

THE STATE

Versus

CALLUP SIBANDA

And

BLESSED NCUBE

IN THE HIGH COURT OF ZIMBABWE
TAKUVA J with Assessors Mr Damba & Mr Sobantu
BULAWAYO 22 OCTOBER 2015

Criminal Trial

Miss N. Ndlovu for the state

R. Dzete for 1st accused

S. Mlambo for 2nd accused

TAKUVA J: Accused persons were facing a murder charge in that on the 1st of February 2015 and at near Malathu Moyo's homestead, the accused persons did wrongfully, unlawfully and intentionally kill and murder Vusumuzi Mathuthu a male adult in his life time there being. They pleaded not guilty to the charge. Accused 1 pleaded guilty to a lesser charge of culpable homicide while accused 2 pleaded guilty to assault. The state accepted the limited pleas. The following exhibits were then produced.

1. Statement of agreed facts;
2. Affidavit by Constable Chikunguru
3. Post mortem report; and
4. A stone weighing 0.560kg.

The facts are as follows;

"1. The deceased was aged 27 years at the time he met his death and he used to reside at Eedufilly Ncube's homestead, Bambanani Makoshe Line, Avoca Area, Filabusi.

2. The first accused (Callup Sibanda) was aged 36 at the time of the commission of the offence and he resides at Esnath Sibanda's homestead, Shakwe Line, Avoca Area, Filabusi.
1. The second accused (Blessed Ncube) was aged 18 at the time of the commission of the offence and he resides at Artwell Ncube's homestead, Shakwe Line, Mbawulo Village, Avoca Area, Filabusi.
2. On the 1st of February, 2015, the two accused persons were at Malathu Moyo's homestead drinking beer under a marula tree. The two were later joined at Malathu's homestead by the deceased who was in the company of Bongani Mathuthu and four others who sat about 3 metres from where the accused persons were and started drinking beer.
3. After some time, Bongani Mathuthu, deceased's brother, stood up from where they were and approached the two accused persons and extended a greeting to them.
4. The first accused did not take kindly to the greeting and queried why he was being greeted at that point. A verbal altercation then ensued between accused persons and deceased and his group to which Bongani Mathuthu was party. Malathu Moyo intervened and quelled the dispute.
5. The 1st accused then asked for his cellphone from Malathu Moyo which was being used for playing music and he, together with the second accused, stood up and left.
6. One Xolani who was of deceased's party followed them indicating that he wanted to understand from the accused persons what their problem was.
7. When Xolani caught up with the accused persons just outside Malathu Moyo's homestead another misunderstanding ensued which degenerated into a physical confrontation.
8. Seeing this Bongani Mathuthu and the deceased rushed to the scene and joined in on the side of Xolani. During the confrontation first accused was struck once in the hip with a catapult propelled by Xolani.
9. Malathu Moyo came through and intervened again and the fighting ceased. Bongani Mathuthu, Xolani and the deceased went back into Malathu Moyo's homestead and

resumed drinking their opaque beer mixed with some illicit brew (tototo) while the two accused persons proceeded towards accused two's homestead which is close to Malathu Moyo's homestead.

10. After a short while, the two accused persons came back and stood outside Malathu Moyo's homestead. The first accused called out saying he wanted to talk to the person who assaulted him to which Malathu Moyo responded by approaching the accused persons and persuading them to just leave the matter.
11. The accused persons however did not heed but remained standing there when Malathu went back to his homestead.
12. On getting back home Malathu found that a fight had erupted amongst the patrons at which he ordered everyone out of his homestead.
13. The bulk of the patrons left using the western gate which is close to where the accused persons were still standing while the deceased, Bongani and Xolani went out through the eastern gate.
14. Upon seeing this, the accused persons went round Malathu's homestead fence to meet the deceased, Xolani and Bongani.
15. Upon meeting, another fight ensued between the two groups with both groups hurling stones at each other. Xolani and the second accused were using their catapults.
16. During the altercation the second accused fled the scene and Xolani pursued him. Second accused outpaced Xolani who turned back and headed to his home.
17. As the fight continued the first accused picked a stone and struck the deceased once on the forehead. As a result the deceased fell, collapsed, and lay prostrate on the ground. At that point Bongani Mathuthu fled from the scene and stood at a point a short distance away.
18. Accused 1 then advanced to the deceased who still lay on the ground and stamped on his head several times with booted feet. Malathu Moyo then rushed to the scene and pleaded with accused 1 to stop assaulting the deceased.

19. Accused 2 on seeing that Xolani had ceased pursuing him, turned and returned to the scene, to find that the deceased had already fallen down after taking a blow to the head from accused 1's hand propelled stone.
20. On approaching the scene. Accused 2 shot at the deceased who was lying down on the ground with his catapult, hitting him on the leg. The two accused persons then left the scene.
21. The witness Malathu Moyo remained at the scene tending to the deceased who had at that point lost consciousness. The deceased was then ferried to Mabuza Clinic where on arrival he was immediately transferred to Filabusi Hospital where he died on admission.
22. Per the post mortem report number 99/97/2015 compiled by Doctor Betauncourt after examining deceased's remains, the cause of deceased's death was,
 1. Severe brain oedema
 2. Subdural haematoma
 3. Severe head trauma
23. Accused 1 pleads Not Guilty to Murder but pleads guilty to Culpable Homicide in that he negligently and unlawfully caused the death of the deceased when he assaulted him with a stone and stamped on his head several times with booted feet.
24. Accused 2 pleads not guilty to murder but guilty to assault in that he intentionally caused bodily harm to the now deceased when he struck him on the leg with a catapult propelled stone."

