

THE STATE
versus
MIZILAMU MASEKO

HIGH COURT OF ZIMBABWE
MUZENDA J
MUTARE, 4 and 5 June 2019

ASSESORS: 1. Dr Sana
2. Mr Chagonda

Criminal Trial

M. Musarurwa, for the State
M Mareanadzo, for the accused

MUZENDA: The accused was arraigned before us charged with the crime of murder as defined in s 47 (1) (a) or (b) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] in that on 15 October 2018 and at Armstone B. Resettlement, Chief Tandi, Rusape, the accused unlawfully caused the death of Taurai Christopher Makarutse by assaulting him all over the body with sticks intending to kill him or realising that there was a real risk or possibility that his conduct might cause death and continued to engage in that conduct despite the real risk or possibility resulting from which Taurai Christopher Makarutse died.

The accused pleaded not guilty to the charge. In his defence outline he stated that he did not have the intention to kill the deceased. On 15 October 2018 he was in his garden when he encountered the deceased stealing his vegetables. When he confronted the deceased, the latter became violent and attacked accused. The deceased advanced towards accused throwing pieces of hard mud. Accused ducked the missiles before he (accused) took a stick and assaulted the deceased on his back and knees. The deceased sensed danger and bolted and in a bid to escape bulldozed through a closed gate head first and the gate fell and he ran away. He saw the deceased a few metres away from his garden and observed that he had sustained head injuries as a result of him head butting the gate. He assisted the deceased home by ferrying him in a

wheelbarrow. He denies intending to kill the deceased nor did accused foresee the possibility of death.

The facts of the matter as outlined by the state are that the accused and deceased are both of Armstone B. Resettlement, Chief Tandri Rusape in Manicaland. On 15 October 2018 at around 1200 hours the accused and the deceased were at Armstone B. Resettlement. The accused assaulted the deceased using sticks all over the body. The deceased sustained injuries and was admitted at Rusape General Hospital. On 22 October 2018 the deceased was transferred to Parirenyatwa Hospital in Harare for further medication. The deceased passed on, on 24 October 2018 whilst admitted at the hospital. On the same day Aisa Serano and a colleague performed post-mortem examination and concluded that the cause of death was brain damage, skull bones fracture and head injuries. The forensic pathologist compiled a post mortem report.

The following were admitted as exhibits by the court upon the application by the state and with the consent of the defence:

1. Certificates of weight and length of sticks found at the scene of the assault.
 - (a) Stick A: the length was 137cm, and the weight was 690 grammes, it was marked exh 1 (a)
 - (b) Stick B: the length was 177cm, and the weight was 720 grammes, it was marked exh 1(b)
 - (c) Stick c: the length was 96.5cm, and the weight was 220 grammes, it was marked exh 1(c).
 - (d) Stock D: the length was 68.5cm, and weight was 100 grammes.
2. The subject sticks were produced by consent of the defence, and were admitted as follows:
 - (i) Stick A was marked exh 1 (a) (i)
 - (ii) Stick B was marked exh 1 (b) (i)
 - (iii) Stick C was marked exh 1 (c) (i)
 - (iv) Stick D was marked exh 1 (d) (i)
3. The post-mortem report was produced and accepted as evidence and marked as exh no. 2. The deceased's apparent age was 28 years measuring 160 cm. The post-mortem was done on 25 October 2018 by Dr Aisa Serano. The pathologist observed head injuries secondary to assault, intra cranial bleeding, epidural bleed, multiple abrasions in legs and back, dehydration. On the aspect of surface wounds and injuries, the doctor

observed injuries on the left shoulder back side, left buttock, left thigh external side, left knee external side; had a deep burn septic aspect haemorrhagic, second intention cicotritation, left scapulae, same injury left buttock same injuries. On the head the parietal right side was injured extending to frontal and temporal left and parietal left, vault fracture temporal parietal right extended to left frontal lineal. There was blood clot in left side. On the skull the doctor observed moderate brain oedema. There was epidural parietal on the left side of the brain extending to the right side, contuse haemorrhage focus left paretal lobe, epidural haemotoma left fontal.

