

THE STATE

Versus

THABANI MOYO

HIGH COURT OF ZIMBABWE
DUBE-BANDA J
BULAWAYO, 8, 9 NOVEMBER 2022 & 11 JANUARY 2023

ASSESSORS: 1. Mr Damba
2. Mr Dewa

Criminal trial

K. M. Nyoni, for the State
I. Ncube, for the accused

DUBE-BANDA J:

1. The accused person is charged with the crime of murder as defined in s 47 (1) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. It being alleged that on the 31st April 2021 at Fanyana Moyo's Homestead, Newline Village, Brunapeng Area, Mpoengs, the accused unlawfully caused the death of Jonathan Moyo (deceased) by stabbing him on the side of the neck and on the shoulder with a knife, intending to kill him or realising that there was a real risk that his conduct might cause his death.
2. Asked to plead to the charge the accused said he did not deny the charge, he was not fighting the deceased but the younger brother. Mr *Ncube* counsel for the accused stood up and informed the court that the accused was pleading not guilty to murder but was pleading guilty to the crime of culpable homicide. Mr *Nyoni* counsel for the State informed the court that the limited plea of guilty to culpable homicide was rejected and that the State was proceeding with the trial on a charge of murder. The trial proceeded on the murder charge.
3. The State tendered a summary of the State case, which is before court and marked Annexure A, and the defence tendered the accused's defence outline and is before court and marked Annexure B. In the defence outline it is, *inter alia*, alleged that on the 31st

March 2021 the accused had an altercation with his young brother Sikhumbuzo after they had drunk 2 x 750 ml Gold Blend Whisky and black label lager beers. They were drinking with their friend called Shadreck.

4. The altercation is said to have started at their brother Tawanda's homestead and spilled over to Fanyana's homestead. It is contended that he tried to make peace with Sikhumbuzo who instead became violent and struck the accused on the head with a log and then ran away and the accused remained talking to his mother. The deceased who was sleeping in another hut came out to intervene and returned to his room. As the accused was still talking to their mother Sikhumbuzo returned and continued being aggressive and confrontational. The deceased suddenly emerged and in the darkness the accused thought and believed that he was ganging up with Sikhumbuzo to attack him and he stabbed him believing that he was acting in self-defence against an imminent attack. Upon realising that he had injured the deceased he assisted him to sit upright and administered first aid, thereafter proceeded to report the incident to his brother Tawanda and to their mother.
5. It is stated that the accused had previously reprimanded the deceased and Sikhumbuzo about the problems they were giving their mother. Sikhumbuzo was said to have been angered for being reprimanded for sleeping with their mother. The relations with Sikhumbuzo were good except that over the last two years whenever he (Sikhumbuzo) got drunk he caused a quarrel after being reprimanded for sleeping in the same room with their mother. It is contended that he be found guilty of the lesser crime of culpable homicide.

The State case

6. In the opening of the State case the prosecuting counsel with the consent of the accused introduced the following documentary exhibits: post-mortem report number 322-289-21(Ext. 1); and accused's confirmed warned and cautioned statement (Ext. 2). The State further introduced a real exhibit, i.e. a silver knife, weighing 400g, length 30cm, length of blade 17.5 cm and length of handle 12.5 cm (Ext. 3).

7. The State Counsel further sought and obtained admissions from the accused in terms of section 314 of the Criminal Procedure & Evidence Act [*Chapter 9:07*] (CP & E Act). These related to the evidence of the following witnesses as contained in the summary of the State case:
- i. The evidence of Sedson Muleya. His evidence is that he is a member of the Zimbabwe Republic Police (ZRP) and he is currently stationed at Mpoengs Police Station. On the night of the 31st March 2021 at around 23:45 hours he was at work and manning the charge office when he received a report of murder which allegedly occurred at Fanyana Moyo's homestead. He proceeded to the scene in the company of Sergeant Nyathi. On arrival at the scene he found the body of the deceased lying in a pool of blood. He observed that the deceased had a sharp wound on the left of the neck and another wound between the shoulder blades.
 - ii. The following morning on the 1st April 2021 he proceeded to the accused's residence where he carried out a search and recovered a silver knife. He booked the silver knife as an exhibit in the Station's Exhibit Book. On the same day at around 1400 hours he arrested the accused. On the 21st May 2021 he witnessed the recording of a warned and cautioned statement from the accused. The accused gave his statement freely and voluntarily.
 - iii. The evidence of P. Nyathi. His evidence is that he is a member of the ZRP and he is stationed at Mpoengs Police Station. On the 21st May 2021 he recorded a warned and cautioned statement from the accused. At the material time the accused was in his sound and sober senses and he gave his statement freely and no undue pressure was brought to bear on him.
 - iv. The evidence of Doctor Juana Rodriguez Gregori. Her evidence is that she is a qualified Medical Practitioner and is based at United Bulawayo Hospitals. On the 6th April 2021 she examined the remains of the deceased and compiled her findings in the post mortem report number 322/289/21.
8. The State called two witnesses who gave *viva voce* evidence. We summarise their evidence and our findings on their credibility. The first to testify was Sikhumbuzo Moyo.

