**THE STATE**

**Versus**

**LEON WEST**

IN THE HIGH COURT OF ZIMBABWE
KABASA J with Assessors Mr P. Damba and Mr E. Mashingaidze
BULAWAYO 2 JUNE 2022

**Criminal trial**

*T. M Nyathi,* for the State
*B.M Siansole,* for accused

**KABASA J:** The accused appeared before us charged with murder as defined in section 47 of the Criminal Law (Codification and Reform) Act, Chapter 9:23. He tendered a plea of not guilty to murder but guilty to culpable homicide. The state accepted the limited plea.

Following such acceptance, a statement of agreed facts was produced and marked Exhibit 1. These facts are to the effect that on 25th September 2021 at around 1900 hours, the accused who was 17 years old at the time, met the now deceased who was 25 years old. The now deceased was in the company of one Phanankosi Ncube on their way to Mawabeni Business Centre. The now deceased asked the accused about his sister who was impregnated by the accused to which the accused responded that the now deceased should ask his mother. The response irked the now deceased and a misunderstanding ensued which degenerated into a fight. The accused fled.

After a while the two met again and the accused asked the now deceased why he had assaulted him. The now deceased took a step towards the accused, who picked up a stone and struck the now deceased on the left side of the head.
The now deceased was assisted home by his father and Phanankosi as the blow had felled him. Medical attention was sought for him but his condition deteriorated and he succumbed to the injury on 11th October 2021.

On 14th October 2021 Doctor Pesanai conducted a postmortem on the deceased's remains and concluded that the cause of death was:-

1. brain abscess
2. depressed skull fracture
3. assault

The postmortem was produced and marked Exhibit 2. Following his arrest the accused gave a warned and cautioned statement to the police which was subsequently confirmed by a Magistrate. In it he admitted striking the deceased with a stone in the circumstances stated in the statement of agreed facts. The warned and cautioned statement was produced and marked Exhibit 3.

The stone which was used in the assault, weighing 1005 g was also produced and marked Exhibit 4.

From the foregoing there is no doubt the now deceased met his death at the hands of the accused.

In terms of section 253 of the Criminal Law Code, the defence of self defence can be a complete defence on a charge of murder if all the requirements as stated are met. However where all the requirements are met but the means used to avert the unlawful attack are not reasonable in all the circumstances, such a defence is only available as a partial defence, reducing murder to culpable homicide.

From the agreed facts the now deceased was not armed and the accused used a 1005 g stone to hit him on the head, a most delicate part of the body and with enough force to fracture the skull.

We were satisfied the means used were not reasonable in all the circumstances. The charge of murder could however not be sustained on these facts and the state's acceptance of a limited plea was therefore indicative of an appreciation of the law and the application of the law to the facts.

The accused is accordingly found not guilty of murder and guilty of culpable homicide.

**Sentence**

In assessing an appropriate sentence we considered the fact that the accused is a youthful first offender who pleaded guilty albeit to the lesser offence of culpable homicide.

The plea of guilty showed contrition and also saved time. It should be rewarded. The accused stays with an 87 year old great grandmother and 2 cousins, one is in Form 2 and the other grade 6. He also has a 6 month old baby girl, born to him and the now deceased's sister.

Society is likely to label the accused a murderer and this is likely to weigh heavily on his conscience for a long time to come. Taking a life can never be easy on the perpetrator and the psychological imprisonment is probably worse compared to the imprisonment which comes with the 4 corners of a prison cell.

We were referred to several cases on sentences imposed in similar cases. (*S* v *Chidhiza* HMT 15-2018, *S* v *Mlambo* HMT 19-2018, *S* v *Mungareka & 4 Ors* HMA 55-20). The sentences therein ranged from 2-3 years with part suspended on the usual conditions of good behavior. The circumstances in these cases are however different to the ones in this case. In the *Chidhiza* case the accused was fighting with the deceased when he used booted feet on the deceased's head resulting in the infliction of fatal injuries. In the *Mlambo* case the accused, a security guard fired at some thieves in an attempt to apprehend them and deceased, who was one of the thieves was shot and killed. These circumstances cannot be compared to the accused's given that his arrogance was the cause of the earlier fight and on meeting the deceased he was the one who again brought up the earlier fight. He was spoiling for another fight and his moral blameworthiness is therefore on the high side.

Aggravating is the fact that a life was needlessly lost. The now deceased was only 25 years old. He was young and in the prime of his life, whatever the future held for him was snuffed out prematurely.

The courts have time without number emphasized the need for society to respect the sanctity of life. Life is a gift given to each one of us once and once lost it cannot be restored. No one should have to lose their life at the hands of another.

It is sad that the youth of today appear to resort to violence as their manner of communication. Many a life has been lost at the hands of youthful offenders who ought to shun violence.

The deceased was the accused's "in-law" and the nature of such a relationship demands respect which the accused did not exhibit.

Indeed the immaturity of youth makes it odious to impose on them the same penalty that would otherwise be appropriate for a more mature offender. (*S* v *Zaranyika & Others* 1995 (1) ZLR 270 (H)).

That said however, we are of the view that imprisonment is called for. Due to the accused's youthfulness there is need to tamper justice with mercy. The accused is however not being punished for his evil intent in causing the deceased's death but for his carelessness. The punishment serves to encourage society to be attentive to the safety of others and to exercise caution at all times. (*R v Richards* 2001 (1) ZLR 129 (S))

A clear message must be sent that violence should be avoided at all costs and where one resorts to violence and takes a life, there will be consequences, consequences which must reflect the court's attitude towards those who fail to respect the sanctity of life.

In the circumstances the appropriate sentence which will meet the justice of the case is:-

3 years imprisonment of which 2 years is suspended for 5 years on condition the accused does not within that period commit an offence of which an assault or violence on the person of another is an element and for which upon conviction he is sentenced to a term of imprisonment without the option of a fine.

Effective: - 1 year imprisonment.

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