

THE STATE

Versus

NTANDO NYATHI

And

CREGY NCUBE

And

THABANI NCUBE

And

SIPHEPHILE NCUBE

And

SILUNGILE NCUBE

IN THE HIGH COURT OF ZIMBABWE

DUBE-BANDA J with Assessors Mr Mabandla and Mr Dewa
Bulawayo 23 & 24 October 2024

Criminal trial

K. Jaravaza for the State

T. Nyapfumbi for the 1st accused

Ms. S. Sithole for the 2nd accused

T. Solani for the 3rd accused

Ms. T. Mafa for the 4th accused

M.E.P. Moyo for the 5th accused

DUBE-BANDA J:

[1] The accused are charged with the crime of murder as defined in section 47 of the Criminal Law [Codification and Reform] Act [Chapter 9:23] (“Criminal Law Code”). It being alleged that on 5 June 2017 the accused persons wrongfully, unlawfully and intentionally killed and murdered Thengile Nyathi (“deceased”) by assaulting him with open hands and kicking him all over the body intending to kill him or realising that there is a real risk or possibility that their conduct may cause the death but continued to engage in that conduct despite the risk or possibility.

[2] The accused persons pleaded not guilty to the crime of murder. The trial commenced with the State producing a post mortem report compiled by Dr. S. Pesanai. The doctor concluded that the cause of death was intracranial haemorrhage; blunt force trauma on the head; and

assault. In addition, the State produced confirmed warned and cautioned statements for the accused persons. Furthermore, the accused persons made admissions in terms of s 314 of the Criminal Procedure and Evidence Act [Chapter 9:07] (CP & E Act). The admissions relate to the evidence of certain witnesses as it appears in the summary of the State case. The prosecutor called three witnesses who and closed the State case. The accused made an application for a discharge in terms of s 198 (3) of the Criminal Procedure and Evidence Act [Chapter 9:07]. The application was dismissed. See *The State v Nyathi & Ors* HB 149/24. Subsequent to the dismissal of the application for a discharge, accused 1,2,4 and 5 made a turn and offered a plea of guilty to the crime of assault, while accused 3 offered a plea of guilty to the crime of culpable homicide. The State accepted the pleas offered by the accused persons, and thereafter a statement of agreed facts was drawn and placed on record. The statement reads as follows:

The State and the defence counsels are agreed that the following be accepted by this Honourable Court as being common cause: -

- i. The 1st accused to the 5th accused persons are villagers who resided in Mahusane Village, Bazha area, they all hail from Matopo.
- ii. The deceased was aged 69 years and resided at his own homestead Domboshaba Village, Chapo area, Matopo.
- iii. The accused persons and the deceased were not related.
- iv. On the 5th day of June 2017 and around 2000 hours the deceased and Ernest Ncube proceeded to Anna Moyo's homestead intending to see Faith Sibanda whom deceased had alleged to be his girlfriend.
- v. Upon arrival there was a misunderstanding between Faith Sibanda, Ernest Ncube and deceased which prompted Faith Sibanda to raise alarm and call other villagers. The deceased was then assaulted by the accused persons leading to his demise.
- vi. A post mortem conducted concluded that the cause of death was:
 - a) Intracranial haemorrhage
 - b) Blunt force trauma
 - c) Assault

State and defence further agree on these aspects

- a) That the 1st, 2nd, 4th and 5th accused all assaulted the deceased with open hands.

- b) That the 3rd accused kicked the deceased on his chest and deceased fell down on his back with his head hitting hard on a rocky surface and he started bleeding from his nose and mouth.
- vii. It is agreed that the 1st, 2nd, 4th and 5th accused's conduct did not cause the death of the deceased, 1st, 2nd, 4th, and 5th accused therefore plead to assault in contravention of s 89 of the Criminal Law Code.
- viii. The 3rd accused pleads guilty to a lesser charge of culpable homicide in contravention of s 49 of the Criminal Law Code. In that the 3rd accused person negligently failed to realise that death may result from his conduct and negligently failed to guard against that possibility.
- ix. The State and the defence therefore pray that the 1st, 2nd, 4th and 5th accused be found not guilty of murder but of assault, and that 3rd accused be found not guilty of murder but guilty of culpable homicide.