On the walls ribs and cartilage, rib 4, 5 and 6 had haemorrhage infiltrated right side internal and external, the lungs were congested. The doctor concluded that the cause of death was brain damage, skull bones fracture and head injuries. The head injuries was produced by a blunt object.

4. The confirmed warned and cautioned statement of the accused was tendered and admitted as exh 4 and the English version of the accused's statement was to the following effect:

"I have understood the caution and I so admit to the charge being levelled against me. Taurai Makarutse was stealing my maize and some butter nuts which were in my garden. At times I would go to Taurai Makarutse's homestead and advise his parents to warn him from stealing my food which I would have grown. That is what caused me to assault him. The assault which I did on him using a stick, it was not known to me that I could kill him. I am sorry for what happened."

On 3 December 2018 the accused made indications to Constable Stanford Hokonya, the confirmed indications were produced by consent and admitted as exh 4. The following constitutes the essentials of the statement made during the indications:

"I was in my garden when I saw the now deceased (Taurai Makarutse) entering into my garden with the intention of stealing my butter nuts which I had cultivated in my garden.....

It was not the first time when I saw him stealing my butter nuts. I once told his parents to warn him from stealing mu butter nuts which I have (sic) grown but he never stopped from stealing my butter nuts.

I then went to the garden where he was in. I asked him why he was in my garden and he remained silent. He then started assaulting me with open hands all over my body. I then started defending myself by assaulting the now deceased with some sticks. He started running away from me and he bumped into barbed wire with his head and he

developed a wound on his head. He fell down. I lifted him and went with him to my garden where my wife Janipha Murewa cleaned the wound using water. I then went with the deceased to his homestead. I travelled a short distance with the now deceased and discovered that he was unable to walk. I then left him alone and proceeded to my house where I collected a wheelbarrow which I used to ferry him to his homestead. I left him in his bedroom.....

On the 17th day of October 2018 at around 1400hrs I made indications to ZRP Rusape Rural where I had assaulted the now deceased. The police took sticks stating that they were the apparatus which I used assaulting the now deceased and I told them that they were not the sticks which I used assaulting the now deceased.....”

The state called accused’s wife to testify. Before she did the court sought clarity from the accused if he had no problem with her testimony since she was accused’s wife. Accused expressed no problem through his counsel. Janepha Murewa told the court that deceased was his maternal uncle and a neighbour. She was inherited by the accused as a wife after the death of her husband. However, she was older than accused by six years, she is 57 years old.

On 15 October she requested accused to go to her garden to guard around midday. The deceased passed by her garden and greeted her and she responded. The accused after hearing the salutary exchanges between his wife and deceased came out of the garden and stood by watching deceased walking towards accused’s garden, a distance from the wife’s accused remarked to the witness stating “this is mad, he is greeting you here, yet he is going to my garden” the witness saw deceased opening the accused’s garden’s entrance and entering. The accused left the wife’s garden and followed the deceased. After about 25 to 30 metres passed by the accused called out to his wife from a distance from the wife’s garden telling the witness that he is going home.

The accused went home and afterwards came back to the wife’s garden and stood by the entrance gate. The wife asked accused as she was told that accused had forgotten to collect rabbit feed. Accused asked the witness whether she had seen the deceased. He was told that she had not seen him. The witness also reminded accused that it was him who had told her that he was going to give deceased “mbanje” so that he will not come again to that garden. Accused then told the wife that he had not given the deceased dagga but instead he had assaulted him. He wife advised accused to proceed to where he had assaulted deceased and find out if he was still there.

The accused went away from the wife and spent quite some time before he returned, he came back at a later stage and the deceased was walking ahead of the accused. When deceased

saw the witness, he went towards her. Deceased had difficulties in opening the entrance gate into the witness' garden and she had to assist the deceased. When deceased removed his woollen hat from his head, the witness asked him if the deceased was feeling hot, that is when the witness saw clotted blood, the blood had dried, the blood was in the middle of the head near the forehead. She inquired from the accused what had happened to the deceased and accused narrated that after he assaulted the deceased the later went out of the garden, in that process he was hooked by the wire which caused the blood to gush. She cleaned the deceased's wound. She observed that deceased had difficulties in lifting one of his legs, his 3 trousers had lowered a bit and she had to pull them up. Deceased showed difficulties in walking. She went on to enquire from the accused as to what had happened to deceased's leg and accused spoke of the wire trapping deceased. She assisted the deceased to walk up to the exit of the garden, she also gave him water to drink, she could however not determine the nature of the injury on deceased's head due to the hair of the deceased, however due to the blood her view was that it was a bad injury. She proposed to accused that he accompany deceased home. Accused agreed.