His evidence was that the accused is his elder brother. This witness and the accused were drinking beer at the local shops, they were later joined by another villager called Elphas Ndlovu also known as Gatsheni. Gatsheni joined them between 7 and 8 O'clock in the evening. The three later got transport to go to their respective homes. Gatsheni said this witness had stolen his phone, however this was not true as the phone had fallen somewhere in the vehicle and was brought the following morning. The accused got angry accusing the witness of having stolen Gatsheni phone. The three got to Tawanda Moyo's homestead. Tawanda is brother to the witness and the accused. The dispute about the phone raged on until the witness left and proceeded to Juliet Dube's (their mother) homestead where he resided.

9. The accused followed and persisted with the accusation that the witness stole Gatsheni's phone. The accused was in fighting mode. One Mbekezeli came and joined the witness, accused and Juliet Dube at the homestead. The accused drew a knife and stabbed the witness on the finger and chest. The witness identified exhibit 3 as the knife that was in the possession of the accused. The deceased who was already in his bedroom hut came to try and stop the fight. The deceased was not fighting anyone he was just a peace-maker. The now deceased left and returned to his bed-room hut.
10. The accused continued with his fighting mode. The witness and Mbekezeli fled into the nearby bushes. Juliet Dube also fled from the homestead. The deceased came for the second time to try and stop the fight that is when the witness heard him saying "you have injured me." The witness returned to the homestead and tried to help the deceased who was bleeding profusely from the side of the neck. The witness testified that it became clear that the deceased was not going to survive. The accused did not help the deceased who was bleeding. The witness denied that he was being intimate with their mother.
11. Under cross examination he testified that the three left the shops at around 8 in the evening. He said at the shops they were drinking beer called Calabash or Indlovu. He disputed that they were drinking Gold Blend Whisky and Black Label Lager. The witness said the accused was intoxicated. It was put to him that in his police statement he did not mention the accusation of having stolen a phone, he said it was in his statement. Asked about the living arrangements at the homestead, he said he was using the same bedroom hut with the deceased, and their mother Juliet Dube was using a separate hut. When put

to him that he was angered because the accused reprimanded him for sleeping with their mother, his answer was he was the last born in the family and he could not have raped their mother. He said the accused was alleging that he raped their mother.

12. When it was put to the witness that he struck the accused with a log, he said he had no log. It is the accused who was armed with a knife. He said when the deceased was stabbed, he (witness) was hiding in the bush across the road which was about sixty metres from the homestead. He testified that there was moonlight and he was able to see what was happening. The accused was armed with a knobkerrie and a knife. There was no fight between the accused and the deceased. He saw the accused and the deceased meeting between two huts, and this is when he heard the deceased saying “you have injured me.” He did not see the actual stabbing. Sikhumbuzo Moyo came across as a witness who had a reasonable recall of events and a very good witness, his evidence is accepted without reservation

13. The second and last witness to give *viva voce* evidence was Juliet Dube. She is 63 years old. The accused and the first witness Sikhumbuzo Moyo are her children. The deceased was also her child. She was residing at the same homestead with Sikhumbuzo Moyo and the deceased. The accused has his homestead. She testified that in the evening Sikhumbuzo Moyo came home and said the accused wanted to fight with him. The accused also came home carrying a knobkerrie, the deceased who had come from his bedroom hut offered the accused a chair. The deceased sat between the accused and Sikhumbuzo Moyo. There was also present a nephew called Mbekezeli. The accused continuously said “today I will kill someone with this knobkerrie.” The accused then removed a shiny knife from his pocket. He waved the knife and said “today I will stab someone and such person will be buried.”