[3] The evidence and the facts that show that the conduct of accused 1,2,4 and 5 neither caused nor contributed to the death of the deceased. These accused persons in beating the deceased with open hands committed the crime of assault. In addition, the totality of the facts and the evidence adduced in this trial show that the injuries sustained by the deceased were caused by the accused 3. The post mortem report shows that the injuries inflicted by the accused 3 caused the death of the deceased. Accused 3 in kicking the deceased in the manner he did, a reasonable man placed in the same circumstances as accused 3 would have foreseen the possibility of death and would have guarded against it. The conduct of accused 3 shows that he fell below the reasonable person standard. Accused 3 ought, as a reasonable man, to have foreseen the death of the deceased and guarded against it. Therefore, he was negligent and it was his negligence that led to the death of the deceased.

[4] In the result: the accused 1, 2, 4 and 5 are not found guilty of murder, but guilty assault in contravention of s 89 of the Criminal Law Code. Accused 3 is not guilty of murder but guilty of the lesser crime of culpable homicide as defined in s 49 of the Criminal Law (Codification and Reform) Act [Chapter 9:23].

Sentence

[5] In determining an appropriate sentence, the courts have stressed the importance of proportionality and balance between the crime, the criminal and the interests of society. See *S v Zinn* 1969 (2) SA 537 (A). It remains the paramount function of the sentencing court to independently apply its mind to the consideration of a sentence that is proportionate to the crime committed. The cardinal principle that the punishment should fit the crime should not be ignored. This court must also factor into sentencing equation the provisions of the Criminal Procedure (Sentencing Guidelines) Regulations, 2023.

[6] The personal circumstances of the accused persons have been conveyed to the Court by the legal representatives. In respect of accused 1, the court was informed that he is 47 years old; married with seven children, and four are still minors. He is the sole provider to his family. He is an artisanal miner. Accused 2 is 42 years old. He is married with four children, and three are still minors. He is the sole provider to his family. Accused 3 is 32 years old. He is married with five children; all are still minors. He is an artisanal minor, earning approximately US\$60.00 per month. He is the sole provider to his family. Accused 4 is 44 years old single mother of six minor children. The youngest child is nine months old. She is a house maid earning ZAR 1000.00 per month. She is the sole provider to her family. Accused 5 is 34 years old. She is a single mother of 4 children, all still minors. She does market gardening for a living and earns approximately US\$20.00 per week.

[7] In addition, the following factors are relevant to sentence; these crimes were not premeditated, it all started with trying to help a fellow villager who was facing intruders. All the accused are first offenders, pleaded guilty, and spent two months in pre-trial incarceration. The accused persons did not use a weapon. Accused 1,2,4 and 5 beat the deceased with open hands, while accused 3 kicked him causing him to fall head-long on a rocky surface.

[8] Although the conduct of accused 3 led to the loss of life, the circumstances of this case are such that a sentence of direct imprisonment is not warranted in this case. The sentence must rehabilitate the accused persons, not to use force when it is not necessary. In this case it was necessary to use force because the deceased, an intruder was neither resisting nor fighting. He immediately surrendered.

[9] The sentence must reflect this reality. In the circumstances, the following sentence will meet the justice of this case.

Accused 1,2,4, and 5 are sentenced to 2 months imprisonment wholly suspended for 5 years on condition the accused does not within that period commit any offence of which an assault

is an element and which upon conviction he/she is sentenced to a term of imprisonment without the option of a fine.

Accused 3 is sentenced to 12 months imprisonment whole suspended for 5 years on condition the accused does not within that period commit any offence of which an assault is an element and which upon conviction he is sentenced to a term of imprisonment without the option of a fine.

National Prosecuting Authority, State's legal practitioners

Macharaga Law Chambers, 1st accused's legal practitioners

Masamvu & Da Silver-Gustavo Law Chambers, 2nd accused's legal practitioners

Sengweni Legal Practice, 3rd accused's legal practitioners

Mlotshwa Solicitors Titan Law, 4th accused's legal practitioners

Mathonsi Ncube Law Chambers, 5th accused's legal practitioners