

THE STATE

Versus

SIBANGA WILLIAM MUZAMBA

IN THE HIGH COURT OF ZIMBABWE

DUBE-BANDA J with Assessors Mr T.E Ndlovu and Mr S.L Bazwi

HWANGE 9, 10 & 14 MARCH 2022

Criminal trial

Mrs M. Cheda, for the State

Ms C. Manyeza, for the accused

DUBE-BANDA J: The accused person is charged with the crime of murder as defined in section 47 of the Criminal Law (Codification and Reform) Act [Chapter 9:23]. It being alleged that on the 24th April 2021, accused unlawfully caused the death of Simati Mefias Mudimba (deceased) by striking him with an axe two times, once on the head and once on the neck intending to kill him or realising that there was a real risk or possibility that his conduct may cause his death continued to engage in that conduct despite the risk or possibility.

The accused person was legally represented throughout the trial. Ms *Manyeza*, accused's counsel explained to the court that accused was tendering a plea of guilty to a lesser crime of culpable homicide. Mrs *Cheda* counsel for the State informed the court that the State does not accept the limited plea tendered by the accused. This court entered a plea of not guilty and the matter proceeded to trial.

The State tendered an Outline of the State Case, which is before court and marked Annexure A. The accused tendered into the record an Outline of his defence case, which is before court and marked Annexure B.

State case

The State tendered into evidence a post mortem report compiled by Dr Juana Rodriguez Gregori at United Bulawayo Hospitals on the 26th April 2021. The report is before court and marked Exhibit 1, it shows that the cause of death was acute anemic, seccion of the neck vessels and chop wound. Further the State produced and placed before court accused's confirmed warned and cautioned statement, it is marked Exhibit 2. The State tendered an axe as a real exhibit before court, it is marked Exhibit 3. The axe has the following measurements: length

of wooden handle 68cm, circumference of wooden handle 11cm, circumference of wooden handle head 21cm, length of axe blade 18cm, width of axe blade (sharp end 11cm).

The prosecutor sought and obtained an admission from the accused in terms of section 314 of the Criminal Procedure & Evidence Act [*Chapter 9:07*] (CP & E Act). This admission relates to the evidence of Doctor Gregori as it is contained in the summary of the State Case. This is the pathologist who examined the remains of the deceased and recorded a post mortem report, i.e. Exhibit 1.

The state called the oral evidence of three witnesses. We are going to briefly summarise their evidence. The first to testify was Fandison Muleya. This witness testified that accused is his cousin, and deceased was his brother in law. On the 24th April 2021, he invited his friends to help him harvest his sorghum crop from the fields. Accused and deceased were part of the invitees. He had two buckets traditional beer to be consumed after the job of harvesting had been completed. Deceased did not bring a knife to use in harvesting sorghum, instead he brought an axe. This witness took the axe for safe keeping and gave him a knife to use to harvest.

After harvesting everyone went to this witness homestead to consume the traditional beer. The accused and deceased sat together and consumed traditional beer, discussing something but this witness did not hear what these two were talking about. The witness said he was seated about one and a half metres from where the accused and deceased were seated. When he stood up to go and collect beer, he saw accused holding an axe. Accused picked the axe from the ground. He then struck deceased on the back of the head. The blow made a big sound. The deceased did not scream or cry, he just fell down. When deceased was down, accused removed the axe from the head of the deceased, and again struck him on the neck. The deceased had a big open wound on the back of the head, and had another big wound on the neck. It was like the deceased had been beheaded. Deceased lay in a pool of blood. He does not know the reason accused axed the deceased. He did not hear accused say anything at the time he axed deceased. He did not see deceased attacking accused.

The second witness to testify was Moses Muzamba. He testified that he is accused's half-brother. Deceased was his neighbour. He was amongst the people who partook in the harvesting of sorghum from Fandison Muleya's fields. After harvesting they went to the homestead and sat in a form of a circle under a cassava tree. Accused was seated close to the

deceased and this witness was about three metres from them. He saw accused holding an axe striking the deceased. He was using the sharp end of the axe. He struck him on the back of the head and deceased fell down, he was then struck on the neck. This witness identified Exhibit 2 as the axe used by the accused to axe the deceased. He did not see deceased attacking the accused.

The third witness to testify was the investigating officer. He testified that accused handed himself to the police. He attended the scene and observed the body of the deceased under a cassava tree, it was laying facing upwards. It was in a pool of blood. The deceased had deep wounds on the head and neck. Before he took accused for indications he warned him of his rights in terms of the requirements of the law. Accused made indications, which led to the recovery of the axe, i.e. Exhibit 3.

At the conclusion of the testimony of the investigating officer the prosecution closed the State case.

