

THE STATE

Versus

MLUNGISI NDEBELE

IN THE HIGH COURT OF ZIMBABWE

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

HWANGE 5 March 2024

Criminal trial

Mrs M. Cheda for the State

Ms. T. Chikwandaere 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 26 September 2022 he unlawfully caused the death of Stephen David Ncube (hereinafter referred to as the “deceased”) by assaulting him with a brick once on the head, 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 54 years at the time of the commission of the offence and he resides at his own homestead, Mathambo Village 24 A, Chief Mabhikwa, Lupane.
- ii. The deceased was aged 93 years at the time he met his death. He used to reside at Josephine Ncube’s homestead Mathambo Village, 24 A, Chief Mabhikwa, Lupane.
- iii. Accused was deceased’s stepson.
- iv. On the 26th of September 2022 and at around 1800 hours, the accused and deceased were gathered at Josephine Ncube’s homestead where there was a beer drink.

- v. The accused and deceased had an altercation over why deceased had allowed accused's 9 year old son, one Mqondani to travel to Bulawayo without accused's permission.
- vi. Accused pushed deceased to the ground and deceased fell down headlong and hit his head against a rock on the ground. Deceased sustained a deep laceration on the forehead.
- vii. Deceased did not immediately seek medical attention until his condition deteriorated on 28 September 2022.
- viii. He received treatment at St Lukes Hospital where he was briefly admitted on the 27th of September up to the 30th of September 2022 and he continued with the treatment while coming from home until his death on the 13th of December 2022.
- ix. The accused person pleads not guilty to murder but pleads guilty to culpable homicide in that he negligently caused the death of the deceased.

[4] The State produced a post mortem report number 1501-1392-22 (exhibit 1). The report was compiled by Dr Juana Rodriguez Gregori who concluded that the cause of death of the deceased was cerebral edema; chronic haemorrhage and assault.

[5] The totality of the facts and the evidence adduced in this trial show that the injuries on 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.

[6] The accused pushed a ninety-three-year-old man to the ground and he fell down headlong and hit his head against a rock. This fall caused the deceased to sustain a deep laceration on the forehead, causing cerebral edema and chronic haemorrhage which caused his death. The conduct of the accused of pushing with much force a frail old man in this manner 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

[7] Mr. Ndebele this court found you guilty of the crime of culpable homicide arising from the death of the deceased. 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. See *S v Zinn* 1969 (2) SA 537 (A). This court must also factor into the equation the provisions of the Criminal Procedure (Sentencing Guidelines) Regulations, 2023.

[8] 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 in respect of the crime of which you had been convicted. Your personal circumstances are as follows: you are fifty-five years old. Married with four children. You are a poultry farmer making approximately USD20.00 per month. You are the sole provider of your family. You are a first offender and you have been in pre-trial incarceration for a period of four months. You will always live with the stigma of having caused the death of your step-father. You also assisted the deceased by taking him to hospital. In aggravation of sentence Mrs *Cheda* counsel for the State submitted that you attacked an old man and violently pushed him to the ground. You caused the death of your step father, in essence your parent. Counsel sought a direct term of imprisonment for this crime.

[9] In determining an appropriate sentence, the court takes into account 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 against a person who by his own negligent conduct cause the death of another human being. The courts must send a loud and clear message that causing death, *albeit* negligently of fellow human being will not be tolerated. You used excessive force in pushing an old frail old man. He fell down headlong and hit his head against a rock. This fall caused the deceased to sustain a deep laceration on the forehead, causing cerebral edema and chronic haemorrhage which caused his death. The injuries sustained by the deceased speak to the force that you used in pushing him. A sentence of direct imprisonment is warranted in this case.

Having taken all the factors into account, we take the view that the following sentence will meet the justice of this case.

You are sentenced to 3 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.

National Prosecuting Authority, state's legal practitioners
Mhaka Attorneys, accused's legal practitioners