

THE STATE

Versus

CEPHAS SIFELANI

IN THE HIGH COURT OF ZIMBABWE

DUBE-BANDA J with Assessors Mr Matemba and Ms Baye
GWERU 18, 19 AND 20 MAY 2021

Criminal Trial

M. Shumba, for the State

B. Balamanja, 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) act [Chapter 9:23]. It is alleged that on the 15th December 2018, and at Dimbamihwa Business Centre, in the Midlands Province, the accused person unlawfully caused the death of Obert Tshuma (deceased), by stabbing him once on the right side of the chest and twice on the right thigh with an okapi knife, intending to kill him or realising that there was a real risk or possibility that his conduct may cause the death and continued to engage in that conduct despite the risk or possibility.

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

The State placed before court a confirmed warned and cautioned statement recorded by the police on 18th December 2018. The statement was confirmed by a magistrate on the 4th January 2019. It is before court as Exhibit 1. The statement reads:

I do admit the charge, I stabbed Obert Tshuma twice using a knife, once on the chest and once on the thigh. I also got injured on my leg and below my jaw but I do not know what injured me.

The State further tendered a post mortem report compiled by Dr Roberto Lara Diaz, at United Bulawayo Hospitals on 19th December 2018. 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: acute anemia; right lung injury and stab wound.

The State placed before court a knife. Its colour and measurements are as follows: it has a brown wooden handle; length of handle is 13 cm; it has a silver blade and a pointed end; the upper part of the blade has pliers; length of blade is 11cm; total length of the knife is 24 cm; weight is 0.059 kg. The knife is before court as a real exhibit and marked Exhibit 3.

The prosecutor sought and obtained admissions from the accused in terms of section 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 Roberto Lara Diaz, who examined the remains of the deceased and recorded a post mortem report. The evidence of Prisca Muzenda, a nurse stationed at Nyama Clinic. On the 15th December 2018, at about 1900 hours, this witness saw a group of people at the clinic, and in the middle of this group was the body of the deceased wrapped with a blanket. The witness informed the persons with the body of the deceased to make a police report. The evidence of Tonny Mudariki, this witness is a member of the Zimbabwe Republic Police (ZRP), stationed at Maboleni Police Station. He is the investigating officer in this matter. His evidence is that the accused gave his warned and cautioned statement freely and voluntarily, without undue influence. Accused made indications at the scene of crime, and a sketch plan was drawn. The evidence of Simbarashe Chaniwa, he is a member of the police. He recorded a warned and cautioned statement from the accused. The statement was given freely and voluntarily without undue pressure. The evidence of Johnson Mugodho, a member of the police stationed at Maboleni Police Station. He accompanied the remains of the deceased to United Bulawayo Hospitals for a post mortem examination. His evidence is that no further injuries were inflicted on the body of the deceased from the death to when the doctor held the post mortem examination.

The State called three witnesses and accused testified in his own defence, and called one witness. We are going to summarise the evidence briefly. The first state witness to testify was Chamunorwa Lunga. He resides at Phakama Village, Headman Nyama, Chief Sogwala, and he is not employed. He knows the accused as a local person. He also knew the deceased as a local person. On 15 December 2018, at Dimbamihwa Shopping Centre, he saw one Bekimpilo Mlilo (accused's witness) slapping the deceased with open hands. When the accused got to the point where there was Bekimpilo Mlilo, deceased and other persons, one

Admire Tshuma, who was part of the group started to run away. He then saw deceased running away, and the accused in hot pursuit. Deceased ran for about 20 to 35 metres, and while running he looked backwards, tripped and fell on a drain. He fell facing upwards. Accused person got to where deceased was. He started stabbing the deceased. Deceased was lying facing upwards. He was kicking upwards. The witness was about 30 away metres from the two, i.e. accused and deceased. This witnesses demonstrated what he says he saw happening, accused moving his hands towards the deceased, deceased lying on the ground facing upwards and kicking. Then accused left the scene. Deceased stood up, walked a few meters and fell down facing upwards. Witness walked towards the deceased, and saw that he had been injured. Deceased had a wound on the right side chest, and was bleeding profusely. Assistance was sought and deceased was taken to the clinic.

The second witness to give oral evidence is Admire Tshuma. He resides at Village Vete, Headman Nyama. He is related to both accused and the deceased, although he is closely related to the latter. While he was buying airtime at Silo shop, he heard noise outside the shop. He got out of the shop and saw Bekimpilo Mlilo slapping deceased with open hands. The two were fighting. Deceased had no weapon. While witness was asking the two about what they were doing, he was stabbed by the accused. He fell down. Accused proceeded to pursue deceased who was running away. While running, deceased looked back and fell down. He fell facing upwards. Deceased tried to kick accused. While deceased was still on the ground, accused stabbed him on the thigh and chest. After the stabbing, accused took his bicycle and went away. This witness was ten metres from the stabbing scene. He saw the knife that was used, but does not know the type. Deceased was then taken to the clinic.

