

THE STATE
versus
MLUNGISI DUBE

HIGH COURT OF ZIMBABWE
MATHONSI J
BULAWAYO 1 MARCH 2018

Criminal Trial

Ms N Ngwenya for the state
Ms L Mguni for the accused

MATHONSI J: The accused person is facing a charge of murder as defined in section 47 (1) of the Criminal Law [Codification and Reform] Act [Chapter 9:23]. The allegations are that on 28 January 2012 at Moses Dube's homestead Mahetshe village in Kezi, he struck the deceased Niko Dube with a knobkerrie several times on the head intending to kill him or realizing the risk or possibility that death may result from his conduct but continuing with it that notwithstanding. The accused pleaded not guilty to the charge of murder but tendered a limited plea of guilty to culpable homicide which the prosecution has accepted.

According to the statement of agreed facts filed of record at the time of the commission of the offence the accused person was aged 26 while the deceased, who happened to be his step grandfather, was aged 74 years. They lived together at Moses Dube's homestead. At about 2000 hours on 28 January 2012 the accused arrived home from a beer drink to find that the deceased had a visitor, his brother Zakhewu Dladla.

As the accused and the deceased shared the same bedroom hut they started having an argument over sleeping arrangements as the deceased wanted to accommodate his visitor. The harsh exchange of words quickly degenerated into a fight forcing Zakhewu Dladla to leave and sleep in the bush. Left alone with the accused the deceased is said to have armed himself with a knobkerrie intending to mete his own form of justice on the accused person. With the obvious benefit of youth fullness, the accused was 48 years his junior, the accused overpowered the deceased whom he disarmed of that knobkerrie. He used that weapon to strike the deceased

several times on the body before fleeing from the scene to Fred Ngwenya's homestead where he reported what had occurred. Thereafter he went to put up at a friend's homestead.

As a result of the assault, the deceased sustained injuries which forced him to seek medical treatment at Maphisa District Hospital but not before he reported the assault at ZRP Maphisa that same day. The deceased was detained overnight at that hospital only to be discharged the following day. His condition however deteriorated resulting in him being taken back to hospital on 5 February 2012 where he died in the early hours of 6 February 2012.

According to the post mortem report compiled by Dr S Pesanai a pathologist at United Bulawayo Hospital, who examined the body of the deceased on 7 February 2012, the post mortem was consistent with bleeding in the brain secondary to blunt force trauma. The doctor concluded that the deceased died as a result of intracranial haemorrhage, head injury and blunt force trauma. Significantly the doctor observed that the skull was intact suggesting that although the deceased was struck in the head, the degree of force used was not enough to cause skull fracture. That in our view is the accused person's saving grace as it discounts intention to kill. We therefore take the view that the acceptance of the limited plea by the state is proper.

Accordingly, the accused is hereby found not guilty of murder but found guilty of culpable homicide.

Reasons for sentence

In arriving at an appropriate sentence we take into account the fact that the accused was aged 26 years at the time of the commission of the offence and therefore in a way youthful indeed. He is now aged 32 years he having waited for this day for 6 years. He is a first offender. The pre-trial delay itself has been inordinate which, on its own is traumatic indeed given that he has had this case hanging over his head all the time. He was in custody for 18 months. Having offered a guilty plea he did not waste the court's time.

His personal circumstances are that he is married with three children. His wife is expecting a fourth child. He is a small scale farmer who is the eldest in his family where both parents died. He looks after his three siblings who are still attending school. Clearly imprisonment will affect his dependants. He paid compensation to the deceased's family in an amount equivalent to four head of cattle.

Regarding the circumstances of the offence we recognize that he was intoxicated. The deceased was in fact the aggressor having tried to assault the accused before the tables were turned against him. Therefor the deceased must shoulder part of the blame. However that does not justify resort to violence especially against a grandfather.

In aggravation, the accused targeted an extremely old man who was in the twilight of his life. He was expected by our culture to show him some respect and as such we find it completely unacceptable that the accused found it fit to beat him up thereby causing his death. He displayed gross negligence by directing blows with a knobkerrie to a vulnerable part of the body, the head, and although he may have been intoxicated, his conduct led to an unnecessary loss of life.

We are therefore duty bound, as a court of law, to impose a sentence that underscores the importance of human life and deters others from any resort to violence as a means of settling differences.

In that regard imprisonment is unavoidable. We will however suspend a portion of the sentence in recognition of the weighty mitigating factors that exist.

Accordingly the accused is hereby sentenced to 6 years imprisonment of which 3 years is suspended for 5 years on condition he is not, during that period, convicted of any offence involving violence for which he is sentenced to imprisonment without the option of a fine.

Effective sentence - 3 years.

National Prosecuting Authority, state's legal practitioners
Job Sibanda and Associates, accused's legal practitioners