

THE STATE
Versus
INNOCENT SIBANDA
And
ERIC SIBANDA
And
ENNIAS MOYO
And
SIPHO TSHUMA
And
CHRISPEN MOYO

HIGH COURT OF ZIMBABWE
KABASA J with Assessors Mrs. Moyo and Mr. Mashingaidze
BULAWAYO 4 FEBRUARY 2020, 29 MARCH 2021 AND 7 APRIL 2021

Criminal Trial

Ms N Ngwenya, for the state
M Mpofu, for the 1st accused
S Nkomo, for the 2nd accused
A Ndlovu, for the 3rd accused
T Mabika, for the 4th accused
B Ncube, for the 5th accused

KABASA J: The accused appeared before us charged with murder as defined in section 47 of the Criminal Law (Codification and Reform) Act, Chapter 9:23. They all tendered pleas of not guilty. Whilst the record shows that 2 assessors sat, I must point out at this juncture that one of the assessors, Mrs. Moyo, resigned after accused 2 had closed his case. The trial thereafter proceeded with one assessor with the state and defence counsel's consent as per section 8(1) of the High Court Act, Chapter 7:06.

The state's allegations are that on 1st September 2017 at around 1500 hours and at Fungwe Restaurant, Killarney Business Centre, Filabusi, the deceased confronted accused 1 over an incident which had occurred sometime back. Accused 1 reacted by stabbing the deceased on the palms of his hands. Later that day at around 1900 hours the first accused in the company of the co-accused confronted the deceased who was in the company of his friends whilst they were seeking financial assistance in order to seek medical attention for the deceased. Accused 1 and his co-accused were armed. Sensing danger the deceased and his friends fled but the accused gave chase. The deceased fell whereupon accused one stabbed

him twice on the shoulder with a knife. Accused 2 hit him with a knobkerrie on the back of the head and accused five hit him with a log. The deceased managed to escape but collapsed and died about 200 metres from the scene.

In his defence accused one admitted stabbing the deceased on the palm of his hands and later on the shoulder but explained that he did so in self defence.

Accused 2 denied participating in the assault although he was in the company of the co-accused. His intention in going to the shops was to confront the deceased and his friends over the theft of gold ore.

Accused 3 denied being at the scene during the assault but arrived there after the incident.

Accused 4 was discharged at the close of the state case. This judgment does not therefore concern him and whatever part he had been alleged to have played in the commission of the offence.

Accused 5 denied ever assaulting the deceased but only observed that the deceased was bleeding from his hands.

At the commencement of the trial the following documentary exhibits were produced by consent:-

- a) The accused's confirmed warned and confirmed statements.
- b) The post mortem report compiled by Doctor Pesanai who examined the body of the deceased.

The statements of seven witnesses were also admitted into evidence in terms of section 314 of the Criminal Procedure and Evidence Act, Chapter 9:07.

The state proceeded to lead evidence from four witnesses. The first three witnesses were in the deceased's company at the shops where they were trying to get financial assistance from the fourth witness so the deceased could get medical attention on the wounds he had sustained at the hands of accused I earlier on that day.

The witnesses' evidence was more or less the same as each one narrated how the accused approached them before they all fled after accused 1 had shot at one of them with a catapult.

Nkosikhona who was the first witness said he ran away first and deceased was running behind him. The deceased fell but the witness continued running as he was still being pursued. He evaded his pursuers when he fled into a thorny thicket and did not witness the assault on the deceased.

The second witness Fedious was at the shops when the deceased sustained the injuries on the palms of his hands. That was why they were at the shops later that evening so as to get financial assistance for deceased's medical expenses. The accused arrived as the witness and his friends were talking to the fourth witness. When accused 1 shot from his catapult he fled into the fourth witness's motor vehicle whilst deceased, Nkosikhona and Davison fled in the same direction whilst being pursued by the accused. He too did not witness the assault on the deceased and later learnt of the deceased's death.

Passmore who was the third witness said he fled into the shop after he was shot at with the catapult whilst Fedious ran into the motor vehicle and the others ran away from the shop area. He then stood by the shop entrance and saw accused 2 and 5 striking the deceased after he had fallen. The deceased managed to get up and resumed his flight into the darkness. Passmore later learnt of the deceased's fate and proceeded to the place where deceased was lying in a pool of blood.

The last witness Mrs Komboni was who the witnesses called "the sponsor" from whom the witnesses were asking for financial assistance.

She confirmed the unfolding of the events which led to the deceased and his friends fleeing from where she had parked her motor vehicle. Four people pursued them. Accused 1 and 2 later returned and wanted to assault Passmore but were restrained from doing so. Shortly thereafter they received news about the deceased.

These witnesses gave the impression of people who were merely relating what they observed on the day in question. None of them appeared to be bent on exaggerating or embellishing their evidence. They were credible witnesses.

