

THE STATE
and
MIKE ZINYEMBA

HIGH COURT OF ZIMBABWE
MUZENDA J
MUTARE, 27 June 2023

ASSESSORS: DR SANA
MR MUDZINGE

CRIMINAL TRIAL

Ms T.L. Katsiru, for the State

T Musara, for the Accused

MUZENDA J: Accused then aged 28 years of age is facing a charge of Murder as defined in s 47(1)(a) or (b) of the Criminal Law (Codification and Reform) Act, [Chapter 9:23]. The State alleges that on 16 December 2021 accused struck now deceased on the head twice using a stone leading to his death.

Accused is denying the charge. In his defence outline Annexure B he states that on the day in question he recalls the now deceased accompanied by Nyasha Shaibo and Kanjalo White went to accused's homestead with knobkerries and stones enquiring about Nyasha's goat which accused had taken as security for his arrear wages owed to him by Nyasha's family. The three attacked accused, and accused managed to run away. All the three threw stones at accused before he fled from his homestead. Accused does not know how the now deceased was struck. After the event, the following day, police attacked him whilst he was in his house. Accused was shot on the leg, but managed to escape and ran away. Upon his subsequent arrest he was subjected to assault by the police forcing him to admit the charge.

Facts

The state summary Annexure A, posits that on 16 December 2021, at around 0800 hours, the now deceased, a police constabulary, accompanied by two fellow police constabularies, proceeded to accused's residence to make enquiries of stock theft. Upon arrival at accused's place of residence, the trio informed accused the purpose of their visit. Accused

told the three to leave his homestead. Accused was seen armed with a machete. The three police constabularies did not leave accused's premises. Accused then charged at the three, picked up a stone and threw it towards the now deceased, the stone struck now deceased on the head. Now deceased collapsed. Now deceased's companions retreated and accused pursued the pair. He could not catch up with the two. Accused resolved to abandon the chase, he returned to where now deceased had fallen. He picked yet another larger stone, went near the helpless deceased and crushed his head. Accused then fled the scene. After fleeing from the accused's homestead Nyasha Shaibo and White Kanjalo rushed to the village head and gave him a report.

On 18 December 2021 police raided accused's homestead, they did not find him. Accused was later found by police details fishing at a river. Accused tried to run away but police fired warning shots. He was then arrested and police recovered a machete and an okapi knife. The state summary also confirms accused's version that on a particular day after the assault of now deceased, police raided accused's house at night, tried to apprehend accused but accused was violent. Accused was shot on the lower limbs but managed to escape.

A post-mortem report attributes the cause of death as due to traumatic injury with skull fracture secondary to blunt force trauma.

Evidence adduced by the state

Evidence led by the state is largely common cause. Accused was a stock theft suspect. Now deceased and his two colleagues approached accused for questioning. Accused became uncooperative and violent towards the police constabularies. He got armed and charged at them. He picked a stone and threw it towards the police constabularies. The stone hit the deceased on the head. He collapsed and became immobilised. Accused then took a stone and crushed the head of the now deceased. This evidence is to us common cause and was scantily challenged by the defence.

Accused distances himself from the death of the now deceased. In his evidence under examination he stated that whilst he was fleeing, he heard a falling sound of a heavy object and upon looking back he saw that out of the three chasers, two were remaining pursuing him, one was on the ground. He believes that the one who fell was accidentally struck by Nyasha Shaibo, one of the police constabularies. Exhibit 2, the confirmed warned and cautioned statement of the accused reads as follows:

"I do admit to the charge of murdering Nicholas Chirengwa. They were the ones who came and wrestled me whilst they were three including Nyasha Shaibo and Kephias Kanjalo. They were in possession of knobkerries and I took a stone and hit Nicholas Chirengwa on the head and he

fell down. Shaibo Nyasha and Kephass Kanjalo then ran away. I then struck him again once on the head when he was lying on the ground and he started bleeding.”

The contents of the extra-curial statement of the accused aligns with the state evidence on all fours. That is the truth that happened. We therefore reject accused’s version reflected in his defence summary that he was attacked by the three police constabularies and ran away. Whilst running away deceased got struck by a stone thrown by Nyasha Shaibo aimed at accused. The version is implausible because if Nyasha had struck now deceased on the head it would mean that deceased was positioned between Nyasha and accused. We do not accept that evidence and conclude that the three police constabularies approached accused to probe the theft of Nyasha’s goat by accused. Accused then attacked the police details. He hit deceased on the head and when deceased fell, he could not rise due to the injuries sustained. Accused then deliberately lifted a 6.715 kilogram stone, stood above the torso of the deceased and smashed the now deceased’s head. Deceased died on the spot.

The extra-curial statement of the accused Exhibit 2, dated 18 December 2021 graphically explains what happened. It is admissible under s 256 of the Criminal Procedure and Evidence Act, [Chapter 9:07]¹ and even in the absence of state witnesses’ evidence the accused unreservedly places himself at the centre of the offence. We therefore reject his further contestation that he was assaulted by the police details and admitted under duress. That version is tantamount to fanciful imagination not supported by real evidence in the circumstances. We are unable to accept it.

The next question is, is the accused liable for murder in contravention of s 47(1) of the Criminal Law Code, Chapter 9:23? Accused was aware that the police constabularies were looking for him for a case of stock theft. Upon confrontation, he emerged from his house well-armed. He attacked the police details. One of the stones hit the deceased on the head and he collapsed. The deceased tried to rise to his feet, he failed. Accused picked a heavier stone and at close range virtually smashed now deceased’s skull. Deceased profusely bled and accused fled. Accused chose to use a lethal weapon on a vulnerable part of the body, a head, which is fragile. He used excessive manual force and broke the bones instantly. He ran away leaving deceased dead. On these facts we have no hesitation on the aspect of accused’s intention. It is clear and undoubted, he wanted to kill the now deceased. We therefore return **a verdict of Guilty of Murder.**

¹ S v Nkomo and two 1988 (3) ZLR 117 (s), Sv Ndlovu 1988 (2)ZLR 465)

Sentence

In assessing an appropriate sentence I will consider all that has been said on behalf of the accused in mitigation as well as the aggravatory features. Accused is below 30 years and may be considered a youthful offender. He has no record. On the other hand s 47(3) of the Criminal Law Code regards very agggravatory the fact that a murder victim was a police officer. I am aware that deceased was a police constabulary and was killed during the tour of duty in upholding the rule of law. The post mortem report shows that the deceased's head was brutally, mercilessly and ruthlessly smashed and that caused his death. The murder was heart wrenching, barbaric and well-orchestrated. Accused did not value life at all and showed no sign of civilisation, he behaved like one bred during the dark ages.

On three diverse occasions he resisted law enforcement agencies and firearms had to be used. This is very aggravatory. During the trial accused was not candid with the court and chose to lie trying to mislead the court as to the cause of death of the now deceased. He did not show remorse over what he had done and wanted to portray a picture that he was the victim not the aggressor. Accused killed a defenceless police detail during day light and tried further to evade the long arm of the law by hiding in the mountains and running away from the police. I had seriously considered capital punishment but the youthful age of the accused heavily weighed in his favour. However accused does not deserve to live nor go back into society. He must be removed from it.

Life.

National Prosecuting Authority, for the State.
Gonese Ndlovu Legal Practitioners, for accused