

THE STATE

Versus

FORTUNE MAKOMBE

IN THE HIGH COURT OF ZIMBABWE
KABASA J with Assessors Mrs C.J Baye and Mrs L. Sithole
GWERU 1 AND 2 FEBRUARY 2022

Criminal Trial

M. Shumba, for the state
T Chivasa, for the accused

KABASA J: The accused is charged with murder as defined in section 47 (1) of the Criminal Law (Codification and Reform) Act, Chapter 9:23. He pleaded not guilty.

The state's case is that on 18th May 2019 at around 2000 hours the accused, deceased, Morgan Fundira and deceased's brother, one Ndaba Ncube were at Zvope bottle store in Chiundura. Morgan Fundira, who is the owner of the bottle store decided to close the bottle store and advised all the patrons to leave.

The accused was not amused and started shouting at Morgan threatening him and Ndaba Ncube with death. The deceased and Ndaba Ncube subsequently left the bottle store and accused followed behind them. He proceeded to hit Ndaba Ncube with a brick but Ndaba managed to flee leaving behind the bicycle he had been pushing. The accused chased after the deceased, caught up with him and struck him on the head with bricks. The deceased sustained injuries and he succumbed to these injuries.

In denying the charge the accused accepted that he is the one who hit the deceased with bricks. He however explained that the bricks were thrown at the deceased and Ndaba randomly as a way of intimidating them as they were out to fight him. The misunderstanding had arisen after the accused had asked the deceased on the progress of a theft case he had reported to him as the deceased was a Neighborhood Watch Committee member. The deceased responded rudely telling the accused that he was not his father who was expected to account for the accused's property. Ndaba Ncube joined in after the deceased had had a

private conversation with him. When he threw the bricks at the two he had no intention to kill any one.

To prove its case, the state produced the accused's confirmed warned and cautioned statement, the post mortem report which was compiled by Dr Pesanai and six pieces of bricks which were recovered at the scene. These exhibits were marked exhibit 1-8 respectively.

The evidence of seven witnesses was also admitted in terms of section 341 of the Criminal Procedure and Evidence Act, Chapter 9:07. These witnesses are:-

1. Request Ncube
2. Oliver Kamota
3. Wilbert Chanyau
4. Tinashe Chitau
5. Themba Nkani
6. Welcome Dube and
7. Dr. S. Pesanai

The evidence of these 7 witnesses established the fact that the deceased met his death on the night of 18th May 2019 following the attack with bricks. The bricks were recovered after the police attended the scene. The body of the deceased was taken from the scene and ferried to hospital and no further injuries were caused to it.

A post mortem was conducted and the cause of death was:-

1. subarachnoid haemorrhage
2. multiple skull fractures
3. assault

Following the accused's arrest a warned and cautioned statement was recorded from him which was subsequently confirmed and in it the accused said:-

“I admit to the allegations being levelled against me. On the 18th of May 2019 I committed an offence of assaulting Jimmy Ncube after I had reported a theft case to him which involved my building tools considering that he was a Neighbourhood Officer whom I knew. I was looking forward to be assisted by him because he is the one whom

I had reported the case to. He did not take my report seriously as an Officer, he responded in a manner which angered me. In his response, the indication was that he knew something about the theft of my property, which led us into a misunderstanding. That is all.”

Evidence was then led from 3 state witnesses. The first witness was Ndaba Ncube, the deceased’s brother who was also at the bottle store on the night in question.

The gist of his evidence was that the accused was outside whilst he, his drinking companion and the deceased were inside the bottle store. The deceased was drunk and declined the witness’s offer to join them in drinking beer. Fundira, the bottle store owner then advised patrons to leave as he wanted to close the bottle store. Accused did not take kindly to this and threatened to kill Fundira. He was holding a brick in his hands. Shortly thereafter the witness left with the deceased and he was pushing the deceased’s bicycle. The accused followed and pelted them with bricks. He was hit twice but managed to flee. He later returned hoping to locate the deceased but found his body lying in a pool of blood, 2 bricks were near his head and one at his feet. His head had evident fractures.

This witness’s evidence did not flow with ease and this was largely because he sought to give explanations which he had not been asked for and he had a roundabout way of responding to simple and straightforward questions.

What was clear however is that there was some discord which led to Fundira deciding to close the bottle store. The true nature of that discord was not very clear.

