

THE STATE

Versus

BOTHWELL MOYO

IN THE HIGH COURT OF ZIMBABWE

DUBE-BANDA J with Assessors Mr Matemba and Mrs Sithole

GWERU 26 & 27 MAY 2021

Criminal Trial

M. Ndlovu, for the State

B. Nyabawa, for the accused

DUBE-BANDA J: The accused is charged with the crime of murder as defined in section 47(1) of the Criminal Law (Codification and Reform) Chapter 9:23. It is alleged that on the 27 April 2017, and at South Devon Shavi River, Zvishavane, the accused person unlawfully caused the death of Brian Bushe (deceased), by striking him with machetes on the head and all over the body, stabbing him with knives on the hands and back as well as detonating explosives and throwing stones at him, intending to kill him or realising that there was a real or possibility that his conduct may cause the death and continued to engage in that conduct despite the risk or possibility.

Accused was initially charged with two other persons. At the commencement of this trial the state, in terms of section 190 of the Criminal Procedure and Evidence Act [Chapter 9:07] applied for separation of trials. The application was not opposed, and it was accordingly granted.

The accused pleaded not guilty to the charge. He was legally represented throughout the trial. The State tendered an outline of the state case, which is before court and marked Annexure A. It now forms part of the record. The accused tendered into the record an outline of his defence case, which is before court and marked Annexure B. The state produced a confirmed warned and cautioned statement recorded by the police on the 3rd May 2017, and confirmed on the 21st August 2017. The statement is before court as Exhibit 1. The statement reads:

I do not admit the charge. The deceased with his gang attacked us during the night in the bush and during the altercation I do not know who stabbed the deceased or what caused him to drown.

The State tendered a post mortem report compiled by Dr S. Pesanai, at United Bulawayo Hospitals on 2nd May 2017. The report is before court and marked Exhibit 2, it shows the injuries sustained by the deceased and cause of his death. The Pathologist concluded that the cause of death was: asphyxia; drowning; subarachnoid haemorrhage; head injury and assault. The State placed before court two unused capped detonating fuses. Fuse 1: length 120 cm; green in colour; purple at one end, and silver on the other end. This fuse is before court as Exhibit 3A. Fuse 2: length 90 cm; green in colour; red on one end, silver on the other end. This fuse is before court as Exhibit 3B.

The prosecutor sought and obtained admissions from the accused in terms of s 314 of the Criminal Procedure & Evidence Act [*Chapter 9:07*]. These related to the evidence of certain witnesses as contained in the summary of the state. That is, the evidence of Dr S. Pesanai, who examined the remains of the deceased and recorded a post mortem report. The evidence of Florence Majambira, she knows the accused person as someone who resides in the locality. She knew the deceased as her son. On the 27 April 2017, in the evening, Evans Sibanda (1st witness) arrived at her home and reported to her that the deceased had been attacked at Shavi River. She in the company of Evans Sibanda reported the matter at the police station. She attended the scene in the company of the police. At the scene she saw unused fuses on the side of the dam. She also observed drops of blood on some rocks on the edge of the dam as well as the deceased's pair of trousers. Since the dam was deep, no one entered and she went home. Later the deceased's body was brought home for burial.

The evidence of Nicholas Marekwa. He is a member of the Zimbabwe Republic Police (ZRP) stationed at ZRP Support Unit Sub-Aqua Section, in Buchwa. He recovered the body of the deceased under water Shavi River, near Sabi Gold Mine. He observed that the body of the deceased had multiple injuries which were consistent with a sharp object. There were also pieces of explosives and struggle marks on the ground. The evidence of Leonard Mubaiwa, He is a member of the ZRP. On the 2 May 2017, he collected the body of the deceased from Zvishavane District Hospital mortuary and ferried it to United Bulawayo Hospitals for a post mortem examination. The body of the deceased did not suffer further injuries during transportation to United Bulawayo Hospitals. The evidence of D/Sgt. Murewa

and D/Sgt. Chiwawa, members of the ZRP, who recorded a warned and cautioned statement from the accused. Sehluselo Khumalo, a member of the ZRP, who identified the body of the deceased to Dr. S Pesanai, who conducted a post mortem report.