14. When the witness asked the accused the cause of the dispute, his answer was, “mother there is something bad you are doing with these boys. You sleep with them making them husbands.” Referring to the now deceased and Sikhumbuzo Moyo. The accused stood up and tried to stab Sikhumbuzo Moyo with a knife. The deceased got hold of the accused, trying to stop him from stabbing Sikhumbuzo Moyo. This witness testified that she screamed saying “Thabani my son why would you kill your young brother in such

brutal manner.” That is when Sikhumbuzo Moyo and Mbekezeli fled to the fields. The deceased remained calling for peace.

15. The accused then hit the witness with open hands and then used a knife to cut the witness’s finger. The now deceased then asked the witness to run away, and she did. She stood outside the homestead, and the deceased told her to go far as the accused would attack her. That is when the witness decided to go to her brother in law’s homestead to report that she was fleeing from the accused. Before she got to the brother in law’s homestead she heard the deceased crying like a “cow being slaughtered.” She fell down and crawled to the brother in law’s homestead, the brother in law was not at home. She went to her other son’s homestead, i.e. Tawanda Moyo. Tawanda asked the witness to hide in the house because the accused was coming. The accused then said “Tawanda my brother I have injured people.” The matter was then reported to the police leading to the arrest of the accused.
16. Under cross examination this witness testified that at her homestead there are two huts. Sikhumbuzo and the deceased used one hut as their bedroom, and the witness used the kitchen hut as her bedroom. It was put to this witness that she would sometimes spend a night with Sikhumbuzo in the kitchen hut, she said she would not do such a thing. When her husband died, Sikhumbuzo was just a child. She testified that the accused made the accusation that she was being intimate with Sikhumbuzo on the date he stabbed the deceased. She thought it was because of intoxication, and was surprised when the accused repeated the same allegation to the police. She did not see Sikhumbuzo hitting the accused with a log.
17. Juliet Dube was a very good witness whose evidence can be accepted without qualification.
18. Mr *Ncube* cross examined both Sikhumbuzo Moyo and Juliet Dube in respect of their police statements. The thrust of the cross examination being that the witnesses have in their evidence in court deviated from their police statements. The statements were not handed in as exhibits. It is trite that a cross examiner may cross-examine on a document without handing it in as an exhibit. However, if there is cross examination on the content itself, or if it is used to contradict the witness, the document must be handed in. See: Pretorius JP *Cross-Examination in South African Law* (LexisNexis Butterworths 1977)

315. Otherwise there would be no way the court may accept that the version of the witness has changed or that she has contradicted herself. Counsel did not hand in the statements as exhibits. There is no way this court can assess the alleged contradictions without the statements having been tendered in as exhibits. Failure to hand in the statements renders the cross-examination valueless.

Defence case

19. The accused elected to give evidence under oath. He testified that the quarrel with Sikhumbuzo led him to stab the deceased. He had no quarrel with the deceased. He did not say he wanted to kill anyone. When he arrived at Juliet Dube's homestead the deceased offered him a chair. While he was narrating the cause of the quarrel he had with Sikhumbuzo, he (Sikhumbuzo) struck him with a log and ran away. He pursued Sikhumbuzo who escaped from the homestead. After pursuing Sikhumbuzo he returned to the homestead. He met someone at the corner of the house under construction, he did not recognise that person. He then drew a knife and stabbed that person. The reason he stabbed him was because he thought that person was also fighting with him. When he returned from pursuing Sikhumbuzo Juliet Dube had gone and he did not know where she had gone to. He testified that no one saw the stabbing of the deceased because all had fled from the homestead. The accused testified that he stabbed the deceased once. The second stab wound might have occurred when he was carrying the deceased to lay him down.
20. Under cross examination he conceded that he is the one who stabbed the deceased. He could not dispute the contents of the post mortem report, and that the deceased had two stab wounds. He accepted that Sikhumbuzo left him (accused) at Tawanda's homestead. Accused followed Sikhumbuzo to Juliet Dube's homestead. He disputed that he was violent when he got to Juliet Dube's homestead. He said he had a knife in his pocket. He denied that he had a knobkerrie. He disputed that he said he wanted to kill someone and that he assaulted his mother. He disputed that he assaulted Sikhumbuzo. He testified that he stabbed the deceased because "when we met I did not realise who he was." He conceded that the deceased did not assault him.
21. The accused was untruthful, unreliable and untrustworthy as a witness. He lied when he testified that Sikhumbuzo was having an intimate relationship with his mother – Juliet

