

THE STATE

Versus

JOSEPH DUBE

IN THE HIGH COURT OF ZIMBABWE
MOYO J
HWANGE 14 MARCH 2014

Mr *G. Muvhiringi*, for the accused
Mr *W. Mabhaudi*, for the state

Criminal trial

MOYO J: The accused is charged with the offence of murder, in that on the 30th of July 2013 and at Ngoma bottle store, Nkwizhu Line Sipepa in Matabeleland, the accused did wrongfully, unlawfully and intentionally kill and murder Hlonipani Ncube a male adult during his lifetime. The accused person pleaded not guilty to the charge of murder but tended a lesser plea to a charge of culpable homicide. The state rightly conceded to this lesser plea. A statement of agreed facts was then read and tendered before this court. It was marked Exhibit I. it read as follows:

1. Accused resides at Livingstone Dube's homestead Nkwizhu Line Sipepa.
2. He was aged 20 years at the time of the commission of the offence.
3. Deceased was aged 24 years at the time he met his death and used to reside at Maria Mlalazi's homestead Nkwizhu, Sipepa.
4. The accused and deceased were not related.
5. On the 30th of July 2013 in the evening deceased arrived at Nkwizhu Business Centre Tsholotsho and gave accused who is a bar attendant at the bottle store his belongings for safe keeping.
6. At around 2100hours deceased demanded his property and accused refused indicating that deceased was too drunk to be able to account properly for his property.
7. An argument ensued resulting in deceased assaulting accused on the thighs with a log.
8. Accused then armed himself with a log and struck deceased once on the head.
9. Deceased collapsed and was ferried to Jimila Clinic and was transferred to Mpilo Hospital

where he subsequently died on the 31st of July 2013.

10. The accused person pleads not guilty to murder but pleads to culpable homicide in that he negligently caused the death of the deceased.

The post-mortem report was read and formally admitted before this court in terms of section 314 of the Criminal Procedure and Evidence Act [Chapter 9:07]. It was marked Exhibit II. It states the cause of death as:-

- (1) epidural haematoma
- (2) skull fractures
- (3) head injury (assault).

It also states that severe force was used. The log that was used to assault the deceased was also tendered as evidence before this court with the consent of the defence counsel. It is a 90cm long log. It has a circumference of 18cm at the bigger end and a circumference of 12cm at the smaller end. It weighs 1.06kgs.

I accordingly find the accused person not guilty of the charge of murder but I convict him on the lesser charge of culpable.

In sentencing the accused person, we have considered that he is a first offender who pleaded guilty to the charge of culpable homicide. That he was 20 years at the time that this offence was allegedly committed. He was employed at his father's bottle store at the relevant time. The facts of the case are that the deceased approached accused who was a bartender, asked accused to take care of his property while he drank beer. Later on the deceased came asking for his property, accused refused to give him the property saying he would give him in the next day when deceased was sober. This did not go down well with deceased who then assaulted accused with a log on the thighs. Accused then armed himself with a log and struck the deceased once on the head. The deceased was drunk. The accused's personal circumstances are that he was aged 20, he pleaded guilty and he is a first offender. The accused looked for deceased's relatives after the assault. In our view, accused's cumulative personal circumstances are a weighty mitigatory feature.

The facts of this case have not shown that he is inherently wicked. Again the circumstances of the commission of the offence are such that a misunderstanding ensued between the two, with deceased being drunk and the deceased proceeding to assault accused with a log. In

these circumstances the deceased contributed to the misunderstanding and he in fact assaulted the accused person. The accused alone can not be held as being responsible for bringing about the misunderstanding. The only aggravating feature in these circumstances is that the accused used a log of the nature and size that was produced before this court, and in so doing he aimed the blow at a vulnerable part of the body exerting severe force in the circumstances. A life was consequently lost and unnecessarily. A custodial sentence would be the only sentence that can be given in the circumstances. Balancing the accused's personal circumstances, the circumstances of the commission of the offence and the interests of society at large, we are of the view that the following sentence would meet the justice of this case:

The accused is sentenced to 5 years imprisonment of which 2 years imprisonment is suspended for 5 years on condition of good behaviour.

*Criminal Division, Attorney General's office, state's legal practitioners
Dube and company, accused's legal practitioners*