post mortem report shows that severe force was used in inflicting the injuries sustained by the deceased. He had brain injury, traumatized ear lobe, he had a 4.5cm sutured wound of the left temporal region ending at the upper part of the left ear. He had other numerous internal injuries emanating from the attack. The attack was so vicious that the deceased was found lying in a pool of blood. The aggravating factors in this case makes a sentence of direct imprisonment warranted and in the interest of justice. This is so because members of society depend upon the courts to protect them against the infringement of their right to safety as a symbol of an orderly society.

[13] Having taken all the factors into account, the following sentence will meet the justice of this case. In the result the offender is sentenced as follows:

“5 years imprisonment of which 1 suspended for 5 year on condition accused does not commit within that period any offence involving the use of violence upon the person of another and or causing the death of another through violent conduct and of which if convicted the accused is sentenced to a term of imprisonment without the option of a fine.”

National Prosecuting Authority State’s legal practitioners
Muviringi & Associates accused’s legal practitioners