Defence case

Accused testified in his defence. He testified that he was one of those invited to harvest sorghum by Fandison Muleya (1st State witness). At around 3 O'clock they stopped working and went to Fandison Muleya's homestead. People sat under a cassava tree. He was seated close to the deceased. He testified that he told deceased that he had a cow that was old, he was keeping it for his child who is at a University in Zambia. Deceased said the cow was old, it must be slaughtered and they eat the meat. He says this discussion degenerated into a misunderstanding, and he told deceased that he was ignorant and did not understand the importance of education. He says deceased got angry and picked an axe, and when he noticed this he quickly dispossessed deceased of the axe. He then struck deceased with the axe on the head. Accused accepts that he struck deceased twice with the axe, but denies that he struck him on the neck. He then handed himself to the police.

In cross examination accused testified that he struck deceased twice with the sharp end of the axe. He says he struck him on the head and on the back of the head. He denied that he struck deceased on the neck. He says he was holding he axe with one hand when axing the deceased. The deceased fell after the second blow. He struck the head because that was the part that was accessible at that time. He was defending himself from an attack by the deceased. He said he and deceased were seated about four metres away from the other people. When it was

put to him that he did not tell the police that he was under attack by the deceased, he said he told them. He said he was not very drunk. When put to him that he wanted to kill deceased, he said he was defending himself.

At the end of the testimony of the accused, the defence closed its case.

Analysis of evidence

It is common cause that the accused struck the deceased with an axe. He was seen by Fandison Muleya and Moses Muzamba striking the deceased. In the confirmed warned and cautioned statement (Exhibit 2) accused admits that he struck deceased on the head and neck with an axe. In his defence outline (Annexure B) he contends that he struck deceased with an axe on the head and neck. The axe that accused used to strike the deceased is before court as Exhibit 3.

It is not in dispute that the deceased suffered the following injuries, under marks of violence: contused wound with linear fracture located in frontal and parietal region; contused wound in left side of the neck with seccion of the neck structure; contused wound in a left shoulder with fracture of the left clavicle. Under internal examination: haemorrhage infiltrate and wound in parietal right region; linear fracture in a frontal parietal region; disclamation of the brain in the right parietal region; and seccion of the left vessels in the neck; seccion in the left place. These injuries were caused by the accused. The post mortem report shows that the injuries inflicted by the accused caused the death of the deceased.

Accused raises the defence of private defence. In his defence outline accused contends that:

1. That he was drinking beer together with the deceased. He told the deceased that he wanted to sell his cow and use the money to pay the school fees for his child.
2. Deceased then told him that he wanted to kill the cow for meat now that the accused is old and that he will die soon. A misunderstanding arose.
3. Deceased the picked his axe and tried to strike accused. Accused managed to take the axe from the deceased and struck him on the head and on the neck.
4. He will tell the court that he had no intention to kill the deceased, he acted at the heat of the moment and in self-defence, he negligently caused the death of the deceased.

In terms of our law the defence of self-defence has been codified in section 253 of the Criminal Law (Codification and Reform) Act [Chapter 9:23]. The law provides that a person is entitled to take reasonable steps to defend himself against an unlawful attack or to take reasonable steps to defend another 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 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.

The first inquiry is whether the accused was under an unlawful attack. The two eye witnesses, Fandison Muleya and Moses Muzamba testified that they did not see deceased attempting to strike the accused with an axe. In fact the evidence is that accused picked the axe from the ground and then struck the deceased. The first strike in head caused him to fall down, he was again struck in the neck when he was already on the ground.

We are fortified in this finding by the fact that in his confirmed warned and cautioned statement signed on the 25th April 2021 (just a day after the attack) he did not mention that he acted in self-defence. In his statement he said:

I do admit that I killed Simati Mefias Mudimba by striking him on the head and neck with an axe. I killed him because he was angry and jealous about my decision of selling my old beasts and sending my children to the college.

This was the first opportunity available to the accused to give the reason he struck deceased with an axe. The events of the 24th April 2021, must have been still too vivid in his mind. If he acted in self-defence he would have easily told the police that he was pre-empting an attack by the deceased, and that version would have been recorded his statement. The investigating officer took him for indications the next day on the 25th April 2021, he did not tell him that he acted in self-defence. If he had done so, this could have been put to the officer in cross examination. In his statement he says he killed deceased because deceased “was angry and jealous about my decision of selling my beasts and sending my children to the college.” The issue of self-defence is just a recent fabrication. It is a falsehood.

Accused testified that he did not strike deceased on the neck. He said he axed him on the head and on the back of the head. However in his defence outline he said he strike deceased on the head and neck. In his warned and cautioned statement he said he struck him on the head and neck. The post mortem report shows that he deceased was axed on the head and neck. There is evidence that he struck deceased on the head and neck. His denial that he struck deceased on the neck is inconsistent with the evidence before court.

