

THE STATE**Versus****KHUMBULANI SIBANDA**

IN THE HIGH COURT OF ZIMBABWE

BERE J with Assessors Mrs E. Mashengele and Mrs A. Moyo

BULAWAYO 30 MARCH 2017

Criminal Trial*Mrs N. Ngwenya* for the state*T. Ndlovu* for the accused

BERE J: The accused was brought to court initially on a charge of the murder of the 4 year old deceased who died at the hands of the accused through assault. The offence was alleged to have occurred at Plot 3 Helensvale, Umguza in the Province of Matabeleland North on 23 October 2015.

After extensive consultations between the State Counsel and the Defence Counsel it was agreed that the accused be found guilty of culpable homicide as informed by the statement of agreed facts marked annexure I. The statement of agreed facts reads as follows:

“The State and the Defence are agreed that the following issues are common cause being that:

1. The accused was aged 29 years at the time of the commission of the offence.
2. The deceased was aged 4 years at the time he met his death.
3. The deceased and accused resided together at Plot 3 Helensvale, Umguza. The accused was deceased's stepfather.
4. On the 23rd of October 2015 the deceased went to Plot 16 Helensvale M. Umguza to his uncle Edwin Ndlovu's place claiming that he was home alone and was afraid.
5. At around 2000 hours the accused followed deceased carrying a switch and asked Respect Muleya of the whereabouts of the deceased.
6. The accused then went into the room where deceased was and assaulted the deceased with a switch all over the body several times in the presence of Respect Muleya and Mehluhi Mpala.

7. The accused and deceased then left Brighton Sibanda's place and went to their place of residence. The following morning the deceased appeared to be unwell. Due to lack of funds deceased was not taken to hospital.
8. After three days deceased was then taken to Mpilo Hospital as he still appeared to be ill, where he was treated and admitted.
9. The deceased succumbed to his injuries and subsequently died on the 28th of October 2015.
10. The post mortem report compiled by Doctor Jekenya after examining the deceased's remains list the cause of death as:
 - a) Subdural haematoma
 - b) Head injury
 - c) Severe assaults
11. The accused pleads Not Guilty to Murder but Guilty to Culpable Homicide in that he negligently and unlawfully caused the death of the deceased when he indiscriminately assaulted him all over the body using a switch."

Having considered all the factors in this case that informed the tendering of a limited plea to culpable homicide, the court found the accused not guilty of murder but guilty of culpable homicide.

Sentence

In sentencing the accused person the court has been guided by the following factors in both mitigation and aggravation.

The accused is a fairly young offender aged 30 years and this is his first conviction.

We do accept that by pleading guilty to the limited plea of culpable homicide the accused has shown regret or remorse for his conduct.

We also accept the fact that the accused is the sole breadwinner for his young family comprising his wife and the remaining two minor children the youngest of whom is 1 year 6 months old.

It has been said the accused was brought up in an area where moderate chastisement was the order of the day and he saw nothing wrong with him chastising the deceased for the omission he had made. There are many in this country who labour under this mistaken view of our law. It

is imperative that the citizens acquaint themselves with the current provisions of our Constitution which aims to strengthen the protection of our children from excessive use of force in controlling their wayward conduct.

It is highly mitigatory that the accused has spent 1 year 5 months in custody awaiting the conclusion of this case.

In aggravation we are guided by the following factors.

We are concerned that having seriously assaulted the deceased the accused made an abortive attempt to mislead the police and the examining doctor by suggesting that the deceased had been assaulted by a non-existent 15 year old boy before he met his fate.

The relationship between the deceased and the accused is cause for concern to this court. The deceased having been a step son to the accused person must have had legitimate expectations to be protected by the accused who turned out to be the little boy's killer.

Adopted children, just like biological children deserve equal protection from their parents and such parents must exhibit greatest forms of protection in looking after such children like the deceased.

The force used in assaulting the deceased who was only four years was clearly excessive in this case.

We consider it highly aggravatory that the accused assaulted the deceased fully aware that the deceased was not well.

To assault a sickling 4 year old child in the manner done by the accused person is an act of inhuman conduct and such conduct is reprehensible and must be adequately punished.

The statement of agreed facts clearly shows that the deceased's punishment by the accused was disproportionate to the allegedly offending conduct shown by the deceased.

One gets the impression that the accused, by assaulting the deceased in the manner he did was merely being cruel to the deceased.

Everything considered we believe the following sentence is appropriate:-

8 years imprisonment, 2 years of which is suspended for 5 years on condition the accused does not within that period commit any offence involving violence upon the person of another and for which upon conviction he will be sentenced to a term of imprisonment without the option of a fine.

*The Prosecutor General's Office, state's legal practitioners
Sansole & Senda accused's legal practitioners*