

THE STATE

Versus

DOUBT TSHUMA

IN THE HIGH COURT OF ZIMBABWE

DUBE-BANDA J with Assessors Mr. Ndlovu and Mr. Ndubiwa

HWANGE 5 March 2024

Criminal trial

Mrs *M. Cheda* for the State

Ms. *A. Kunda* for the accused

DUBE-BANDA J:

[1] The accused is appearing before this court charged with the crime of murder as defined in s 47 of the Criminal Law (Codification and Reform) Act [Chapter 9:23]. It being alleged that on 12 July 2023 he unlawfully caused the death of Bonald Moyo referred to as deceased by striking him several times on the head with a knobkerrie intending to kill him or realising that there was 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 plea of guilty to the lesser crime of culpable homicide. The State accepted the plea of guilty to the crime of culpable homicide. 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:

The State and the Defence are agreed that the following issues are common cause being that:

- i. The accused was aged 36 years of age at the time of the commission of the offence and he resides at Godfrey Moyo's homestead Ceseculu line, Chief Tategulu, Tsholotsho.
- ii. The deceased was aged 38 years at the time he met his death. He used to reside at Smart Moyo's homestead, Cuseculu line, Chief Tategulu, Tsholotsho.
- iii. Accused and deceased were cousins.
- iv. On the 12th of July 2023, deceased who was drunk armed himself with a knobkerrie and asked Iphithule Nkomo to accompany him to accused's place to look for his 15 year old nephew, one Lungisani Moyo.

- v. Accused was already in bed. Deceased asked for Lungisani's whereabouts but accused said that he did not know. The accused allowed the deceased to search for Lungisani in all the rooms but deceased did not find him.
- vi. Iphithule then left and proceeded back to his home. Whilst still by the gate, he heard accused and deceased fighting and he stopped. He then proceeded to a neighbour, Nkaza Moyo's homestead to seek for help.
- vii. As accused and deceased were fighting, the deceased was still armed with the knobkerrie. Accused armed himself with a rake but it fell. As they continued to fight, Accused punched the deceased with clenched fists and deceased struck accused with the knobkerrie on the arm.
- viii. Accused snatched the knobkerrie from the deceased and used it to assault him twice on the head and several times all over the body. Deceased fell onto the floor and Accused fled from the scene.
- ix. Iphithule and Nkaza Moyo arrived at the scene and found deceased lying on the floor bleeding, he was unconscious, groaning in pain and was unable to speak.
- x. Deceased died before he could be ferried to the hospital.
- xi. Accused's footprints were traced and he was apprehended by villagers who found him hiding in the bush.
- xii. The accused person pleads not guilty to murder but pleads guilty to culpable homicide in that he negligently caused the death of the deceased.

[3] The State tendered the following exhibits; a post mortem report compiled by Dr. S. Pesanai who concluded that the cause of death was intracranial haemorrhage, depressed skull fracture and assault. And a knobkerrie with the following measurements: length 58cm; circumference of handle 9cm; circumference of head 28cm; weight 720g.

[4] The totality of the facts and the evidence adduced in this trial show that the injuries sustained by the deceased were caused by the accused. The post mortem report shows that the injuries inflicted by the accused caused the death of the deceased.

[5] The accused struck the deceased with a knobkerrie twice on the head and several times all over the body. In striking the deceased in the manner he 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. The accused ought, as a reasonable man, to have foreseen the death of the deceased and guarded against it. The accused was negligent and it was his negligence that led to the death of the deceased. On the basis of the facts and the evidence of this case, the court is satisfied that the State's concession was properly taken.

In the result: the accused is found not guilty of murder and found guilty of the lesser crime of culpable homicide as defined in s 49 of the Criminal Law (Codification and Reform) Act [Chapter 9:23].

Sentence

[6] In determining an appropriate sentence, a court has regard to the personal circumstances of the accused, the nature of the crime, and the interests of society. The courts have stressed the importance of proportionality and balance between the crime, the criminal and the interests of society. It remains the paramount function of the sentencing court to independently apply its mind to the consideration of a sentence that is proportionate to the crime committed. The cardinal principle that the punishment should fit the crime should not be ignored. This court must also factor into the equation the provisions of the Criminal Procedure (Sentencing Guidelines) Regulations, 2023.

[7] It is trite law that sentencing is about striking the correct balance between the crime, the offender and the interests of the community commonly referred to as the triad. See *S v Zinn* 1969 (2) SA 537 (A). A court should, when determining sentence, strive to accomplish and arrive at a judicious counterpoise between these elements in order to ensure that one element is not unduly emphasised at the expense of and to the exclusion of the others. In its consideration of an appropriate sentence, the court is mindful of the need to apply the established principles of deterrence, prevention, reformation, and retribution.

[8] The personal circumstances of the accused have been conveyed to the Court by your legal representative who informed the court that accused is 36 years old and he is not married. He has no assets of value. Further in considering sentence it is important to take into account that the accused is not repeat offender, and he pleaded guilty to the offence of culpable homicide. He is remorseful for having caused the death of his cousin. The court further takes into account

it was the deceased who provoked the offender and that he was armed with a knobkerrie that was used by the offender. Again, the offender has been in pre-trial incarceration for two weeks.

[9] It is stating the obvious but it bears repeating that culpable homicide is a serious of crime. In wrongfully causing the death of the deceased the accused's actions have impacted on the lives of the deceased's family, relatives and friends. They must now deal with the emotional trauma that his violent and premature death has thrust on them.

[10] The sentence the court imposes must be one that will not only rehabilitate the accused but it should also serve as a deterrent to other likeminded individuals. Members of society must know that the courts will protect their rights. It is the kind of sentence which we impose that will drive ordinary members of our society either to have confidence or to lose confidence in the judicial system. The sentences that our courts impose when offences of this nature are committed, should strive to ensure that people are not driven to take the law into their own hands, but rather to scare away would be offenders. In our constitutional order every person is entitled to expect and insist upon the full protection of the law.

[11] The offender after having disarmed the deceased, he proceeded to use the same knobkerrie to strike the deceased twice on the head and several times all over the body. The offender aimed the head a delicate part of the human body. The post mortem report shows that severe force was used in inflicting the injuries sustained by the deceased. His skull was depressed and fractured. He had other numerous internal injuries emanating from the attack. The attack was so vicious and brutal. The offender fled from the scene and did not offer assistance to the deceased who was unconscious, groaning in pain and unable to talk. The aggravating factors in this case makes a sentence of direct imprisonment warranted and in the interest of justice. This is so because members of society depend upon the courts to protect them against the infringement of their right to safety as a symbol of an orderly society.

[13] Having taken all the factors into account, the following sentence will meet the justice of this case. In the result the offender is sentenced as follows:

“3 years imprisonment of which 1 year is suspended for 5 years on condition accused does not commit within that period any offence involving the use of violence upon the person of another and or causing the death of another through violent conduct and of

which if convicted the accused is sentenced to a term of imprisonment without the option of a fine.”

National Prosecuting Authority State’s legal practitioners
Dube & Associates accused’s legal practitioners