

THE STATE

Versus

THULANI NCUBE

IN THE HIGH COURT OF ZIMBABWE
KABASA J with Assessors Mr G Maphosa and Mr J Ndubiwa
HWANGE 28 JUNE 2023

Criminal Trial

Mrs M Cheda, for the state
Mr.B. Siansole, for the accused

KABASA J: The accused was facing a charge of murder as defined in section 47 of the Criminal Law (Codification and Reform) Act, Chapter 9:23 to which he pleaded not guilty but tendered a plea of guilty to culpable homicide. The state accepted the limited plea.

The agreed facts are that on 27 August 2022 at around 1845 hours the accused was on his way home from a party when he passed by the deceased's home. The deceased struck him on the back with a sjambok ostensibly because the accused had once assaulted him. The deceased continued with the assault and the accused fled to his home. He armed himself with an axe and went back to the deceased's home. He met the deceased on the way and the deceased was armed with a log. The deceased hit the accused once on the head with the log and the accused hit him with the axe on the head.

The deceased was ferried to hospital where he succumbed to his injuries 2 days later.

A post-mortem conducted on 30 August 2022 gave the cause of death as:-

Severe traumatic brain injury

Compound skull fracture

Callous head axing

The marks of violence noted were an 11 cm right frontal, right parietal wound. The underlying bones of the wound had a 12 cm long and 13 mm wide bone defect and multiple

fractures. The removed bone was buried deep down in the brain and from the surface of the brain the wound was 12 cm deep, that is, the axe travelled for about 12 cm within the brain.

The axe which inflicted the injury had the following dimensions:-

Length of axe handle - 70 cm

Circumference of axe handle - 9 cm

Length of axe head – 15 cm

Length of axe blade – 10 cm

Width of blade – 6 cm

Weight – 1,070 kg

The injury sustained by the accused when he was hit with the log was described as a laceration on the head, the force used was moderate and there was no danger to life or likelihood of permanent injury.

From these facts it was not in issue that the deceased died as a result of the injuries inflicted by the accused.

It was not in issue that the deceased had been the aggressor and had provoked the accused by whipping him as the accused was walking to his home.

In terms of section 239 (1) (a) of the Criminal Law Code, that provocation reduces the murder charge to culpable homicide.

We were however of the view that this was a borderline case between murder and culpable homicide. The circumstances under which the deceased was struck with the axe were however largely based on the accused's version as no one else witnessed it. The accused could however had stayed in his home and not choose to arm himself with an axe and go back to deceased's home. The force with which he struck the deceased's head was staggering. He literally crushed the deceased's head as demonstrated by the post-mortem.

However the provocation by the deceased informed the basis of the conviction for culpable homicide. The accused is accordingly found guilty of culpable homicide.

Sentence

The accused and deceased were cousins. The death of a cousin at his hands will be a heavy burden on the accused.

The stigma of being labelled a murderer will also be a heavy burden to live with.

The accused is a 48 year old married man with 3 children, 2 of whom are still minors.

By pleading guilty to culpable homicide he showed contrition. He also sustained an injury on the fateful day.

In aggravation is the fact that a life was needlessly lost. The accused need not have armed himself with an axe after he had removed himself from the deceased's presence and had reached the safety of his home. He failed to exercise self-restraint.

The courts have time without number implored society to be respectful of the sanctity of life. A life lost can never be regained and no one should ever have to lose their life at the hands of another.

The viciousness of the assault, the weapon used and the part of the body the blow was directed at calls for an exemplary sentence.

But for the plea of guilty and the 10 month period of pre-trial incarceration a sentence of 10 years would have been appropriate.

We considered the following sentence appropriate and also accords with the interests of justice:-

9 years imprisonment of which 2 years is suspended for 5 years on condition the accused does not within that period commit an offence of which an assault 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.

Effective: - 7 years imprisonment