

THE STATE

Versus

NKOSANA NKOMO

And

KHAWULANI NCUBE

IN THE HIGH COURT OF ZIMBABWE

MAKONESE J with Assessors Mrs Moyo & Mrs Dhlula
BULAWAYO 26 SEPTEMBER & 31 OCTOBER 2017

Criminal Trial

Mrs N. Ndlovu for the state

Ms J. Mugova for 1st accused

R. Ndou for 2nd accused

MAKONESE J: The accused persons face a charge of murder. It is alleged by the state that on 9 November 2011 accused 1 and 2 did each one or both of them kill and murder Sibuzani Moyo at Sanzukwi area Mphoengs in the Province of Matabeleland South, by assaulting him with open hands and kicking him with booted feet upon the head and all over the body intending to cause his death. Both accused persons pleaded not guilty to the charge of murder and tendered pleas of guilty to the lesser crime of culpable homicide. The state accepted the limited pleas and proceeded to tender into the record of proceedings a statement of agreed facts. A post mortem report compiled after an examination of the remains of the deceased was also tendered as part of the documentary exhibits. The brief facts of the matter are that on the 9th November 2011 the two accused persons and the deceased spent the better part of that day drinking alcoholic beverages at Mazithulela Bar, Sanzukwi Business Centre, Mpoengs. During the evening hours the trio, that is, the two accused persons and the deceased either decided that they were too drunk or they had had enough of alcohol. They decided to leave for their respective homes. Along the way a misunderstanding arose between accused persons and the deceased. It would appear that the deceased was having some difficulty in walking due to his state of drunkenness. The accused persons tried to assist the deceased who returned the favour

by insulting them by making reference to accused 1's mother genitals. This did not go down well with the accused persons who then physically assaulted the deceased with open hands and booted feet all over the body. Deceased was left lying on the road. The following morning accused persons were alerted to the fact that the deceased had been found close to where they had left him. He was badly injured. Deceased subsequently died from injuries sustained during the assault. The post mortem report compiled by Dr Sanganayi Pesanai at United Bulawayo Hospitals on 14 March 2011, lists the cause of death as (1) cervical spine injury; (2) dislocated cervical spine; (3) homicide. An internal examination of the remains of the deceased was not possible as the internal organs had autolysed.

From the evidence presented before us, we are satisfied that accused persons negligently caused the death of the deceased. It is evident that the death occurred as a result of injuries inflicted upon deceased by accused persons. Accordingly, accused persons are found not guilty on the charge of murder. Accused persons are both found guilty of culpable homicide.

Sentence

The accused persons have been convicted of culpable homicide. The admitted facts are that deceased died as a result of injuries inflicted by one or both of the accused persons. In arriving at an appropriate sentence this court takes into account the mitigating factors of the case as articulated by defence counsels for accused 1 and accused 2. I shall consider the personal circumstances of the accused persons and the circumstances surrounding the commission of the offence. Both accused persons are fairly mature adult persons. Accused 1 is single and takes care of his aged mother. He has no wife and has no children. The second accused has a wife and 4 children. Both accused persons are first offenders who pleaded guilty. The plea of guilty is a mitigating circumstance which the court takes into account. It exhibits some form of remorse and contrition on the part of the accused persons. However, the assault perpetrated upon the deceased was senseless, brutal and vicious. The post mortem report reflects that the cause of death was: (a) cervical spine injury; (b) dislocated cervical spine; (c) homicide.

There can be little doubt that from the nature of injuries reflected in the post mortem report, severe and excessive force was used. The pathologist observed a stab wound 0.5cm on the right retroauricular base of the skull only 1.5cm. The findings in the post mortem report indicate that the spine injury is secondary to the spine being twisted. If the accused persons had been meaning well, as they claimed, the question is why they assaulted the deceased in this barbaric manner. If the accused, as they say, were provoked, the provocation is disproportionate to the nature of the retaliation. In other words, the accused persons acted in reckless fashion, without regard to the possibility of death or serious harm occurring to the victim. The court takes into cognizance, the delay the matter has taken to finalise. The matter has been hanging over the accused persons for almost 6 years. Accused persons have been out of custody on bail. The accused persons deserve a moderate sentence bearing in mind the fact that they co-operated with the police and accepted responsibility for their conduct.

Both accused persons reside at Mpoengs, a place near the Zimbabwe/Botswana border. The accused could have decided to disappear into the neighbouring country to avoid trial. They did not do so. The court commends them for that.

The court however, has a duty to protect the sanctity of human life. A term of imprisonment is called for in this matter. A non-custodial sentence would trivialize this offence. The court shall impose a sentence that suits the offenders at the same time meeting the ends of justice.

The following sentence is appropriate:

“Accused 1 and 2

Each accused is sentenced to 3 years imprisonment of which 1 year is suspended for 5 years on condition the accused are not within that period convicted of an offence involving violence and for which they are sentenced to imprisonment without the option of a fine.

Effective sentence 2 years”

HB 353/17
HC (CRB) 117/17

National Prosecuting Authority, state's legal practitioners
Calderwood, Hendrie & Bryce, 1st accused's legal practitioners
Mugiya & Macharaga Law Chambers, 2nd accused's legal practitioners