

THE STATE

Versus

AGENT NDLOVU

IN THE HIGH COURT OF ZIMBABWE

DUBE-BANDA J with Assessors Mr Matemba and Ms Baye
GWERU 21 & 24 MAY 2021

Criminal Trial

Ms. Chikuni, for the State
C. Magwara, for the accused

DUBE-BANDA J: The accused is charged with the crime of murder as defined in section 47 of the Criminal Law (Codification and Reform) [Chapter 9:23]. It is alleged that on the 4 February 2019, and at Village Mhlupheki, Chief Malisa, Zhombe, the accused person unlawfully caused the death of Tororo Ndlovu (deceased), by striking him once on the back of the head with an axe, 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.

The accused, whilst admitting causing the death of the deceased, stated in his defence outline that the death occurred whilst he was under an imminent attack from the deceased who had harassed him prior to the axing. He pleaded self-defence and implored this court to find him not guilty of the charge of murder, but guilty of the crime of culpable homicide. The State rejected the plea of guilty to culpable homicide. The matter proceeded to trial. Accused was legally represented throughout the trial. The State tendered an outline of the state case, which is before court and marked Annexure A. It shall not be necessary to repeat the entire contents of the state outline. 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 5th February 2019. The statement was confirmed by a magistrate on the 24th February 2019. It is before court as Exhibit 1. The state tendered a post mortem report compiled by Dr Roberto Lara Diaz, at United Bulawayo Hospitals on 11 February 2019. The report is before court and marked Exhibit 2. Following an examination on the remains of the

deceased, the Pathologist concluded that the cause of death was: subdural haemorrhage; skull fracture and head trauma.

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 case. 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 Wellington Sibanda, who on the 4th February 2019, received a report from Peter Ncube (1st witness) that accused had struck deceased with an axe. He proceeded to the accused's homestead in the company of Peter Ncube. He saw deceased's body lying facing upwards. He also noticed a mixture of blood and brains coming out of deceased's head. On the 5th February 2019, he with other villagers arrested accused person in Nkayi. Accused led this witness and other villagers to the location where he had hidden the axe. The axe blade had some blood stains and some whitish stains on it. The evidence of Fanuel Moyo and Gilbert Rusike, which is similar to that of Wellington Sibanda. The evidence of Lazarus Rumhungwe, a member of the Zimbabwe Republic Police, stationed at Zhombe Police Station. He is the investigating officer in this matter. He attended the scene and the body of the deceased was identified to him. The body had a deep cut on the head. He was handed the axe which was used to strike at the deceased, he kept it as an exhibit. He recorded a warned and cautioned statement from the accused. The evidence of Spencer Zhuwao, he is a member of the Zimbabwe Republic Police, he ferried the body of the deceased to United Bulawayo Hospitals for a post mortem examination. The body did not suffer any further injuries while under his care. The evidence of Lovemore Mukotsanjera, Nicholas Moyo and Welcome Dube, whose evidence is similar to the evidence of the other police witnesses.

The state called two witnesses and accused testified in his own defence. We are going to summarise the evidence briefly. The first to testify was Peter Ncube. He resides at Village Mhlupheki, Chief Malisa, Zhombe. The accused is his neighbour. He knew the deceased during his lifetime, as a neighbour and accused's brother. On the 4th February 2019, he was herding cattle close to the homestead of accused and deceased. He went to their homestead to look for fire to light a cigarette. He found accused sitting outside. With an axe put close to him. Deceased was inside the house. He was eating sadza. He came outside the house because he also wanted to smoke. He saw nothing amiss between the two. He left to return to herd his cattle. He left the two seated outside. Before he could even exit the gate, after

walking about 3 metres, he heard someone screaming behind him. He looked back and saw that the accused had strike deceased with an axe, and saw him was trying to remove the axe from the head of the deceased. He identified the axe, Exhibit 3 before court, as the axe used by the accused to strike at the deceased.