The state called two witnesses and accused testified in his own defence. We are going to summarise the evidence briefly. The first state witness was to testify was Evans Sibanda. He resides in Village Majoni, Chief Mazvihwa, Zvishavane. He knew accused person as a local person. He knew the deceased in his lifetime as a local resident and his friend. This witness testified on the 27 April 2017, in the company of his colleagues, who included the deceased, where coming gold panning. His group had seven men. Each man was carrying a bag containing gold ore. The witness's bag was weighing 50 kg. This witness and his colleagues, met accused who was in a large group of man, numbering approximately fifty. Accused was leading this group of men. These men were armed with machetes and axes. It was approximately 7 p.m. and each group had torches, which provided light. He says visibility was good. Members of his group were walking in a single file. He was 5 metres from the deceased. As these two groups met, accused and one member of his group got hold of the deceased. After getting hold of deceased, they assaulted him. They assaulted him with machetes. Accused struck him on the head. Other two members of the group struck him on the back. Deceased after freeing himself from the accused and his group, ran towards the dam, and the accused and other gave chase. Deceased ran and dived into the dam. He did not see deceased diving into the dam, had some noise, suggesting that someone had dived into the water. Accused and his colleagues surrounded the dam, and detonated explosives into the water. At this point the witnesses escaped. This witness reported the matter to deceased's mother.

The second witness to give oral evidence is Sipho Ndlovu. He is the investigating officer in this matter. He recorded statements from witnesses. He arrested accused and other persons in connection with this case. He requested the accused and these other persons, to accompany him to the scene of crime for indications. All refused, alleging that they fear assault from the villagers. The witness was accompanied to the scene by the Evans Sibanda. The width of the dam is between 20 to 30 metres; length 50 metres, and depth was about 10 metres. Picked some unused fuses at the scene, i.e. Exhibits 3A and 3B. In cross examination he testified that he did not recover the weapons used to assault the deceased because the

accused and some members of his group hid them. After the conclusion of the testimony of Siphon Ndlovu, the prosecution closed its case.

Defence case

Accused testified that on the 27 April 2017, at approximately 9 p.m. he and his group of men, numbering 63, were going to do gold panning at Sabi Gold Mine. Some members of his group had their gold ore taken from them by the deceased and his group. As his group arrived at Sabi Gold Mine, it met the deceased and his group. This group was walking in a single file. He had noise about 45-50 metres from where he was in the single file. He saw some members of deceased's group running towards his group. As this group was running, some were complaining that their gold ore had been taken. Accused testified that he had nothing to do with this commotion because, he gold ore was not taken, and he had taken no one gold ore. When he returned home, he was told the police were looking for him and other members of his group. He and others surrendered themselves to the police station, in the company of a lawyer they met on the way to the station. He testified that he was reported in this matter because of a grudge that started in December 2016.

In cross examination, this accused testified that on the night in question, he neither saw deceased nor Evans Sibanda, but saw some members of the deceased's group. He denied that when the two groups met, visibility was good. He accepted that both groups were using head-torch. He denied that he had a machete. He denied that he attacked deceased with a machete.

The law and analysis of evidence

In criminal proceedings, the State bears the onus to prove the accused's guilt beyond a reasonable doubt. The accused's version cannot be rejected only on the basis that it is improbable, but only once the trial court has found, on credible evidence, that the explanation is false beyond a reasonable doubt. The corollary is that, if the accused's version is reasonably possibly true, the accused is entitled to an acquittal. Equally trite is that the accused can only be found guilty if, after consideration of all the evidence, his version of events is found to be false. See: *S v V* 2000 (1) SACR 453 (SCA) at 455B; *S v van der Meyden* 1999 (1) SACR 447 (W) at 448f-h and 450a-c.

Evans Sibanda is a single witness in respect of the actual striking of the deceased with machetes and axes. No other witness testified that he or she was present when the actual assaulting of the deceased occurred. In terms of section 269 of the Criminal Procedure and Evidence Act [Chapter 9:07], an accused may be convicted of any offence of murder on the single evidence of any competent and credible witness. It is trite law, however, that, as a result of the danger of relying exclusively on the sincerity and perceptive powers of a single witness, a judicial practice has evolved that such evidence be treated with special care. The cautionary rule originated in remarks made by De Villiers, JP in *R v Mokoena* 1932 OPD 79, to the effect that the evidence of a single witness should only be relied upon where it is “*clear and satisfactory in every material respect*”. However, over the years a more flexible approach to the testimony of a single witness has been generally accepted. This follows the decisions in cases such as *R v Nhlapo* 1953 (1) PH H 11 (A), *R v Bellingham* 1955 (2) SA 566 (A), *R v Abdoorham* 1954 (3) SA 163 (N), *R v Mokoena* 1956 (3) SA 81 (A).

