

THE STATE

Versus

MAKHOSI NCUBE

IN THE HIGH COURT OF ZIMBABWE
DUBE-BANDA J with Assessors Mr Mashingaidze and Mr Dewa
HWANGE CIRCUIT COURT 3 November 2020

Criminal Trial

Mr. Gundani for the State
Ms Nkomo, for the accused

DUBE-BANDA J: The accused was arraigned before this Court on 3rd November 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 17th of August 2019 and at number 73 Candelbra Road Thorngroove, the accused person struck Keith Ramjee (deceased) with a cooking stick and a broom stick 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 tendered a plea of guilty to a lesser charge of culpable homicide. The State accepted the plea of guilty to culpable homicide. State counsel and defense counsel tendered into the record of proceedings a statement of agreed facts, and the material parts of the statement reads as follows:

1. The accused was aged 33 years at the time of the commission of the offence and the deceased was aged 40 years at the time he met his death. The deceased was accused's cousin and both resided at House Number 73 Candelbra road, Thorngroove, Bulawayo.
2. On the 17th day of August 2019 at around 2000 hours, the accused and the deceased arrived home from attending a party in Mahatshula, Bulawayo. Both deceased and accused had been drinking beer at the party.

3. Upon arrival at home the two had a misunderstanding over money which had been sent by deceased's mother. The deceased assaulted the accused with a cooking stick and a broom. The accused retaliated and the two engaged in a fight in which the accused overpowered the deceased. The accused then assaulted the now deceased using the cooking stick and it broke. Accused then hit deceased with a broom and deceased fell and hit his head against the floor and he started bleeding from the head. Accused further assaulted deceased.
4. Accused then took deceased and shut him in their bedroom while he was bleeding from the head.

The state tendered various exhibits, documentary and real exhibits. Documentary exhibits being an Affidavit of Constable Masharu; post mortem report; and accused's confirmed warned and cautioned statement. Real exhibits being a stick measuring 34cm in length, diameter of 1.8cm and weighing 78g; metal pipe (brown and white in colour) measuring 92cm in length, diameter 1.5cm, weighing 95g; sweeping broom with a broken handle (blue and yellow in colour) weighing 850g; broken plank with blood stains measuring 34cm long, weighing 48g; broken plank with blood stains measuring 39cm long, weighing 51g; broken wooden coking stick measuring 39cm long, weighing 75g; and a stick with blood stains measuring 33cm long, and weighing 76g.

The post mortem report lists the cause of death as: traumatic subarachnoid hemorrhages; head injury and multiple injuries. According to the post mortem report, severe force was used to cause the multiple injuries of broken teeth, broken back ribs, subarachnoid hemorrhages; etc. if the back part of the ribs are broken it shows that severe force was used as the back ribs are normally protected by a thick mass of very strong back muscles.

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. 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 deceased; nor realised 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 there was a fight between the now deceased and the accused. The accused overpowered the deceased, and continued to assault him using a cooking stick and a broom. When the deceased fell and hit his head on the floor and started bleeding, the accused continued to assault him. Accused shut the deceased in the bedroom while he was still bleeding. Severe force was used against the deceased. He suffered broken teeth and broken ribs.

The accused's actions are the cause of the death. 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.

Verdict

On the basis of the facts 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. 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.

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 33 years old; not married; with a child aged 6 years old in the custody of its mother; he is not employed. We also take into account that he had

taken alcohol, he is a first offender and that he has been in pre-trial incarceration for a period of approximately one year and two months. We also factor into the equation that there was a fight between the accused and the deceased and that it is the deceased who started to assault the accused with the cooking stick and a broom. We also take into account that the accused is a first offender who pleaded guilty to culpable homicide.

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 a fellow human being will not be tolerated. We note that the accused the accused overpowered the deceased, assaulted him with the cooking stick and sweeping broom, he fell down and hit his head against the floor and he started bleeding from the head. Accused did not stop but continued to assault the deceased. As shown by the post mortem report, accused deployed severe force in assaulting the deceased. Deceased had broken ribs and broken teeth.

Taking into account the facts of this case, a non-custodial term or community service will trivialize an otherwise serious case. We are of the view that the following sentence will meet the justice of this case, the accused is sentenced to 6 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
Ncube-Tshabalala Attorneys, accused's legal practitioners*