

THE STATE

Versus

CHELESANI SIBANDA

IN THE HIGH COURT OF ZIMBABWE

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

HWANGE 17 JUNE 2021

Criminal Trial

Mrs. M. Cheda, for the state

C. Muleza for the accused

KABASA J: The accused faces a charge of murder as defined in section 47 (1) of the Criminal Law (Codification and Reform) Act, Chapter 9:23, in that on 9th December 2020 at Maswabisa General Dealers Store, Janjanja Shopping Centre, the accused unlawfully struck Mncedisi Ndlovu with a log several times on the head and on the hands intending to kill Mncedisi Ndlovu or realizing that there was a real risk or possibility that his conduct may cause death but continued to engage in that conduct despite the risk or possibility. The accused pleaded not guilty to murder but tendered a limited plea of guilty to culpable homicide.

The state accepted the limited plea and to that end tendered a statement of agreed facts. These facts were to the following effect:

The accused and deceased were both aged 29 at the relevant time. They were neighbours.

On 9th December 2020 the accused was at Maswabisa General Dealer Shop when he was approached by the deceased who accused him of having stolen sugar cane from the garden. A misunderstanding ensued.

The deceased went out of the shop and came back armed with a log. He proceeded to head-butt the accused twice on the forehead. The accused managed to disarm him of the log and assaulted him with it twice on the head and several times on the hands.

The deceased ran to the shop counter whilst the accused left the shop. The deceased pursued the accused armed with stones. The accused ran into a bathroom but the deceased pursued him. On leaving the bathroom the accused was hit with a stone on the shoulder. He walked away but the deceased pursued him.

The accused then hit the deceased three times on the head with the log whereupon the deceased collapsed. He was thereafter ferried to a clinic and later transferred to Mpilo Hospital where he succumbed to the injuries on 12th December 2020.

The post mortem report was tendered into evidence and marked exhibit 1. The doctor observed the following marks of violence:

“6cm long midline sutured wound involving the frontal region (non hairy and hairy part of the frontal region). There is a slightly underlying depression (depressed fracture) and haematoma.”

The cause of death was established as:

1. Skull fracture
2. Head injury
3. Assault

The weapon used to inflict these injuries was produced and marked exhibit 3. The log had the following dimensions:

“Length	-	89cm
Weight	-	750g
Circumference	-	13cm”

We agreed with the state that the circumstances leading to the assault which resulted in the deceased’s death did not show that the accused set out to kill the deceased and achieved that purpose. (*State v Mugwanda* 2002 (1) ZLR 547(S), *State v Herold Moyo* HB-19-17)

The deceased’s attack on the accused was persistent and unlawful. Such attack had commenced and was continuing. The accused walked away but was pursued. The log that was used to inflict the fatal injuries was what the deceased had armed himself with before he was disarmed. The means used to avert the unlawful attack were however not reasonable in all the circumstances.

A thick log whose dimensions and appearance qualifies to be called a lethal weapon was used to hit a most vulnerable part of the body not once but several times and with considerable force to cause the skull to fracture.

Whilst all the other requirements for self-defence were met, the means used to avert the attack were not reasonable in all the circumstances.

In terms of s254 of the Criminal Law Code, where all the requirements for self-defence are met except that the means used to avert the unlawful attack were not reasonable in all the circumstances, the defence of person can only be a partial defence, reducing murder to culpable homicide.

In the circumstances the state’s concession accords with the facts and the law.

In the result the accused is accordingly found not guilty of murder but guilty of culpable homicide as defined in section 49 (a) of the Criminal Law Code.

Sentence

The accused stands convicted of the lesser charge of culpable homicide. He is 29 years old and was orphaned at a tender age. He lost his parents when he was only in grade 7. He is an unsophisticated village man.

By pleading guilty to culpable homicide he showed contrition. He took responsibility for his actions.

The deceased was the author of his own demise. He just would not let go and persistently pursued the accused who had decided to walk away.

In arriving at an appropriate sentence, we are alive to the real likelihood that the accused will suffer from stigmatization as he is likely to be referred to as “that one who killed his neighbor”. The psychological trauma cannot be under-estimated. It is quite a burden to carry for a 29-year-old.

We however do not lose sight of the fact that a life was lost. The deceased sustained a fractured skull and the marks of violence already alluded to are indicative of the use of excessive force.

Life is a gift which cannot be replaced once lost. People must therefore respect the sanctity of life. The courts have emphasized this time without number.

As DUBE-BANDA J stated in *S v Consider Ndlovu* HB-243-20, in considering the appropriate sentence, the court should send a signal that such crimes will not be tolerated, that there is a significant and serious consequence to be suffered by the perpetrator.

The punishment must however fit the offender and the offence and be fair to society. (*S v Harrington* 1988(2) ZLR 344, *Sv Rabie* 1975 (4) SA 855(A))

Whilst an effective term of imprisonment is called for, the circumstances of this case do not justify a lengthy term of imprisonment.

We are of the view that the following sentence will meet the justice of the case:

4 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 2 years imprisonment.

National Prosecuting Authority, state’s legal practitioners
Legal Aid Directorate, accused’s legal practitioners