The third witness to give oral evidence is Alberto Mtayikwa. At the material time he was a member of the police, stationed at Maboleni Police Station. He was part of the investigation team. Accused made indications which resulted in the recovery of the knife. The witness identified the knife which is before court as Exhibit 3, as the knife recovered following indications made by the accused. He observed injuries on the body of the deceased. Accused also had injuries.

After the conclusion of the testimony of Alberto Mtayikwa the prosecution closed its case.

Defence case

The accused elected to give evidence under oath. He testified that he is 35 years old, and his address is Dimbamihwa School. His evidence is that he initially did not have a dispute with the deceased. His dispute was with one Mbongeni Tshuma. When he was at the shopping centre, on the fateful day, deceased questioned him about the misunderstanding he (accused) had with Mbongeni Tshuma. Mbongeni Tshuma was a young brother of the deceased. Accused says he told deceased that he (deceased) *“was young, if there is anything he intended to do, he must do it.”* Accused says deceased said to him, *“if you are a man, wait until sunset, it will be proved then.”* Accused testified that he got worried, phoned his young brother to come to the shopping centre because they were people who were threatening him (accused). The young brother came to the shopping centre, approached the deceased and slapped him (deceased). At that point accused says he saw deceased and his group of men starting to assault his young brother. This young brother is Bekimpilo Mlilo. Accused moved to rescue his brother. Accused was axed on his right leg and stabbed on his jaw. He says the injuries were serious and he was treated in prison. A fight then started. He says deceased tried to run away and he fell on the ground. Accused says deceased had a knife, and he tried to stab him (accused). Accused used the knife to defend himself. He did not intend to stab deceased, it was a fight. He did not realise that deceased would die. He was defending himself. He says after that he took his young brother and they went home. Accused says he was not drunk.

The defence led the evidence of Bekimpilo Mlilo. He resides at Village Kudzanai, Headman Mafusini, Lower Gweru. He is related to the accused person. On the 15th December 2018, he was phoned by accused who said he was connered by people at the shopping centre. This witness testified that the accused asked him to come with other people to rescue him, and that they must bring weapons. The witness proceeded to the shopping centre alone. Accused said to him, since he did not bring weapons, they must look for logs. After talking to the accused, this witness approached the deceased. Deceased was sitting on a 30 cm knife. He asked deceased what was happening, deceased answered in a harsh manner. He slapped deceased twice. Thereafter, accused intervened. He testified that deceased did not run away. He later says deceased ran away for 5 metres. Accused did not pursue him. He saw deceased falling down. He says when deceased was stabbed by accused, the two were facing each other and fighting. Deceased had a knife too.

After the testimony of Bekimpilo Mlilo, the defence closed its case.

The law and analysis of evidence

The following facts are common cause in this case: the accused stabbed deceased with a knife, Exhibit 3. The accused admitted in his confirmed statement that he stabbed deceased twice with a knife, once on the chest and once in the thigh. The two State witnesses, i.e. Chamunorwa Lunga and Admire Tshuma testified that it is accused who stabbed the deceased. The deceased suffered injuries arising from the stab wounds. These injuries caused the death of the deceased. According to the post mortem report Exhibit 2, deceased suffered the following injuries: wound on the anterior part of the thorax on the right side measuring (3x2cm) located 11cm from the middle anterior to 8cm of the clavicular acromic joint and 9cm from the right breast; wound measuring 4cm located in the inner part of the right thigh in the third distal at 3cm from the knee; wound that measures 3cm on the lateral part of the right thigh in its middle third, wound on the middle lobe of the right lung intra thoracic haemorrhage of 2630ml. The cause of death is acute anemia; right lung injury and stab wounds.

Accused raises the defence of private defence. In his defence outline¹ accused contends that:

1. At the moment, Admire Tshuma and Bongani Tshuma intervened and started attacking Bekimpilo Mlilo. The deceased also joined in. Seeing that his cousin was under attack, the accused will state that he rushed to rescue his cousin.
2. When he reached the place, Admire Tshuma hit him first on his right sheen just below the knee with an unknown weapon. He sustained a gush wound and started bleeding heavily. The deceased sprang to the accused, sliced him just under his cheek with an unknown weapon and started to flee.
3. Accused will state that in private defence, he reached for his okapi knife and stabbed Admire Tshuma twice, one of which landed on the hand. He then pursued the deceased whom he stabbed once close to the collar bone.

