

THE STATE

Versus

LEEROY MADHARI

IN THE HIGH COURT OF ZIMBABWE
DUBE-BANDA J with Assessors Mr A.B. Mpofu and Mr E. Shumba
GWERU CIRCUIT COURT 15 MAY 2023

Criminal trial

Ms. L. C. Mamombe, for the State

Ms. E. Gonese, for the accused

DUBE-BANDA J:

[1] The accused is appearing before this court charged with the crime of murder as defined in section 47 of the Criminal Law (Codification and Reform) Act Chapter 9:23. It being alleged that on 19 February 2020 the accused unlawfully caused the death of Tedi Urayayi (deceased) by hitting him with a fist on the face, head-butted him on the forehead, kicking him several times all over the body with booted feet and assaulting him all over the body with an electric cable intending to kill him or realising that there is a real risk or possibility that his conduct may cause the death of the deceased and continued to engage in that conduct despite the risk or possibility.

[2] The accused pleaded not guilty to the crime of murder and offered a limited plea to the lesser charge of culpable homicide. The State accepted the plea of guilty to the lesser charge of culpable homicide. *Ms Gonese* defence counsel confirmed that the plea was in accordance with instructions her instructions. The State tendered into the record of proceedings a statement of agreed facts, which is before court and marked Annexure "A". The statement reads as follows:

- i. Leeroy Madhari (hereinafter referred to as the accused person) was aged 33 years at the time of the commission of the alleged offence. He resides at Forestvale Farm Compound, Kwekwe, in the Midlands Province. He is employed as a general labourer at Forestvale Farm.
- ii. Tedi Urayayi (hereinafter referred to as deceased) resided Forestvale Farm Kwekwe during his lifetime. He was aged 50 years at the time he met his death.
- iii. The deceased was accused's cousin.

- iv. On the 19th February 2020 and at about 2200 hours at Forestvale Farm, Kwekwe. The deceased was in Israel Mukova's room together with Kenneth Ncube. The accused entered and demanded for his alcohol which the deceased was drinking. The deceased refused and the accused grabbed the plastic bottle with alcohol being consumed by the deceased. The two wrestled for the container with some alcohol spilling in the process, leading to the now deceased insulting the accused.
- v. The accused person then hit the deceased with a fist on the forehead and head-butted him once on the forehead. The deceased fell hitting against the wall with the back of his head and fell unconscious. After about two minutes, the deceased regained consciousness and he was bleeding on the forehead. The deceased stood up and was kicked by the accused and fell again on his back hitting a speaker and landed on the floor. He further assaulted him with an electric cable all over the body.
- vi. The accused then left the deceased alone and went to his home. On the 20th February 2020 around 1800 hours, the deceased died in his room.
- vii. The matter was reported to the police leading to the arrest of the accused person.
- viii. The deceased's remains were ferried to United Bulawayo Hospitals where a post mortem examination was conducted on the 26th February 2020 by Dr Juana Rodriguez Gregori. He concluded that the cause of death was; undetermined.

Samples were taken for post mortem histopathology and a report by Dr B Zambuko concluded that the cause of death was:

 - 1) Pulmonary oedema
 - 2) Cardiac hypertrophy
- ix. The accused accepts the evidence of the State witnesses and contents of the post mortem report. The accused denies having requisite intention to kill in the form of *dolus directus* or *dolus eventualis*. Rather, the accused acknowledges that through his conduct aforesaid, he was negligent in causing the death of the deceased.
- x. The State concedes to the fact that the accused was negligent in the manner he assaulted the deceased and therefore accepts the accused's plea of culpable homicide.

[3] The State tendered a Confirmed Extra Curial Statement (Exhibit 1). In the statement the accused admits that the assault he inflicted on the deceased caused his death, however, he did not intend to kill but to discipline him. Further the State tendered a Post Mortem Report (Exhibit 2) compiled by Dr. Juana Rodriguez Gregori who opined that the cause of death could not be determined, and noted that certain samples had been taken for histology. The Post Mortem Histology Report (Exhibit 3) compiled by Dr B. Zambuko state that the lungs showed a marked pulmonary oedema; autolysed liver; and autolysed heart showing hypertrophy. Dr Zambuko opined that the cause of death was pulmonary oedema and cardiac hypertrophy. Under summary of history Dr Gregori notes that the deceased was assaulted, and it is the accused who assaulted him. A red electric cable (Exhibit 4) and a pair of black safety shoes (Exhibit 5) were tendered as real exhibit. However, the accused disowned the safety shoes, and no further reference shall be made to them.

