

THE STATE

Versus

MHLAWUMBE MOYO

IN THE HIGH COURT OF ZIMBABWE
MAKONESE J with Assessors Mr J. Ndubiwa and Mr J.L.M. Zulu
HWANGE 6 JUNE 2022

Criminal Trial

Mrs M. Cheda, for the state
Ms L. Mtombeni, for the accused

MAKONESE J: The accused was 38 years at the time the offence was committed. The deceased was aged 35 years. The accused appears in this court on a charge of murder in contravention of section 47 (1) of the Criminal Law Codification and Reform Act (Chapter 9:23). The accused denies the charge of murder and tenders a plea of guilty to the lesser offence of culpable homicide. The state accepts the limited plea. A Statement of Agreed Facts has been tendered into the record. It summarizes the events leading to the death of the deceased. On the 4th of August 2004 the accused and the deceased were drinking beer at a night club in Tsholotsho. The night club is known as Lambada Nite Club. The accused was drinking opaque beer whilst the deceased was drinking clear beer. The deceased and accused started insulting each other. After a while the accused and the deceased would burst into laughter. The accused started shaking his container of opaque beer. The container burst and spilt beer on the deceased's shirt. This infuriated the deceased who then insulted the accused saying, "stupid, how can you splash us with opaque beer when we are not drinking

beer.” The accused got angry and said to the deceased “I will kill you.” Accused responded in good measure and remarked that accused was not strong enough to kill him. The two burst out in laughter once again. The two hugged each other. The accused and deceased went outside the night club, they were hugging each. The two then started assaulting each. They began to fight using clenched fists. One Themba Ncube who was employed as a security guard at Thuthuka Wholesalers, located opposite the night club, asked the two to stop fighting but they continued fighting. Several patrons came out of the night club. Accused ran away. Deceased chased after him and got hold of him before accused broke free. Deceased picked up stones and accused ran away. Deceased got hold of him. The accused turned and punched the deceased causing him to fall to the ground. Accused kicked the deceased on the hand, picked up a stone and struck the deceased on the head several times.

The deceased was found dead the following morning with multiple injuries on the head and face.

The Post Mortem Report produced by the state was compiled by Dr I. Jekonya at Mpilo Central Hospital on the 5th of August 2004. The cause of death is listed as:

- (a) brain haemorrhage
- (b) skull fractures
- (c) head injury
- (d) assault (murder)

On internal examination the pathologist observed multiple fractures of the right skull, the longest fracture being 15cm and running from the right mid base of the skull upwards.

On these facts, we are satisfied that the accused inflicted upon the deceased the injuries that led to his demise. We conclude that the accused had no intention to bring about

the death of his victim. The accused and the deceased were fighting. We accept the limited plea tendered by the accused, to the lesser charge of culpable homicide.

In the result, the accused is found not guilty on the charge of murder. Accused is found guilty of culpable homicide.

Sentence

Far too many lives are being lost as a result of violence committed at drinking places. Those who patronise night clubs and beer gardens should always bear in mind that drunkenness should never be used as an excuse to inflict harm and even death on innocent victims. The accused has been convicted of a serious offence. The sentence this court shall pass must reflect the seriousness with which our court values the loss of lives at the hands of other human beings. The accused was aged 38 years at the time he committed the offence. He is now aged 56 years. The delay in the finalisation of this case was caused in large part by the accused himself who defaulted court and could not be brought to justice until January 2022 when he was apprehended. Accused is a family man with the usual family responsibilities. He lives a modest life and survives as a communal farmer. By pleading guilty accused has shown a certain degree of remorse. He has not wasted the court's time. He has openly admitted his guilt and not sought to raise frivolous defences. The court shall take that into account in assessing an appropriate sentence. *Mrs Mtombeni*, appearing for the accused suggested that a sentence in the region of 5 years with a portion suspended on the usual conditions of good behaviour would meet the justice of the case. *Mrs Cheda* appearing for the state has submitted that a sentence of 8 years imprisonment would be appropriate.

We take into account all the mitigatory features of the case, particularly that the deceased was clearly the aggressor who armed himself with stones. The accused however

got the better of him and deceased found himself with fatal head injuries after the fight. The accused clearly used excessive force and struck the deceased several times on the head causing multiple fractures. The deceased was never going to survive the brutal assault.

In the result, and accordingly the following is an appropriate sentence:

“Accused is sentenced to 8 years imprisonment of which 3 years imprisonment is suspended for 5 years on condition accused is not within that period convicted of an offence involving violence and for which upon conviction accused is sentenced to imprisonment without the option of a fine.”

Effective sentence: 5 years

National Prosecuting Authority, state’s legal practitioners

Dube Nkala and Company, accused’s legal practitioners