

THE STATE

Versus

BATHETHELELE NDLOVU

IN THE HIGH COURT OF ZIMBABWE

DUBE-BANDA J with Assessors Mr T.E Ndlovu and Mr S.L Bazwi

HWANGE 8 MARCH 2022

Criminal trial

Mrs M. Cheda, for the State

Ms L. Mtombeni, for the accused

DUBE-BANDA J: The accused appears before this court on a charge of murder as defined in section 47 of the Criminal law [Codification and Reform] Act Chapter 9:23. It being alleged that on the 5th May 2021, accused unlawfully caused the death of Yenzani Maphosa (deceased) by stabbing him with a knife once on the chest, intending to kill him or realising that there is a real risk or possibility that his conduct may cause the death of deceased and continued to engage in that conduct despite the risk or possibility.

The accused pleaded guilty to a lesser crime of culpable homicide. The State accepted the limited plea of guilty to culpable homicide. State counsel tendered into the record of proceedings a statement of agreed facts. The statement is before court and marked Annexure A, and it reads as follows:

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

1. The accused was aged 28 years at the time of the commission of the offence and he resides at Johane Ndlovu's homestead, Dzimidza line, Chief Gampu, Tsholotsho.
2. The deceased was aged 42 years at the time he met his death. He used to reside at his own homestead, Kwini line, Mbalibali Tsholotsho.
3. On the 5th of May 2021 and at around 1800 hours the accused, deceased and one Josphat Ncube were drinking beer at Kwini line Tuckshop.
4. The accused bought a two litre bottle of opaque beer and sat alone some distance away from the deceased and Josphat Ncube.

5. The deceased approached the accused and forcibly grabbed the two litres of beer from accused and drank the beer without accused's permission.
6. This angered the accused who grabbed his bottle of beer back, stood up and walked a few metres away.
7. The deceased followed the accused and grabbed the accused by both hands around his shoulders and chest and then called out Josphat Ncube to come and deal with the accused.
8. The accused and the deceased wrestled and subsequently the accused reached for a knife from his trousers pocket and stabbed the deceased once on the chest. The deceased loosened his grip on the accused.
9. The accused fled from the scene. The deceased tried to give chase but he collapsed to the ground and bled profusely from the wound. Deceased died on the spot.
10. The accused person pleads not guilty to murder but pleads guilty to culpable homicide in that he negligently caused the death of the deceased.

The State tendered into evidence a copy of the post mortem report is before court and marked Exhibit 1. The post mortem report lists the cause of death as acute anemic, cardiac and pulmonary laceration and stab wound. According to the report the deceased was stabbed. Under marks of violence it is stated that deceased suffered incise wound smooth edge, 1.5 cm in length, located in the anterior thorax, penetrating in cavity at level to left 6th costal arch. The facts 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.

The facts of this case show that the accused and the deceased wrestled and subsequently the accused reached for a knife from his trousers pocket and stabbed the deceased once on the chest. Accused deployed disproportionate force was used in stabbing the deceased. This caused the deceased to suffer the injuries that caused his death.

Accused was under an unlawful attack. The attack had commenced. The stabbing of the deceased with a knife, a lethal weapon on the chest was disproportionate to the attack. The stab wound perforated the heart. It was objectively foreseeable or within the range of ordinary human experience that accused's actions would lead to the death of the deceased. It therefore means that the accused acted negligently by assaulting the deceased in the manner he did. A

reasonable person placed in a similar situation would have avoided acting in the manner the accused did. Accused negligently failed to realise that death may result from his conduct; or realising that death may result from his conduct and negligently failed to guard against that possibility.

In the circumstances of this case, we are satisfied that the State's concession has been properly made, it accords with the facts of this case and the law. It cannot be said that the accused is guilty of the crime of murder.

In the result, the accused is accordingly found not guilty of murder and found guilty of a lesser crime of culpable homicide in terms of section 49 of the Criminal Law (Codification and Reform) Act [Chapter 9:23].

Sentence

The accused has been convicted of the crime of culpable homicide. This Court must now decide what sentence is appropriate for the offence for which he has been found guilty. To arrive at the appropriate sentence to be imposed, this Court will look at his personal circumstances, take into account the nature of the offence he has been convicted of, and factor in the interests of society.

We factor into the equation the personal circumstances of the accused which are as follows: he is 29 years old, and was 28 years old at the time of the commission of this offence. He is not married, however he has two minor children. He has no assets of value and has no savings.

We also take into account that he is a first offender. He pleaded guilty to the crime of culpable homicide. We factor into the sentencing equation that there was some measure of provocation and intoxication. We further take into account that the deceased grabbed accused's bottle of beer. Accused stood up and walked a few metres away. The deceased followed the accused and grabbed the accused by both hands around his shoulders and chest and then called out one Josphat Ncube to come and deal with the accused. The accused and the deceased wrestled and subsequently the accused reached for a knife from his trousers pocket and stabbed

the deceased once on the chest. We also take into account that deceased was much older than the accused.

On the other side of the pendulum we factor into the equation that the accused has 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 at the taking of another human being's life. The courts must send a loud and clear message that the killing of a fellow human being will not be tolerated. We note that the accused used disproportionate force, stabbed deceased with a knife on the chest. He used much force on a delicate part of the human body, and damaged the heart of the deceased. He inflicted serious injuries as depicted in the post mortem report.

In the circumstances only a custodial sentence will meet the justice of this case. The accused is sentenced as follows: 6 years imprisonment of which 2 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
Dube, Nkala & Company accused's legal practitioners