The evidence shows that the accused was not under attack. The defence is predicated on a falsehood. Fandison Muleya and Moses Muzamba who witnessed accused striking deceased with an axe, testified that deceased did not attack the accused. The accused's version that he wrestled the axe from the deceased and eventually dispossessed the deceased is just a falsehood. The witnesses, who by his own version were seated four metres away could have easily seen this happening. Accused lied that he was holding the axe with one hand when he struck the deceased. It is a big axe, he could not have struck deceased in the manner he did and inflicted the injuries he caused holding that axe by one hand. He was holding it by two hands.

We mention that the State witnesses were truthful, honest and reliable as witnesses in this court. We accept their evidence as the truth of what they observed and we have no hesitation in relying on their evidence. The accused was not telling the truth to this court. His version of events is so false that it cannot be accepted as representing a true version of events in this case. From the totality of the evidence led herein, we find that the State proved its case against the accused beyond reasonable doubt.

State counsel submitted that this court finds accused guilty of murder in terms of section 47(1) (a) of the Criminal Law (Codification and Reform Act) [Chapter 9:23]. For this court to return a verdict guilty of murder with actual intent, we must be satisfied that the accused desired death, and that death was his aim and object or death was not his aim and object but in process of striking the deceased with the axe he foresaw death as a substantially certain result of that conduct and proceeded regardless as to whether death ensues. See: *S v Mugwanda* SC 215/01.

Accused used an axe to strike the deceased. The axe is before court, it has the following measurements: length of wooden handle – 68cm; circumference of wooden handle – 11cm; circumference of wooden handle head – 21cm; length of axe blade 18 cm; width of axe blade 11cm. This is a very big axe. The first strike was on the head. This strike produced a big sound

which scared the witnesses, and it produced a big wound. The deceased fell down with the axe still stuck on his head, and accused removed the axe and struck again on the neck when he was lying down. Severe force was used in striking the deceased. Fandison Muleya testified that it was like the accused had decapitated the deceased. Accused aimed at the head and the neck, with a big and sharp axe. The first blow standing alone was enough to cause the deceased, the second blow on the neck was just to ensure that he was finished off.

The post mortem report confirms these serious injuries inflicted by the accused on the deceased. The skull was fractured. The neck was fractured. The left shoulder was fractured. The witnesses actually said it was like the deceased's head been decapitated. This speaks to the weapon used, the part of the body targeted and force deployed.

The accused desired death, and death was his aim and object, and achieved his aim and object which was the death of the deceased. We are satisfied on the evidence before us, that the accused is guilty of murder with actual intent.

Verdict

Having carefully weighed the evidence adduced as a whole in this trial: the accused is found guilty of murder with actual intent as defined in terms section 47 (1) (a) of the Criminal Law (Codification & Reform Act) [*Chapter 9:23*].

Sentence

It is firmly established that in determining upon an appropriate sentence a court should have regard to the nature of the crime the accused has committed, the interests of the community and the individual circumstances of the accused. These considerations are commonly referred to as the '*Zinn triad*' after the often quoted decision of the Appellate Division that authoritatively confirmed them to be the relevant compass points. See: *S v Zinn* 1969 (2) SA 537 (A).

The accused is 58 years old. He is married. He has no assets of value. He resides in communal areas and survives on subsistence farming. He spent one day in pre-trial custody. He is a first offender.

The offence accused has been convicted of is grave and serious offence. The prevalence of the crime of murder is such that cognisance is sometimes lost of the extreme consequences that flow from it. A life is ended. Not only is a life ended, but the lives of family and friends are irreparably altered and damaged. It is for this reason that the rule of law requires that the perpetrator should generally be visited with severe punishment.

Accused committed a barbaric act of mindless brutality directed at another human being. The evidence shows that an extraordinary degree of violence was deployed against a defenceless human being. The violence that preceded the killing of the deceased was such as to place this crime in the category of the most serious. That the injuries inflicted were severe is borne out by the post-mortem report. Accused struck deceased twice with an axe, after the first struck he struggled to remove the axe from the head, and then struck again for the second time. The neck of the deceased was like decapitated.

What a horrible way to end the life of another human being. It is incumbent on this court to emphasize the sanctity of human life. Society frowns at the taking of another human being's life. The courts must send a loud and clear message that the killing of a fellow human being will not be tolerated.

Accused is 58 years old. He is in the afternoon of his life. We want to pass a sentence that will leave him with hope of release in the future. Because of his age we do not want a sentence that takes away from the offender all hope of release. However the sentence must still reflect the barbarity of this crime. It must still speak to the cruelty he meted out on the deceased. It must still make the point that this court will not tolerate the killing of another human being.

Taking into account the facts of this case we are of the view that the following sentence will meet the justice of this case:

Accused is sentenced to 25 years imprisonment.

*National Prosecuting Authority, State's legal practitioners
Mhaka Attorneys, accused's legal practitioners*

