

THE STATE

Versus

THANDAZANI NGWENYA

IN THE HIGH COURT OF ZIMBABWE

DUBE-BANDA J with Assessors Mr T.E Ndlovu and Mr S.L Bazwi
HWANGE 14 &15 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 2nd January 2021, accused unlawfully caused the death of Moffat Moyo (deceased) by striking him once on the head with a knobkerrie, 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. The accused tendered 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. The court entered a plea of not guilty and the trial proceeded on the murder charge.

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 prosecutor produced a confirmed statement made by the accused and it was received in evidence and is marked Exhibit 1. The prosecutor further produced a post mortem report and it was received in evidence and is marked Exhibit 2. A knobkerrie was produced and received in evidence and is Exhibit 3. The knobkerrie has the following measurements: length 93cm; weight 235g; circumference of head 15cm; and circumference of handle 6cm.

The prosecutor sought and obtained admissions from the accused in terms of section 314 of the Criminal Procedure & Evidence Act [*Chapter 9:07*] (CP & E Act). The admissions

related to the evidence of Sergeant Sigauke and Dr. Jekenya as contained in the summary of the State Case. The evidence Sergeant Sigauke is that on the 2nd January 2021, he received a report about this case. He proceeded to St. Lukes Hospital where the deceased was admitted. The deceased was unable to communicate, had a bandage on the head. He died on the 3rd January 2021. The police recovered the knobkerrie used in the attack of the deceased. He recorded a statement from the accused which was confirmed at court. The evidence of Dr. Jekenya is that he is a Medical Practitioner based at Mpilo Hospital. On the 4th January 2021, and during the course of his duties he examined the remains of the deceased and compiled his findings in a post mortem report number 03/03/21 (Exhibit 2).

The State called the oral evidence of three witnesses. We are going to briefly summarise their evidence. The first to testify was Providence Murewa. This witness and her husband are the owners of Jays General Dealer Shop, she sell grocery items and opaque beer. On the 1st January 2021, she opened the shop and served customers until at night. The accused and the deceased were amongst the patrons who were buying beer from her shop and she recalls serving them beer around 11 O'clock in the evening. The two amongst others continued drinking until the morning on the 2nd January 2021. In the morning accused entered the shop and said he was looking for his red cap. Deceased was intoxicated and accused was mildly intoxicated. People said they did not see the cap, accused then said he knows the person who took his cap, he said it was the deceased. The accused grabbed the deceased by the arm and said "let us go outside and talk about this issue." When they were outside this witness saw them exchanging fists. At that time six people had remained drinking beer, inclusive of the accused and the deceased. She asked people to stop the fight, deceased was taken inside the shop. She then asked someone to go and call accused's brother and deceased's mother, to take the two to their respective homes.

Accused's brother came and left with the accused, and deceased's mother came to take the deceased. Deceased was initially resisting to go home, but eventually agreed. Deceased eventually left in the company of his mother and one Joshua Sibanda. After deceased mother, deceased and Joshua Sibanda had walked for a distance this witness heard deceased's mother making a distressed call, saying "my child is dying."

In cross examination this witness testified that it was like deceased and accused were pulling each other. She was thirteen metres from the point where deceased and accused were like pulling each other. She was not able to hear what they were saying to each other. Asked

whether she saw deceased producing a knife, she said she did not see a knife. The accused and his brother were the first to leave the shop, then deceased in the company of his mother and Joshua left later. Providence Murewa was a very good witness, never stating more than she knew or believed. We accept her evidence without reservation.

The second witness to testify was Olalia Moyo. She testified that she is 73 years old. She has a hearing problem. She was deceased's mother. She referred to accused as her grandchild and a neighbour. She testified that on the 2nd January 2021, at around 8 O'clock in the morning Providence Murewa (1st State witness) sent a child to request her to come to the Shop. When she arrived at the Shop accused had left. Providence Murewa said take your child home. After some resistance deceased agreed to go home. She left the shopping centre in the company of deceased and Joshua Sibanda. The two were walking in front of her. She was following behind walking slowly. She suddenly heard a sound and she started screaming, saying "someone is killing my son." She saw accused striking deceased on top of the head with a knobkerrie. He struck him once. She saw some white stuff and blood coming out of the wound inflicted by the accused on the deceased. Accused just emerged from the bushes or shrubs. She did not hear accused say anything before he struck the deceased. She identified Exhibit 3 as the knobkerrie used by the accused to strike the deceased. He used the head of the knobkerrie to strike the deceased. Someone joined and grabbed the accused, to prevent further strikes on the deceased. Deceased was carried home. She phoned an ambulance and deceased was taken to hospital.

