

THE STATE

Versus

MLALELI ELIJAH NSINGO

IN THE HIGH COURT OF ZIMBABWE
DUBE-BANDA J with Assessors Mr A.B. Mpofu and Mr E. Shumba
GWERU CIRCUIT COURT 15 & 18 MAY 2023

Criminal trial

Ms. N. Chikuni, for the State
A Chingwe, 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 is alleged that on 30 May 2014 the accused unlawfully caused the death of Brian Moyo (deceased) by striking him with a log on the head 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 limited plea of guilty to the lesser charge of culpable homicide. Mr *Chingwe* defence counsel confirmed that the plea was in accordance with his 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. Mlaleli Elijah Nsingo (hereinafter referred to as the accused) was aged 20 years old at the time of commission of the alleged offence. He resides at Village Tekwani, Chief Malisa, Zhombe, in the Midlands Province.
- ii. Brian Moyo (hereinafter referred to as deceased) resided at Village Tekwani Chief Malisa, Zhombe during his lifetime. He was aged 21 years old at the time he met his death.
- iii. On the 14th of May 2014 at around 1700 hours, the accused and the deceased were gambling in the bush within the village.

- iv. A misunderstanding ensued between the two resulting in the deceased person hitting the accused with a log on the left shoulder and ran away.
 - v. Accused picked the same log which deceased had used and threw it at the deceased resulting in hitting the deceased on the head, and he fell down.
 - vi. Butholezwe Moyo arrived and rendered first aid to the deceased and carried him to his homestead and later to the hospital.
 - vii. The deceased was transferred to Parirenyatwa Hospital for further treatment and died on 2 June 2014 while under treatment.
 - viii. A report was made to the police leading to accused's arrest on 2 August 2019.
 - ix. Deceased's remains were taken to United Bulawayo Hospitals where a post mortem examination was conducted on 3 June 2014. The pathologist concluded that the cause of death was:
 - Brain damage-depressed skull fracture
 - Head trauma
 - Assault
- Thereafter post-mortem report number 58-14 was compiled.
- x. 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.
 - xi. 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.

[4] State tendered a Post Mortem Report (Exhibit 1) compiled by Dr M Gonzalez who opined that the cause of death was brain damage-depressed skull; head trauma and assault. The State further tendered a real exhibit i.e., wooden log (Exhibit 2) with the following measurements: length 92cm; weight 0.55kg; circumference 14cm.

[5] 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 on 14 May 2014 at around 1700 hours, the accused and the deceased were gambling in the bush within the village. A misunderstanding ensued between the two resulting in the deceased person hitting the accused with a log on the left shoulder and ran away. Accused

picked the same log which deceased had used and threw it at the deceased resulting in hitting the deceased on the head, and he fell down. One Butholezwe Moyo arrived and rendered first aid to the deceased and carried him to his homestead and later to the hospital where he died.

[6] The injuries inflicted by the accused caused the death of the deceased. In assaulting the deceased in the manner the accused did 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 he fell below the reasonable person standard.

[7] 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. The accused fell below the standard of a reasonable man. 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

[8] Mr. Nsingo, this Court found you guilty of the crime of culpable homicide. It is now the task of this court to impose an appropriate sentence. 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, this court will have regard to the triad of factors that have to be considered as set out in case law, e.g., in the case of *S v Zinn* 1969 (2) SA 537 (A). This Court must therefore take into account your personal circumstances, the nature of the crime including the gravity and extent thereof and the interests of the community. Whilst it is so that a court must always endeavour to exercise a measure of mercy, however, sight must not be lost on the purpose and objectives of punishment. See: *S v Rabie* 1975 (4) SA 855 (AD) at 862G-H.

[9] 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 the elements under consideration and not unnecessarily elevate one element of above others, rather, a balance must be struck amongst these factors and between the interests of the accused and that of society.

[10] We will now turn to the facts of this case and the submissions made by your Counsel and Counsel for the State.

[11] In mitigation of sentence, your Counsel addressed the court and placed factors which he urged this court to 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 were 20 years old at the time of the commission of this crime. You are now 33 years old. You are married and a father two minor children.

[12] Your Counsel urged this court to factor in the sentencing equation that you caused the death of your close friend, and such stigma shall haunt you to the end of your life. Counsel submitted that this court takes into account that your family met the hospital and funeral bills of the deceased, and paid eight beasts in compensation.

[13] This court was urged to take into account that it is the deceased who first picked the log and struck you with it and ran away. You picked the same log struck him, inflicting injuries that resulted in his death.

[14] On the other hand State Counsel submitted that this court must take into account that the fact that life was lost in circumstances where this could have been avoided. The deceased's family was unnecessarily robbed of a breadwinner. Counsel conceded that the deceased was the aggressor. And urged this court to factor into the equation that you have waited for nine years for the finalisation of this matter.

[15] Counsel informed this court that on 13 March 2020 you were convicted of the crime of murder and sentenced to 14 years imprisonment. However, Counsel conceded that this 13 March 2020 case is not a previous conviction because the murder on which it is anchored was committed after this case you have been convicted by this court. I agree. Counsel urged this court to order the sentence to be imposed in this case to run concurrently with the 14-year imprisonment imposed in the 13 March 2020 case.

[16] This court factors into the sentencing triad all that has been submitted by your Counsel. The 13 March 2020 conviction is indeed not a previous conviction. This crime was committed on 14 May 2014, while the murder you were convicted on 13 March was committed on 28 June 2019. The fact that it was finalised prior to this one does not make it a previous conviction. Though it is not a previous conviction it however shows a propensity of committing these violent crimes.

[17] 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 struck the deceased with a log on the head with excessive force that you caused brain damage and fractured his skull. This is an important consideration in the assessment of sentence.

[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 1 year 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.

It is ordered that the sentence in this case run concurrently with the 14-year imprisonment in HC (CRB) 23/20, judgment HB 73-20.

National Prosecuting Authority, state's legal practitioners
Hore & Partners, accused's legal practitioners