

THE STATE

Versus

NKOSIKHONA NGWENYA

IN THE HIGH COURT OF ZIMBABWE

KABASA J with Assessors Mr. T. Ndlovu & Mr. G. Maphosa

HWANGE 9 JUNE 2021

Criminal Trial

Ms. M. Munsaka, for the state

N. Ndlovu, for the accused

KABASA J: The accused appeared before us on a charge of murder as defined in s47(1) of the Criminal Law (Codification and Reform) Act, chapter 9:23. He pleaded not guilty to the murder charge but tendered a plea of guilty to culpable homicide, which was accepted by the state.

To that end the state tendered a statement of agreed facts. The facts are to the effect that:

On 9th September 2020 at about 20:00 hours the accused was in the company of the deceased proceeding home from Godweni grounds where they had been watching a soccer match. On the way the two had a misunderstanding with the deceased accusing the accused of having an affair with his wife. The deceased proceeded to attack the accused with a knobkerrie, felled him to the ground and went on top of him. The accused then withdrew an Okapi knife from his pocket and stabbed the deceased once on the chest. He thereafter fled.

The deceased was found lying dead along a foot path. The accused was subsequently arrested.

The post mortem compiled by the pathologist who examined the deceased's body gave the cause of death as;

- (a) acute anaemia
- (b) Cardiac and pulmonary laceration stab wound

The knife which was used to inflict these fatal injuries was an Okapi knife, 100g in weight, 70cm the wooden handle and 2cm in width, 12cm the length of the blade with a width of 2cm at the wide end and 0,5cm at its tip.

The circumstances which led to the stabbing were largely based on what the accused said. This being so because there were no eye witnesses to the incident. The state could only rely on that which accused gave as the reason for his actions.

The accused's narration of the events raised the defence of person. Such a defence can be a complete defence when all the requirements for it are met.

In terms of section 253 (1) (a)-(d) of the Criminal Law Code, there must be an unlawful attack, such attack must have commenced or was imminent. The accused's conduct must be necessary to avert such attack with no avenue of escape which could have been explored. The means used to avert the attack must be reasonable. Where such means are not reasonable the defence of person can only be a partial defence to murder.

In casu, the attack on the accused was unlawful. The attack had commenced. The deceased was on top of the accused giving no room of escape. It was necessary for the accused to defend himself but it is the means he resorted to which were not reasonable in the circumstances.

He used an Okapi knife of the dimensions stated and plunged it in the deceased's chest with enough force to lacerate the upper lobe of the left lung and the left atrium. The atrium is one of the four chambers of the heart. Plunging a knife whose blade was 12cm in length into a human being's chest was not reasonable. A knife is a lethal weapon and when used on a human being results in serious injury or death, as was the case *in casu*.

The means used were therefore unreasonable and the "defence of person" is not available to the accused as a complete defence.

The state's acceptance of a limited plea to culpable homicide was therefore an appreciation of the facts and the law.

The defence of person is therefore available to the accused as a partial defence to the charge of murder.

The accused is accordingly found not guilty of murder but guilty of culpable homicide as defined in section 49 of the Criminal Law Code.

Sentence

In assessing an appropriate sentence, we considered that the accused is a youthful first offender. He is only 19. He pleaded guilty to the charge, albeit, the lesser offence of culpable homicide.

By pleading guilty he showed contrition and accepted responsibility for his actions. He also saved time by avoiding a protracted trial.

The deceased was the aggressor, he accused him of cheating on him with his wife and proceeded to assault the accused.

Whilst this did not warrant the taking of his life, it somewhat reduces the accused's moral blameworthiness.

At 19 he will live with the guilt of having taken a life, a huge weight on such a young person's shoulders.

The stigma will haunt him for the rest of his life. Society can be very unforgiving and the label, 'that murderer', will likely follow the accused for life.

We also do not lose sight of the fact that the accused's family assisted with ZAR10 000 at the deceased's funeral.

The accused only went up to form 1, he can be described as an unsophisticated rural youth. He had also drunk some beer.

In aggravation is the fact that a life was needlessly lost. The use of knives in our society is worrying. It appears knives have become the weapon of choice.

The accused ought not to have been in possession of a prohibited knife. An Okapi knife is a prohibited knife and for good reason. Possession of such knives poses a serious threat as they can be recklessly used with disastrous consequences, as happened in this case.

Young men ought not to move around with knives, given that their youthfulness tends to cause them to act before they think.

The sanctity of life ought to be respected. The courts need to send the message loud and clear that the taking of life will be visited by an exemplary sanction.

But for the accused's age, a sentence in the region of 10 years with part suspended would have been appropriate.

The immaturity of youth makes it odious to mete out a sentence which would otherwise be appropriate for a mature offender. (*S v Zaranyika & Others* 1995 (1) ZLR 270 (H)).

Youthfulness brings with it not only immaturity but lack of experience of life, youthfulness and irrationality (*S v Ndlovu* S-91-94)

In *S v Mutinima* HH-16-18 a 17-year-old who used an Okapi knife to stab the deceased on the right rib was sentenced to 9 years imprisonment. The accused had been the aggressor which is not the case *in casu*.

Having weighed the mitigatory factors as well as the aggravating ones, we believe the following sentence will meet the justice of the case.

6 years imprisonment of which 2 years is suspended for 5 years on condition the accused does not within that period commit any offence of which an assault 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.

Effective: 4 years imprisonment.

National Prosecuting Authority, state's legal practitioners
Mhaka Attorneys, accused's legal practitioners