

**THE STATE**

**Versus**

**SUCCESS DUBE**

IN THE HIGH COURT OF ZIMBABWE  
MAKONESE J with Assessors Mr J. Ndubiwa and Mr J.L.M. Zulu  
HWANGE 15 AND 16 JUNE 2022

**Criminal Trial**

*Mrs C. Gorerino*, for the state  
*Ms C Manyeza*, for the accused

**MAKONESE J:** On 1<sup>st</sup> of January 2021 and at 0100 hours the accused and the deceased were celebrating New Year's day at Phokuhle Nyoni's homestead at Dromoland, Inyathi. Also in attendance were Imanathi Ndlovu, Vusumuzi Moyo and Clement Moyo. At around 0400 hours when others had retired to bed, accused in the company of his co-accused, Vusumuzi and Clement took the deceased to Mtshoko Dam where they assaulted him with an axe and bricks on the head. The deceased died as a result of injuries sustained in the assault. The body was discovered by Livious Ndlovu on the edge of the dam the following day. Accused was arrested and confessed to having attacked the deceased.

Accused is facing one count of murder in contravention of section 47 (1) (a) of the Criminal Law (Codification and Reform) Act (Chapter 9:23). Accused denied the charge of murder and tendered a plea to the lesser charge of culpable homicide. The state rejected the limited plea and the matter proceeded to trial. The state tendered a Summary of the State

case which now forms part of the record. It shall not be necessary to repeat the contents of the state outline. Accused tendered a brief defence outline in the following terms:

- “1. He and Clement Moyo were friends to the extent of becoming brothers.
2. The deceased assaulted Clement’s young brother, Imanathi Ndlovu which did not go down well with them.
3. Imanathi Ndlovu was severely assaulted to the extent of failing to walk properly.
4. He together with Clement Moyo and Vusumuzi Moyo sought to reprimand the deceased.
5. He used bricks to assault the deceased to reprimand the deceased.
6. He never intended to kill the deceased but rather to reprimand him.”

In a confirmed warned and cautioned statement recorded on the 9<sup>th</sup> of January 2021 at Inyathi Police Station, the accused confessed having committed the offence. In his statement, the accused narrated what transpired on the fateful day as follows:

*“I have understood my rights. I admit to these allegations levelled against me. I assaulted Phathisani Ngwenya with bricks three times on the head and I was in the company of Clement Moyo and Vusumuzi Ngwenya and they also assaulted him. Clement is the one who suggested that we assault him because he had fought with Clement Moyo’s brother.”*

Dr Juana Rodriguez Gregori is a Forensic Pathologist based at United Bulawayo Hospitals. On the 4<sup>th</sup> of January 2021 he examined the remains of the deceased. He recorded

his findings in a Post Mortem Report filed under report number 10/09/21. The report reveals that the cause of death was:

1. Encephalic Dilaceration
2. Skull Bones Fracture
3. Head Trauma

On marks of violence the report reflects that the pathologist observed a contused wound on the left parietal and frontal regions. On internal examination, there were signs of hemorrhage infiltrate, and laceration on the left parietal and frontal region. There was a comminute fracture from the right parietal to the left.

The state introduced the following physical exhibits into the record:

1. 2 bricks with a total weight of close to 3 kg.
2. A blanket that was being used by the deceased before the assault.
3. A pair of push-ins inscribed “champion.”

#### **THE STATE CASE**

The state led *viva voce* evidence from Phokuhle Nyoni. The witness testified that he resides at stand 34, village 38 Dromoland in Inyathi. The witness knew the deceased Phathisani Ngwenya (also known as Mbare), as a gold panner in the Dromoland area. The witness described the deceased as a humble person who was reserved. He was a peaceful individual. The witness knew the accused as an artisanal miner. He worked with him at the relevant time. Phokuhle narrated that he was also known to Vusumuzi Moyo and Clement Moyo as gold panners in the same area. On the 1<sup>st</sup> of January 2021 at around 0100 hours the witness was seated alone in his kitchen. His brother-in-law Imanathi arrived at his house.