Nkosikhona was candid in his admission that he only saw accused 1 and did not witness the stabbing. Had he been bent on lying just so as to nail all the accused he could easily have said he managed to watch from the thorny thicket where he had sought refuge and saw who assaulted the deceased and with what.

For people who were on a mission to get help from Mrs Komboni something must have happened to cause them to flee and abandon their mission. At the time they abandoned this mission Mrs Komboni was examining deceased's injured hands, clearly showing that deceased and his friends' purpose at the shops was not to fight but to seek help.

Nkosikhona's evidence was materially corroborated by the other witnesses as to what it is that caused the deceased and his friends to flee from where Mrs Komboni's motor vehicle was parked.

It was suggested by the defence that Passmore was not being truthful when he said he managed to see accused 2 and 5 assaulting the deceased after he fell because he was standing at the shop entrance. This assertion was premised on the fact that Mrs Komboni testified to the effect that Passmore did not leave the shop after he sought refuge therein.

However Mrs Komboni in her testimony said she only followed into the shop about 10 minutes or so later. She was terrified at what was going on. That being so Mrs Komboni would not be in a position to say with certainty what Passmore did in those 10 minutes. More so as it was not Passmore's evidence that he actually went out of the shop, he stood by the entrance and that would not have taken much effort to do, an effort which could be said would have drawn Mrs Komboni's attention to him.

Accused 5 actually admitted hitting the deceased with a log and accused 2, whilst denying that he had a knobkerrie, accepted that he had a stick. Whether that weapon could be described as a knobkerrie or just a stick is neither here nor there. The point is he had a weapon which resembled a knobkerrie and Passmore said he saw him use that knobkerrie to assault the deceased whilst accused 5 used a log. Accused 5 admitted using a log to assault the deceased.

Passmore was therefore narrating what actually happened and not the product of a fertile imagination. He could only have given such a narration because he observed it

happening. Mrs Komboni in her frightened state did not see even that which accused 5 admitted to and so her evidence cannot be taken as evidence pointing to the unreliability of Passmore's testimony.

Granted Fedious's evidence on the identity of the two people who came back and intended to assault Passmore differed with Passmore and Mrs Komboni's. Fedious said it was accused 1 and 3 whilst Passmore and Mrs Komboni said it was accused 1 and 2. There is no doubt however that accused 3 at one stage came into the shop warning Passmore against involving himself in issues that did not concern him.

The fluidity of the events as they unfolded and the tense atmosphere could have resulted in some confusion for Fedious as to who got hold of Passmore but the overall evidence makes this discrepancy pale into insignificance.

What was very clear was the fact that the deceased and his friends had gone to the shops to seek for financial assistance. As soon as Mrs Komboni arrived at the shops they made a bee-line for her car and promptly stated their case.

It is therefore not difficult to accept that they were not armed as they had no reason to be armed.

On the other hand the accused were armed. Accused 1 said on their way to the shops they met a young man and they asked him whether Nkosikhona and his friends were at the shops. This clearly shows that it was accused 1 and his friends who went out in search of the deceased and his friends and they were armed. Accused 1 confirmed his friends had logs and a pick handle. He had a catapult. If all they wanted was to ask why the afternoon incident had occurred since the earlier issue of theft of gold ore had been resolved, why go armed to the teeth? Does this speak of people who only wanted to talk? We think not.

It is equally not in dispute that the deceased was pursued. By fleeing, the deceased had clearly demonstrated that he was not out to fight. Had he not been pursued he would not have lost his life.

The following exchange between state counsel and accused 1 demonstrates who the aggressors were on this fateful day. This is the exchange:-

“Q - You chased after deceased and his friends.

A - Yes

Q - So you chased after deceased and he tripped and fell.

A - When I turned deceased appeared armed with a knife and I disarmed him and stabbed him.

Q - Where did you stab him.

A - Somewhere on the shoulder.

Q - Post mortem shows deceased was stabbed at the back of the shoulder, shows he was fleeing and you stabbed him from the back.

A - He fell down.

Q - He was stabbed from the back.

A - He fell when I disarmed him, then I stabbed him.”

The foregoing speaks to the fact that the deceased was no threat to accused 1 when he was stabbed. How can a person who is fleeing be a threat?

Section 253 of the Criminal Law (Codification and Reform) Act, sets out the requirements to be met where a person raises self defence. Were these requirements met *in casu*?

There was no imminent attack and no attack had commenced as the deceased was fleeing. He was not only fleeing but he tripped and fell rendering him defenceless.

There was no unlawful attack on the first accused or his co-accused, a person fleeing cannot be on the offensive.

Accused 1's conduct was not necessary for not only was there no attack but he said the deceased was on the ground when he stabbed him from the back.

