

THE STATE

Versus

MTHOKOZISI MKANDLA

IN THE HIGH COURT OF ZIMBABWE
MAKONESE J
BULAWAYO 28 & 29 JUNE 2016

Criminal Trial

W. Mabhaudi for the state
Nyathi for the accused

MAKONESE J: The 27 year old accused person typifies a neighbour's keeper. On 3rd May 2015 in the evening hours he observed the deceased attempting to break into a house belonging to a neighbour one Mr Nkomazana. Accused's instincts compelled him to apprehend the deceased who was about to commit a crime. The accused did not realise that his good intentions would lead to the tragic consequences that led to the death of the deceased.

The established facts of the matter reveal that as soon as the accused person had apprehended the deceased, the accused together with members of the public took turns to assault the suspect. The injuries inflicted upon the deceased were so severe that he failed to get back to his home. He collapsed by the road side. He was only discovered by members of the public the following day on 4th May 2015 with a heavily swollen face and injuries all over the body. The deceased later succumbed to these injuries and died at Mpilo Hospital on the 1st of June 2015.

The accused now faces a charge of murder, it being alleged that on 3rd May 2015 and at house number 9756, Cowdray Park, Bulawayo accused did wrongfully and intentionally kill and murder Mphithizeli Ncube, a male adult aged 37 years at the time of his demise. Accused pleads not guilty to the charge and tenders a plea of guilty with respect to the lesser charge of culpable homicide. The state accepts the limited plea. A statement of agreed facts has been adduced into evidence as Exhibit 1. The events leading to the death of the deceased are as set out in this judgment. It is accepted by the court that the accused did assault the deceased but that angry members of the public bayed for the deceased's blood and joined in the assault. The post

mortem report number 180/120/2015 which was tendered into evidence as Exhibit 2 was compiled by Dr Jekenya on the 2nd of June 2015. As a result of the examination conducted on the body of the deceased, the pathologist concluded that the cause of death was:

- (a) Brain haemorrhage
- (b) Head injury
- (c) Trauma (assault)

The post mortem report indicates under summary of history that the deceased had been admitted to hospital on the 4th May 2015 following an assault by unknown assailants. On marks of violence, the post mortem report reveals that the deceased had a healing scar of the mid lower lip, 2 x 1cm, and a healing scar 5cm x 2mm on the mid frontal region just above the eye. An examination of the brain the pathologist observed oedematous, congested brain with patchy superficial brain haemorrhages especially the parietal region.

The court is satisfied that on the basis of the evidence placed before it, the deceased sustained serious injuries following a vicious attack by the accused and other unidentified assailants. The court notes that members of the public should surrender suspects to law enforcement officers. The public must be encouraged not to resort to the law of the jungle where instant justice is delivered to those suspected of breaking the law.

The accused is acquitted on the charge of murder and found guilty with respect to culpable homicide.

Sentence

As regards sentence, the court takes into account all the mitigating circumstances of the case as articulated by accused's defence counsel. This court attaches great importance to the plea of guilty that has been tendered to the lesser charge. The accused has taken full responsibility for his role in this offence. He has not chosen to distance himself from the assault, in the light of the fact that several members of the public joined in the assault. The court shall

never know with certainty the actual role of each of the assailants and apportion to each assailant a specific role. In terms of our law, however, the doctrine of common purpose attaches criminal liability to the accused person. The accused need not have foreseen the precise nature in which the injuries that caused death were inflicted. I must, however, hasten to add that the scenario in the present case is far different from a case of gang violence leading to a gang attack.

The court also takes into account the fact that accused who is a first offender has spent slightly over a year in custody pending his trial. In my view the accused has already served part of his sentence.

See *S v Harington* 1988 (2) ZLR 344 (S), where it was held at page 365 as follows:

“The appellant has to pay for her crime. She must be sentenced rationally and fairly. This is one of the principles of criminal justice which requires that the punishments imposed by the court for crimes committed must themselves be just and fair.”

The sentence the court shall impose should reflect the seriousness of the offence, at the same time the sentence should be rehabilitative and not unduly harsh. A just and fair sentence is called for that fits the offence and the offender. The sentence must not break the offender but must send a clear message that no one is permitted to take the law into his own hands. Where members of the public effect a citizen’s arrest as they often do, they must deliver suspects to the police and not mete out mob justice.

In all the circumstances of the offence the appropriate sentence regard being had to all the aggravating features and factors in mitigation is as follows:

“Accused is sentenced to 3 years imprisonment of which 2 years is suspended for 5 years on condition accused does not within that period commit an offence of which violence is an element and for which upon conviction accused is sentenced to imprisonment without the option of a fine. The remaining 1 year imprisonment is suspended on condition accused completes 420 hours of community service at ZRP Luveve on the following conditions:

HB 176/16
HC (CRB) 78/16

The community service starts on the 1st of July 2016 and must be completed within 12 weeks. The community service shall be performed every Monday to Friday which is not a public holiday between 8am to 1pm and 2pm to 4pm, to the satisfaction of the Officer-In-Charge Luveve Police Station, who may on good cause shown grant accused leave of absence on certain days or during certain hours.”

National Prosecuting Authority, state’s legal practitioners
Dube-Banda, Nzarayapenga & Partners, accused’s legal practitioners