Dube. He lied that Sikhumbuzo struck him with a log. He lied that when he stabbed the deceased he did not recognise him. He lied that he stabbed the deceased because he thought he was fighting with him. He lied that he assisted the deceased after stabbing him. He lied that he stabbed the deceased once. The medical evidence is clear that the deceased had two stab wounds. In his evidence in chief he testified that he did not recognise who the deceased was when he stabbed him. But in his defence outline and warned and cautioned statement he says he stabbed him because he thought he was ganging up with Sikhumbuzo. He lied when he denied that he said he wanted to kill someone. There are many such falsehoods. Where his version contradicts or is at variance with that of State witnesses, we reject it as false.

Analysis of the evidence

22. It is common cause or not seriously disputed that the injuries sustained by the deceased were caused by the accused. In his confirmed warned and cautioned statement (Ext. 2) the accused admits that he stabbed the deceased. In his defence outline he avers that he stabbed the deceased in self-defence. The knife he used to stab the deceased is before court as a real exhibit. The evidence of Sikhumbuzo and Juliet Dube show that it is the accused who stabbed the deceased. The cause of death is listed as acute anemic, laceration of carotic artery and stab wound. The post mortem report shows that the injuries inflicted by the accused caused the death of the deceased.

23. In his defence outline the accused avers that he stabbed the deceased believing that he was acting in self-defence against an imminent attack. To secure a conviction the State is obliged to disprove the defence raised in the defence outline. See: *S v Cloete* 1994 (1) SACR 420 (A) at 424. The accused is raising self-defence. The requirements for this defence are; an unlawful attack upon the accused or a third party where the accused intervenes to protect that third party; the attack must have commenced or be imminent; the action taken must be necessary to avert the attack; and the means used to avert the attack must be reasonable.

24. 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 ors 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.

25. The first question is whether the accused was under an unlawful attack? The accused made it clear that he was going to kill someone with his knobkerrie. He then removed a shiny knife from his pocket and waved it saying he was going to stab someone and such person was going to be buried. He assaulted and stabbed Sikhumbuzo who with Mbekezeli fled and hid outside the homestead. He assaulted Juliet Dube with open hands and then used a knife to stab her finger. Juliet Dube fled and left the homestead. The accused had already decided that he was going to stab someone to death.
26. The accused says that he thought the deceased was ganging up with Sikhumbuzo to attack him. The evidence is clear that Sikhumbuzo did not attack the accused with a log or in any manner at all. First Sikhumbuzo left Tawanda's homestead in fear of the violence of the accused. Again he fled his mother's homestead and hid in the bush in fear of the accused. So therefore there was no basis of thinking that the deceased was ganging up with Sikhumbuzo to attack him. Again the now deceased did not attack the accused at all. He was a peace maker. After Sikhumbuzo Moyo, Mbekezeli and Juliet Dube fled from the homestead, the now deceased became the only person who remained available for stabbing. He then became the victim. There was moonlight and visibility was good. The accused does not even say the deceased was armed with a weapon. He was not armed. He posed no threat to the accused. Therefore the accused was not under any attack at all.
27. The defence that an attack was imminent has no basis on the facts and the evidence. The accused had made a decision that he was going to stab someone to death. His wish is manifested in the manner he stabbed the deceased. He used a lethal weapon. The knife weighs 400g, with a length of 30cm, the length of blade is 17.5 cm and the length of

handle 12.5 cm. This is a huge knife. Under the marks of violence the post mortem report shows that the deceased had two incise wounds, the first was 2cm length located in the left side of the neck, the second was 4cm of length, superficial in right side of the back. Under internal examination the report says the deceased had laceration of the left lateral muscles of the neck, and laceration of carotic artery (carotid arteries are major blood vessels in the neck that supply blood to the brain, neck and face). He was stabbed twice on the neck. The laceration of the left lateral muscles of the neck, and laceration of carotic artery speaks to the force that was used to inflict these injuries. The defence of self-defence is a false creation. It is rejected.