The second witness to give oral evidence is Edmore Moyo. He also resides at Village Mhlupheki, Chief Malisa, Zhombe. He knows accused person, he is his cousin. He knew deceased during his lifetime, he was also his cousin. The two, accused and deceased, were living together in the same homestead. He received a report that deceased had died. He observed blood and a whitish stuff coming out of the deceased's head. He reported the matter to the police. He and other villagers arrested the accused and handed him over to the police. The witness testified that, accused explained to them that he had a misunderstanding with his brother (deceased) about food. A fight started, deceased attacked accused first. Accused picked an axe, and then struck the deceased. Accused showed the witnesses and other villagers an axe with blood stains. He identified the axe as Exhibit 3 before court. He testified that the deceased ejected their mother (mother to deceased and accused) from the homestead. The accused and the deceased did not have a cordial relationship. Each one of them would look for his own food, they were not sharing.

After the conclusion of the testimony of Edmore Moyo, the prosecution closed its case.

Defence case

The accused elected to give evidence under oath. He testified that he resides at Magwizi area, Village Mhlupheki, Chief Malisa, Zhombe. Deceased was his biological brother. They were residing at the same homestead. When their father died in 2012, deceased chased away their mother from the homestead. He says the deceased always asked him to leave the homestead, and join his mother. He testified that on the fateful day, he was from cutting firewood. The deceased questioned him about the recent visit accused had made to his mother. He asked why accused did not stay with his mother. Accused says he replied that he was not going anywhere. He would continue residing in the homestead he only knew, i.e. their father's homestead. Peter Ncube arrived, the quarrelling stopped for a while. It resumed when Peter left. He says deceased accused him of stubbornness. He said at that point, deceased picked a hoe handle and threw it at the accused. It hit him. Deceased was standing

up to proceed to pick his own axe. Accused then picked an axe and struck deceased once on the head. He says he realised that if deceased picked his axe first, he was going to kill him (accused). So it was a question who moves first, and accused moved first. He says deceased used to assault him. He testified that he accepts that he used disproportionate force. He asks the court to forgive him. After the testimony of the accused, the defence closed its case.

Legal principles

Proof of an accused's guilt beyond a reasonable doubt is what the State must achieve before it succeeds in pushing the wall of guilt onto the side of the accused. There is no duty on an accused person to push any part of that wall onto the side of the State. An accused's person should be acquitted if the State evidence is not strong enough. He should be acquitted if there exists a reasonable possibility that his evidence may be true. See: *S v Alex Carriers (Pty) Ltd en 'n Ander* 1985 (3) SA 79 (T); *S v Radebe* 1991 (2) SA 166 (T); *S v Munyai* 1986 (4) SA 712 (V). As stated in *S v Schackell* 2001 (4) SA 1 (SCA) *para* 30.

It is a trite principle that in criminal proceedings the prosecution must prove its case beyond a reasonable doubt and that a mere preponderance of probabilities is not enough. Equally trite is the observation that in view of this standard of proof in a criminal case, a court does not have to be convinced that every detail of an accused's version is true. If the Accused's version is reasonably true in substance the court must decide the matter on the acceptance of that version. Of course it is permissible to test the accused's version against the inherent probability but it cannot be rejected merely because it is improbable; it can be rejected if it can be said to be so improbable that it cannot reasonably possibly be true. [My emphasis].

When the court is faced with a situation where there is doubt as to what happened in a particular case, the doubt must be resolved in favour of the accused. In *Edward Chindunga v The State* SC 21/02, the court stated that where an accused gives a reasonable explanation of his actions. That explanation cannot be rejected out of hand. See also; *S v Kuiper* 2000 (1) ZLR 113 (S) and *S v Manyika* 2002 (2) ZLR 103 (H); *S v Chabalala* 2003 (1) SACR 134 (SCA); *S v Van Aswegen* 2001 (2) SACR 97 (SCA).

It is with these legal principles in mind that this court will proceed to analyse the evidence presented in this trial. In analysing the evidence before us, we start by considering the events that occurred on the fateful day. We do so because the accused contends that what made him to strike at the deceased was that the deceased had attacked him with a hoe handle and was proceeding to pick an axe for the same purpose. In terms of section 253 (2) of the Criminal Law [Codification and Reform] Act [Chapter 9:23], in determining whether or not the requirements of self-defence have been satisfied a court shall take due account of the circumstances in which the accused found himself including any knowledge or capability he may have had and any stress or fear that may have been operating on his mind.