In cross examination she testified that she found accused at the shops, before she left with his brother. She did not see accused emerging from the bushes, she just heard the sound when he was striking the deceased. Accused's brother Mkhululi joined them after she screamed, and assisted to carry the deceased home.

In re-examination she was asked the reason she said in cross examination that she found the accused at the shops, when in her evidence in chief she had said she found him gone. Her answer was she was reminded by the cross-examiner. Olalia Moyo came across as a witness who had a reasonable recall of events. Her evidence was not challenged in any material respects and there is no reason not to accept it.

The third to testify was Joshua Sibanda. He testified that accused is his neighbour, and deceased was also his neighbour. On the 1st January 2021, at around 6 O'clock in the evening

he went to Jays General Dealer Shop to drink beer. He drank beer until sunrise on the 2nd January 2021. At around sunrise there was an altercation between deceased and the accused. He was seated outside the shop, the shopkeeper called for assistance to stop the fight between accused and the deceased. He helped to separate the two, deceased was taken inside the shop, and the accused was taken outside the shop. The shop keeper then asked someone to go and call deceased's mother and accused's brother.

Accused and his brother were the first to leave the shops. Deceased and this witness were intoxicated at the same level. He is not sure about the intoxication of the accused as he was a church person. This witness left the shops in the company of deceased's mother and the deceased. It was about forty minutes after accused and his brother had left the shops. He was walking with the deceased and they were talking. Deceased's mother was following them from behind. When they were near the homesteads, accused emerged from the bushes and stood in front of the two, and asked deceased saying "where is my cap." The deceased did not reply. This witness realised that the accused wanted to strike deceased with a knobkerrie, and he then stood between the two of them, i.e. deceased and accused. Accused had already lifted his knobkerrie, this witness lifted his hands to try and stop accused from striking the deceased. He does not know how deceased exposed his head, and he was then struck on the head. He was struck at the centre of the head. He identified Exhibit 3 as the knobkerrie used by the accused to strike at the deceased. He testified that deceased's mother was only two and a half metres away when deceased was struck.

The knobkerrie is made from hard wood, and is very strong. The accused struck deceased using severe force. Deceased was struck once on the head. Accused wanted to strike again and he was prevented by this witness and others who had joined them. The accused then escaped from the scene. The deceased was carried to his home. In cross examination he testified that accused emerged from the bushes. Accused's brother Mkhululi joined after deceased had already been struck once on the head with a knobkerrie. Joshua Sibanda appeared to be a credible and honest witness. He was not challenged in cross-examination and we accept his account of what happened without qualification.

At the conclusion of the testimony of the Joshua Sibanda the prosecution closed the State case.

Defence case

Accused testified in his defence. He testified that his cap went missing. When he asked about his cap, deceased started advancing towards him. He testified that he fought with the deceased, they were fighting over a cap. He said he asked for his cap and deceased started fighting him, and that is when deceased was taken inside the shop. He was not armed and it was the deceased who was armed with a knife. He did not see deceased mother at the shops, she referred to her as grandmother.

He left the shops with his brother and went home. When home they decided to go look for a cow that they had bought from somewhere. He then met deceased who started asking him about what happened the previous day. He then struck deceased with a knobkerrie and then ran away. He struck when deceased was advancing towards him. He was defending himself because he knew deceased had a knife. It was not his intention to kill the deceased.

In cross examination he admitted that he struck deceased once on the head with a knobkerrie. His intention was to strike him on the back of the head, but then struck the head. He used severe force because he was scared. He was holding the knobkerrie with one hand. He disputed that he emerged from the bush, he said he approached from a straight road. He says Joshua Sibanda, whom he referred to as uncle was trying to prevent the two from fighting. He conceded that when he struck deceased his brother (Mkhululi) was not present. He did not realise that deceased was going to die. He disputed that he waylaid or ambushed the deceased. The accused was not an honest and credible witness. At the end of the testimony of the accused, the defence closed its case.

Analysis of evidence

The evidence shows that accused and deceased had an altercation about the cap at the shops. Accused left the shops in the company of his brother, and the deceased left the shops about forty minutes later in the company of his mother and Joshua Sibanda. When deceased was on his way his, in the company of his mother and Joshua Sibanda, he was then struck by the accused with a knobkerrie once on the head. In his statement accused admits that he struck deceased once on the head. Further in his defence outline he admits that he struck deceased with a knobkerrie once on the head.

