

**THE STATE**

**Versus**

**MQONDISI TSHUMA**

IN THE HIGH COURT OF ZIMBABWE

DUBE-BANDA J with Assessors Mr T.E Ndlovu and Mr S.L Bazwi  
HWANGE 15 & 16 MARCH 2022

**Criminal trial**

*B. Tshabalala*, 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 17<sup>th</sup> July 2021, accused unlawfully caused the death of Gift Ndlovu (deceased) by stabbing him with a press button knife once on the stomach, 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. He tendered a plea of guilty to a lesser crime of culpable homicide. Mr. *Tshabalala* counsel for the State informed this 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 into the record 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**

At the commencement of trial the prosecutor produced a post mortem report compiled by Dr. Juana Rodriguez Gregori and it was received in evidence and is marked Exhibit 1. Further the prosecutor produced a confirmed statement made by the accused and it was received in evidence and is marked Exhibit 2. A knife was produced and received in evidence and is Exhibit 3. It has the following measurements: handle 15cm; blade 8cm; and weighs 149g.

The prosecutor sought and obtained an admission from the accused in terms of section 314 of the Criminal Procedure & Evidence Act [*Chapter 9:07*] (CP & E Act). The admission related to the evidence of Dr. Juana Rodriguez Gregori as contained in the summary of the State Case. His evidence is that he is a Forensic Pathologist based at United Bulawayo Hospitals. On the 19<sup>th</sup> July 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 200/539/21, i.e. Exhibit 1.

The State called the oral evidence of three witnesses. We are going to briefly summarise their evidence. The first to testify was Lungisani Ndlovu. He knows the accused as a neighbour, and deceased was his cousin. On the 16 July 2021, this witness's brother one Finito Ndlovu had a traditional ceremony at his homestead. He had invited family members and relatives. Accused was not invited. Some people remained at the ceremony until 4 a.m. on the 17<sup>th</sup> July 2021. This witness heard some elders complaining that accused was harassing them, pouring traditional beer in the pots that had meat.

He testified that accused was not assaulted. This witness and deceased were not in possession of knives. They did not have a knobkerrie. Accused had taken some beer but he was not intoxicated. This witness and the deceased then attempted to remove accused from the homestead. When they got hold of accused he slapped deceased with an open hand. When asked what he was doing, he slapped again and ran away. He returned running very fast, passed this witness and stood in front of the two, i.e. this witness and the deceased. He then asked deceased the reason he was being removed from the ceremony. He then stabbed deceased below the ribs on the left side. Deceased tried to run to the homestead, he fell down and said "I have been injured." Deceased lay on the ground groaning. Accused ran to the bush.

Soon thereafter accused returned from the bush, produced his knife and said he was apologising. He said he wanted to stab the deceased on the buttocks. This witness took accused's knife and one Finito Ndlovu ferried deceased to hospital. After a while Finito Ndlovu informed this witness that deceased had died. Accused was handed over to the police. This witness identified Exhibit 3 as the knife used by the accused to stab the deceased. In cross examination he said they tried to remove accused from the homestead because he was misbehaving. He was grabbed and pulled in an attempt to remove him from the homestead. He

denied that accused was assaulted at all. Lingisani Ndlovu was a very good witness, never stating more than he knew or believed. We accept his evidence without reservation.

The second witness to testify was Finito Ndlovu. He is a brother to the first witness (Lingisani Ndlovu), and deceased was his cousin. He knows the accused as one of the villagers in the area. They was a traditional ceremony at his homestead. The accused was not invited. He was not very intoxicated, but was behaving strange. On the 16<sup>th</sup> July 2021, at around 11 p.m. the neighbours started leaving for their homes. Family members and few people remained at the homestead. Accused was one of the people who remained. Around 4 a.m. on the 17 July 2021, he was told that there was someone who was disturbing those who were preparing food. He was told that accused was opening pots and pouring beer inside the pots with food. He said accused must go home and sleep. He then asked deceased and first witness to remove accused from the homestead. Deceased and the first witness were not armed. He did not see first witness carrying a knobkerrie. Accused was not assaulted in his presence. They tried to remove him, he was resisting and did not want to leave.