Did the accused have any reason to fear the deceased? First, we will consider the evidence of Edmore Moyo. We know from this witness that the deceased ejected his mother from the homestead. We know from this witness that the accused and the deceased had a frosty relationship. They were residing in the same homestead, each one gathering his own food, and not sharing with the other. This resonates with the accused version. In his defence outline, he says:

1. Accused will state that after the death of their father in 2012, the deceased chased away their mother from their father's house. Other siblings went together with their mother and started staying at their uncle's place. This was sometime in 2014.
2. Although the accused remained staying with the deceased at their father's house, the two did not share a cordial relationship expected of biological brothers, to the extent that they did not cook and eat together. Each person would cook his own food and eat alone.
3. The deceased did not want to remain staying with the accused.
4. Two days before the fateful day of the attack on his brother, the accused had returned from visiting his mother and other siblings.
5. His visit to see his mother and other siblings did not go well with the deceased.

Witness Peter Ncube, does not know the reason accused struck deceased with an axe. In his evidence, he says he got fire to light his cigarette and left to herd his cattle. He did not witness anything amiss between the accused and the deceased. This again resonates with accused's version. In his evidence in chief, accused testified that before the arrival of Peter Ncube, the two had a misunderstanding. When Peter Ncube arrived, the two kept quiet. After

Peter left, the dispute started again. This explains the reason why Peter says he neither saw nor heard anything amiss.

The only version before court as to what happened when the accused struck deceased with an axe, is that of the accused. The court does not have to believe the defence story; still less has it to believe it in all its details; it is sufficient if it thinks that there is a reasonable possibility that it may be substantially true. A court does not have to be convinced that every detail of an accused's version is true. If the accused's version is reasonably true in substance the court must decide the matter on the acceptance of that version. See: *S v Kuiper* 2000 (1) ZLR 113 (S) at 118B-D; *R v Difford* 1937 AD 370 and *R v M* 1946 AD 1023; *R v M* 1946 AD 1023 at 1027; *S v Jaffer* 1988 (2) SACR 84 (C) at 89D. The See: *S v Abrahams* 1979 (1) SA 203 (A); *S v Mhlongo* 1991 (4) SACR 207 (A); *S v Guess* 1976 (4) SA 715 (A); *S v Trainor* 2003 (1) SACR 35 (SCA).

Win these principles in mind, we agree with the accused when he says, Peter was more than 3 meters away when the deceased was struck with an axe. This is supported by the objective facts. Accused impressed us as a witness bent on telling the truth. He even accepted that he lied to the police, just to try his luck, and that he told the court the truth. There is no basis upon which this court can reject the version of the accused. We accept his version and find that it accords with the probabilities and objective facts of this case.

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]. We are of the considered view that the accused's defence of self-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.

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.

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 defensive act and to act calmly. In *S v Ntuli* 1975 (1) SA 429 (A) at 437E, 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 the precise bounds of legitimate self-defence or the foreseeability or foresight of resultant death.

Even if we were to accept Peter's evidence that he found accused sitting with an axe close to him, which he later used to strike the deceased, this shows that there was tension between the accused and the deceased. He was keeping the axe for the purpose of defending himself. There would be no reason why he would keep an axe close to him if there was no fight.

Was there an unlawful attack on the accused? Accused's evidence that deceased hit him with a hoe handle, and that he was proceeding to pick an axe was not shown to be false. In his defence outline accused says:

1. Suddenly, the deceased picked a wooden hoe-handle which was close to him and threw it to the accused. The accused was hit by the hoe handle on the right side of his forehead. The deceased stood up as if he wanted to get inside the house.
2. The accused thought and believed the deceased wanted to get inside to pick his axe which was inside the house. The accused immediately picked his axe and struck the deceased once on the back of the head, and the deceased fell down.

We agree, that there was an unlawful attack on the accused. In this regard we factor into the equation the evidence of Edmore Moyo, who testified that the relationship between the two was not cordial. We find that the attack had commenced or was imminent, accused had to act to avert the danger. Even if accused was mistaken, in believing that deceased was reaching out for his axe, we find, on the facts of this case, his belief reasonable. See: Section 255 of the Criminal Law (Codification and Reform) Act. We accept that the accused had no luxury to rationalise at that moment.

