

**THE STATE**

**Versus**

**LISTEN NDOU**

IN THE HIGH COURT OF ZIMBABWE  
DUBE-BANDA J with Assessors Mr. P. Damba and Mr. E. Mashingaidze  
BULAWAYO 8 & 9 June 2023

**Criminal trial**

*K. Shava*, for the State  
*M. Mpofu*, for the accused

**DUBE-BANDA J:**

[1] The accused, Mr Listen Ndou, is appearing before this court charged with the crime of murder as defined in section 47(1) of the Criminal Law (Codification and Reform) Act Chapter 9:23 (Criminal Code). It being alleged that on 13 February 2021 the accused unlawfully caused the death of Fanyana Muleya (deceased) by stabbing him once below the left ear with a screw driver intending to kill him or realising that there is a real risk or possibility that his conduct may cause the death of the deceased and continued to engage in that conduct despite the risk or possibility.

[2] The accused was represented throughout the trial. He pleaded not guilty. And in his defense outline tendered a plea of guilty to the lesser crime of culpable homicide. The State rejected the plea to the lesser crime and the matter proceeded to trial on the charge of murder. The State tendered an outline of the summary of the State case (Annexure A), which was read into the record. The accused tendered his defence outline (Annexure B). The defence outline was read into the record. In his defence outline the accused admitted that he inflicted the injuries that caused the death of the deceased. He contended that he stabbed the deceased by mistake.

[3] The following admissions by the accused were noted in terms of s 314 of the Criminal Procedure and Evidence Act [Chapter 9:07]. The admissions relate to the evidence of certain witnesses as it appears in the summary of the State case. That is the evidence of:

[3.1] The evidence of Dr. I Jekeny. His evidence is that he is a qualified medical practitioner. On 21 February 2021 he examined the remains of the deceased and concluded that the cause of death was: traumatic brain injury; head injury; and assault.

[3.2] The evidence of Moyo Millias. His evidence is that on 13 February 2021 at around 2100 hours he received a report and as a result of the report he proceeded to the deceased's homestead and found deceased lying unconscious with a deep cut wound below the left ear and was bleeding profusely. He ferried the deceased to Zezani Clinic.

[3.3] The evidence of Mavisa Amos. His evidence is that he is employed by the Ministry of Post and Telecommunications. On 10 March 2021 he weighed a screw driver which was handed to him by Sergeant Isaac Mhlanga. The screw driver weighed 114 grams.

[3.4] The evidence of police officers who attended the scene and investigated the matter. And the evidence of nurses who attended to the deceased.

[4] The State, with the consent of the accused tendered the following documentary and real exhibits: The accused's confirmed warned and cautioned statement (Exhibit 1). A Post Mortem Report compiled by Dr I Jekeny (Exhibit 2). A screw driver (Exhibit 3), with the following measurements: weight 114 grammes; length of 23 cm.

[5] The State called one *viva voce* witnesses and the accused testified in his defence. We will summarise the evidence briefly.

[6] The State adduced the evidence of Sipiwe Muleya. She testified that the accused is her neighbour and the deceased was her father. On 13 February 2021 at around 2000 hours a neighbour one Raphael Tlou and his son Thulani Tlou arrived at her homestead. They were coming from the accused's homestead. The two were in a drunken state, and Raphael Tlou fell asleep. Following their arrival, the accused's mother also arrived at the homestead, and after a short while she returned to her homestead. She testified that the accused then arrived at the homestead and found Raphael Tlou still asleep. Accused started a fight with Thulani Tlou, and the two fought inside the kitchen hut. The accused was armed with a screw driver and Thulani was armed with a stick. She identified the screw driver as exhibit 3. At that time the deceased was seated in front of a hut, and he got up to check what was happening between the accused and Thulani. Thulani emerged from the hut fleeing and the accused was in pursuit. Outside the kitchen hut it was very dark, there was no moon light. The accused then met the deceased

outside the kitchen hut, thought it was Thulani, and stabbed him with a screw driver on the left side ear.

[7] Under cross examination by Counsel for the accused, this witness testified that when the accused arrived at the homestead, he entered the kitchen hut, Thulani stood up armed with a stick and a fight ensued. The accused tried to stab Thulani with a screw driver, but he escaped and disappeared into the darkness. The accused in pursuit met the deceased outside the kitchen hut, and thought it was Thulani.

[8] Siphiwe Muleya came across as a witness who had a reasonable recall of events. Her evidence was not challenged in any material respects and there is no reason not to accept it.

[9] After the evidence of Siphiwe Muleya the State closed its case, and the accused opened his defence case.