The requirements for a defence of self defence were therefore not met. If there was any truth in the story of self defence proffered by accused 1 such would have come out at the

very earliest opportunity he had to state his side of the story. That opportunity was availed to him when he gave his warned and cautioned statement which was duly confirmed.

In that statement accused one said:-

“I admit to the allegations leveled against me. I had a misunderstanding with Professor Ndlovu over an issue that we once assaulted them. It is him who approached me with an intention to assault me with his colleagues. I initially stabbed him with a knife on both hands. Later on that night I stabbed him again on the shoulder.”

That night is when accused 1 inflicted the fatal stab wounds and yet there is nothing in his statement to show what threat he was under necessitating the use of a knife.

The injuries observed by the doctor who conducted the post mortem are very telling on how the assault was perpetrated. The doctor observed the following:-

- “1. stab wound right shoulder back (5 x 3 x 2 cm)
2. stab wound right upper shoulder (7 x 3 x 1 cm)”

The doctor also made the following remarks:-

“The stab wound above the right scapula bone went from back to front, top to bottom right to left and perforated the right jugular vein.”

The cause of death was:-

- “1. Haemorrhagic shock
2. Perforated right jugular vein
3. Stab wound
4. Assault”

For a person who had been rendered defenceless after he tripped and fell, the first stab wound whose dimensions shows that the knife was plunged into his shoulder must have rendered him even more defenceless. A second stab wound with dimensions which again show that the knife was plunged in with considerable force was demonstrative of an aggressor who was out to mete out their own brand of unmitigated vengeance. It is no

coincidence that a knife was used and it is not stretching it to conclude that it must have been the same knife accused 1 had used that afternoon.

In the circumstances is self defence available to first accused? The answer is No. That said, what was his intention when he inflicted these wounds? Did he intend to kill the deceased or he realised the real risk or possibility that his conduct may cause death but continued to engage in that conduct despite the risk or possibility?

Can it be said that accused 1 desired death and that was his aim and object? (*State v Herold Moyo* HB 19-17).

There is no doubt a knife is a potentially lethal weapon and when used to stab a human being can result in serious injury or the severing of a vital organ leading to death as happened *in casu*. The jugular vein was perforated resulting in the deceased's death.

Although accused 1 sought to suggest that he was under attack that story was shown to be beyond doubt false. (*R v Difford* 1937 AD 373).

In *State v Jealous Tomasi* HH 217-16 KUDYA J cited CHIDYAU SIKU CJ's decision in *State v Mugwanda* 2002 (1) ZLR 547 (S) where the learned CJ held 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.

Regard being had to the part of the body that accused 1 aimed the blows and the number of stab wounds inflicted we are not satisfied that accused 1 set out to cause death and succeeded in doing so.

However, by using a knife to stab the deceased, not once but twice and with such force as to penetrate the deceased's body to the extent observed by the doctor, he must have realised that there was a real risk or possibility that his conduct may cause death but continued nonetheless despite that risk or possibility.

Turning to accused 1's co-accused, the question is "did the evidence show that accused 2, 3 and 5 acted with a common purpose with accused 1 in causing the deceased's death and had the requisite *mens rea*" (*S v Safatsa and Others* 1988 (1) SA 868). Has it been shown that these 3 associated themselves with the actions of the first accused? If that is so

then the casual connection of each accused's action in causing the death is not the issue but the presence of the requisite *mens rea*. There was no evidence to show that the 3 were aware that accused 1 was armed with a knife which was likely to be used in the event that a fight broke out between the two groups. There was also no evidence to show that the accused had agreed beforehand to cause the deceased's death.

Secondly the post mortem report makes no reference at all to injuries which were likely to have been caused by anything else other than a knife.

Whilst the witnesses testified to observing 4 people chasing after the deceased, it was Passmore who saw accused 2 and 5 using a knobkerrie and a log on the shoulder and the head. However it is important to note that the deceased got up and fled into the dark and that is where he was stabbed by accused 1. It was not clear where accused 2 and 5 were at that time.

We therefore find it difficult to hold that there was common purpose justifying a conviction of the 3 accused on a charge of murder. There is however no doubt that accused 2 and 5 assaulted the deceased that night. Accused 5 admitted as much. Accused 2 sought to mislead the court when in his defence outline he stated that the reason they went to the shops that evening was to confront the deceased and his friends over gold ore which had been stolen. There was no truth in this assertion as the issue of the gold ore had been dealt with well before this fateful day. The purpose of the visit to the shops was to confront the deceased over an incident that had occurred earlier that day. Accused 2 was therefore not being truthful.

Passmore knew accused 2 very well and stated that accused 2 and 3 were close friends who were always together. He was therefore able to identify accused 2 who was armed with a knobkerrie, a fact accused 2 accepts although he described it as a stick.