In his submissions, Mr *Malamanja*, counsel for the accused, argued that accused met the requirements of private defence, in that BekimpiloMlilo was under an unlawful attack

¹Paragraphs 7, 8 and 9.

from deceased and his group. When accused intervened to save his cousin, he himself came under a weapon attack.

In terms of our law such defence has been codified in section 253 of the Criminal Law (Codification and Reform) Act [Chapter 9:23]. We are of the considered view that the accused's defence of private defence must be examined to determine whether he has met the requirements of the law.

The requirements for this defence are;

- (a) an unlawful attack
- (b) upon the accused or a third party where the accused intervened to protect that third party
- (c) the attack must here commence or be imminent;
- (d) the action taken must be necessary to arrest the attack; and
- (e) the means used to avert the attack must be reasonable.

CR Snyman in the well-known academic work, *Criminal Law*² defines private defence as follows:

- (f) A person acts in private defence, and her act is therefore lawful, if she uses force to repel an unlawful attack which has commenced, or is imminently threatening, upon her or somebody else's life, bodily integrity, property or other interest which deserves to be protected, provided the defensive act is necessary to protect the interest threatened, is directed against the attacker, and is reasonably proportionate to the attack. (My emphasis.)

In determining whether an accused has met the requirements for the defence of private defence it must always be borne in mind that the trial court must avoid taking an armchair approach in the assessment of the situation faced by the accused. It is easy, after the event and far from the dust of the conflict in which the accused was involved, to find possible ways and means through which the accused could possibly have averted the deceased's death. (*See S v Manyekete* HS -386-81.)

² 6th edition, (2014) at page 102.

The test is an objective one and our courts have emphasised that one should not judge the events like an armchair critic, but rather place oneself in the shoes of the attacked person at the critical moment and bear in mind that at such point in time the attacked person only has a few seconds in which to make a decision. The court should then ask whether a reasonable person would have acted in the same way in those circumstances. A person who suffers a sudden attack cannot always be expected to weigh up all the advantages and disadvantages of his/her defensive act and to act calmly. In *S v Ntuli* 1975 (1) SA 429 (A) at page 437 E, the court noted the following:

In applying these formulations to the flesh and blood facts, the Court adopts a robust approach, not seeking to measure with nice intellectual calipers (sic) the precise bounds of legitimate self-defence or the foreseeability or foresight of resultant death.

The inquiry is to ascertain whether at the time accused stabbed the deceased, either Bekimpilo Mlilo or the accused himself was under any unlawful attack? To answer this question, it is critical to isolate the two scenes that occurred on the fateful day. The first scene is the melee under a tree; and the second one, is at the point where deceased was stabbed. We deal with these scenes in turn.

Scene 1: Bekimpilo Mlilo came to the shopping center at the invitation of the accused. He was directed by the accused to bring manpower and weapons. The evidence is that when Bekimpilo arrived, he found deceased and his colleagues lying under a tree. Bekimpilo immediately assaulted the deceased. Accused testified to this assault, and Chamunorwa Lunga testified to this assault. Bekimpilo himself, who came in as accused's witness, confirmed that he clapped deceased with an open hand, although he was trying to down play this assault. The evidence is that deceased colleagues joined in to protect him. Accused then joined in, and there was a melee, or confused fight or scuffle at the scene. It is at this scene that accused says he joined in to protect Bekimpilo. Accused says he was attacked with weapons at this scene and sustained injuries.

First, we find that Bekimpilo was not under an unlawful attack. He says in evidence that the deceased and his colleagues teamed up against him, but did not do anything to him. Furthermore, he was the aggressor. He found deceased and his colleagues lying under a tree, and started to assault deceased. Whatever the attack, if any, which might have been directed at Bekimpilo was not unlawful. Upon his arrival, accused quickly stabbed Admire Tshuma twice. Even if accused was attacked with weapons at this stage, we cannot say the attack was unlawful, as he was fighting in aid of an aggressor, Bekimpilo who started the fight. He was also an aggressor himself as he had stabbed Admire Tshuma. Most important, this is not the scene where deceased was stabbed.

Scene 2: Bekimpilo testified that after the first scene under the tree, he retreated, by running away. Accused had already stabbed Admire Tshuma, and thus immobilized him. The evidence of Chamunorwa Lunga and Admire Tshuma is that deceased ran away from the accused. The running away by the deceased is corroborated by the accused himself. In his defense outline he says “in private defence, he reached for his okapi knife and stabbed Admire Tshuma twice, one of which landed on the hand. He then pursued the deceased whom he stabbed once close to the collar bone.”³ According to Chamunorwa Lunga, deceased ran for about 20 to 35 meters, and while running looked backwards, tripped and fell on a drain. He fell facing upwards. Again in his oral evidence, accused says deceased tried to run away and he fell on the ground.