It was equally clear that the witness left the bottle store with the deceased and he was pushing the deceased’s bicycle. Equally clear was the fact that the accused threw bricks at the witness and the deceased resulting in the witness fleeing in one direction whilst the deceased took a different direction.

On returning to the scene the accused was nowhere to be found and the deceased had been mortally wounded. The injuries were inflicted by the use bricks.

We were satisfied that this witness was being truthful when he denied ever attacking the accused or threatening him in a manner that justified the accused's decision to throw bricks at the witness and his brother, the deceased. This is so because if the accused's explanation on why he threw the bricks at the witness and the deceased had any truth in it, he would have stated so when he gave his warned and cautioned statement. The statement he gave made no mention of him being under some attack necessitating throwing bricks in order to intimidate his attackers.

Surely if this was the reason why he threw bricks he would have had no difficulty stating so. One would have expected him to quickly explain that he had to throw bricks in order to ward off the deceased and his brother who wanted to attack him. Instead he said he was angered by the deceased's response to his inquiry concerning his theft report. He therefore was punishing the deceased for being rude and not that the deceased was threatening to attack him.

To that end therefore Ndaba Ncube's evidence that he and his brother never attacked the accused was the truth and can be relied on.

The second witness was Morgan Fundira, the bottle store owner who decided to close his bottle store, a decision which angered the accused. Morgan was not forthcoming on what it is that had made him feel unsettled resulting in his decision to close the bottle store and order the patrons who were inside to leave. His evidence however showed that he was anxious to get rid of these patrons and to close the bottle store.

He confirmed that the accused threatened to kill him. He however proceeded to close the bottle store and saw Ndaba Ncube leaving pushing a bicycle. Later that same night he was informed of the deceased's death and visited the scene. The incident disturbed him so much that all he observed was that there were bricks at the scene but did not take particular note of where they were positioned in relation to the deceased.

It could be due to age or lapse of time but this witness was not the easiest of witnesses when it came to giving detail as to what he observed or heard.

The fact that there were bricks at the scene was however not in dispute. So too was the fact that the deceased had been struck with bricks and the injuries observed by the doctor were inflicted by bricks.

Besides establishing that the accused was aggressive on the night in question, the witness's evidence was largely colourless.

The last witness was the police officer who drove the attending details to the scene. She had decided not to get close to the scene until her colleagues came to the motor vehicle to get a body box and informed her of the identity of the deceased. On learning that he was a member of the Neighbourhood Watch, she decided to get close and observe the scene. She saw that the deceased's head was bloody and near the body were bricks. The brick nearest to the deceased's body was close to his head.

She is the one who ferried the body to the mortuary.

We were of the view that this witness merely related what she did and what she observed, no more no less.

Her evidence corroborated Ndaba Ncube's evidence that there was a blood stained brick (s) at the scene, close to the deceased's body.

None of these witnesses testified on how the deceased sustained the injuries which led to his death.

The accused's explanation was that he inflicted these injuries when he randomly threw bricks at Ndaba Ncube and the deceased.

What was striking about the accused's story is the fact that he never mentioned that he was under attack when he gave his warned and cautioned statement. We have already observed that had this been true, this is something he would have mentioned without even thinking. It would have been the first thing he would have been expected to mention by way of explaining the reason for his conduct. What was so difficult for him to tell the police that "But for the fear

instilled in me by Ndaba and the deceased who were threatening to harm me, I would not have thrown the bricks which injured and killed the deceased.” He did not mention that because there is no truth in such a story. The story is the product of a scheming mind, a story he made up in order to explain his conduct.

The deceased was a big man, 1,74 m tall and 80 kg in weight. The accused would have us accept that he just threw bricks at random in the general direction of where he could hear voices and these bricks managed to hit the deceased, tall as he was, precisely on his head. The marks of violence observed by the doctor were:-

1. Laceration on the right occipital region (5 x 1 cm)
2. Laceration right parietal (2 x 1 cm)
3. Laceration on the left ear (6 x 4 cm)
4. Friction abrasion on the right hand (4 x 3 cm)
5. Blood on the face and head clothes covered with blood.
6. Scalp haematoma on both parietal region.
7. Fractured right parietal region (4 x 3 cm, lineal fracture on both parietal bones)

These are the injuries supposedly inflicted by bricks which were thrown at random but managed to hit the head. Not only that, the accused said he threw only 3 bricks and Ndaba Ncube said he was hit by 2 bricks before he managed to flee. This therefore leaves one brick which is the one that must have struck the deceased. How can that one brick account for the injuries observed by Dr. Pesanai? Are we to conclude that the brick had some elastic qualities that made it bounce after hitting one area of the head and went on to hit several other areas of that head resulting in the extensive marks of violence observed by the doctor?