[4] In a nutshell the totality of the facts and the evidence adduced show that the injuries sustained by the deceased were caused by the accused. The facts of this case show that the accused hit the deceased with a fist on the forehead and head-butted him once on the forehead. The deceased fell hitting against the wall with the back of his head and fell unconscious. After about two minutes, the deceased regained consciousness and he was bleeding on the forehead. The deceased stood up and the accused kicked him and he fell down again on his back hitting a speaker and landed on the floor. He further assaulted him on with an electric cable all over the body. The injuries inflicted by the accused caused the death of the deceased. A reasonable man placed in the same circumstances as the accused would have foreseen the possibility of death and would have guarded against it. The conduct of the accused shows that fell below the reasonable person standard.

[5] On the basis of the facts and the evidence of this case, we are satisfied that the State's concession is properly taken, it accords with the law and the facts. In the circumstances, we are satisfied that on the facts of this case, 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 the lesser crime of culpable homicide.

Sentence

[6] Mr. Madhari, this Court found you guilty of the crime of culpable homicide. Now is the time for this court to meet out an appropriate sentence to you for the crime of which you had

been convicted. In sentencing you this court has to take into account all relevant factors, afford each the appropriate weight thereto and strike a balance between the various interests. In determining a sentence which is just and fair, I have regard to the triad of factors that have to be considered as set out in the case of *S v Zinn* 1969 (2) SA 537 (A). The Court must therefore take into account your personal circumstances as the accused and being the person convicted of the crimes, the nature of the crime including the gravity and extent thereof and the interests of the community. In deciding on such a sentence, the Court must blend it with a measure of mercy and strive to meet the objectives of punishment being retribution, prevention, deterrence and rehabilitation.

[7] In *S v Rabie* 1975 (4) SA 855 (AD) at 862G-H, the court held that: "Punishment should fit the criminal as well as the crime, be fair to society, and be blended with a measure of mercy according to the circumstances."

[8] This means that a court should consider the objectives of punishment which is that of prevention, deterrence, reformation and retribution and a court must decide what punishment would best serve the interests of justice. A court should also be cautious in weighing one element of such consideration, above that of another. Rather, a balance must be struck between the interests of the accused and that of society

[9] In mitigation of sentence, your counsel addressed the Court and placed factors which this court should take into account in order to impose a lesser sentence to you in respect of the crime of which you had been convicted. Your personal circumstances are as follows: You are 37 years old. You are a family man and a father five minor children, the eldest is 14 and the youngest is 5 years. You are the sole provider of your family. Prior to the commission of this offence, you were gainfully employed at Forestvale Farm. Obviously as a result of your arrest you have lost your employment. You are a first offender. You pleaded guilty to the crime of culpable homicide. You have been incarcerated for a period of just over three years, whilst awaiting the finalisation of this matter, having been arrested on 21 February 2020.

[10] Counsel for the State on the other hand submitted that you stand convicted of a serious offence. You caused the death of an elderly relative. For whatever reason you had no right to discipline the deceased. You should have exercised restraint and you failed to do so, resulting in the death of the deceased. You killed for alcohol and Counsel submitted that this court must make it clear that the killing of another human being is unacceptable, and visit you with an exemplary sentence.

[11] We factor into the sentencing triad the fact that you have 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. You hit the deceased with a fist on the forehead and head-butted him once on the forehead. The deceased fell hitting against the wall with the back of his head and fell unconscious. After about two minutes, the deceased regained consciousness and he was now bleeding on the forehead. The deceased managed to stand up and you again kicked him and he fell again on his back hitting a speaker and landed on the floor. You further assaulted him on with an electric cable all over the body.

[12] We balance the aggravating features of this case with your personal circumstances, and that you are a first offender and you have been in custody awaiting trial for just over three years.

[13] In the circumstances we are of the view that the following sentence will meet the justice of this case: you are sentenced to 5 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
Mhaka Attorneys, accused's legal practitioners