

THE STATE

Versus

JULIA DEWA

IN THE HIGH COURT OF ZIMBABWE
KABASA J with Assessors Mrs C. J. Baye & Mrs L. Sithole
GWERU 24 JANUARY 2022

Criminal Trial

M. Ndlovu for the state

C. Makwara for the accused

KABASA J: You appear before us on a charge of murder as defined in section 47 (1) of the Criminal Law (Codification and Reform) Act, Chapter 9:23. You pleaded not guilty to murder but offered a limited plea of guilty to culpable homicide. The state accepted the limited plea.

In accepting that limited plea the state produced a statement of agreed facts and these facts reveal that:-

1. On 17 March 2016 at 1500 hours you had a misunderstanding with the now deceased's wife. You exchanged harsh words.
2. The deceased's wife left and went to her homestead where she narrated what had happened to the deceased who was her husband.
3. As she was so narrating you arrived at their homestead and started shouting at the deceased and his wife.
4. The deceased's efforts to calm you down went unheeded. He thereafter asked you to leave his homestead. He walked towards you holding a hoe which he had been using. You moved towards the gate but stopped by the gate and exchanged harsh words with the deceased.

5. You then picked a knobkerrie with which you assaulted the deceased twice on the head.
6. The deceased was ferried to Shangani Hospital and later transferred to Mpilo Hospital but succumbed to his injuries on 20 March 2016.

A post mortem was conducted by Dr Jekenya on 21 March 2016 and he concluded that death was as a result of:

1. Intracranial haemorrhage
2. Skull fracture
3. Post assault head injury

The post-mortem was produced and marked exhibit 2, whilst the agreed facts were marked exhibit 1.

After your arrest you gave a statement to the police wherein you were alleging that you were acting in self defence. The statement was confirmed and it was produced and marked exhibit 3.

The knobkerrie you used to inflict the injuries which took the deceased's life was produced and marked exhibit 4. The knobkerrie has the following dimensions:

62cm length

22cm circumference on its widest part

0.454kg in weight.

From the documentary and physical exhibits, it is not in doubt you caused the deceased's death.

The issue is whether you set out to cause such death and achieved that purpose or you foresaw death as a likely result but continued with your conduct nonetheless.

You allege self defence, which can be a complete defence when all the requirements are met. When all the requirements are met but it is shown that the means used to avert the attack were not reasonable in the circumstances, self-defence can at most be a partial defence, reducing murder to culpable homicide.

From the evidence submitted, in particular the warned and cautioned statement and the agreed facts we are unable to quarrel with the state's decision to accept a limited plea of culpable homicide.

The facts and circumstances do not show that there was an intention on your part, either *dolus directus* or *dolus eventualis*. The state therefore appreciated the facts and the law in accepting the limited plea.

In the result, you are accordingly found not guilty of murder but guilty of culpable homicide.

Sentence

In assessing sentence I have considered what was submitted on your behalf. You are a woman first offender married with 8 children, 2 of whom are still minors. You pleaded guilty albeit to a lesser offence. You therefore did not waste the court's time. You also showed remorse and contrition.

It has taken all of 6 years to finalise the matter. One cannot under-estimate your anxiety over this period.

I have been referred to a number of cases, all of which speak to the following:

1. Sentence must be approached rationally and not be aimed at destroying an offender.
2. Too harsh a sentence is as ineffective as a too lenient one
3. Sentence must fit the offence and the offender and be fair to society
4. Punishment ought to be reformatory and not purely punitive. (*S v Chadyamunda* HH228/89, *S v Khumalo* 1973 (3) SA 679, *S v Van der Wan Westhuizen* 1974 (4) SA 61)

That said however, the court considers the following in aggravation:

1. A life was needlessly lost
2. You could have gone to your own home just as deceased's wife had but chose to follow her and would not listen to the deceased's voice of reason.
3. The deceased was not able bodied and you could have run off which is all he wanted you to do, i.e. leave his homestead.
4. You used a knobkerrie and aimed it on the deceased's head not once but twice.
5. You exhibited a lack of self-control which the courts have time without number urged society to exercise in order to avoid incidents such as this one where a life was unnecessarily lost.
6. The deceased's wife has now to contend with being a widow and her children fatherless.

Whilst I do accept that the delay of 6 years ought to influence the assessment of an appropriate sentence, (*S v Mzila Muhlupayi and Anor* HB-125-17) I am not persuaded that your conduct and the lack of respect of the sanctity of life calls for a non-custodial sentence.

Society abhors violence and the unfortunate loss of life that often follows the use of unmitigated violence is equally frowned upon. Courts must mete out sentences that show that such lack of self-control which leads to the unnecessary loss of life will not be tolerated.

It is not necessarily the length of imprisonment which will send this message home but imprisonment itself. Not every case which falls within the community service threshold is deserving of community service. Community service must gain society's confidence and offences where violence which could have been avoided leads to loss of life, unless exceptional circumstances exist, community service should not be considered.

As a woman first offender who had gone for 46 years without falling foul of the law, I am of the view that a sentence of 3 years will meet the justice of the case.

As a first offender who pleaded guilty, I will suspend a portion of the term of imprisonment. The delay of 6 years has informed the decision to impose this sentence.

You are accordingly sentenced to 3 years imprisonment of which 1 ½ years is suspended for 5 years on condition you do not within that period commit any offence of which an assault on the person of another is an element and for which upon conviction you are sentenced to a term of imprisonment without the option of a fine.

Effective 1 ½ years imprisonment.

*National Prosecuting Authority, state's legal practitioners
Mutatu, Mandipa & Partners, accused's legal practitioners*