

THE STATE

Versus

COMEDY MOYO

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
Mrs J Change, 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. He pleaded not guilty but tendered a limited plea to culpable homicide as defined in section 49 of the Criminal Law Code. The state accepted the limited plea.

The agreed facts upon which the limited plea acceptance was premised are that on 8 November 2022 at around 1600 hours the deceased who was drunk went to Mahobo Business Centre Lupane and proceeded to Ntuthuko Store where accused was employed. The deceased insulted the accused by his mother's private parts before boarding a truck. He however returned and again went to the same shop where he insulted the accused using the same derogatory words. The two started pushing each other with the deceased repeatedly uttering the same derogatory words. The deceased pulled the accused out of the shop and the two started fighting. The accused was overpowered and he ran back into the shop where he emerged armed with an axe handle and a knife. The deceased grabbed the axe handle and assaulted the accused with it. The accused then used the knife to stab the deceased on the neck resulting in his death.

A post-mortem conducted on the deceased's body gave the cause of death as hypovolemic shock as a result of a stab wound.

The post-mortem report, knife, accused's birth certificate and a probation officer's report were produced in evidence.

The knife had the following dimensions:-

Length of blade - 13, 5 cm

Width of the blade at the wide end - 3, 7 cm

Width of blade at its tip - 4 mm

Length of handle - 12 cm

Width of blade -3 cm

Weight- 180 grams

The accused was born on 7 January 2005 and as at 8 November 2022 he was 17 years 10 months old. The deceased was 27 years old and was married to the accused's sister.

In terms of section 239 (1) (a) of the Criminal Law Code provocation reduces murder to culpable homicide where the circumstances are such that the accused lacked the intention or realisation referred to in section 47. Equally where an accused acts in self-defence but the means used are not reasonable in all the circumstances, murder is reduced to culpable homicide.

In casu the deceased's insults must have had an effect on the accused who was only 17 years old. The deceased was the aggressor and after the initial incident he went back to the shop and again continued with the verbal abuse against the accused.

When the accused armed himself after he was losing the fight to the much older deceased the deceased disarmed him of the axe handle which he proceeded to assault him with.

In terms of section 254 of the Criminal Law Code a person who satisfies all the requirements for self-defence except that the means he used to avert the unlawful attack are not reasonable in all the circumstances is guilty of culpable homicide and not murder.

In accepting the limited plea the state therefore properly applied its mind to the facts and the law.

We were therefore satisfied that the acceptance of the limited plea was justified in the circumstances.

In the result the accused was found not guilty of murder but guilty of culpable homicide.

Sentence

In assessing an appropriate sentence we considered that the accused was only 17 at the time the offence was committed and had turned 18 at the time of conviction.

He is a youthful offender who was bullied by a much older man who happened to be his sister's husband.

At 18, the death of the deceased will undoubtedly weigh heavily on him, more so as the deceased was his sister's husband.

The stigma of being labelled a murderer, as society differentiates not between murder and culpable homicide (*S v Mbiti* HMA 01-20) is also likely to be a heavy burden on his young shoulders.

Juveniles ought not to be sent to prison unless imprisonment is absolutely unavoidable (*S v Zaranyika and Ors* 1995 (1) ZLR 270)

The accused's contrition was not only in the plea of guilty but it was evident even in his countenance.

Whilst it is aggravating that a life was lost and needlessly so, the court did not lose sight of the circumstances.

Violence is to be discouraged and self-restraint encouraged and we are of the view that the accused has learnt this the hard way. He spent 3 weeks in pre-trial incarceration and that must have had an impact on him as a day can be equated to a year when one is incarcerated.

For these reasons we were in agreement with the submissions of the defence and the state that community service would meet the justice of the case.

In the result the following sentence accorded with the justice of the case:-

"3 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.

The remaining 12 months is suspended on condition accused performs 420 hours of
Community Service at Lupane Magistrates Court ...”

National Prosecuting Authority, state’s legal practitioners
Mvhiringi and Associates, accused’s legal practitioners