It was put to the accused in cross examination that he could have fled from the attack. Our understanding of the contention by the State is that he had a window of escape, because he says he picked the axe 5 metres in the opposite direction from where deceased was, moved 10 metres to reach and at strike at the deceased. A question that arises is whether a person who is being attacked must flee if he can do so in order to ward off the attack. Put differently, whether there is a duty to flee. In general, where a man can save himself by flight, he should flee rather than kill his assailant. See: *Rex v Zikalala* 1953 (2) SA 568 (A). However, a person has no duty to flee from his own house or home if he is attacked there. See: Snyman Criminal Law 6 edition (2014) at 437 and 442 and *S v Engelbrecht* 2005 2 SACR 41 (W) at *para* 354. His house or place of residence is his last refuge - his "castle" - where he may protect himself against any unlawful attack. Accused was at his home or residence, he says in his evidence, that there was nowhere to flee to. On the objective facts of this case, we find that the accused had no duty to flee.

Ms *Chikuni*, counsel for the State, submitted that accused should be convicted of murder in terms of section 47(1) (b) of the Criminal Law (Codification and Reform) Act, we do not agree. On the facts of this case, accused cannot be convicted of murder. On the facts of this case, we find that accused satisfied all the requirements of self-defence except that the means he used to avert the unlawful attack were not reasonable in the circumstances. Section 254 of the Criminal Law (Codification and Reform) Act says:

254 When defence of person partial defence to murder

If a person accused of murder was defending himself or herself or another person against an unlawful attack when he or she did or omitted to do anything that is an essential element of the crime, he or she shall be guilty of culpable homicide if all the requirements for defence of person specified in section *two hundred and fifty-three* are satisfied in the case except that the means he or she used to avert the unlawful attack were not reasonable in all the circumstances.

We say the means he used to avert the unlawful attack were not reasonable in all the circumstances because at the time he struck deceased, deceased was not armed. He had thrown the hoe handle and not yet managed to pick his own axe. We think the use of an axe on the head, with that amount of force was disproportionate.

Verdict

In the result, the accused is accordingly found not guilty of murder and found guilty of a lesser crime of culpable homicide in terms of section 49 of the Criminal Law (Codification and Reform) Act [Chapter 9:23].

Sentence

The accused has been convicted of the crime of culpable homicide. This Court must now decide what sentence is appropriate for the offence for which you have been found guilty. To arrive at the appropriate sentence to be imposed, this Court will look at your personal circumstances, take into account the nature of the offence you have been convicted of, and factor in the interests of society.

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. He is 26 years old now. He was 24 years old at the time of the commission of this offence. He is not married. He has a 2 year old child. Prior to his arrest, he was self-employed as an artisanal miner. He has no property of value. As at the date of sentence, accused has been in custody for 2 years, 3 months and 19 days. He is a first offender. The court must weigh these mitigating features against the aggravating factors and the interests of justice.

We are of the view that deceased was a bully. He was 28 years at the time he met his death, older than the accused. We know from the evidence on record, that after the death of their father he ejected their mother from the homestead. The mother moved out of the homestead with other children. Deceased quarrelled with the accused, about why he visited their mother. He did not want accused to reside in their late father's homestead. Unfortunately, accused had nowhere to go. There is uncontested evidence on record that deceased used to assault the accused.

Accused used an axe, a very dangerous weapon. He struck the head with excessive force. The post mortem report speaks to the force used by the accused in striking the deceased. We also factor into the sentencing equation the fact that the accused has been convicted of culpable homicide. A life was ended. It is incumbent on this court to emphasize the sanctity of human life. Society frowns at the taking of another human being's life, particularly with a weapon like an axe on the head. The sentence must speak to this phenomenon.

After taking all the relevant factors into account, we are of the view that the following sentence will meet the justice of this case, the accused is sentenced to 7 years imprisonment of which 2 years imprisonment is suspended for 5 years on condition the accused does not within that period commit an offence of which an assault or physical violence on the person of another is an element and for which upon conviction he is sentenced to a term of imprisonment without the option of a fine.

National Prosecuting Authority, state's legal practitioners
Mutatu & Mandipa Legal Practice, accused's legal practitioners