

THE STATE

Versus

CONSIDER NDLOVU

IN THE HIGH COURT OF ZIMBABWE

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

HWANGE CIRCUIT COURT 5 OCTOBER 2020

Criminal Trial

Mrs M. Cheda for the state

Miss C. Manyeza, for the accused

DUBE-BANDAJ: The accused was arraigned before this Court on 5th October 2020 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 7th of April, under a Mususu tree along a foot path leading to Mandawe Line, Chief Siphoso, Tsholotsho, the accused unlawfully stabbed Khululani Sibanda with a knife once on the stomach intending to kill him or realising that there was a real risk or possibility that his conduct may cause death but continued to engage in that conduct despite the risk or possibility.

The accused tendered a plea of guilty to a lesser charge of culpable homicide. The State accepted the plea of guilty to culpable homicide. The state tendered into the record of proceedings a statement of agreed facts which was marked Annexure A. According to the statement, the accused was aged 30 years at the time of the commission of offence, and the deceased was aged 28 years at the time he met his death. On the 7 April 2020, at around 2030 hours, the accused and the deceased were gambling under a Msusu tree along a footpath leading to Mandawe. They were in the company of other persons, namely, Mgcini Sibanda, Sabelo Sibanda, Maphikelela Sibanda, Phangisani Sibanda and others. The accused and the deceased had a misunderstanding while playing cards. The deceased assaulted the accused with an open hand. The accused drew out a knife from his pockets which he waved in front of the now deceased. Sabelo Sibanda intervened and chased them away and the accused went home. The deceased followed the accused and caught up with him at the gate. The accused was trying to close the gate, while the now deceased was trying to force his way inside the yard. Accused turned and walked away and the deceased who was armed with a log struck

the accused once on the head. The accused fell to the ground but soon got up and grabbed a knobkerrie which he used to strike the now deceased once on the head. The deceased who was still carrying a log advanced towards the accused. The two then wrestled for the log and both fell to the ground and the now deceased got on top of the accused. The accused took out a silver folding knife from his trouser pocket and stabbed the deceased once on the left side of the stomach. The accused and the deceased wrestled for the knife. The deceased took possession of it and then proceeded home. Along the way his intestines protruded from the stomach. When he got home he reported to his mother and also handed her the knife. He was ferried to hospital where he died on the 8th April 2020.

The state tendered a post mortem report compiled by a pathologist, Dr. E. Foto at Mpilo Hospital, Bulawayo 10th April 2020. The post mortem report number 88/62/2020 was received by consent and marked Exhibit 1. The findings in the post mortem report list the cause of death as: hypovolemia due to internal haemorrhage and lacerated kidney (left). The State also produced a silver folding knife. The knife was received by consent and marked Exhibit 2. The knife has the following dimensions: weight 410 grams; length of handle 18 cm; width of handle 3 cm; length of blade 16 cm; width of blade at its tip 5mm.

The facts show that the injury sustained by the now deceased was caused by the accused. The post mortem report shows that the injury inflicted by the accused caused the death of the deceased. In accepting a limited plea of guilty to culpable homicide, the State is conceding that the accused neither had the requisite intention to kill the now deceased; norrealised a real risk or possibility that his conduct may cause death, and continued to engage in that conduct despite the risk or possibility of death.

The facts of this case show that the deceased was the aggressor. The accused tried to avoid him by going to his home, the deceased followed. It is the deceased who was armed with a log, and started using it on the accused. However, by stabbing the deceased with a lethal weapon, on a very delicate and vulnerable part of the body, the accused negligently failed to realise that death may result from his conduct; norrealised that death may result from his conduct and negligently failed to guard against that possibility.

On the basis of the facts of this case, we are satisfied that the State's concession is properly made, it accords with the facts and the law. It cannot be said that the accused is guilty of the crime of murder. In the result the accused is accordingly found not guilty of murder and found guilty of lesser crime of culpable homicide.

Sentence

It is firmly established that in determining upon an appropriate sentence a court should have regard to the nature of the crime the accused has committed, the interests of the community and the individual circumstances of the accused. These considerations are commonly referred to as the '*Zinn triad*' after the often quoted decision of the Appellate Division that authoritatively confirmed them to be the relevant compass points. See *S v Zinn* 1969 (2) SA 537 (A).

In determining an appropriate sentence, we are guided by section 49 of the Criminal Law [Codification and Reform] Act Chapter 9:23. We factor in the personal circumstances of the accused which are as follows: he is 30 years old, he is the father of minor children, one in Grade 7 and the other in Grade 5. He is self-employed and makes ZAR 2000.00 per month. He has one cow and no savings. Again, we take into account the fact that the accused is a first offender. He pleaded guilty to the lesser charge of culpable homicide. In accused's favour it is apparent that the deceased was behaving in a provocative manner. He was in fact the aggressor.

However, we take into account 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 fellow human being will not be tolerated. The carrying of knives is unacceptable. The accused used a lethal weapon on a delicate and vulnerable part of the body.

With the facts of this case, a non-custodial term will trivialize an otherwise serious case. We take the view that the following sentence will meet the justice of this case, the accused is sentenced to 4 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
Ndove & Associates, accused's legal practitioners