[10] The accused testified in his defence. His evidence is that Raphael Tlou proposed love to his sister. A neighbour called Knowledge reprimanded Raphael for proposing love to a young person. Raphael and Thulani armed with an axe and a machete attacked Knowledge, and Knowledge sought refuge at the accused's homestead. Raphael and Thulani damaged the door and window panes of a house at the accused's homestead. Then they left the accused's homestead. He testified that between 1900 hours and 2000 hours he proceeded to the deceased's homestead to buy beer. He was not aware that Raphael and Thulani were at the deceased's homestead. He found many people at the deceased's homestead, and most of them were in a drunken state. He sat down in the kitchen hut and Thulani stood up armed with a stick, and insulted him saying "you are full of shit." A fight then started between him and Thulani. He was struck with a stick and he fell down. He got up, he was struck again with a stick, he fell down. He got up and the fight continued, now with bare hands. The fight moved to the doorway of the kitchen hut. As they fought at the door-way the deceased emerged, and tried to intervene to stop the fight. He testified that he stabbed the deceased by mistake. He carried the screw driver because he was repairing a torch and then put it in his pocket. He disputed that it was Thulani who was fleeing, and said it was him who was fleeing from Thulani.

[11] Under cross examination by Counsel for the State, he testified that he admitted that it is him who stabbed the deceased by mistake and caused his death. When he arrived at the deceased's place, there were ten people at that homestead. He disputed that he proceeded to deceased's homestead to attack Thulani.

[12] The accused attempted to twist and colour his evidence in the hope that he was exonerating himself. He lied that he is the one who fled, with Thulani Tlou in pursuit. He lied that the fight moved to the door-way, and that the deceased emerged and tried to intervene to stop the fight. The *maxims semel mentitus, semper mentitur* (once untruthful, always untruthful) and *falsum in uno, falsum in omnibus* (false in one thing, false in all) do not apply in our law of evidence. It is permissible either to accept or reject the evidence of a witness who has lied before or who has lied only with regard to a particular fact, everything depends upon the particular circumstances of the case. In this case we have no reason, however, to doubt the general thrust of the accused's evidence. Moreso, in that the general thrust of his evidence has not been rebutted, or challenged.

[13] After testifying the accused closed his case.

[14] We find the following facts established: on 13 February 2021 the night was pitch black. There were people drinking beer at the deceased's homestead, Rapheal Tlou and his son Thulani Tlou were amongst the imbibers. At around 2000 hours the accused arrived at the deceased's homestead, and joined other imbibers inside the Kitchen hut. An altercation ensued between the accused and Thulani Tlou, leading to a fight. The fight took place inside the kitchen hut. And the deceased was seated outside his kitchen hut. The accused tried to stab Thulani Tlou with the screw driver, however he fled and bolted out of the kitchen hut, with the accused in pursuit. At the same time the deceased was making his way to the Kitchen hut to stop the fight. Outside the hut the accused met the deceased and stabbed him once with a screw driver (Exhibit 3) inflicting injuries that caused his death. The accused had no dispute with the deceased. He mistook him for Thulani Tlou, who by that moment had escaped and disappeared into the darkness.

[15] This is a case of an error as to identity as provided for in s 56 of the Criminal Code. In the case of a mistake of identity the injury is inflicted upon the object that is right before the actor's

eyes. We are clearly dealing here with an error or mistaken identity, in that the blow was meant for the person who was standing before the accused's eyes, who the accused believed was Thulani, however that person turned out to be the deceased. The blow struck and killed the person who was standing before the accused's eyes. The fact that the person stabbed turned out to be the deceased and not Thulani, is irrelevant. Although the accused's intention to stab must relate to the person stabbed, this does not mean that the accused must know or appreciate the identity of the victim. This is what s 56 of the Criminal Code speaks to. It negates the defence of mistaken identity, otherwise all other defences recognised by law remain available to the accused.

[16] The question is whether by stabbing the person who was before his eyes, who turned out to be the deceased the accused intended to kill him or realised that there was a real risk or possibility that his conduct may cause the death of the deceased and continued to engage in that conduct despite the risk or possibility. The accused had a fight inside the kitchen hut with Thulani Tlou. Thulani Tlou was armed with a stick, and he escaped into the darkness. We accept that the accused thought the deceased was Thulani who was returning to continue the fight. In fact, Sipiwe Muleya testified to this effect, and such accords and answers to the probabilities of this case. In the pitch of darkness, the accused drew a screw driver and stabbed the deceased. With the description of the darkness given by Sipiwe Muleya it cannot be said that the accused deliberately aimed the blow just behind and below the left ear. He just threw a blow, blindly striking at the person who was in front of him, thinking it was Thulani and thereafter he escaped. He stabbed him once showing that he thought he was defending himself against an unlawful and imminent attack perpetrated by Thulani. A court cannot fail to give effect to an apparent defence available to an accused on the facts because he has not taken it.

