

THE STATE

Versus

KELVIN BAHLANGENE

IN THE HIGH COURT OF ZIMBABWE
DUBE-BANDA J with Assessors Mr Mashingaidze and Mr Mabandla
BULAWAYO 23 & 24 May 2024

Criminal trial

Ms. D.E. Kanengoni, for the State
B. Siansole, 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 11 December 2023 he unlawfully caused the death of Siphamandla Mpofu referred to as deceased by striking him with a brick 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, is a male juvenile aged 16 years, residing at 4 Shellingford, Tegela Flats, Bulawayo.
- ii. The now deceased is Siphamandla Mpofu who was 18 years when he met his death and he resided at 71834 Lobengula West, Bulawayo.
- iii. On the 11th of December 2023, the now deceased was in the company of one Lorraine Dlamini, walking towards Lobengula West when they met with the accused person who was sitting in the company of Milton Nyathi and his other friends.

- iv. The accused person then called the now deceased to come to where he was seated but the now deceased ran away instead.
- v. The accused then chased after the now deceased, in the company of his friend, Milton Nyathi.
- vi. During the chase, the accused person then picked up a piece of a brick and threw it at the now deceased.
- vii. The piece of brick hit the now deceased at the back of his right ear and caused the now deceased to fall to the ground, at which point the accused person fled from the scene.
- viii. The now deceased then got up and went to Magwegwe Police Station where he made a report for assault and implicated the accused person, after which an ambulance was called to ferry the now deceased to Mpilo Hospital.
- ix. The accused person and his friend, Milton Nyathi, later returned to the scene to check on the condition of the deceased but the deceased was no longer at the scene.
- x. On the 12th of December 2023, at around 2200 hours, the now deceased succumbed to his injuries while admitted at Mpilo Hospital in Bulawayo.
- xi. On the 13th of December 2023, the accused person went to Magwegwe Police Station in the company of his mother, where he had been asked to report in order to answer to allegations of assault. Upon arrival at the police station, he learnt of the demise of the now deceased, leading to his arrest.
- xii. The pathologist who examined the now deceased's remains and compiled his findings in Post Mortem Report Number 343/259/2023, opines that the cause of deceased's death was:
 - a) epidural haematoma
 - b) head injury
 - c) assault
- xiii. The accused was then charged with Murder as defined in section 47 of the Criminal Law (Codification and Reform) Act (Chapter 9:23).
- xiv. However, an assessment of the facts and circumstances show that while the accused person is the factual and legal cause of the now deceased's death, at the material time, he did not intend to bring about the death of the now deceased.

WHEREFORE, the State and the Defence pray that the Accused person be found guilty of Culpable Homicide as defined in section 49 of the Criminal Law (Codification and Reform) Act (Chapter 9:23), on the basis that he acted negligently when he assaulted the now deceased with a piece of a brick behind his right ear, which brought about the death of the now deceased.

[3] The State tendered the following exhibits; a post mortem report compiled by Dr. I. Jekenya who concluded that the cause of death was epidural haematoma, head injury and assault. The accused's confirmed warned and cautioned statement where he admitted that he struck the deceased with a brick. The the birth certificate of the accused which shows that he was born on

14 June 2007, making him 16 years old at the time of the commission of this offence and again 16 years old at the time of the trial.

[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 brick on the head. 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] The accused stands before this court convicted of the crime of culpable homicide as defined in s 49 of the Criminal Law Code. It is often said that sentencing is the most difficult phase of a criminal trial, and rightly so. This one of those cases that brings into sharp focus the dilemma that is often faced by the trial court in sentencing a child for violent crime. In determining an appropriate sentence this court must consider the applicable sentencing principles, and juxtapose the principles with the circumstances of the case. A consideration of the well-known triad of sentence consisting of the crime, the offender and the interests of society is necessary. See *S v Zinn* 1969 (2) SA 537 (A).

[7] In terms of the Criminal Procedure (Sentencing Guidelines) Regulations, 2023 ("Sentencing Guidelines") a "child" means any person under the age of eighteen years. The accused was born on 14 June 2007, and is 16 years old and therefore a child. It is trite that in

sentencing of a child, every court must take into account the provisions of s 21(1) of the Sentencing Guidelines which provides that that the best interests of the child are the paramount consideration when determining the most appropriate sentence to impose and the court shall strive as best as it can to ensure that the sentence is rehabilitative in nature and imprisonment as a sentence imposed on a child is to be used only as a last resort and then only for the shortest possible period of time. The pertinent remarks made by MAWADZE J in *The State v X (JUVENILE)* HMA 26/23 are apposite in this case:

“That cases of loss of life through violent conduct remain worrying prevalent. What is even more saddening is such serious offences are being committed by very young people. It is not an easy task for the courts to pronounce an appropriate sentence on such a juvenile offender facing very serious crimes. The delicate balance is always elusive.” See *The State v Mguni* HB 41/24; *The State v Sebele* HB 51/24.

[8] The personal circumstances, characteristics and the social background of the offender are clearly stated in the probation officer’s report (exhibit 4). He was born on 14 June 2007. His parents did not marry and his father never took responsibility and was never part of his life. He resents his father for abandoning him and not being present in his life financially and emotionally. The accused grew up staying with his mother, siblings and grandparents. He did his secondary education up to Form 4; however, he did not write his final Ordinary Level Examinations. He is religious, plays soccer and tiling floors. His mother has relocated with him from the family to reside at Tegela Flats in Romney Park. The report shows that the offender usually keeps to himself, although he can easily make friends. He is awkwardly quiet, stubborn and aggressive when provoked. During the interview with the probation officer, he was quiet and lacked the essence of remorsefulness in his speech and actions.

[9] The facts show that the offender called the deceased to come to where he was seated, but the deceased ran away. The offender and his friends gave chase, and the offender picked up a piece of brick and struck the deceased at the back of the right ear inflicting injuries which caused the death. It is mitigating that the facts do not show that this was a premeditated attack, and that later the offender returned to the scene of crime to check on the condition of the deceased. It is further mitigating that the family of the offender reached out to the family of the deceased and contributed towards funeral expenses. It is further mitigating that at the time the offender committed this crime he was a child, and he is still a child. He is a first offender and

pleaded guilty to this crime. The accused will live with the trauma of having caused the death of another human being.

[10] On the other hand the accused ended the life of a young person who was aged 18 when he met his death. The evidence of William Mpofu deceased's grandfather shows that the deceased was doing Form 4. He was a well-behaved child and always reading his books. His untimely and violent death was painful to his family. The offender used a brick on a delicate part of the human body, i.e. the head. The post mortem report shows that severe force was used in striking the deceased with a brick. The strike caused a compression of the brain from the haematoma with a maximum depression of about 2 cm. It is further aggravating that the deceased was struck when he was fleeing from the attack. The offender was not provoked, himself was the aggressor. His character is also concerning, particularly that he is stubborn and aggressive when provoked. Human life was needlessly lost.

[11] Despite these aggravating features of this case, the accused is a child and his sentencing must still be informed by the provisions of s 21(1) of the Sentencing Guidelines. It must be rehabilitative in nature. A sentence of direct imprisonment will be counterproductive, it will not rehabilitate the offender. Significantly, the probation officer recommended, with cause, a suspended sentence. The accused should be spared of the harmful effects of imprisonment at this tender age. Ms. *Kanengoni* counsel for the State submitted that four-year prison term wholly suspended will meet the justice of this case. Indeed, a wholly suspended prison term is therefore in order.

In the result the offender is sentenced as follows:

“4 years imprisonment wholly 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.”