The accused's story was improbable. It was as if he decided to just say anything, whether it made sense or not was the least of his concerns. He was clearly lying through his teeth.

Asked on visibility he initially said it was dark and he was hiding and so the deceased and Ndaba could not see him. He must have realized that this would not support his story that he threw bricks to ward off the two, because asked why he would still say the 2 were chasing

him if he had hid and it was dark he then said they saw him. Asked how they could have seen him since it was dark and he was hiding, he replied:-

“I think I tried to get up so I go to the road and I made a sound and I was also wearing a white shirt.”

He was thinking on his feet and had an answer for every question, whether such answer made sense in light of his version of events was something else.

At one point he said it was dark but the clouds would move and illuminate the area. Asked whether it meant he could see as he picked up the bricks and took aim, he quickly back-pedaled and said it was dark.

He was one person who was just bent on denying for the sake of it. He was a poor witness whose story would make a good story-line for a fiction novel.

The extent of the injuries, the severity thereof, and the location is indicative of multiple blows at close range and not random bricks thrown as the accused was fleeing.

The accused’s story as it related to the injuries inflicted on the deceased was shown to be not only improbable but beyond doubt false. (*R v Difford* 1937 AD 370, *S v Kurauone* HH 961-15).

The accused knew what he was doing. He may have taken some alcohol but he was not drunk. Even if he was drunk, voluntary intoxication does not avail him as a defence.

That said, can it be said he desired death and that was his aim and object (*State v Herold Moyo* HB 19-17)

State counsel referred to the case of *S v Mugwanda* 2002 (1) ZLR 547 (S) where CHIDYAUUSIKU CJ stated that for a verdict of murder with actual intent, a trial court must be satisfied beyond reasonable doubt that the accused desired to bring about the death of the victim and succeeded in doing so. (See also *S v Jealous Tomasi* HH 217-16).

We are unable to come to the conclusion that the accused set out to kill and his aim and object was to kill and he achieved it.

He however must have realized that using bricks to hit a person on the head could result in death and therefore that there was a real risk or possibility that his conduct may cause death but he continued nonetheless despite that realization.

We are therefore satisfied that the state has proved its case beyond a reasonable doubt and accordingly find the accused guilty of murder as defined in section 47 (1) (b) of the Criminal Law (Codification and Reform) Act, Chapter 9:23.

Sentence

In assessing sentence I will consider what has been said in mitigation. You are a first offender. The offence was committed in 2019, you were 24 years old at the time. 24 is a youthful age.

You have spent 2 years in pre-trial incarceration. You must have been anxious over this period.

Defence Counsel referred us to *S v Mungoza* HMT 1-2018 and I will consider MWAYERA J's (as she then was) remarks therein. Sentence should fit the offence and the offender and be fair to society.

In *S v Harington* 1998 (2) ZLR 344 DUMBUTSHENA CJ put it thus:-

“The appellant has to pay for her crime. But she must be sentenced rationally and fairly. This is one of the principles of criminal justice which requires that the punishment imposed by the court for crimes committed must themselves be just and fair.....”

The humane approach has nothing to do with maudlin sympathy for you but ensures that the punishment fits the criminal as well as the crime and be fair to society. (*S v Rabie* 1975 (4) SA 885, *S v Narker and Another* 1975 (1) SA 583).

In aggravation is the fact that a life was needlessly lost. The deceased's wife and children have to contend with a life without a husband and father.

Everyone has the right to life and no one should lose their life at the hands of another.

State counsel put it well when he said life is God given and lived once and as such it is sacred.

The courts have time without number emphasized the need for society to respect the sanctity of life.

You were 24 and the deceased was 59, old enough to be your father.

There is need for the youth of today to refrain from resorting to violence and it appears youths these days have no qualms about resorting to violence. It is as if it is now a favourite past-time and the courts must send a loud and clear message that such behavior will not be tolerated. (*S v Mazviyo* HB 298-17)

A long term of imprisonment is called for. In deciding on the term, I will consider the 2 years of pre-trial incarceration and your age at the time the offence was committed.

You are accordingly sentenced to 15 years imprisonment.

National Prosecuting Authority, state's legal practitioners
Chivasa and Associates c/o Kwande Legal Practice, accused's legal practitioners