She was not contented by accused's explanations about what had caused the injuries on the deceased. She further stated that accused's garden had two gates. However the gate that allegedly caused the injury was the one leading to the water point in accused's garden. It was a metre and half square and was made of wooden poles and barbed wire. During the time the witness was asking accused as to how deceased got injured, the deceased never denied accused's version of the events or did deceased say anything in response. The witness did not witness the assault. Under cross-examination by the defence she was adamant that the head injury could not have been caused by wire.

The evidence of the following witnesses was produced by consent in terms of s 314 of the Criminal Procedure and Evidence Act [*Chapter 9:07*].

- (a) Darlington Zindoga: his evidence is that deceased was his uncle accused is his neighbour. On 15 October 2018 at round 0700hrs the accused informed him that the deceased was stealing dagga from accused's garden and that if he finds him stealing he would assault him. On the same day he later on saw deceased lying on the ground and was unable to walk or talk. He saw a deep cut on the head of the deceased. The accused handed the sticks he used to assault the deceased.
- (b) Emily Nhawu: her evidence is that deceased was her neighbour as well as the accused's. She saw accused pushing deceased in a wheelbarrow. She also witnessed deceased in great pain and being assisted to sit properly.

(c) Doctor Aisa Serano: he is the pathologist. His critical evidence is the post-mortem report which had already been admitted as exh 2.

The state then called Mr Phillip Urayayi Makarutse the father of the deceased. He did not witness the assault nor the fight. He told the court that the deceased was 28 years old. Accused is his nephew through the wife and a neighbour. On 15 October 2018 he saw deceased in his bedroom but deceased could not speak nor was he in a position to wake up. He remained lying on his bed. Around 900am deceased had left home on that date and when the witness saw him in bed it was now 1800 hours. The witness tried to find out from the deceased what happened but there was no response. The witness got a report from Darlington Zindoga who told him that accused had brought deceased in a wheelbarrow. The witness went on to summon neighbours to come and witness what had happened to the deceased. All present then noticed a wound on the middle of the head, his left collar bone had broken, dislocated and the bare bone could be seen, his left leg was no longer functioning. He transported deceased to Rusape General Hospital on 16 October 2018. Upon confronting the accused on 15 October 2018, the witness was told that deceased was brought to his homestead after he had found him standing along the road and had no power to walk. He did not explain to the witness how deceased had got injured.

He told the court that deceased was mentally challenged for a period of five years preceding 2018 and it was known by the family that deceased was in the habit of stealing accused's dagga from the gardens for 3 years. Accused had previously visited him about the issue and the witness tried to warn the deceased against his behaviour but deceased was adamant and continued to steal. The witness blamed accused for giving the deceased dagga. He tried to consult both traditional and conventional health experts but deceased could not improve. However deceased and accused could frequently spend the whole day together and deceased could go back home after sunset.

The state called Cleopas Chigede a police detail who visited the scene of the assault on 17 October 2019 and arrested accused on charges of attempted murder. Four sticks were produced by consent and marked exhibits 1 (a) (i), 1 (b) (i), 1 (c) (i), 1 (d) (i). He did not record a statement on indications. He inspected the gate. It was constituted by poles fixed on either side and supported by poles crossing between the verticals. There was no barbed wire. On the date of indications and recovery of sticks the alleged gate had been damaged and not working. He told the court that the sticks were recovered at the scene at the instance of the accused. He

was challenged by the defence on the issue of sticks and admitted there was no document signed by the accused relating to the sticks nor indications on that day.

