

THE STATE

Versus

ISRAEL MXOTSHWA

IN THE HIGH COURT OF ZIMBABWE
DUBE-BANDA J with Assessors Mr A.B. Mpofu and Mr E. Shumba
GWERU CIRCUIT COURT 16, 17 & 18 MAY 2023

Criminal trial

Ms. N. Chikuni, for the State
T. Midzi, for the accused

DUBE-BANDA J:

[1] The accused, Mr Israel Mxotshwa, 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 21 September 2020 the accused unlawfully caused the death of Zibulo Sibanda (deceased) by stabbing him twice on the left arm and left chest with a homemade knife, 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 State tendered an outline of the summary of the State case (Annexure A), which was read into the record. The accused, who was legally represented throughout his trial, pleaded not guilty. He tendered a defence outline (Annexure B) which was read into the record. He admitted that the deceased died as a result of the stab wound that he inflicted upon him but pleaded that he acted in self-defence.

[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] Dr. Juana Rodriguez Gregori a registered medical practitioner practising as a Pathologist. That he examined the remains of the deceased and compiled a post mortem

report (Exhibit 1) depicting the injuries sustained by the deceased and the cause of his death.

[3.2] The evidence of Wiseman Nyoni as it appears in the summary of the State case, who says that he saw the accused and the deceased quarrelling over the issue of music. The deceased clapped the accused and engaged in a fist fight. The accused was chased from the homestead and returned after about 25 minutes. He saw the accused challenging the deceased who jumped the fence and the two engaged in a fight. He saw the deceased staggering and falling to the ground.

[3.4] The evidence of Mkhulekelwa Makaba, that he witnessed the accused and the deceased engaging in a fist fight. The accused was later chased and returned after about 25 minutes. The deceased and the accused fought again and the accused stabbed the deceased with a home-made knife.

[3.5] The evidence of Simbarashe Nemutambwa a member of the Zimbabwe Republic Police (ZRP). He arrested the accused and later recorded a warned and cautioned statement from him. At the scene he observed the body of the deceased. The body had a stab wound on the left elbow and another stab wound on the left chest.

[3.6] The evidence of attending police officers whose evidence is that that no further injuries were inflicted on the body of the deceased when it was in the custody of the police.

[4] The State tendered with the consent of the accused the following documentary and real exhibits: the Post Mortem Report (Exhibit 1) compiled by Dr. Juana Rodriguez Gregori who examined the remains of the deceased and concluded that the cause of death was: acute anemia; cardiac laceration; and stab wound. The confirmed warned and cautioned statement of the accused (Exhibit 2). A home-made knife (Exhibit 3) with the following measurements; length of blade – 21cm; length of handle – 15cm; with of blade – 4cm; total length of knife – 36cm; weight – 0, 29kg.

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

[6] The first state witness was Sethuselo Sibanda (Sibanda). She testified that she was related to the deceased as they share the same totem. On 21 September 2020 her mother had organised what is called “a working party,” the deceased and the accused were among the people who attended this function. She testified that in the afternoon the people were given food and beer. There was a radio that was playing music, and the accused stopped the song that was playing and put one of his choice. She testified that the deceased remonstrated with the accused, and a fight ensued. The fight was stopped and the accused was ordered to leave the homestead. After about 20 to 25 minutes the accused returned, and he did not enter the homestead. He remained outside the perimeter fence of the homestead; however, he continued hailing insults against the deceased.

[7] The deceased was angry and offended and jumped over the perimeter fence and confronted the accused outside the homestead. The two engaged in a fight exchanging fists. She testified that when she got to where the deceased was, she observed that he was bleeding. Further he had a stab wound on the arm and underneath the arm. He died on the spot. She testified that she did not see how the deceased got stabbed. She identified the home-made knife (Exhibit 3) as the knife that was recovered from the accused after the fight with the deceased. Further she testified that the accused and deceased were not highly intoxicated.

[8] Under cross examination Sibanda testified that she did not notice who started the first fist fight, she just saw the accused and the deceased exchanging fists. When the accused was ordered to leave, he left his Sandals at the homestead. She testified that in the second encounter it is the deceased who jumped over the perimeter fence and started a fight with the accused who was outside the homestead.

