

THE STATE

Versus

CLEAR NCUBE

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. T. Chikwandare 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 Flesher Ndlovu referred to as deceased by stabbing him once on the chest with a hunter's knife 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 22 years of age at the time of the commission of the offence and he resides at Mbikeni Ncube's homestead, Mathe Line, Chief Mahlathini, Tsholotsho.
- ii. The deceased was aged 34 years at the time he met his death. He used to reside at Sunboy Ndlovu's homestead, Mathe Line, Chief Mahlathini, Tsholotsho.
- iii. On the 23rd of June 2023 and at 18:30, the accused, Heaven Sibanda, Methuseli Mpala and other locals were gambling at Vukuzenzele shop veranda, Mathe Business Centre, Tsholotsho.

- iv. The deceased was at the Business Centre sitting in a building that is still under construction next to Vukuzenzele shop some ten metres away drinking some beer. Deceased was in the company of his brother Sanctity Ndlovu.
- v. The deceased approached accused and his friends and admonished them for gambling at the shops. The group that was gambling dispersed leaving accused behind.
- vi. Deceased asked accused his name and accused told him he was Ndai. There was an exchange of words. Deceased slapped the accused once across the face with an open hand.
- vii. Accused withdrew a hunter's knife from his pocket and stabbed deceased once on the chest. Accused fled from the scene.
- viii. Deceased bled profusely and fell to the ground groaning in pain.
- ix. Deceased died at the scene before he could be taken to hospital.
- x. 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. Maibelys Gavilan Acosta who concluded that the cause of death was haemorrhagic shock; stab wound in the chest; and assault.

[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 stabbed the deceased with an Okapi knife in the chest. He exceeded the lawful limits of self-defence. By stabbing 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 22 years old and he is not married. He stays at his parent's homestead and 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 a fellow villager. The court further takes into account it was the deceased who provoked the offender. He is a youthful offender. Again, he has been in pre-trial incarceration for three months.

[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 stabbed the deceased in the chest, a delicate part of the human body. He used a hunter's knife a dangerous weapon. The post mortem report shows that severe force was used in inflicting the injuries sustained by the deceased. The stab wound was 3cm x 1cm x 6cm deep. The stab caused serious internal injuries. The attack was so vicious and brutal. The offender fled from the scene and did not offer assistance to the deceased who was bleeding profusely. 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:

“10 years imprisonment of which 2 imprisonment 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.”

Legal Aid Directorate accused's legal practitioners