

THE STATE

Versus

BRIAN KHONA

IN THE HIGH COURT OF ZIMBABWE

DUBE-BANDA J with Assessors Mr T.E Ndlovu and Mr S.L Bazwi
HWANGE 9 MARCH 2022

Criminal trial

Mrs M. Cheda, for the State
G. Musengi, 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 25th January 2021, caused the death of Conelious Khona (deceased) by striking him with a log once on the head, with stones on the chest / stomach area 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 and defence counsel tendered into the record of proceedings a statement of agreed facts. The statement is 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 56 years at the time of the commission of the offence and he resides at Alice Khona's homestead, stand number 98 Mazizini Village, Chief Ndondo, Mbembesi.
2. The deceased was aged 70 years at the time he met his death. He used to reside at the same homestead as the accused.
3. The accused and the deceased were brothers.
4. On the 25th January 2021, at Alice Khona's homestead, and at around 1300 hours, the deceased arrived coming from the fields and enquired from his mother Alice

Khona as to who had let the cattle out from the kraal as they would end up grazing in the fields. The deceased was then advised that it was the accused.

5. The deceased then assaulted the accused with a fist on the head, the two then started exchanging blows. The deceased fell to the ground. The accused picked a log and struck the deceased once on the head.
6. The accused and the deceased were restrained by Mthandazo Msimanga and Khuselwa Mjonono. The deceased was escorted out of the homestead but came back armed with two knobkerries.
7. The deceased found the accused having left for the fields and followed him. The accused the picked two stones and threw them at the deceased, on the chest and the other on the back. The two were restrained by Philani Mniki. Both accused and the deceased had no visible injuries.
8. After a few days the deceased started complaining of headaches and chest pains. His condition deteriorated and on the 29th January 2021, he was taken to hospital where he died on the 4th February 2021.
9. The accused person pleads not guilty to murder but guilty to culpable homicide in that he negligently caused the death of the deceased.

The State tendered into evidence the post mortem report. It is before court and marked Exhibit 1. The post mortem report lists the cause of death as intracranial haemorrhage; blunt head trauma; and assault. The State placed the following real exhibits before court, a wooden stick, with the following measurements: weight 555grammes, length 81cm, circumference 11cm (Exhibit 2a); a knobkerrie with the flowing measurements weight 380grammes, length 90cm, circumference 13cm, circumference of handle 7cm (Exhibit 2b); a stick with the flowing measurements weight 325grammes, length 90cm, circumference 7.5cm (Exhibit 2c). Further two stones were placed before court as exhibits. A stone with the following measurements weight 1.240kg, diameter 15cm, colour brownish (Exhibit 2d); and another stone with the measurements weight 405grammes; diameter 12cm; colour brownish (Exhibit 2e).

The facts of this case show that the deceased assaulted the accused with a fist on the head, the two then started exchanging blows. The deceased fell to the ground. The accused picked a log and struck the deceased once on the head. The accused and the deceased were restrained. The deceased was escorted out of the homestead but came back armed with two

knobkerries. The deceased found the accused having left for the fields and followed him. The accused then picked two stones and threw them at the deceased, striking him on the chest and the other on the back. 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.

Accused was under an unlawful attack. The attack had commenced. The accused fails on the points that he deployed disproportionate force to avert the attack. First he attacked a 70 year old man who had fallen down with a log on the head. At the fields he attacked him with stones. It was objectively foreseeable or within the range of ordinary human experience that accused's actions would lead to the death of the deceased. Accused used excessive and disproportionate force in averting the attack. 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 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 factor into the equation the personal circumstances of the accused which are as follows: he is 57 years old. He is not married. Has no children. Cares for his mother who is in her nineties. We also take into account that accused is of ill-health. Even in the dock he looked very unwell. We also take into account that he is a first offender and he has been in custody for approximately three months before trial. He pleaded guilty to the crime of culpable homicide. We factor into the equation that the deceased assaulted the accused with a fist on the head, the two then started exchanging blows. The deceased fell to the ground. The accused picked a log and struck the deceased once on the head. The accused and the deceased were restrained. The deceased was escorted out of the homestead but came back armed with two knobkerries. The deceased found the accused having left for the fields and followed him. The accused the picked two stones and threw them at the deceased, on the chest and the other on the back. The two had no visible injuries. We take into account that accused used stones he picked at the scene. In this case a non-custodial sentence will meet the justice of this case.

Taking into account the facts of this case we are of the view that the following sentence will meet the justice of this case, the accused is sentenced to 3 years imprisonment wholly 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
Mvhiringi and Partners, accused's legal practitioners