

THE STATE

Versus

MDUDUZI NCUBE

And

NOTHANI NCUBE

IN THE HIGH COURT OF ZIMBABWE

MAKONESE J with Assessors Mr J. Ndubiwa & Mr J. I. M. Zulu

HWANGE 7 JUNE 2022

Criminal Trial

Mrs M. Cheda for the state

E. Mashindi, for 1st & 2nd accused

MAKONESE J: The accused persons have been arraigned in this court facing a charge of murder in violation of section 47 (1) of the Criminal Law Codification and Reform Act (Chapter 9:23). It is alleged that on 18th October 2019 at Battlefields Village, Mbembesi, the accused acting in concert with three other persons, assaulted the deceased, Sifelani Nkomo all over the body several times using switches, a whip and an axe, intending to cause his death or realizing that their conduct may cause his death. The accused persons deny the charges. They however tendered a plea of guilty to the lesser charge of culpable homicide. The state accepts the limited plea. A statement of agreed facts has been tendered into the record. The background facts leading to the commission of the offence are these. Accused 1 was aged 36 years at the time the offence was committed. Accused two was aged 28 years at the relevant time. The deceased was aged 32 years when he met his death. On 18th October 2019 and around 0800 hours Mthokozisi Moyo, Kelvin Moyo and Malvin Moyo proceeded to accused's one's homestead intending to return an axe that belonged to accused 1. There was no one in sight at the homestead. Mthokozisi decided to peep through the window to one of the bedroom huts where upon to his utter horror he observed the deceased having sexual intercourse with a dog belonging to accused 1. Mthokozisi called Mandla Tshuma who was at a nearby tuck shop. Mandla then phoned accused 1 and advised him of the matter. A few minutes later Mandla Ncube and accused 2 arrived at the homestead. Accused 2 assaulted the deceased who was still naked, several times on the back using sticks

which he had picked from the yard. Accused 1 also arrived at the scene together with Richard Sibanda at around mid-day. Accused 2 came back to the homestead followed by Gerald Lunga who was armed with a whip. Deceased pleaded for forgiveness. Accused 1 who was holding an axe snatched the whip and assaulted the deceased. Accused 1 then questioned the others as to why they were not joining in the assault. Accused 1 in the company of accused 2 took deceased into his bedroom hut and ordered him to have sexual intercourse with the dog in their presence. Accused 1 and 2 assaulted the deceased using the whip and stick. Accused 1 then commandeered everyone present to escort the deceased to Ntabazinduna Police Station to file a report of bestiality. After travelling about 400 metres accused 1 stopped and instructed the group to assault deceased. Accused 1 and 2 together with Mandla and Gerald assaulted deceased indiscriminately all over the body using sticks and the whip. Accused 1 struck the deceased twice on the back and once on the head using the back of the axe. Accused 2 grabbed the axe from accused 1 and struck deceased on his hands using the back of the axe. Accused 1 ordered the deceased to kill the dog but he failed. Accused 1 then killed the dog using an axe. Accused 1 and 2 together with Mandla assaulted the deceased again using sticks. This group left the scene leaving the deceased in the bush, injured. Deceased suffered bruises all over the body and sustained severe head injuries. The body of the deceased was discovered on the 19th October 2019.

The state has tendered into the record a post mortem report compiled by Dr Juana Rodriguez Gregori at United Bulawayo Hospitals on the 21st October 2019. The cause of death is listed as:

- (1) Cerebral edema
- (2) Encephalic contusion
- (3) Cranial trauma

On marks of violence the pathologist observed contused wounds located in the front of the parietal region, 5cm in length, multiple abrasions elongated located in the lower limbs and left upper.

The state also produced as an exhibit, a small axe with a wooden handle used in the assault. 10 sticks were also tendered as part of the evidence.

From the evidence placed before the court we are satisfied that the accused persons and their associates assaulted the deceased and inflicted serious injuries that led to his death. The state concedes that there is no evidence to establish that the accused persons had the requisite *mens rea* to sustain a charge of murder. We make a finding that accused persons are liable for their negligence in causing the death of the deceased.

Accordingly, and in the result accused are found not guilty of murder. The accused are found guilty of culpable homicide.

Sentence

In terms of section 74 of the Criminal Law Codification and Reform Act, it is a criminal offence for any person who knowingly commits any sexual act with an animal or bird. The offence is commonly known as bestiality. The deceased in this matter was performing an unnatural act upon a dog belonging to accused 1. Accused 1 and 2 and their accomplices took it upon themselves to punish the deceased and inflict injury upon him for his conduct. It is indeed considered taboo for any person to have sexual intercourse with an animal. Accused 1 and 2 have been convicted of a serious offence. The accused together with their accomplices administered vigilante justice. Members of society must be warned that the courts frown upon such conduct. Accused persons ought to have taken deceased to the nearest police station for him to be made accountable for his conduct. Both accused persons are family man with the usual family responsibilities. They are artisanal miners and bread winners for their families. They have pleaded guilty to the lesser offence of culpable homicide. Their plea of guilty will be credited as it enables the speedy resolution of cases. The accused persons are contrite and must have acted out of deep anger.

Mrs Cheda, appearing for the state has urged the court to impose a sentence in the region of 5 years with part suspended. She has argued that a delay of 2 years in the finalization of the case is not unduly inordinate to as infringe the accused's rights as enshrined in the Constitution of Zimbabwe (Amend) No. 20, 2013.

Mr Mashindi, appearing for the accused persons has implored this court to pass a lenient sentence regard being had to the guilty plea that has been tendered. He argued that a delay of 2 years violated the accused rights to their right to a fair and speedy trial as provided for under section 69 of the Constitution. Whilst there are no set time limits within which trials

must be finalized, I am of the view that a delay of 2 years bearing in mind that the other accomplices are denying the charges resulting in a separation of trials is not inordinate delay. I conclude that the state has not dragged its feet in bringing the accused persons to court. I however, must take into account that accused two already spent 2 ½ years in custody pending the trial. He has already served a portion of his sentence. As for accused one he shall be credited for having come forth and admitted his crime. He has not sought to evade justice. That fact should be taken into his favour.

In the result, and accordingly, the following sentence is deemed appropriate in the circumstances:

“Accused 1 and 2 are each sentenced to 5 years imprisonment of which 2 years is suspended for 5 years on condition accused persons do not commit any offence involving violence to which upon conviction they are sentenced to a term of imprisonment without the option of a fine.

Effective sentence 3 years.”

National Prosecuting Authority, state’s legal practitioners
Mashiindi & Associates, 1st and 2nd accused persons’ legal practitioners