Imanathi was breathing heavily. He announced that he had just assaulted the deceased with a fist on the face over an issue involving a girl. As they were talking the deceased arrived. Deceased confirmed that he had been hurt by Imanathi in a fist fight. Deceased had a small cut on the forehead. A short while later, the accused and Vusumuzi and Clement also arrived. Accused was visibly drunk. He was moderately drunk. The witness continued his discussion with Imanathi about the assault on the deceased. At that point accused interjected and said, “Imanathi you are weak and stupid, you should have beaten him heavily.” The witness reprimanded the accused. Accused appeared to have taken the advice of the witness. The witness went and retired in his bedroom. The accused and his colleagues remained in the kitchen. The witness told accused and his friends to leave his residence as he wanted to rest. Everyone else left except for Imanathi.

When accused woke up the following day he was approached by Livious Ndlovu who reported that deceased’s body was floating at Mtshoko Dam. The dam is about 150 metres from the witness’s homestead. The witness rushed to the scene in the company of other neighbours. They confirmed that deceased was dead. His hand and leg were in the water. The rest of his body was on dry land. The witness observed that the deceased had a cut on the back of the head, the centre of the forehead, and an injury on the hip. The trousers were lowered at the back exposing his buttocks. The witness explained that Imanathi was implicated in the murder. The body was retrieved from the scene by the Police. Accused was later arrested by the police on allegations of murder.

The evidence of this witness was largely common cause. His evidence was not controverted by defence counsel under cross-examination. We found the evidence of this witness to be credible in all material respects.

The state led no further *viva voce* evidence in support of the state case. The state sought and obtained formal admissions in terms of section 314 of the Criminal Procedure and Evidence Act (Chapter 9:07). The evidence of the under listed witnesses was admitted by consent as it appears in the outline of the state case;

- (1) Sinqobile Nkomo
- (2) Sgt Nxongo
- (3) Dr Juan Rodriguez Gregori

The state closed its case.

#### **DEFENCE CASE**

The accused, elected to give evidence under oath. Accused gave evidence that was at variance with his defence outline. From the onset accused fought a battle which was not his. Accused cried more than the bereaved. Accused was never provoked by the deceased. Accused was never involved in a fight, let alone a misunderstanding with the deceased. In essence, accused poked his nose into matters that had nothing to do with him. Phokuhle had reconciled the deceased and Imanathi. The two had forgiven each other. The accused decided to escalate tensions between the deceased and his friends, Clement and Vusumuzi. In what appeared to be a slip of the tongue, accused indicated that Clement and the deceased had a previous misunderstanding. It would seem from accused's evidence, that Clement bore a grudge with the deceased. Even with that scenario, the accused involved himself in a matter he was not a part of. The attack on the deceased was purely a revenge attack. By his own admission, the accused, Vusumuzi and Clement sought out for deceased. They confronted him whilst he was fast asleep. They dragged or carried him to the dam. They laid him down. Clement produced an axe and struck the deceased twice on the head. Accused

struck the deceased three times on the head whilst he lay down injured. Accused admits that he used bricks to assault the deceased. There is evidence that there were pieces of broken bricks around the area where the body of the deceased was recovered. Accused indicated that the reason they took deceased to the dam is that they did not want to assault him in someone's yard. After assaulting the deceased, accused and his associates fled the scene. They left the injured deceased on the scene. They did not render assistance to the injured person. They had achieved their objective.

**WHETHER THE STATE PROVED THAT ACCUSED INTENDED TO CAUSE THE DEATH OF DECEASED OR FORESAW DEATH AS A POSSIBILITY**

The sole issue for determination in this matter is whether the state succeeded in proving that the accused intended to cause the death of the deceased, and if not, whether the state proved that the accused realized that there was a real risk or possibility that his conduct may cause death but continued with his conduct despite that possibility. In terms of section 47 of the Criminal Law Codification and Reform Act, murder is defined in the following terms:

“47 Murder

- (1) Any person who causes the death of another person
  - (a) intending to kill the other person; or
  - (b) realizing that there is a real risk or possibility that his or her conduct may cause death, and continues to engage in that conduct despite the risk or possibility, shall be guilty of murder.”

