

THE STATE
versus
ALBERT NCUBE

HIGH COURT OF ZIMBABWE
MAKONESE J
GWERU 28 JANUARY 2016

Criminal Trial

M. Shumba for the state
Ms Makande for accused

MAKONESE J: The accused is a juvenile whose estimated age was between 12 years and 13 years at the time of the commission of the offence. He has been arraigned before this court on a charge of murder, it being alleged that on 28 August 2009 at Messouri Farm, Matobo Road, Gweru the accused unlawfully and intentionally caused the death of Sherpherd Nyathi a male infant aged 1 year by administering paraquat poison to him. The accused denies the charge and tenders a limited plea of guilty with respect to culpable homicide. Accused's defence counsel has confirmed that accused understands the charge and tenders a plea of guilty with respect to the lessor charge of culpable homicide. The state accepts the limited plea.

The brief facts as summarized in the statement of Agreed Facts (exhibit 1) are as follows: On 28 August 2009 at around 1530 hours accused and the deceased were at home at Plot 14, Messouri Farm Gweru. The accused was pushing the deceased around the homestead in a wheelbarrow. At some point accused pushed the deceased up to the fowl run. While there, the accused took a bottle which contained some liquid which was later established to be paraquat a poisonous substance usually used as a weedkiller. The accused gave the liquid to the complainant to drink. After deceased consumed the liquid, accused closed the bottle and was observed doing so by Sinikiwe Dumezweni. Accused threatened Sinikiwe Dumezweni with assault if ever she disclosed to anyone what he had done. Moments later deceased started crying and Sinikiwe took him to his mother who detected a strong smell of paraquat poison. The

mother applied first aid but to no avail. The deceased died as a result of the consumption of the poisonous liquid.

The Post Mortem Report of Dr. I. Jekonya, compiled at Mpilo Central Hospital, and filed under number 377/284/09 has been tendered into the record of proceedings as Exhibit 2. The report concludes that the cause of death was paraquat poisoning. On external examination the pathologist observed greenish vomits around the deceased's mouth.

The State also tendered into evidence Exhibit 3, the Affidavit of Dr Mlala which was compiled at Gweru District Hospital on 17 September 2009. The report confirms that from the dental examination conducted on the accused his apparent age was between 12 years and 13 years.

From the evidence presented before us we are satisfied that there is no evidence that the accused had the requisite intention in the form of *dolus directus* or *dolus eventualis* to kill but was negligent in his conduct leading to the death of the deceased. When quizzed by the police why he had given the deceased the poisonous substance accused had responded by saying that he wanted to see what would happen if the deceased consumed the substance. This was a dangerous prank which led to the unnecessary loss of human life.

Accused is therefore found not guilty and acquitted on the charge of murder and is convicted of culpable homicide.

Sentence

The sentence imposed must be just to the offender and must fit the offence. The court has been urged by both state and defence not to impose an effective custodial sentence. The court accepts that the mitigating features of the case outweigh the aggravating features. The courts are slow to send young juvenile offenders to the polluting environment of prison where there are likely to mix with hardened criminals. The courts will in that respect tend to be in favour of a sentence that will rehabilitate the offender. The court's view is that the sentence the court should impose in this case should give the accused a second chance in life. I have taken into account that accused has already spent five months in prison awaiting trial and this should weigh heavily in his favour.

I am in agreement with defence counsel's observations that the accused person's personal circumstances more specifically his age have been overtaken by the passage of time and this court cannot be seen to place an old head on a small mind and body. The accused was a young juvenile at the time of the offence.

In the circumstances, and in my view the sentence proposed by the probation officer's report in Exhibit 4 that the accused be placed at a Special Institution in terms of section 351 (3) of the Criminal Procedure and Evidence Act [Chapter 9:07] would be inappropriate.

Accordingly and, in the result accused is sentenced as follows:

4 years imprisonment wholly suspended for 5 years on condition the accused does not within that period commit an offence of which violence is an element and for which he is sentenced to imprisonment without the option of a fine.

National Prosecuting Authority, state's legal practitioners
L. Makande c/o Masawi and Partners accused's legal practitioners