28. The accused got to Juliet Dube's homestead at what was called bed-time. When he left Tawanda's homestead instead of proceeding straight to his own home he chose to follow Sikhumbuzo at Juliet Dube's homestead. This was to continue the quarrel and then fight with Sikhumbuzo. He was armed with a knobkerrie and a deadly knife. There was no reason to be in possession of such weapons. He made it clear to all that he was going to stab someone to death. He did not mention the identity of the person he intended to stab. Therefore to him it was Sikhumbuzo or anyone else. When Sikhumbuzo fled he tried to stab Juliet Dube's. When Juliet Dube's fled the only person remaining at the homestead was the deceased, he then stabbed him to death. He accomplished his purpose of stabbing someone to death.
29. The facts show that the injuries sustained by the deceased were caused by the accused. The post mortem report shows that the injuries inflicted by the accused caused the death of the deceased. Having carefully weighed the evidence adduced as a whole in this trial we are satisfied that the State has proved its case beyond a reasonable doubt against the accused person.
30. The accused person is charged with murder as defined in s 47(1) of the Criminal Law (Codification and Reform) Act, [*Chapter 9:23*]. It is no longer necessary in our law to specify that the accused has been convicted under 47(1) (a) or (b). See: *Mapfoche & Another v The State* SC 84/21.

In the result:

The accused is found guilty of murder as defined in section 47 (1) of the Criminal Law (Codification & Reform Act) [*Chapter 9:23*].

Sentence

31. Mr Moyo you have been found guilty of murder in terms of section 47 (1) of the Criminal Law (Codification & Reform Act) [*Chapter 9:23*] This Court must now decide what sentence is appropriate for the offence for which you have been found guilty. To arrive at the appropriate sentence to be imposed, this Court will look at your personal circumstances, take into account the nature of the offence you have been convicted of, factor in the interests of society, weigh the same against the others and then blend them with the requisite measure of mercy.
32. You did not lead evidence in mitigation of sentence. You placed the following personal circumstances before the court through the medium of your legal practitioner. You are 43 years old. Dropped out of primary school at grade 6. You are a family man, married with five children. The eldest is 18 years and the youngest is 3 years old. You are self-employed as a small scale farmer, earning an income of 800 South African Rands per month. You have been in custody for a period of 1 year 9 months awaiting the finalisation of this matter.
33. Your legal practitioner submitted that at the time you committed this crime you were intoxicated. We factor into the equation that you were intoxicated. Counsel submitted that you are remorseful of having caused the death of your own brother. You did not testify in mitigation to express your remorse, in a case like this a plea of remorse that comes from counsel carries little weight, if any. It must come from the mouth of the accused, the court must “hear and see” that indeed the accused is remorseful. Against you also is that you peddled a lie that your mother was having an intimate relationship with her own children. Demeaning your own mother for no good measure.
34. We also factor into the sentencing equation that you used a knife, which is a lethal weapon in causing the death of the deceased. The knife is before court as an exhibit, it

is a very huge knife. You stabbed the deceased twice on the neck and shoulder. It is clear that you used formidable force in stabbing the deceased. The deceased had done you no wrong. He was a mere peace maker. The post mortem report shows that you used excessive force in stabbing the deceased. These factors makes this case a bad one. You committed a grave and serious offence. What a horrible way to end the life of another human being. This court must say it, and say it strongly that such conduct will not be tolerated. This court has taken a stand, and it will continue taking a stand, against this wanton violence and destruction of life. Such conduct must be appropriately punished. Your moral blameworthiness is very high indeed.

35. After taking all the factors into account, we are of the view that the following sentence will meet the justice of this case. In the result:

You are sentenced to 20 years imprisonment.

*National Prosecuting Authority, State's legal practitioners
Dube & Associates, first accused's legal practitioners*