

THE STATE
versus
PHUMULANI NCUBE

HIGH COURT OF ZIMBABWE
MOYO J
BULAWAYO 14 JULY 2015

Criminal Trial

V Shava for the state
N Mazibuko for the accused

MOYO J: The accused person faces a charge of murder in that it is alleged that on 30 September 2013 he killed Qhubekani Ncube. The accused person pleaded not guilty to this charge but instead offered a limited plea to the charge of culpable. The state counsel accepted this limited plea and tendered in this court a statement of agreed facts which was marked as Exhibit 1. It reads as follows:

- 1) The accused person is facing a charge of murder in that on 30 September 2013 he killed Qhubekani Ncube, his half brother with intent aforethought.
- 2) The accused person will plead not guilty to the charge but will plead guilty to culpable homicide.
- 3) The accused person and the deceased made arrangements on the 30th September 2013 to meet at Sanzukwi Shopping Centre for a beer-drink. The accused person arrived at the shops before the deceased and started drinking with some friends.
- 4) The deceased subsequently joined the accused person and his friends after a while and the parties continued drinking. After some time, the deceased person had a misunderstanding with one Shepherd Ncube, when Shepherd objected to the deceased's friend joining them

in the beer-drink. During the misunderstanding, the deceased threatened to kill some people just like he had killed someone in South Africa.

- 5) The accused person intervened and remonstrated with the deceased person for boasting about killing someone in South Africa. The deceased person did not take kindly to the accused's intervention and alluded to the fact that the accused person would be dead by the morning, which the accused person took to mean that the deceased might attempt to kill him during the night. By this time, both the accused person and the deceased were intoxicated.
- 6) The accused person advised the deceased to go home and sleep if he was too drunk and stop fighting with everyone whereupon the deceased left, whilst the accused person continued drinking with his friends.
- 7) The accused person later left for home and when he got to the homestead he found the deceased person about to leave, pushing his bicycle. On enquiring why the deceased person was leaving in the middle of the night the deceased's response was that the accused person should mind his own business and bear in mind that he might be dead in the morning.
- 8) Getting concerned as the deceased person continued to mention that the accused person might be dead in the morning, the accused person then suggested that they go and see their father so that the deceased person could explain himself, but the deceased refused and left.
- 9) As the accused person was concerned about what the deceased person might do to him during the night because of his continued reference to the accused's demise by the morning, the accused followed the deceased outside the homestead and grabbed him insisting that they should go and see their father, whereupon the deceased person slapped him very hard on the cheek resulting in the accused person reflexively kicking out at the deceased person in self defence. The deceased person fell down and the accused person then took a tree branch/switch and hit the deceased person about three times whilst the deceased was still lying on the ground.
- 10) Their father then arrived on the scene prompting the accused person to stop hitting the deceased with the tree branch as abovestated.

- 11) When told to go back inside the homestead by their father, the deceased person indicated that his abdomen was too sore whereupon the accused person assisted to lift the deceased back into the homestead where their father rendered first aid. After that the accused person assisted to put the deceased into his blankets.
- 12) As the accused person was of the view that the deceased person was exaggerating his injuries so that he could maybe surprise him during the night and kill him, since he had kept referring to the accused being dead by the morning, the accused person decided not to sleep in the homestead that night and left without telling anyone and spent the night at the mine where he works.
- 13) The next day, whilst still pondering how to approach his father about the previous night's misunderstanding between himself and the deceased person, he then received a call that his half-brother, the deceased, had passed away.
- 14) The accused person was troubled and devastated by the news and spent that day and the night in the forest not sure what to do. The next day the accused person handed himself over to the police.

The state counsel also tendered the post mortem report prepared by Dr S. Pesanai. It gives the cause of death as :

- 1) peritonitis
- 2) ruptured small bowel
- 3) blunt force trauma
- 4) assault.

On the facts presented to this court the accused person is accordingly acquitted on the charge of murder and is found guilty of culpable homicide.

Sentence

The accused person is convicted of the offence of culpable homicide. He pleaded guilty to this charge. He is a first offender. There had been a misunderstanding between himself and the deceased. He kicked the deceased once in the stomach resulting in injuries that then caused deceased's death. The deceased was his half brother and they were both intoxicated. He also assisted the deceased after the assault. Guided by the principles as set out in the case of *S v*

Sibanda SC 245/13 wherein the appellant was found to have accidentally chopped the deceased's head whilst chopping firewood and that he was very contrite and was a first offender. He had already spent a year in custody. Prior to sentence, the Supreme Court held that nonetheless a life was unnecessarily lost and that it is the duty of the court to mark its abhorrence of such conduct and uphold the sanctity of life. In that case the appellant was sentenced to six years imprisonment of which two years imprisonment was suspended on the usual conditions. Whilst an axe was used in the *Sibanda* case, the Supreme Court found that the chopping of the deceased's head was an accident but held that accused should have been more careful not to chop firewood with the deceased seated in that close proximity. We find that in the case before us, the moral blameworthiness is higher than in the *Sibanda* case for the accused was fighting with the deceased and kicked him resulting in deceased's death. We are therefore of the view that a sentence in the region of six years imprisonment, taking into account that accused has already spent almost one year in prison, suspending a portion would meet the justice of the case. The accused person is accordingly sentenced to 6 years imprisonment with 2 years imprisonment suspended for 5 years on condition the accused person is not within that period convicted of an offence of which violence is an element.

National Prosecuting Authority, state's legal practitioners
Calderwood, Bryce Hendrie and Partners, accused's legal practitioners