This witness returned to where he was seated with the elders. He could see that accused was resisting to be removed from the homestead. The homestead had lights so visibility was good. He saw accused slapping deceased twice with an open hand. Accused then ran away and went to the bush. He believed accused had finally gone home. First State witness then came and reported to him that accused had stabbed deceased. He went to the scene and found deceased lying on the ground groaning. Deceased could not talk. Accused returned carrying his knife, he apologised and said he did not want to kill deceased, but wanted to stab him on the buttocks. People tried to provide first aid assistance to the deceased, but it could not work, then he ferried him to hospital. Deceased was handed over to the police. Defence counsel did not cross examine this witness. Finito Ndlovu came across as a witness who had a reasonable recall of events. His evidence was not challenged and there is no reason not to accept it.

The third witness to testify was Daniel Kupangwa. He is the investigating officer in this matter. He testified that accused was not injured, and did not complain of any injuries. In cross examination he said accused did not tell him that he was assaulted, and he did not observe any injuries on him. This came across as a witness who had a reasonable recall of events. His evidence was not challenged in any material respects and there is no reason not to accept it.

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

### **Defence case**

Accused testified in his defence. He testified that he was 21 years old. He attended the traditional ceremony at Finito Ndlovu's homestead. He was not invited to the ceremony. When the young people finished beer that was allocated to them, he was asked by one elderly person go get more beer. After collecting the beer he striped and some beer spilled into the fire. He returned to where he was seated. Before he sat down deceased and first State witness approached him, and asked why he was being disrespectful. He told deceased that he was not being disrespectful, and at that point deceased slapped him with an open hand, grabbed him and continued beating him. First witness struck him with a knobkerrie. He was injured on his head. He did not tell anyone about the assault. The police did not ask him about the assault on him.

He testified that he escaped and got out of the homestead. He got to the bush, and stopped. He returned to the homestead and asked them the reason for assaulting him, he took out his knife from his pocket. He wanted to stab deceased on the buttocks, deceased moved and he ended up stabbing him on the stomach. He ran to the bush again. When in the bush he saw deceased walking home, and then saw him falling down. He then realised that he had injured someone, which was not what he intended to do. He returned to the homestead and threw the knife to the ground. He apologised to the people. He was then handed over to the police.

In cross examination he testified that he was not very drunk. He was aware of what was happening. He was ordered to leave the homestead. He carried the knife because usually in such ceremonies sometimes a need arises to cut meat. He testified that the reason he returned from the bush was to protect his young brother who was about to be assaulted. He removed the knife from his trouser and opened it, he then approached deceased and stabbed him. He was very angry. He conceded that his life was not in danger. Asked by the court why he did not tell the court in confirmation proceedings that he had injuries, his answer was that he was not asked about injuries. Accused was not a credible and honest witness to this court. At the end of the testimony of the accused, the defence closed its case.

### **Analysis of evidence**

The evidence shows that there was a traditional ceremony at Finito Ndlovu's homestead. The accused was not invited. He nonetheless attended the ceremony. On the 17<sup>th</sup> July 2021, at around 4 am deceased and the first State witness were tasked to remove accused from the homestead as he was by then a nuisance. He was resisting to be removed. Lungisani Ndlovu testified that accused slapped deceased twice with an open hand. This evidence was corroborated by the second State witness - Finito Ndlovu. Finito Ndlovu was not cross examined by defence counsel. It is trite that should a witness's account not be disputed in cross-examination, it indicates an acceptance of the evidence. Such acceptance may be equated with tacit admission and the result may be that such evidence cannot later be doubted. Finito Ndlovu say there was good visibility at the homestead and he saw accused slapping deceased twice with an open hand.

After slapping deceased accused ran out of the homestead. He returned and stabbed deceased once on the stomach. Accused in his confirmed statement and defence outline admits that he stabbed the deceased once on the stomach. The post-mortem report shows that the deceased suffered the following injuries, under marks of violence: small wounds penetrating in abdominal cavity, located in left side. Internal examination showed that deceased suffered the following injuries: there was abundant free blood in abdominal cavity; and laceration of intestines. The Pathologist opined that the cause of death was hypovolemic shock, laceration of peritoneum and stab wound. It is clear from the post mortem report 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. He was drinking beer together with deceased and others at Finito Ndlovu's homestead. He was tasked to collect beer. He lost grip, and the container which had beer fell on fire. Deceased then slapped him with an open hand. Lungisani was holding a knobkerrie. Lungisani and deceased continued assaulting him. Accused asked why they were assaulting him but they did not respond.
2. He ran away and fled into the bush. He removed a knife from his trousers pocket and opened it. He then asked the deceased and Lungisani why they were assaulting him. He ran towards the deceased and stabbed him and he ran to where they were

trees. He then ran backwards. Lungisani then chased him and he ran to where there were some trees. Lungisani went back home. Accused noticed deceased walking around at home and shortly the deceased fell to the ground. Accused was shocked upon realising that he had injured the deceased and he then ran back to where the deceased was. He then threw away the knife, and apologised that he did not intend to injure the deceased. He was then arrested.