From the facts contained in the statement of agreed facts we are satisfied that the state's concession to the limited pleas is proper at law. Accused 1 admits the *actus reus*. He admitted using the stone and stamping deceased on the head with booted feet. Deceased died from injuries sustained from accused's assault. A reasonable man would have foreseen that a person might die if struck with such weapons. Accused struck deceased on the head.

We therefore return the following verdicts:

Accused 1 – not guilty of murder but guilty of culpable homicide

Accused 2 – not guilty of murder but guilty of assault i.e. contravening section 89 of Criminal Law (Codification and Reform) Act Chapter 9:23.

Sentence in respect of accused 1

In assessing sentence the court will take into account what has been submitted on your behalf by your counsel in mitigation. In particular we have considered your personal circumstances namely that you are a 36 year old family man. As regards circumstances surrounding the commission of the offence, we have considered that the incident occurred at a beer drink and that you were drunk. We have also taken into account the fact that you pleaded guilty to the charge and in that respect you did not waste the court's time. We accept the legal principle that a plea of guilty is a weighty mitigating factor. While we accept that the accused was hit by one of deceased's friends, we do not attach much weight to this as accused knew who had assaulted him and he should have pursued that attacker instead of assaulting an innocent man.

On the other hand we considered the following aggravating factors,

- (i) life was unnecessarily lost. The motive for the attack appears totally unreasonable
- (ii) the accused used a very dangerous weapon – a very hard granite stone.
- (iii) he aimed at the most vulnerable part of a human body i.e. the head
- (iv) he used excessive force to fracture deceased's head
- (v) he continued to attack the deceased when he was lying on the ground helpless
- (vi) the accused showed total disregard for deceased's safety and health
- (vii) accused disregarded Malathu Moyo's very good advice not to engage in violence and to leave the place.
- (viii) although he was the most mature person at the scene, he did not exhibit this maturity in his conduct towards the deceased.

(ix) accused had more than one opportunity to pull out of this fight but he consciously decided not to do so. For these reasons we find that the cases of *S v Sibanda* SC 245-13 and *S v Ncube* HB-173-15 are clearly distinguishable from the one *in casu*.

Bearing in mind the deterrent and retributive theories of sentence we weighed the mitigating features against aggravating factors and found that the latter far outweigh the former. We agree with the state counsel that a substantial term of imprisonment is called for. The value of deterrence should not be underestimated. If courts pass lenient sentences, this would put the administration of justice into disrepute. The result will be an affront on the rule of law as victims' relatives will take the law into their own hands with catastrophic consequences. The courts therefore have a duty to uphold the sanctity of human life by passing sentences that take into account the retributive element of sentencing. As we pointed out above, it is not clear why the accused killed the deceased.

For these reasons, accused 1 is sentenced as follows:

8 years imprisonment of which 2 years imprisonment is suspended for 5 years on condition the accused does not within that period commit any offence involving violence upon the person of another and for which upon conviction will be sentenced to a term of imprisonment without the option of a fine.

Sentence in respect of accuse 2

As regards accused 2 we took into account the following mitigating factors:

- (a) youthfulness – accused was aged 18 years at the time. It is trite that young people act irrationally and are easily influenced
- (b) the fact that the accused is a 1st offender is mitigatory in that 1st offenders should be kept out of prison where possible
- (c) the plea of guilty – the accused did not waste the court's time
- (d) the accused has been in custody for 8 months pending trial through no fault of his

(e) that he is remorseful

Against these mitigating factors we found the following aggravating features;

- (a) the accused assaulted the deceased for no apparent reason as deceased was lying down posing no threat at all to the accused.
- (b) the accused used dangerous weapons i.e. a catapult and a stone
- (c) the accused intended to assault the deceased
- (d) he inflicted bodily harm in the form of a wound on the deceased's left leg
- (e) instead of stopping accused 1 from further assaulting a helpless man, he joined in the unlawful attack.

Weighing these two, we find that the aggravating factors far outweigh the mitigating features. In terms of section 89 (1) of the Criminal Law (Codification and Reform) Act, the court can impose a fine or a term of imprisonment as punishment for assault.

In casu, we are of the view that a fine will trivialize the offence and will not send the correct message to would be offenders. Accused is a man of straw and if ordered to pay a fine, his parents will most likely pay on his behalf and he will not be punished personally. As regards community service, we disregarded it for the simple reason that in the rural areas it is difficult to supervise these offenders.

We have decided therefore to impose a custodial sentence. However in determining the length of this sentence we will take into account the period accused spent in custody awaiting trial. It is common cause that accused spent 8 months in custody pending trial. We strongly feel that there is need to deter young people from committing offences involving violence through the use of dangerous weapons. In most cases as indeed *in casu*, the victims of such assaults are elderly innocent citizens. The only way the court can deter would be offenders is through stiff penalties.

Accordingly, the accused is sentenced to 6 months imprisonment of which 4 months imprisonment is suspended for 5 years on condition accused is not within that period convicted of an offence of which violence is an element.

Prosecutor General's Office, state's legal practitioners
Marondedze & Mukuku & Partners, 1st accused's legal practitioners
Messrs Majoko & Majoko 2nd accused's legal practitioners