Under this section, it is not necessary, as was the position under the common law. To find the accused guilty of murder with either actual or constructive intent. It is no longer necessary under the Criminal Code to specify that the accused has been convicted under section 47 (1) (a) or (b). Killing or causing death of another person with either of the two intentions is murder as defined by this section. See: *Mapfoche v The State* SC 84-21 at page 9 and 10 of the cyclostyled judgment.

From the evidence placed before the court it is clear that the attack on the deceased was carefully planned and executed. The accused and his colleagues isolated the deceased by dragging him to the dam. They used lethal weapons to attack the deceased. The injuries described in the Post Mortem Report indicate that excessive force was used. It matters not, who amongst the three co-accused delivered the fatal blow. The doctrine of common purpose is applicable in these circumstances. The accused was a willing participant in the assault. He was well aware that his conduct could bring about the death of the deceased. He persisted with his conduct regardless of the consequences.

The court rejects the notion that accused was coerced into assaulting the deceased. This defence was clearly an afterthought. Accused's own defence counsel expressed surprise at this defence which she referred to as a fabrication.

## **DISPOSITION**

It is our view that the state proved that accused caused the death of the deceased. He must have realized that in assaulting the deceased in the manner he did there was a real risk or possibility that his conduct could cause the death of his victim. The accused continued with his conduct regardless of the consequences.

In the result, and accordingly accused is found guilty of murder as defined in section 47 (1) (b) of the Code.

### **Sentence**

The accused has been convicted of a serious offence. Those who needlessly bring about the death of others over trivial cases should expect stiff sentences from the courts. The courts do not condone the use of violence in the resolution of disputes. In this matter, from the onset the accused chose to fight a battle which was not his. The deceased and one Imanathi had had a misunderstanding. The two had been reconciled by Phokuhle Nyoni and had forgiven each other. The accused for no apparent reason escalated the dispute by suggesting that the deceased should have been heavily assaulted. Accused and his co-accused who are still at large abducted the deceased whilst he was asleep and took him to a dam. The accused who was an active participant in the assault attacked the deceased with bricks. Accused was aware at that stage that deceased had already been struck with an axe twice on the head by Clement. Accused's behavior shows inherent wickedness. Throughout the trial accused sought to downplay his role and even suggested that he was compelled to assault the deceased. Accused did not show any flicker of remorse or contrition but instead sought to mislead the court.

In mitigation it has been argued on his behalf by *Mrs Manyeza*, that he is a youthful offender who has pleaded guilty to the lesser charge of culpable homicide. Accused is a single man who survives by gold panning. He has been in remand custody awaiting his trial for a period of one year 5 months. To a certain extent accused has already served a portion of his sentence. The accused will be credited in that regard. We do accept that the accused deserves leniency. He is a youthful offender. The sentence this court shall impose must have a rehabilitative effect. In aggravation, *Mrs Gorerino*, appearing for the state, argued that the

right to life is protected under the Constitution. No one is entitled to take that right away. The accused showed a total disregard for human life. The court was urged to pass a deterrent sentence. The sentence this court shall pass must serve the ends of justice. The sentence must not be too harsh so as to break the offender. The sentence must not trivialize the offence but must be equitable.

In the circumstances, and accordingly accused is sentenced as follows:

“Accused is sentenced to 15 years imprisonment of which 2 years is suspended for 5 years on condition accused is not within that period convicted of an offence involving dishonesty and for which he is sentenced to a term of imprisonment without the option of a fine.

Effective: 13 years imprisonment.

*National Prosecuting Authority*, state’s legal practitioners

*Mhaka Attorneys*, accused’s legal practitioners