The post-mortem report shows that the deceased suffered the following injuries, under marks of violence: a longitudinal wound 5cm in the middle of the frontal region but slightly towards the left parietal region. There is a 3cm depressed frontal fracture near the midline. The cause of death was a depressed skull fracture, severe head injury and assault. 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 and others at Jays General Dealer's Shop. At around 01:00 hours, he missed his cap. He asked the deceased who became angry and sought to assault him. The deceased had an okapi knife. He was restrained by people. Accused then went home.
2. The following morning at around 08:00 a.m. accused was looking for cattle with Mkhululi when they met the deceased along a footpath. Deceased started shouting at him, saying he wanted to beat him. Accused then struck deceased once on the head with a knobkerrie and ran away.
3. He will tell the court that he had no intention to kill the deceased, 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 eye witness, Joshua Sibanda testified that when they were near the homesteads, accused emerged from the bushes and stood in front of them, and asked deceased saying "where is my cap." The deceased

did not reply. This witness realised that the accused wanted to strike deceased with a knobkerrie, and he then stood between the two of them, i.e. deceased and accused. Accused had already lifted his knobkerrie, this witness lifted his hands to try and stop accused from striking the deceased. He does not know how deceased exposed his head, and he was then struck on the head. He was struck at the centre of the head. He identified Exhibit 3 as the knobkerrie used by the accused to strike at the deceased. This evidence is corroborated by deceased's mother.

Deceased did not try to attack the accused. We are fortified in this finding by the fact that in his confirmed warned and cautioned statement, signed on the 27 July 2021, he did not mention that he acted in self-defence. In his statement he said:

I admit the allegations preferred against me where it is alleged I assaulted Moffat Moyo culminating in his death on the 3rd January 2021. I am the one who struck him with a stick once on the head resulting in him falling. I assaulted the deceased person after causing my cap to disappear whilst we were drinking beer at a local shop.

This was the first opportunity available to the accused to give the reason he struck deceased with a knobkerrie. The events of the 2nd January 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 issue of self-defence is just a recent fabrication. It is a falsehood.

The evidence shows that accused ambushed the deceased and struck him with a knobkerrie on the head. In his defence outline accused contends that in the morning at around 08:00 hours he was with his brother Mkhululi when they met deceased along a footpath. The acceptable evidence is that accused was alone and laid an ambush targeting the deceased. He conceded in cross examination that when he struck deceased his brother was not present at the scene.

The defence is predicated on a falsehood. The contention in the defence outline that the deceased said he will beat up accused is just a falsehood. His evidence that he struck when deceased was advancing towards him, and that he was defending himself because he knew deceased had a knife is just a lie.

Accused's evidence that he was holding the knobkerrie with one hand when he struck deceased is a lie. He conceded in cross examination that he used severe force when he struck

deceased. The post mortem report says severe force was used. The force was so severe that the strike caused white stuff and blood to ooze from the head of the deceased. The white stuff must have been the brain matter from deceased's head. This speak to the force used by the accused, and such force could not emanate from a knobkerrie held by one hand. He was holding the knobkerrie with two hands. The accused was just peddling lies in this court. 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 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 he foresaw death as a substantially certain result of that activity and proceeded regardless as to whether death ensues. See: *S v Mugwanda* SC 215/01. We do not agree that on the facts of this case it can be said that accused is guilty of murder with actual intent.

Defence counsel conceded that accused should be found guilty of murder in terms of section 47(1) (b) of the Criminal Law (Codification and Reform Act) [Chapter 9:23]. For this court to return a verdict of murder with constructive intent, we must be satisfied that accused did not mean to bring about death of the deceased but foresaw it as possibility whilst striking him with a knobkerrie and proceeded regardless as to whether death ensues. See: *S v Mugwanda* SC 215/01.

Accused used a knobkerrie made from hard wood. He struck deceased once on the centre of the head. He used severe force in striking the deceased. After the strike the witnesses saw blood and white stuff oozing from the head of the deceased. The force was so severe that the strike depressed and fractured the skull. This explains the white stuff (brain matter) that oozed from the head. The injuries observed by the pathologist speak to the severe force used in striking the deceased. Accused targeted the centre of the head, a delicate part of a human body. The evidence is sufficient to establish beyond a reasonable doubt a realization by the accused that there was a real risk or possibility that the conduct embarked on by him may result

in the death of the deceased and he continued to engage with such conduct despite the awareness of the risk or possibility of death

Verdict

Having carefully weighed the evidence adduced as a whole in this trial, the accused is found guilty of murder as defined in terms section 47 (1) (b) 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 31 years old. He is married, with three minor children. He has no assets of value. He resides in communal areas and survives on subsistence farming. He spent nine months 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. That the injuries inflicted are so severe is borne out by the post-mortem report. He just fractured the skull of the deceased. Accused struck deceased once with a knobkerrie on the head. Otherwise if he was not prevented, he was going to strike again and again.

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 31 years old. He is a first offender. We want to pass a sentence that will leave him with hope of release in future, with the hope that upon release he will contribute to the development of society.

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 15 years imprisonment.

National Prosecuting Authority, state's legal practitioners
Mhaka Attorneys, accused's legal practitioners