At the moment deceased was running away he posed no danger to Bekimpilo and the accused. For all intents and purposes, deceased had surrendered. While running away from accused, and the accused being in hot pursuit, deceased fell down. Accused caught up with him. Deceased tried to avert the knife attack by kicking as he lay on the ground facing upwards. Notwithstanding, accused stabbed him twice, first in the thigh and second on the chest. When accused stabbed the deceased, which stab wounds caused the death, neither Bekimpilo nor accused was under any unlawful attack. Therefore, the defense of private defense is not available to the accused.

We have had the opportunity of watching all the state witnesses as well as the accused and his witness when they testified in this court. We distinctly formed an impression that

³Paragraph 9 defence outline.

state witnesses were truthful, honest and reliable as witnesses in this court. Although there could be one or two contradictions in some of the details in their testimonies, these are not of any meaningful or material nature as to affect the quality of their evidence or cast doubt or aspersions on their credibility. We can say here without any shadow of doubt that the state witnesses did not embellish their versions to disadvantage the accused herein. We have no reason to reject or disregard their testimonies. We distinctly formed an impression that the accused and his witness were selective, and untruthful in their testimonies, e.g. the defence evidence that the deceased had a knife measuring 30cm; that deceased's three colleagues had similar axes in their pockets; that deceased was fighting at the point he was stabbed, is false beyond reasonable doubt. From the totality of the evidence led herein, inclusive of the accused's version, we have been persuaded that the state has been able to prove a case against the accused beyond a reasonable doubt.

In terms of section 47 (1) (b) of the Criminal Law [Codification and Reform] Act, any person who causes the death of another person; realising that there is a real risk or possibility that his or her conduct may cause death, and continues to engage in that conduct despite the risk or possibility; shall be guilty of murder. First, accused stabbed deceased on the thigh. At that point he had subdued the deceased. To again continue and stab him with a knife, which is a lethal weapon, with such force on the chest, as to cause a wound in the lung, shows that accused must have realized the real risk or possibility of the fatal consequences of his conduct. These facts, in our view, are 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 in such conduct despite the awareness of the risk or possibility of death.

We are satisfied therefore, taking into account the entire conspectus of the evidence, that the State has discharged the *onus* resting upon it to prove the guilt of the accused beyond reasonable doubt.

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

The accused has been found guilty of murder in terms of section 47 (1) (b) of the Criminal Law (Codification & Reform Act) [*Chapter 9:23*] This Court must now decide what sentence is appropriate for the offence for which he have been found guilty. To arrive at the appropriate sentence to be imposed, this Court will look at his personal circumstances, take into account the nature of the offence he has been convicted of, factor in the interests of society, weigh same against the others and then blend them with the requisite measure of mercy.

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 35 years old now, he was 32 years old at the time of the commission of this offence. He is married. He has two minor children. The children are minors. He is the sole provider of his family. He went to school up to Grade 7. He is self-employed. Accused's family paid 8 beasts to the family of the deceased. This was a way of compensating the family of the deceased for the loss of their son. Again, accused's family paid the funeral expenses associated the burial of the body of the deceased. He is a first offender, and has been in custody awaiting trial for two and a half years. The court must weigh these mitigating features against the aggravating factors and the interests of justice.

We also factor into the sentencing equation that accused used a knife, which is a lethal weapon in causing the death of the deceased. The knife is before court as an exhibit, it is a very dangerous knife. The accused stabbed someone who had run away from him, he was lying on the ground. In fact, for all intents and purposes, the deceased had surrendered. He first stabbed him on the thigh, that stab was enough to subdue the deceased. To further stab on the chest and perforate the lungs, was an act of cruelty. The post mortem report shows that the accused used excessive force in stabbing the deceased. These factors makes this case a bad one.

This offence is a grave and serious. The prevalence of the crime of murder is such that cognizance is sometimes lost of the extreme consequences that flow from it. A life is ended. And with it the enjoyment of all of the rights vested in that person: the right to dignity, the right to equality and freedom, and the right to life itself. 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 harsh punishment. See: *S v Mhlanga* HB 125/20.

The evidence shows that an extraordinary degree of violence was deployed against a defenseless human being, who tried to run away from the accused, and had already been subdued. Who had surrendered. 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 the degree of violence that was meted out against the deceased, and what the victim experienced in his last moments. What a horrible way to end the life of another human being. 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. Such conduct must be punished, and punished severely. See: *S v Mhlanga* HB 125/20.

After taking all the factors into account, we are of the view that the following sentence will meet the justice of this case. In the result:

Accused is sentenced to 15 years imprisonment.