[9] Our evaluation is that Sibanda was a very good witness, she was honest and candid in her evidence. For example, she testified that she did not see how the deceased was stabbed. She testified that in the second encounter it is the deceased who jumped over the perimeter fence and started a fight with the accused who was outside the homestead. In cross examination she made many concessions. We accept her evidence without reservation.

[10] The second State witness was Gift Maphosa (Maphosa), he testified that he is related to the accused. On 21 September 2020 people were invited to a working party to carry bricks from

a certain dam. After they had finished the work, they were served with food and beer. The accused changed the song playing on the radio, the deceased proceeded to where the accused was and confronted him and then punched him with a fist. The owner of the homestead ordered the accused to leave the homestead, and he complied and left. He testified that after a while the accused returned, but did not enter the homestead, he remained outside the perimeter fence but hailing insults against the deceased. The deceased jumped over the perimeter fence and got to the accused and started to punch him with fists. He did not see the deceased carrying a weapon. The accused did not retaliate, he was merely dodging the attacks. While blocking the attacks he took a bending position and drew a knife from his back trouser pocket. He saw the accused stabbing the deceased, and he ran got hold of the accused, and dispossessed him of the knife. Maphosa testified that he observed that the knife entered the arm of the deceased and passed through to the chest. The accused had one arm around the deceased, and used the other hand to stab him. The accused fled from the scene. Maphosa identified the home-made knife (Exhibit 3) as the knife that was used by the accused to stab the deceased. Maphosa testified that the accused and deceased were intoxicated, however they knew what they were doing.

[11] Under cross examination he testified that in the second incident it was the deceased who was punching the accused with fists. The deceased was the aggressor. He testified that when the accused was ordered to leave, he gave him his sandals. He disputed that he gave him his sandals when he returned to the homestead. He did not see the satchel that the accused said he left at the homestead. It was put to him that he might have forgotten because he was intoxicated, his answer was “it may be so.”

[12] After this evidence the State closed its case.

[13] Mr Maphosa appeared to be a credible and honest witness. Although he was under the influence of alcohol on the day in question, he could remember what took place. Although he is related to the accused, he did not shield him and he merely testified about what he witnessed. He testified that he saw the accused stabbing the deceased. He gave a correct version of how the fight started and progressed. We accept his account of what happened without qualification.

[14] The accused testified that he and the deceased were part of the people who were invited to the function. They started drinking beer in the morning, and they were intoxicated. He

testified that he changed the song that was playing on the radio and the deceased approached him, insulted him using foul and obscene language and assaulted him with open hands and fists. He testified that he had the knife at the function, which he uses to repair the tyres of his scotch cart. During the first fight he did not produce the knife. After the first fight he left the homestead. He left behind a satchel and sandals. After leaving the function he later returned to collect his sandals and satchel. He was given his satchel. He saw the deceased running and jumping over the perimeter fence, and he (deceased) started to punch him with fists.

[15] He testified that as he was being punched by the deceased, on his part he was trying to dodging the punches and he finally grabbed of the deceased. He was with the other hand now holding the knife, which was pointing at the upper arm of the deceased. The knife stabbed the deceased as he sprang and it pierced through the arm and perforated the chest on the left side.

[16] Under cross examination by State Counsel the accused testified that he returned to the homestead to collect his satchel and sandals. The deceased jumped over the perimeter fence and attacked with fists all over the body. He drew the knife from the back pocket of his work suite, hoping it will scare the deceased, but he was undeterred and continued assaulting him. The deceased was stabbed as he “sprung” and that is the reason the knife penetrated the arm up to the chest. He conceded that he used a very dangerous weapon on the upper body of the deceased.

[17] After this evidence the defence closed its case.

[18] In his evidence the accused was in some instances peddling falsehoods and exaggerating. His description of the manner in which he stabbed the deceased was incomprehensible, and utterly false and cannot be taken seriously. The demonstration he made of him having grabbed the deceased with one hand and the other holding a knife and the deceased being stabbed by mistake was just a rehearsed falsehood. In his confirmed warned and cautioned statement he was clear that he stabbed the deceased with a knife once on the elbow and it protruded into the chest.

