

THE STATE

Versus

WELLINGTON SHOKO

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

E. Mashindi, 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 8th August 2021, accused unlawfully caused the death of Chizeya Smart Ngwenya (deceased) by striking him with a metal shock absorber on the left side of the head and face, 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 29 years at the time of the commission of the offence and he resides at his own homestead, Gamba 2 Village, Chief Nekatambe, Hwange.
2. The deceased was aged 54 years at the time he met his death. He used to reside at his own homestead, Gamba 2 village, Chief Nekatambe Hwange.
3. The accused was married to the deceased's daughter Sekai Ngwenya.

4. On the 8th of August 2021 around 1930 hours, accused had a domestic dispute with his wife whereupon he threatened to assault his wife Sekai with a switch for accompanying her young sister Joylet Ngwenya back home against his orders.
5. Joylet Ngwenya reported the incident to her brother Evans Ngwenya when she got home. Evans Ngwenya proceeded to accused's homestead to confront him about the incident. Evans forced open the door and held the accused by his hands and pulled the accused outside and they subsequently fought.
6. Evans bit the accused on the chin and ran back home and accused gave chase until they got to deceased's homestead. The deceased asked the accused to return to his homestead and advised him that the matter would be resolved the following day.
7. As accused left the homestead he shouted that Evans and the deceased were meddling in his family's affairs. This angered the deceased who then followed the accused to his homestead in the company of Evans and Joylet. The deceased lit a torch of his cellphone as it was now dark.
8. When they got nearer to accused's homestead, Evans picked a stone and threw it at the accused and struck him with it on the stomach. The accused then picked a metal shock absorber and struck the deceased on the left side of the head and face.
9. The deceased fell and died on the spot. The accused fled from the scene.
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 post mortem report. It is before court and marked Exhibit 1. The post mortem report lists the cause of death as subarachnoid hemorrhage and cranial trauma. According to the report the deceased was struck on the head several times. Under marks of violence it stated that deceased suffered deformity of right lateral of face, contused wound in frontal region and right parietal region. The internal examination showed the scalp suffered hemorrhagic infiltrate in frontal region, the brain had subarchnoid hemorrhage in left frontal region and left parietal and occipital region. The State further tendered into evidence the metal shock absorber (Exhibit 2). It has the following measurements: weight 2k.g; length 61 cm; circumference at the top 14.5 cm and diameter 7 cm.

The facts of this case show that the accused picked a metal shock absorber and struck the deceased on the left side of the head and face and he fell down and died on the spot. Disproportionate force was used in striking the deceased. This caused him to suffer the injuries that caused his death. 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 accused was under an unlawful attack. The attack had commenced. The action taken by the deceased was not necessary to avert the attack. He used disproportionate means to avert the attack. 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. He has three minor children, and is the sole provider for his family.

He is a substance farmer, and also does part time jobs to help vend for his family. He has no assets of value and has no savings.

We also take into account that he is a first offender and he has been in custody for approximately seven months before trial. He pleaded guilty to the crime of culpable homicide. We factor into the equation that there was some measure of provocation.

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 the accused used disproportionate force, used a metal shock absorber on the head and face of the deceased. The deceased was a relatively elderly person. He inflicted serious injuries as depicted in the post mortem report. Accused's moral blameworthiness is high.

In the circumstances only a custodial sentence will meet the justice of this case. The accused is sentenced as follows: 5 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
Mashindi and Partners, accused's legal practitioners