[17] It is trite law that the *onus* rests on the State to prove the guilt of the accused beyond a reasonable doubt in order to secure a conviction. There is no *onus* on the accused to prove his innocence. This principle is trite in our law. We cannot on the facts of this case find that he intended to kill him or realised that there was a real risk or possibility that his conduct may cause the death of the deceased and continued to engage in that conduct despite the risk or possibility. In the circumstances, we are satisfied that on the facts of this case, it cannot be said that the accused is guilty of the crime of murder as defined in s 47 of the Criminal Code.

[18] The fact that the accused cannot be convicted for the crime of murder, is not the end of the inquiry. In stabbing the deceased in the manner he did, a reasonable man placed in the same circumstances as the accused would have foreseen the possibility of death and would have guarded against it. To his knowledge he was stabbing Thulani, and Thulani was armed with a stick, and on his part, he used a lethal weapon, i.e., a screw driver. He stabbed with excessive force and in the dark at a person who was in front of his eyes. He caused a wound of 3 x 2cm just behind and below the left ear, this speaks to the excessive force he deployed. He ought to have appreciated the danger created by his conduct of just stabbing in that kind of darkness and with that kind of force. In the circumstances of this case, we take the view that the conduct of the accused shows that he fell below the reasonable person standard. We find that the accused was negligent and it was such negligence that led to the death of the deceased.

In the result: the accused is accordingly found not guilty of murder and found guilty of the lesser crime of culpable homicide.

### **Sentence**

[19] Mr. Ndou, this Court found you guilty of the crime of culpable homicide as defined in the Criminal Code. In sentencing you this court has to take into account all relevant factors, afford each the appropriate weight thereto and strike a balance between the various interests. In determining a sentence which is just and fair, this court will have regard to the triad of factors that have to be considered as set out in case law, e.g., in the case of *S v Zinn* 1969 (2) SA 537 (A). This Court must therefore take into account your personal circumstances, the nature of the crime including the gravity and extent thereof and the interests of the community. It is trite that a sentence must be blended with mercy. See: *S v Rabie* 1975 (4) SA 855 (AD) at 862G-H. The right balance must be achieved. As sentence that is too light is as wrong as sentence too heavy. Both can bring the criminal justice system into disrepute. See: *S v Matika* (HB 17 of 2006) [2006] ZWBHC 17 (15 March 2006). It is also trite as stated in case law that true mercy has nothing in common with soft weakness, or maudlin sympathy for the criminal or permissive tolerance. It is an element of justice itself. See: *S v Matika* (supra); *Graham v Odendaal* 1972(2) SA 611A at 614. Mercy must not be allowed to lead to condonation or minimisation of serious offences. See: *S v Van der Westhuizen* 1974(4) SA 61(c).

[20] This means that a court should consider the objectives of punishment which is that of prevention, deterrence, reformation and retribution and a court must decide what punishment would best serve the interests of justice. A court should also be cautious in weighing the elements under consideration and not unnecessarily elevate one element of above others, rather, a balance must be struck amongst these factors and between the interests of the accused and that of society.

[21] This court now turn to the facts of this case and the submissions made by your Counsel and Counsel for the State in the light of the above principles.

[22] In mitigation of sentence, your counsel addressed the Court and placed factors which this court should take into account in order to impose a lesser sentence to you in respect of the crime of which you had been convicted. Your personal circumstances are as follows: you are 22 years old, and you were 19 years at the time you committed this offence. You are not married and you have no children. You are not employed; you however do general work for members of the community and earn ZR500 00. You have been in pre-trial custody for a period of two years three months. You are a youthful first offender.

[23] We further take into account that it is Thulani who started this fight that led to the unfortunate death of the deceased. You will carry the stigma of having caused the death of an elderly neighbour. This you will have to live with the rest of your life.

[24] On the other hand you stand convicted of a serious offence. You caused the death of an elderly neighbour. A life was ended. It is incumbent on this court to emphasize the sanctity of human life. Society frowns at the taking of another human being's life. You used a lethal weapon, with excessive force. The deceased died a painful death. What makes this case ugly is that it resulted in the death of an innocent person who had nothing to do with the dispute between you and Thulani. The lives of his family and children have been irreparably damaged. Any sentence other than a direct prison term will not be fair to society and will trivialise this case.

In the circumstances we are of the view that the following sentence will meet the justice of this case:

You are sentenced to 5 years imprisonment of which 2 years imprisonment is suspended for 5 years on condition the accused does not within that period commit an offence of which an assault or physical 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.

*National Prosecuting Authority*, state's legal practitioners  
*Coghlan And Welsh*, accused's legal practitioners