[19] Further for the first time under cross examination, he testified that the deceased had a weapon and he was trying to produce it, this is falsehood. He was exaggerating his level of intoxication, when it is clear that although he drank beer, he was not highly intoxicated. We

say so because after the first fight he was ordered to leave the function and he complied. According to his version, while on the way he remembered that he had forgotten his sandals and satchel and decided to return to collect these. Further he was able to testify about the nitty-gritties of the second fight outside the perimeter fence. The force he used in stabbing the deceased cannot be unleashed by a heavily intoxicated person. And he was able to outpace Wiseman Nyoni who chased him after he stabbed the deceased.

[20] Again, in his evidence in court he testified that during the first fight, he did not retaliate, however in his defence outline he is clear that he retaliated with clenched fists but he was overpowered by the deceased. In the circumstances, where his evidence is at variance with that of State witnesses, we reject it as false.

[21] The accepted facts are that the accused changed the song on the radio, and this angered the deceased. The deceased clapped the accused and the two engaged in a fist fight. The owner of the homestead ordered the accused to leave and he complied. The accused left the homestead and only to return after about 20 to 25 minutes. On his return the accused did not enter the homestead, instead he was walking along the perimeter fence and he was hailing insults against the deceased. The deceased jumped over the perimeter fence and started a fist fight with the accused. At this moment the accused was not throwing punches, he was merely dodging punches from the deceased. He then drew a knife from his back work suite pocket and stabbed the deceased once on the arm and the knife ploughed through to the chest and caused the injuries depicted in the post mortem report. The deceased died on the spot. The injuries on the deceased were caused by the accused. The injuries inflicted by the accused caused the death of the deceased.

[22] There is a suspicion that after the first fight the accused armed himself with a knife and the returned to the function to confront the deceased. This suspicion is not supported by the evidence. The version of the accused is that the knife had always been in his possession, and he gave reasons for his possession of this knife. There is nothing to gainsay this version and it is reasonable possible true.

[23] It is trite law that the *onus* rests on the State to prove the guilty 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. The defences of provocation and intoxication were abandoned, not without cause. The evidence and facts in this case do not speak to the

availability of these defences. It was just opportunistic and a fishing expedition. The dispute that remains is whether the accused acted in self-defence. This common law defence has been codified in section 253 of the Criminal Code. CR Snyman in the well-known academic work, *Criminal Law* 6th edition, (2014) at page 102 defines private defence as follows:

“A person acts in private defence, and her act is therefore lawful, if she uses force to repel an unlawful attack which has commenced, or is imminently threatening, upon her or somebody else’s life, bodily integrity, property or other interest which deserves to be protected, provided the defensive act is necessary to protect the interest threatened, is directed against the attacker, and is reasonably proportionate to the attack.’ [Own emphasis]

[24] Prof. *G. Feltoe* in his well-known book, *A Guide to the Criminal Law in Zimbabwe* p.42 clarifies that the law provides that a person is entitled to take reasonable steps to defend himself against an unlawful attack. Harm, and even sometimes death, may be inflicted on the assailant in order to ward off the attack. The requirements for this defence are; an unlawful attack; upon the accused or a third party where the accused intervened to protect that third party; the attack must here commence or be imminent; the action taken must be necessary to arrest the attack; and the means used to avert the attack must be reasonable.

[25] The test is an objective one and our courts have emphasised that one should not judge the events like an armchair critic, but rather place oneself in the shoes of the attacked person at the critical moment and bear in mind that at such point in time the attacked person only has a few seconds in which to make a decision. The court should then ask whether a reasonable person would have acted in the same way in those circumstances. A person who suffers a sudden attack cannot always be expected to weigh up all the advantages and disadvantages of his/her defensive act and to act calmly.

[26] The first question that arises is whether the accused was under an unlawful attack? The accused was outside the perimeter fence of the homestead, *albeit* insulting the deceased. The gate to the homestead was closed, so the deceased jumped over the perimeter fence and started to assault the accused. The attack on the accused had commenced and it was unlawful.

