

THE STATE

Versus

SIKHANGELE KHUMALO

IN THE HIGH COURT OF ZIMBABWE
KABASA J with Assessors Mr. Maphosa and Mr. Ndlovu
HWANGE 7 JUNE 2021

Criminal Trial

Mrs. M Cheda, for the state

Ms. J Change, for the accused

KABASA J: The accused appeared before us charged with the crime of murder, as defined in section 47 (1) of the Criminal Law (Codification and Reform) Act, Chapter 9:23. He tendered a plea of not guilty to murder but guilty to culpable homicide. The state accepted the limited plea.

In so accepting the limited plea, the state tendered a

- (1) statement of agreed facts
- (2) a post-mortem report compiled by Doctor Juana Rodriguez Gregori, which was marked Exhibit 1.
3. an axe which was the murder weapon whose weight was 1,5 kg, length of wooden handle 82,5 cm, circumference of the handle 8,5 cm, length of the axe blade 16,5 cm and width of the axe blade 10 cm. The axe was marked Exhibit 2.

The statement of agreed facts revealed the following: -

1. The accused was 53 years old and the deceased 47 as at 24th July 2020, the day the offence was committed.
2. The two were part of a group of people gathered at Saziso Khumalo's homestead to help in clearing her fields in preparation for the planting season.

3. After the task was completed, the accused collected all the axes and placed them in a storeroom. The crowd had lunch after which they started imbibing home-made beer.
4. At around 1900 hours the accused and deceased were sitted around the fireplace when accused asked for a share of the opaque beer deceased had bought from the shops.
5. The deceased refused to give him and proceeded to utter the following words:
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“How can you ask for beer that I bought with my own money yet your family brewed beer for the gathering”, to which the accused responded that the beer was finished.
6. The deceased then insulted the accused saying “You have a heart that is outside like that of a dog” and went further to say “You think you are old, stand up and I show you.”
7. The deceased then stood up to attack the accused who fled but the deceased pursued him.
8. The accused ran into the storeroom and picked up an axe, the deceased followed into the storeroom whereupon the accused struck him twice on the head using the back of the axe before fleeing.
9. The deceased collapsed and died.

On 27th July 2020 the deceased’s remains were examined by a doctor who concluded that the cause of death was: -

- (a) subarachnoid haemorrhage
- (b) head trauma

The foregoing speaks to the circumstances surrounding the assault on the deceased and the injuries sustained which led to the deceased’s death.

In accepting a limited plea, the state was effectively accepting that the accused lacked the intention to cause the deceased's death.

We considered the facts which clearly showed that there was provocation and an attack on the person of the accused before he struck the deceased.

There is no suggestion that the accused was so intoxicated that he lacked the requisite intention to commit murder. However, in terms of section 239 of the Criminal Law Code, which provides that: -

- (1) "If, after being provoked, a person does or omits to do anything resulting in the death of a person which would be an essential element of the crime of murder if done or omitted, as the case may be, with the intention or realisation referred to in section forty-seven, the person shall be guilty of culpable homicide if, as a result of the provocation -
 - (a) he or she does not have the intention or realisation referred to in section forty-seven, or
 - (b) he or she has the intention or realisation referred to in section forty-seven but has completely lost his or her self-control, the provocation being sufficient to make a reasonable person in his or her position and circumstances lose his or her self-control," the state is accepting that the accused was provoked and as a result lacked the intention referred to in section 47 of the Criminal Law Code.

The facts also show that the deceased pursued the accused after he had stood up to attack the accused who decided to flee from him. The accused used the axe to evade an attack but the means he used were not reasonable in the circumstances.

Section 254 of the Criminal Law Code provides that: -

"If a person accused of murder was defending himself or herself or another person against an unlawful attack when he or she did or omitted to do anything that is an essential element of the crime, he or she shall be guilty of culpable homicide if all the requirements for defence of person specified in section two hundred and fifty-three are satisfied in the case except that the means used to avert the unlawful attack were not reasonable in all the circumstances."

In the circumstances we are of the view that the state's acceptance of a limited plea to culpable homicide is a correct appreciation of the facts and the law.

It cannot be said the accused had an intention to kill, either *dolus directus* or *dolus eventualis*.

However, the accused was negligent in causing the deceased's death when he struck him twice on a delicate part of the body, that is the head.

We are therefore satisfied that the state's concession is properly made.

In the result the accused is accordingly found not guilty of murder and guilty of culpable homicide.

Reasons For Sentence

In assessing sentence, we considered the following: -

- 1) The accused is a first offender, who accepted responsibility for his actions by pleading guilty albeit to a lesser charge of culpable homicide.
2. He stands convicted of culpable homicide.
3. He is a family man, with 7 children, 3 of whom are still minors and was the sole bread winner for his family.
4. He is of ill health and has been in pre-trial incarceration for 7 months.
5. His family paid 5 head of cattle as some form of "reparation" for the accused's conduct.

In aggravation however is the fact that a life was unnecessarily lost. The courts have time without number emphasized the need to respect the sanctity of life. The use of violence is to be deplored in a civilised society.

Life is a gift which is given once and once lost cannot be replaced. The deceased's family has lost a father, uncle, son, brother, nephew and husband. Their loss cannot be measured and no amount of punishment visited on the one who took their loved one's life can ever adequately compensate them for that loss or make their pain any easier to bear.

Society frowns upon the taking of life and courts must mete out sentences which are exemplary and send out a clear message on the undesirability of using violence which results in the loss of life.

In coming up with the appropriate sentence however it is well to remember that: -

“The accused is not being punished for his evil intent, for he had no intent at all, but for being careless. The function of punishment in this situation is not so much to punish wrong doing as to inculcate caution in the citizenry and encourage attentiveness to the safety of others. The function of the crime of culpable homicide is as much educative as it is corrective.” (*R v Richards* 2001 (1) ZLR 129 (S))

For these reasons the accused is sentenced to: -

6 years imprisonment of which 2 years is suspended for 5 years on condition the accused does not within that period commit an 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
Muvhiringi and Associates, accused’s legal practitioners