In *R v Nhlapo* 1953 (1) PH H 11 (A), it was stated that the cautionary rule may well be helpful as a guide to the right decision, it naturally requires judicious application and cannot be expected to provide, as it were automatically, the correct answer to the question of whether the evidence of the state witness should be accepted as truthful and accurate. The court added that it does not mean that an appeal must succeed “if any criticism, however slender, of a witness’s evidence were well founded”. In *R v J* 1966 (1) SA 88 (SRA), the court expressed the view that the cautionary rules are “no more than guides, *albeit* very valuable guides, “which assist the Court in deciding whether the Crown has discharged the *onus* resting upon it”. The court added that the exercise of caution should not be allowed to displace the exercise of common sense. And once a judicial officer has anxiously scrutinised the evidence of a single witness he should not be ‘swayed’ by fanciful and unrealistic fears. The courts have stated that there is no rule of thumb test or formula to apply when it comes to a consideration of the credibility of a single witness. The trial Judge will weigh his evidence, or consider its merits and demerits and, having done so, will decide whether it is trustworthy and whether, despite the fact that there are shortcomings or defects or contradictions in the testimony, he is satisfied that the truth has been told.

Evans Sibanda, as a single witness, his evidence should accordingly be treated with caution. This caution must not displace the exercise of common sense. He testified that he knows the accused as a local person. His knowledge of the accused was not disputed. In fact in his evidence, accused confirmed that the two i.e. Evans Sibanda and accused knew each

other. Therefore, there can be danger of a mistaken identification. Evans Sibanda testified that visibility was good, and that he saw accused in a group of men armed with machetes and axes. As these two groups met, accused and one member of his group got hold of the deceased. After getting hold of deceased, they assaulted him. They assaulted him with machetes. Accused struck him on the head. Other two members of the group struck him on the back. Evans Sibanda testified that he was 5 metres from the deceased when all this happened. Deceased after freeing himself from the accused and his group, ran towards the dam, and the accused and other gave chase. Deceased ran and dived into the dam. He did not see deceased diving into the dam, had some noise, suggesting that someone had dived into the water. Accused and his colleagues surrounded the dam, and detonated explosives into the water.

The evidence of Evans Sibanda is corroborated in material respects, by the following: in his confirmed statement, accused avers that the deceased and his group attacked the accused and his group, and as a result of the altercation, he does not know who stabbed the deceased or what caused him to drown. This shows that accused was at the scene. His evidence that he was far from the fight and only heard the noise, cannot be reasonably possibly true. Evans Sibanda, testified that deceased was struck with a machete and axes, the post mortem report speaks to injuries arising from such assaults. The evidence of Nicholas Marekwa, received in terms of section 314 of the Criminal Procedure and Evidence Act, shows that the body of the deceased had multiple injuries which were consistent with a sharp object.

Evans Sibanda testified to the detonating explosives into the water. Some unused fuses were recovered at the scene. Evans Sibanda was cross examined on the statement he gave to the police *vis a vi* his evidence before court. The statement was not handed in as an exhibit. We accept that a cross examiner may cross examine on a document without it being handed in as an exhibit. However, we take the view that, if there is cross examination on the content of the document, or if it is used to contradict the witness, the document must be handed in. See: Pretorius JP *Cross-Examination in South African Law* (LexisNexis Butterworths 1977) 315. However, nothing turns on the failure by the defence to hand in the document in this case, as the cross-examination did not affect the credibility of the witness. We are satisfied that Evans Sibanda is credible witness and that the truth has been told. The

evidence of Evans Sibanda, because of its credible nature, is accepted. Accused, defence that he did not assist, participate in or come into any physical contact with deceased rejected as false.

The state alleges that the accused person acting in common purpose with other not before court cause the death of the deceased. In such a case, the state must prove the existence of a common purpose to commit the crime charged, i.e. murder. In terms of section 196A of the Criminal Law [Codification and Reform] Act, the doctrine of common purpose is part of our law. *S v Ndebu and Another* 1986 (2) SA 133 (ZSC); *S v The bus and Another* 2003 (2) SACR 319(CC). In terms of the principles of common purpose, in the absence of prior agreement, liability arises from active association and participation in the criminal design. In this case, the issue is, did the accused actively associate himself and participate in a common criminal design with the requisite blameworthy state of mind? In *S v Mgedezi and Others* 1989 (1) SA 687 (AD) at 705I-706C, Botha JA stated the following regarding concept of common purpose:

In the absence of proof of a prior agreement, accused no. 6 who was not shown to have contributed causally to the killing or wounding of the occupants of room 12, can be held liable for those events, on the basis of the decision in *S v Safatsa and Others* 1988 (1) SA 868 (A), only if certain prerequisites are satisfied. In the first place, he must have been present at the scene where the violence was being committed. Secondly, he must have been aware of the assault on the inmates of room 12. Thirdly, he must have intended to make common cause with those who were actually perpetrating the assault. Fourthly, he must have manifested his sharing of a common purpose with the perpetrators of the assault by himself performing some act of association with the conduct of the others. Fifthly, he must have had the requisite *mens rea*; in respect of the killing of the deceased, he must have intended them to be killed and performed his own act of association with recklessness as to whether or not death was to ensue.

