

THE STATE
versus
MPIKELELO TRUST MSEBELE

HIGH COURT OF ZIMBABWE
MATHONSI J
HWANGE 28 JUNE 2016

Criminal Trial

Ms M Munsaka for the state
G. Muvhiringi for the respondent

MATHONSI J: The accused person is charged with murder, it being alleged that on 27 December 2004 at John Moyo's homestead, Bangamakuni Line, Sipepa in Tsholotsho he unlawfully and intentionally killed Mlandeli Moyo, a male adult aged 28 at the time. The accused person was himself aged 24 at the time and resided at his own homestead in the same line.

The accused person has pleaded not guilty to the charge but has tendered a plea of guilty to culpable homicide instead. The agreed facts are that on 27 December 2004 the accused and the deceased had a misunderstanding over the deceased's missing panties and a Zionist cotton thread. When a fight erupted between the two, the accused ran away but the deceased pursued and caught up with him.

As he pursued the accused the deceased was armed with a switch and a catapult. He took aim at the accused with a catapult and hit him three times. In response the accused tripped the deceased and then assaulted him several times on the face, neck and chest with clenched fists and booted feet until the deceased lost consciousness.

Leaving the deceased lying on the ground, the accused made his way to his home. The deceased was ferried to Sipepa clinic where he was referred to Mpilo Hospital in Bulawayo for treatment. He died on his way to hospital as a result of which a murder charge was preferred against the accused person aforesaid. The state has accepted the accused's limited plea of guilty to culpable homicide. According to the post mortem report prepared by Dr I. Jekanya of Mpilo Hospital, the cause of death was haemothorax lung injury as a result of assault.

It is clear that on the day in question the deceased was the aggressor who persistently attacked the accused who initially tried to run away, until he decided to defend himself. The agreed facts therefore suggest that the accused person only exceeded the bounds of self-defence. For that reason tendering a limited plea of guilty to culpable homicide was proper and the state only did well to accept it.

According the verdict of this court is that the accused is found not guilty of murder but is found guilty of culpable homicide.

Reasons for sentence

In considering sentence we take into account that the accused is a first offender who has pleaded guilty thereby saving the court's time. He is 36 years old although he was only 24 at the time of the offence and therefore youthful indeed. He is now a widower who has to take care of four minor children the oldest of whom is 9 years old while the youngest is 1 ½ years old.

Sending the accused person to jail may deprive the children of support. This is an issue which could have been avoided if the accused had been brought to court without delay. A significant reduction of sentence will always be effected by this court for as long as the state delays bringing accused persons to trial without any excuse. This is in order to encourage the state to respect the rights of accused persons to be tried within a reasonable time.

While it is true that a precious life has been lost we cannot possibly lose sight of the fact that the deceased brought about what befell him by his aggressive conduct towards the accused.

If the agreed facts are anything to go by, the accused and the deceased had a misunderstanding over his stolen panties and a Zionist cotton thread. When the fight erupted the accused did the sensible thing, one expected of every law abiding citizen in the circumstances, that is, he absconded. This was in order to avoid violence.

However the deceased was persistent. Armed with a switch and catapult he is said to have given chase and escalated the fight. Distraught and left with no sense of solution, the accused is said to have fought back. Our law recognizes that a person is entitled to take reasonable steps to defend himself against an unlawful attack. Harm or even death may be inflicted on the attacker in order to ward off an unlawful attack.

Unfortunately in his case the accused exceeded the bounds of self-defence. He should have continued with the commendable spirit of non-violence. But after he had felled the deceased to the ground he was no longer under attack. He however took leave of his senses and continued to assault him using clenched fists and booted feet several times on the face, neck and chest until he lost consciousness. He died as a result of that attack which had taken an unlawful turn the moment the deceased was on the ground.

This court however cannot ignore the fact that the accused had initially been the reasonable one and that he may have snapped following the deceased's persistent attack on him with a catapult.

Although a precious life was lost, the accused's moral blameworthiness is very low. That has to reflect on the sentence to be imposed. More importantly he has had this charge hanging over him for 12 years which on its own is a traumatic experience especially as he has had to face the family of the victim and the community at large.

Accordingly the accused is sentenced as follows:

5 years imprisonment of which 3 years imprisonment is suspended for 5 years on condition the accused is not convicted of any offence of which violence is an element for which upon conviction he is sentenced to imprisonment without the option of a fine. The remaining 24 months is suspended on condition the accused completes 630 hours of community service at ZRP Sipepa on the following conditions:

The community service should be performed between the hours of 0800 hours and 1300 hours and 1400 hours and 1700 hours on Mondays to Fridays and should be completed within 6 weeks from Monday 4 July 2016 to the satisfaction of the person in charge of the station.

National Prosecuting Authority, state's legal practitioners
Dube & Partners, accused's legal practitioners