[27] The question is not whether other methods of defence might have been successful, but whether the method in fact adopted was reasonable. It was necessary for the accused to defend

himself against an unlawful attack. It is the method or means that he used to avert the attack that were not reasonable. The deceased was not armed with a weapon. He was punching the accused with clenched fists. Instead, the accused stabbed him with a lethal weapon i.e., a huge knife with a blade of 21cm. He used excessive force and directed the stab on the upper part of the body. No wonder the knife caused serious injuries depicted in the post mortem report. Under “marks of violence” the post mortem report shows that the deceased had the following wounds: wound of 11cm x 4cm in the left arm, external face; wound of 2cm x 1cm on the left arm, internal face; wound of 2cm x 1cm, interior thorax from 8cm to mamilla, penetrating in thorax cavity at level of 3rd left costal. The knife caused a cardiac laceration. These injuries speak to the excessive force used by the accused. The means used to avert the attack were not reasonable in the circumstances.

[28] In this case all the requirements of self-defence of codified in s 253 of the Criminal Code are satisfied except that the means used to avert the attack were not reasonable in all the circumstances. We agree with Ms *Chikuni* Counsel for the State that is a border-line case between murder and culpable homicide. In such a case the accused is entitled to the benefit of doubt. In the circumstances the accused cannot be guilty of the crime of murder as defined in s 47(1) of the Criminal Code. However, in stabbing the deceased in the manner the accused did a reasonable person placed in the same circumstances as the accused would have foreseen the possibility of death and would have guarded against it. The conduct of the accused shows that he fell below the reasonable person standard. In the circumstances, and in terms of s 254 of the Criminal Code we are satisfied that the accused is not guilty of the crime of murder, but guilty of the lesser crime of culpable homicide. Defence Counsel conceded that the appropriate verdict is culpable homicide. The concession was properly taken.

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

Sentence

[29] Mr. Mxotshwa, this Court found you guilty of the crime of culpable homicide. It is now the unenviable but necessary task of this court to impose an appropriate sentence. 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. Whilst it is so that a court must always endeavour to exercise a measure of mercy, however, sight must not be lost on the purpose and objectives of punishment. In *S v Rabie* 1975 (4) SA 855 (AD) at 862G-H, the court held that: "Punishment should fit the criminal as well as the crime, be fair to society, and be blended with a measure of mercy according to the circumstances."

[30] 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.

[31] We will now turn to the facts of this case and the submissions made by your Counsel and Counsel for the State.

[32] In mitigation of sentence, your Counsel addressed the court and placed factors which he urged this court to 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 were 28 years old when you committed this crime. You are now 31 years old. You are married and a father of two minor children, one is four years and the other is seven years. You are the sole provider of your family. The seven-year-old is now of school going age, but has not enrolled at school because you are not available to provide the financial support. You have no savings and assets of value, the six head of cattle you inherited from your late parents were allegedly taken by the relatives of the deceased.

[33] Counsel urged the court to take into account that you are a first offender, you have been in pre-trial incarceration for 2 years 9 months, and that the deceased was the aggressor. Counsel submitted further that the court must take into account that you shall live with the stigma of having caused the death of another human being.

[34] On the other hand Counsel for the State argued that you stand convicted of a serious offence. You caused the death of another human being, and though a first offender you started from the deeper end. This court was urged to take into account that you used a very dangerous weapon and inflicted serious injuries on the deceased. Counsel argued that a non-custodial sentence will trivialise an otherwise serious offence.

[35] This court factors into the sentencing triad all what has been submitted in mitigation. Particular that you are a first offender, and you have been in pre-trial incarceration for a period of 2 years 9 months. The evidence shows that you were intoxicated, that is also taken into account. You spent a considerable time in pre-trial incarceration. Before sentencing, a court must consider any substantial time spent in custody awaiting trial. I do not believe that it is a mitigating factor per se that lessens the blameworthiness of the accused. However, a court tasked with imposing an appropriate sentence cannot ignore the time the accused spent in custody pending his conviction and sentence if such period is substantial. A court must accord sufficient weight to such time spent in custody and should consider it together with other relevant factors to arrive at an appropriate sentence. Taking it into account does not mean simply deducting the time spent in custody from the intended sentence, it must be considered.

[36] On the other hand, you stand convicted of a serious offence. A life was ended. It is incumbent on this court to emphasize the sanctity of human life. The deceased was unarmed. You used a lethal weapon with excessive force on another human being. The deceased suffered serious injuries which caused his death on the spot.

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

You are sentenced to 8 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
H. Tafa & Associates, accused's legal practitioners