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 commence 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 evidence is that Lungisani Ndlovu and deceased did not assault the accused. Deceased was not armed with a knife and Lungisani Ndlovu was not armed with a knobkerrie. It is accused who slapped deceased twice and ran away. He ran out of the homestead and to the bush. He returned running very fast, passed Lungisani and stood in front of the deceased. He then asked deceased the reason they were removing him from the ceremony. He then stabbed deceased below the ribs on the left side. This version is corroborated by his confirmed statement; he actually says "I ran way and went out of the homestead through the main gate. I fled in the bush and stopped at a distance away from them and they also stopped. I removed a knife from my trousers' pocket and opened it. I asked them why they were assaulting me. I ran towards the now deceased and stabbed him on the stomach." In his defence outline he contends that "he ran away and fled into the bush. He removed a knife from his trousers pocket and opened it. He then asked the deceased and Lungisani why they were assaulting him. He ran towards the deceased and stabbed him and he ran to where they were trees."

Therefore by his own version in his defence outline and statement he was not under any attack. We say so because he says he fled to the bush, removed the knife from his trousers and ran towards the deceased and stabbed him. In his evidence in chief he said he escaped and got out of the homestead. He got to the bush, and stopped. He returned to the homestead and asked them the reason for assaulting him, he took out his knife from his pocket. He wanted to stab deceased on the buttocks, deceased moved and he ended up stabbing him on the stomach. Accused was not under any attack. At the time he stabbed deceased, he was actually the aggressor. He opened the knife when he was still in the bush. He returned from the bush for the sole reason to stab the deceased. In cross examination he conceded that he stabbed deceased because he was very angry, and that his life was not in danger.

In cross examination he testified that he returned from the bush to protect his young brother who was about to be assaulted. This version was not put to Lungisani Ndlovu and Finito Ndlovu in cross examination. He did not say this in his confirmed statement. He did not say this in his defence outline. He did not say this in his evidence in chief. It is just a recent fabrication. It is a falsehood.

In evidence in chief he testified he was injured on his head. During confirmation proceedings he was asked whether he had any injuries, his answer was that he had no injuries. It is just a falsehood that Lungisani Ndlovu and deceased assaulted him and he sustained injuries. 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) (b) of the Criminal Law (Codification and Reform Act) [Chapter 9:23]. 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 stabbing deceased and proceeded regardless as to whether death ensues. See: *S v Mugwanda* SC 215/01.

Accused used a press button knife. A lethal weapon. He stabbed deceased once on the stomach. A delicate part of the human body. He knew that the stomach is a delicate part of the body and this explains his lie that he wanted to stab the buttocks. He used severe force in

stabbing the deceased. The injuries observed by the pathologist speak to the severe force used in stabbing the deceased. The stabbing caused abundant free blood in abdominal cavity and the intestines were lacerated. 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).

Accused personal circumstances are as follows: he was 20 years when he committed this offence. He is 21 years old now. He has no assets of value. He is not married. He resides in communal areas and survives on subsistence farming. He spent four months in pre-trial custody. He is a first offender.

The offence accused has been convicted of is grave and serious offence. The prevalence of the crime of murder is such that cognisance is sometimes lost of the extreme consequences that flow from it. A life is ended. Not only is a life ended, but the lives of family and friends are irreparably altered and damaged. The evidence shows that an extraordinary degree of violence was deployed against another human being. That the injuries inflicted on the deceased are severe as appears in the post-mortem report.

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 was 20 years old at the time he committed this offence. He is 21 years now. He is a first offender. He is a youthful offender. After stabbing the deceased, he ran to the bush. When he saw deceased falling down, he realised that he had injured someone, he returned to the homestead, surrendered his knife and apologised. He was then handed over to the police. His actions shows that he was surely remorseful. He can however not be spared imprisonment.

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 10 years imprisonment.

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