

THE STATE

VERSUS

WITNESS SIBANDA

IN THE HIGH COURT OF ZIMBABWE
MAKONESE J
GWERU 31 JANUARY 2013

Mr S. R Mafa for the State
Mr . W Mehlo for the accused

Criminal Trial

MAKONESE J: The accused has been arraigned before this court on a charge of murder, it being alleged that on the 12th December 2006 at village Mumango, Chief Mahlebadza, Mberengwa, the accused person wrongfully and unlawfully and with intent to kill Siphephethiwe Mpesi a female adult aged 61 years by striking her on the stomach with a brick thereby causing her injuries resulting in death.

The accused pleaded not guilty to the charge of murder and a plea of not guilty was accordingly entered. The accused however tendered a limited plea of guilty with respect to culpable Homicide. The State conceded that the accused was negligent in his actions and accepted accused's plea of culpable Homicide. It is a clear view that the concession by the State was properly made.

The facts of this case are very sad. The accused person who was aged 39 years at the time of the offence struck and killed his biological mother with a brick. The deceased sustained injuries which led to her death. The State and defence tendered into evidence a statement of Agreed Facts which was marked as Exhibit 1. The contents of the statement of agreed facts are as follows:

- “(1) The accused person Witness Sibanda was aged 39 years at the time of the commission of the alleged offence. He resides at village Munaga Chief Mahlebadza, Mberengwa.

- (2) The deceased Siphephethiwe Mpesi was aged 61 at the time of her death and also resided in the same village as the deceased who was accused's biological mother.
- (3) On the 12th December 2006, and at Garai Mpanza's homestead the deceased had a misunderstanding with Garai Mpanza who is accused's father.
- (4) After Garai Mpanza had left the homestead the accused sought to inquire from his mother the cause of the quarrel between her and his father.
- (5) Such an enquiry by the accused enraged the deceased to the extent that a quarrel ensued between the two of them.
- (6) In the midst of the quarrel and out of anger the accused picked up a brick and threw it at the deceased who was struck in the abdomen causing her internal injuries which later led to death.
- (7) It was not the intention of the accused to kill his biological mother but it happened accidentally.
- (8) The deceased was first ferried to a local clinic whereupon she was transferred to United Bulawayo Hospitals where she died. On the 28th December 2006 Dr Sanganayi Pesanayi examined the deceased's remains and concluded that the cause of death was:
 - (1) septicaemia
 - (2) peritonitis
 - (3) laporatomy done for perforated bowel
 - (4) Assault
- (9) The accused accepts the evidence of State witnesses and the contents of the Post Mortem Report as well as the medical Affidavit of Dr S. Pesanai. The accused denies having an intention to kill in either form of *dolus directus* or *dolus eventualis*.
Rather, the accused acknowledges that through his conduct he might have caused the death of the deceased.
- (10) The State concedes to the fact that accused was negligent in his actions and therefore accepts accused's plea of culpable homicide."

The State then tendered into evidence the medical report of Dr Pesanai in terms of the provisions of section 278 (3) of the Criminal Procedure and Evidence Act [Chapter 9:07]. The Post Mortem Report was marked Exhibit 2. The State then produced with the consent of the Defence Counsel Exhibit 3, being the half brick used to attack the deceased. The brick weighed 1.176kg and was 13cm long and 9 cm wide.

The Defence Counsel confirmed that all the essential elements of Culpable Homicide had been explained to the accused who understood then and further that the limited plea of guilty to culpable homicide was genuinely made.

We therefore found the accused not guilty on the charge of murder and accordingly acquitted him. We found him guilty on the lesser charge of culpable homicide.

The State addressed the court in aggravation and in turn the defence addressed us in mitigation.

The State urged the court to impose a custodial sentence in the region of 10 years and to support that contention cited these cases: *State v Bonginkosi Sibanda* HB 91/12 and *State v Lovemore Zulu* HB 88/12.

The State argued that a sentence of 10 years imprisonment was appropriate regard being had to the fact that there was no high degree of provocation. The Defence on the other hand placed reliance on cases, which in our view were not entirely relevant. The case *State v Ndlovu* 1996(2) ZLR 1 which was cited dealt with a case of theft and the facts are on entirely different aspects of the law. This did not assist the court. The other case of *State v Elias Ndlovu* HB 119/05 was to some extent relevant and the court will take into account the sentence imposed in that case as a guideline.

In arriving at an appropriate sentence this court notes that the degree of provocation was very slight. In fact what worries us in this case is that the dispute was between the accused's father and mother (deceased) and it seems the accused entered the fray for no apparent reason. Accused's moral blameworthiness is very high. We note that accused is now aged 45 years and it has been submitted that he is HIV positive although no medical evidence was placed before the court. We therefore there cannot accept the medical condition of the accused in the absence of some evidence in the form of hospital cards or Treatment Records cards being placed before the court.

We note that accused is a peasant farmer with some huge family responsibilities of taking care of his extended family. We have also considered the fact that the accused will forever be traumatized by the fact that he took his own mother's life. Although it was submitted that the accused person was somehow intoxicated there was no compelling argument on that aspect and one can only assume that the level of intoxication if any of the accused was not very insignificant.

The accused person showed some amount of contrition and remorse and that works in his favour. However, as submitted by *Mr Mafa* Counsel for the State, in this case the accused person pleaded guilty principally because he had no defence to proffer and the court should not place undue weight on the fact that accused did not waste the court's time. The court however accepts that a plea of guilty is on its own a factor in mitigation. The court also notes that accused is a first offender who has spent 6 years awaiting the outcome of his trial. The anxiety associated with the delay is taken into account. The accused was on bail pending trial as submitted by this defence counsel *Mr Mehlo*.

We must remark here that it is of vital importance for legal practitioners to investigate the personal circumstances of accused person in detail so the court is not left to guess on what personal circumstances to consider. In this case, we were not very impressed as it appeared defence counsel had not sought specific instructions on accused's personal circumstances. This court implores all defence counsel especially in *pro deo* cases to ascertain the correct age of the accused, their occupation, their means of income, their savings, their responsibilities, whether there has been pre-trial incarceration, and what time it has taken the court to finalise the case. Where the delay in concluding the case is entirely the State's fault this should be brought to the attention of the court. It is not enough for a represented accused person to simply recite that accused is a first offender, has pleaded guilty to the charge and that he has family responsibilities. By the same token legal practitioners must endeavour to refer to relevant decided cases so as to provide the court with a guide on the appropriate sentence.

In the circumstances of this case we consider that a life was needlessly lost. The accused person struck and killed his biological mother with a brick. Resolving disputes by violent methods cannot be condoned by these courts. The courts would be failing in their duty if they do not pass deterrent sentences.

In the circumstances accused is sentenced as follows:

Sentence: 8 years imprisonment

*Criminal Division, Attorney General's Office, state's legal practitioners
Dzimba, Jaravaza and associates, accused's legal practitioners*