First, was the accused present at the scene of the crime? The evidence of Evans Sibanda places the accused at the scene of crime. Accused in his confirmed statement places himself at the scene of crime. On the objective facts of this case, we find as a proved fact, that the accused was present at the scene of crime. Secondly, was the accused aware of the assault on the deceased? The evidence of Evans Sibanda is that accused struck deceased with a

machete, and participated in running after the deceased until he dived into the dam. The evidence is that accused and his colleagues surrounded the dam, and detonated explosives into the water. Again, we find it as factually proved that the accused was aware and participated in the assault on the deceased. Third, did accused intend to make common cause with the group that was assaulting the deceased? His act of striking the deceased with a machete shows that he intended to make common cause with the other members of the group that was assaulting the deceased.

Fourth, he must have manifested his sharing of a common purpose with the group by himself performing some act of association with the conduct of the others. He manifested his sharing of the common purpose by striking the deceased with a machete, as described above. Fifth, he must have had the requisite *mens rea*; in respect of the killing of the deceased, he must have intended him to be killed and performed his own act of association with recklessness as to whether or not death was to ensue. As outlined above, he hit the deceased with a machete. By striking deceased with a machete and being part of the group that pursued deceased until he dived in the dam and drowned, accused had the requisite *mens rea*; in respect of the killing of the deceased. He must have intended him to be killed and performed his own act of association with recklessness as to whether or not death was to ensue.

Did the actions of the accused and his group cause the death of the deceased? The Pathologist concluded that the cause of death was: asphyxia; drowning; subarachnoid haemorrhage; head injury and assault. Section 11 of the Criminal Law (Codification and Reform) Act, deals with causation as follows:

- (1) A person shall not be held criminally liable for a consequence unless the person's conduct caused or substantially contributed to its occurrence.
- (2) A person's conduct shall be deemed to have caused or substantially contributed to a consequence for the purposes of subsection (1) if the conduct—
 - (a) is the factual cause of the consequence, that is, but for the conduct the consequence would not have occurred; and
 - (b) is the legal cause of the consequence, that is, the consequence—
 - (i) was a reasonably foreseeable consequence of his or her conduct; or
 - (ii) was brought about by a new cause supervening after his or her conduct, which cause was itself a reasonably foreseeable consequence of his or her conduct.

The totality of the evidence is that death was a direct result of the actions of the accused and his group. They assaulted deceased with machetes and axes, made him dive into the dam, and to finish him off, throw explosives in the dam. We find that accused and his

group caused the death of the deceased. In sum, all of the pieces of the evidence, when sewn together, create an impregnable mosaic of proof against the accused. We find that the state proved its case beyond reasonable doubt. See: *Tafadzwa Watson Mapfoche v The State* HH 348/18 and *The State v Kudakwashe Firisiyano* HH 564/14.

Mr *Ndlovu*, counsel for the State, invited this court to find accused guilty 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 aim and object but in process 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. Accused and his group assaulted deceased with machetes and axes, made him dive into the dam, surrounded the dam to ensure he does not escape, and to finish him off, throw explosives in the dam. We are satisfied on the evidence before us, that the accused desired death, and that death was his aim and object or death was not him aim and object but in process foresaw death as a substantially certain result of his actions and proceeded regardless as to whether death ensues.

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 did not lead evidence in mitigation of sentence. He placed the following personal circumstances before the court through the medium of his legal practitioner.

Accused is now 34 years old. He was 30 years old at the time of the commission of the offence. He is a family man, with three minor children. He is the sole provider of his family. Further, it was put on record that accused is a first offender. He has been in pre-trial incarceration for a period of four years. The court must weigh these mitigating features against the aggravating factors and the interests of justice.

On the other side of the pendulum, the court factors into the sentencing equation the following factors. The deceased was killed in the most horrific manner imaginable. He was struck with machetes and axes. He tried to escape, he was pursued. By trying to escape he had surrendered. The accused could not be swayed. Deceased dived into a dam. Accused and his group surrendered the dam. Throw explosives into the water to finish him off. Accused committed a barbaric act of mindless brutality. That the injuries inflicted by the accused were severe is borne out by the post-mortem report. The evidence shows that an extraordinary degree of violence was deployed against another 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. It is difficult to conceive what the victim experienced in his last moments.

What a horrible way to end the life of another human being. The throwing of explosives into the water to finish him off, was inhuman and heinous. The deceased was killed as if he was a wild animal. This court must say it, and say it strongly that such conduct will not be tolerated. This court has taken a stand, and it will continue taking a stand, against this wanton violence and destruction of life. This court must send an appropriate signal in such case. Such conduct must be answered with appropriate punishment. The moral blameworthiness of the accused is very high. See: *S v Enock Sibanda* HB 151/20.

After taking all factors in to account, we find 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
Nyabawa Legal Practice, accused's legal practitioners