The evidence against accused 2 is therefore not purely circumstantial as Passmore witnessed the assault. It was also accused 2 who intended to assault Passmore but was restrained by accused 4.

It must be borne in mind that the identification of someone one knows is usually more reliable than identification of a stranger. (*S v Nkomo* SC 142-89, *R v Turnbull* 1976 3 ALL ER 549).

At the time he made these observations Passmore was not under attack. All the accused had pursued the deceased. It can therefore not be said Passmore was inhibited from properly observing because he was under attack. He did not have a fleeting glance at the deceased's pursuers and his decision to stand by the shop entrance was so he could observe what was happening.

This was not a drunken brawl where a lot of people were involved and so there was nothing militating against Passmore's ability to observe.

We are therefore satisfied that he did see accused 2 and accused 5 assaulting the deceased in the manner he described.

Turning to accused 3, whilst evidence placed him at the shops when he warned Passmore not to meddle in affairs that did not concern him, there was no evidence linking him to the assault on the deceased.

He could have been the fourth person seen chasing after the deceased but given the uncertainty regarding accused 4's presence which led to his acquittal at the close of the state case, we are not satisfied that there was evidence linking the third accused to the assault.

With that said we are satisfied the state proved its case beyond a reasonable doubt as against accused 1, 2 and 5 and we accordingly return the following verdicts:-

Accused 1 – Guilty of murder as defined in section 47 (1) (b) of the Criminal Law (Codification and Reform) Act, Chapter 9:23.

Accused 2 – Guilty of assault as defined in section 89 (1) (a) of the Criminal Law Code.

Accused 3 – Not Guilty and Acquitted.

Accused 5 – Guilty of assault as defined in section 89 (1) (a) of the Criminal Law Code.

Reasons for Sentence

In assessing sentence we have considered the following in mitigation:-

Accused 1 - you are a first offender. You were 20 at the time of the commission of the offence and you are 23 years old now. You were youthful then and you still can be described as youthful now.

You have a 1 year old child who is likely to be affected by the lack of a father's influence in his/her life.

Your parents assisted at the deceased's funeral, a factor which demonstrated their and your regret at what had happened.

You have spent 1 year 2 months in pre-trial incarceration.

The death of the deceased is likely to haunt you for the rest of your life. The stigma that comes with being labeled "a murderer" is a burden that will weigh heavily upon you.

In aggravation is the fact that you took a life. The deceased was only a year older than you at 21. He was in the prime of his life.

Life is not to be taken away from another by another. Courts emphasize the sanctity of life. It is a gift that we all are given once, live once and once taken we cannot have it back.

The deceased's death was uncalled for. You had inflicted injuries on him that afternoon but you were not done yet. The deceased ran away but so determined were you to harm him that you pursued him, inflicting the mortal wounds in the process.

You started at the deep end of crime, whilst the punishment must fit both you as the offender and the offence, it must also reflect the seriousness of what you did. Society expects no less.

As for you accused 2 and 5 you were also youthful at the time of the commission of the offence. You were both 21.

You both stand convicted of a lesser offence. The force used to assault the deceased was not severe given the fact that there were no visible injuries or a fracture observed by the doctor who conducted the post mortem.

You have spent 1 year 8 months and 3 years 7 months respectively in pre-trial incarceration. Even if the matter had been concluded closer to the time of commission you were very unlikely to have received sentences in this range.

The penalty provision for the offence you stand convicted of provides for a fine. The courts should always look to the fine first unless the offence is particularly bad such that a fine would not be appropriate.

Not much can be said in aggravation, except that you allowed yourselves to be drawn into a matter that you ought not to have participated in. Your presence may have added adrenalin to the first accused, a fact which whilst not making you as bad as accused 1, still shows you in bad light.

The mitigatory factors however far outweigh the aggravatory ones.

Whilst it will not serve the interests of justice to send you back to prison given the period of pre-trial incarceration, the nature of what you do, being artisanal miners, an occupation you are most likely going to go back to, makes it necessary to impose a sentence which will hang over your head and regulate your future conduct.

For these reasons you are each sentenced as follows:-

Accused 1: 12 years imprisonment.

Accused 2 and 5 – Each:- 3 months imprisonment, the whole of which is suspended for 5 years on condition you do not within that period commit an offence of which an assault on the person of another is an element and for which upon conviction you are sentenced to a term of imprisonment without the option of a fine.

National Prosecuting Authority, state's legal practitioners
Samp Mlaudzi and Partners, 1st accused's legal practitioners
Mathonsi Ncube Law Chambers, 2nd accused's legal practitioners
Dube and Associates, 3rd accused's legal practitioners

Mugiya and Muvhami Law Chambers, 4th accused's legal practitioners
Mweli Ndlovu & Associates, 5th accused's legal practitioners