

THE STATE

Versus

TAKAVAONA MASHAVAKURE

IN THE HIGH COURT OF ZIMBABWE

DUBE-BANDA J with Assessors Mr Matemba and Ms Baye
GWERU 19 MAY 2021

Criminal Trial

Ms N. Chikuni, for the State

Ms. T. Takaendesa, for the accused

DUBE-BANDA J: The accused was arraigned before this Court on 19th May 2021, 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 17th June 2014, and at Zwavamwenye Village, Mberengwa, the accused unlawfully caused the death of Daniel Tarukwasha Mtiyi (deceased) by hitting him on the back of the head with a mattock intending to kill him or realising that there was a real risk or possibility that his conduct may cause death and continued to engage in such conduct despite the risk or possibility.

The accused tendered a plea of guilty to a lesser offence of culpable homicide. The State accepted such plea of guilty to culpable homicide. The State tendered into the record of proceedings a statement of agreed facts which is marked Annexure A. The statement reads as follows:

1. Takavaona Mashavakure (accused) resides at Village Zwavamwenye, Chief Mposi, Mberengwa. He was aged 22 years at the relevant time.
2. Daniel Tarukwasha Mtiyi (deceased) resided at the same village and homestead as the accused during his life. He was 65 years old when he met his death.
3. The deceased was the accused's father.
4. On the 17th of June 2014, at around 1000 hours, the accused and the deceased were at their homestead. A misunderstanding then ensued between the two over an issue of \$9 change which accused had not returned to the deceased.
5. The misunderstanding resulted in a scuffle and a fight ensued.

6. The deceased picked a short steel iron rod and intended to strike the accused with it. The accused picked a mattock which was nearby and struck the deceased with it once on the head, and deceased fell down.
7. The accused then lifted the deceased and placed him in his bedroom hut after which accused fled from the scene.
8. A report was made to the police leading to the accused's arrest and subsequent recovery of the exhibit. The exhibit went missing at the police station.
9. The deceased's remains were ferried to United Bulawayo Hospitals, where a post mortem report examination was conducted on 18 June 2014, by Dr S Pesanai. He concluded that the cause of death was:-
 - Extensive subarachnoid haemorrhage
 - Multiple skull fractures
 - Multiple skull trauma
 - Homicide
10. The accused accepts the evidence of the State witnesses and the contents of the post mortem report. The accused denies having requisite intention to kill in the form of *dolus directus* or *dolus eventualis*. Rather, the accused acknowledges that through his conduct aforesaid, he was negligent in causing the death of the deceased.
11. The State concedes to the fact that the accused was negligent in the manner he assaulted the deceased, and therefore accepts the accused's plea of Culpable Homicide.

The State tendered a post mortem report compiled by a pathologist, Dr. S. Pesanai, at United Bulawayo Hospital, on the 18 June 2014. The post mortem report number 420-419-2014, was received by consent and marked Exhibit 1. The findings in the post mortem report list the cause of death as the following:

1. Extensive subarachnoid haemorrhage
2. Multiple Skull Fractures
3. Blunt force trauma
4. Homicide

The accused struck deceased once with a mattock on the head. 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. In accepting a limited plea of guilty to culpable homicide, the State is conceding that the accused neither had the requisite intention to kill the deceased ; nor realised a real risk or possibility that his conduct may cause death, and continued to engage in that conduct despite the risk or possibility of death. By assaulting the deceased in the manner he did, the accused negligently failed to realise that death may result from his conduct; or realised that death may result from his conduct and negligently failed to guard against that possibility.

In the circumstances, we are satisfied that the State's concession is properly made, it accords with the facts 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 the lesser crime of culpable homicide.

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 the accused's personal circumstances, take into account the nature of the offence he has been convicted of, and factor-in the interests of society.

In determining an appropriate sentence, we are guided by section 49 of the Criminal Law [Codification and Reform] Act [Chapter 9:23]. The accused did not lead evidence in mitigation of sentence. He placed the following personal circumstances before the court through the medium of his legal practitioner. He was 22 years at the time of the commission of the offence, he is now 29 years old. He is married with 1 child. He is a communal farmer. He is the sole provider of an extended family, which includes his mother and a sibling. The court must weigh these mitigating features against the aggravating factors and the interests of justice.

We also factor into the sentencing equation that accused caused the death of his own father. He used a mattock, a dangerous and lethal weapon. He struck the head. He used excessive force on a 65 year old person. Injuries caused on the deceased are extensive. The post mortem report shows that he depressed and fractured the deceased's skull. Instead of

rendering assistance to a person he had injured, lifted the deceased and placed his body in a hut and fled the scene. Accused cannot benefit from the fact that the matter took a long time to be finalised, because he could not be located to be placed on trial. It is his fault. These aggravating factors make this case a bad case of culpable homicide. The sentence must reflect and show that this is a bad case of culpable homicide.

The sentence must send a signal that such crimes will not be tolerated, that there is a significant and serious consequence to be suffered by the perpetrator. On the facts of this case, a non-custodial term will trivialize an otherwise serious case. No father must die such a cruel death in the hands of his own son. A sentence of effective imprisonment is warranted in this case.

We are of the view that the following sentence will meet the justice of this case: the accused is sentenced to 10 years imprisonment of which 2 years imprisonment is 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
Danziger and Partners, accused's legal practitioners