The evidence of Stanford Hokonya was tendered in terms of s 314 more critically his evidence relates to the indications as well as warned and cautioned statement which are already cited *in extensor (supra)*. The confirmed warned and cautioned statement was marked exh 3 and indications by accused also confirmed marked exh 4. The sketch plan was marked exh 5. The state closed its case. Accused gave evidence. He is aged 45 years. Deceased was his uncle. He related what is contained in his warned and cautioned statement, indications and defence outline. When the deceased greeted accused's wife on 15 October 2018, accused decided to take a nap after waking up he decided to go and water his tobacco nursery. When he stood by he saw deceased opening accused's garden. He alerted his wife about this. He told his wife that he was proceeding to go and give deceased what he wanted. He walked to his garden and found deceased standing and later turned around and faced him. He was standing near the gate which leads to the water point. Accused approached him and enquired from deceased what he wanted. The deceased picked up some moulds of soil and hailed them at the accused but he missed. Accused went on further to state that they exchanged some blows, fought and he was overpowered. He fell after he was struck with a fist. Whilst on the ground he found a stick nearby, picked it and struck deceased on the left hand elbow. He stood up from the ground and the fighting continued. The deceased charged at the accused and the two entangled and accused was still holding on to the switch. Accused managed to disentangle from deceased and pull himself from deceased and pushed him off, whilst free he struck deceased on the loin, left shoulder and back. The deceased bolted towards the gate and he head butted it, the gate got damaged and fell, deceased fell towards the same direction where the gate had fallen. He landed badly then crawled for a short distance along the stream. He started walking and the accused left the scene. He went home past his wife's garden and when he returned he enquired from his wife whether she had seen the deceased. After receiving a negative answer he proceeded back to the scene and found the deceased seated. He assisted him to stand up and accompanied him home.

The rest of the evidence from that stage onwards is common cause. He insisted that the deceased got the head injury when he hit the gate and the leg and shoulder injuries, he sustained them when he landed on the ridge. The stick he used to assault the deceased was not found. He admitted that he lied about deceased stealing vegetables but that deceased was stealing his dagga. He admitted during cross examination that deceased could have sustained the fatal

injuries as a result of his blows. He also admitted that the injuries sustained by deceased were of a serious nature. As for him he did not sustain visible injuries.

In its submissions the State in this court's view correctly captured the following aspects as uncontroverted:

- (a) accused encountered deceased in accused's garden, intending to steal accused's dagga.
- (b) accused assaulted deceased, resulting in deceased sustaining fatal injuries.
- (c) there was no eye witness during the encounter and assault, the court has to rely on the evidence of the accused juxtaposed with the circumstantial evidence in this case.

The accused advanced defence of self and contend that he had a right to defend himself (and presumably his dagga) against the conduct of the deceased. He submitted that because of deceased's mental instability, his behaviour was unpredictable, hence he urges us to uphold defence of self. Sections 253 and 257 of the code were accordingly cited to convince the court. Accused could not have fled from his garden and leave deceased to steal. He had no room to manoeuvre.

The story of the accused based on his extra-curial statements, indications, evidence in chief and defence outline does not read smoothly and coherently. In our view he deliberately concealed salient features of what actually happened. The accused in his confirmed warned and cautioned statement stated that deceased was stealing from his garden

“that is what caused me to assault him. The assault which I did on him using a stick, it was not known to me that I could kill him. I am sorry for what happened.”

As gleaned from this statement, there is no mention by the accused about the unlawful attack by deceased, there is nothing about fighting and him fighting back to defend himself. He gave his statement when events were fresh and he precisely offered uncontaminated version of what happened on the day in question that he wanted to assault deceased because of deceased's behaviour of stealing accused's dagga. On the statement he gave whilst making indication of Constable Hokonya after the death of the deceased in Harare he then introduced a hybrid defence showing the police detail a spot where deceased allegedly hailed dry earth at him, being assaulted by deceased and him defending himself. Even on the indication he added very crucial dimension that he used sticks, meaning contrary to what is in his cautioned statement that he used a stick, now the sticks were obviously more than one.

In his evidence in chief he further stated that deceased punched him resulting in accused being overpowered and falling. He got a stick and hit him on the left elbow whilst still on the

ground. When he rose from the ground the fight resumed, got entangled with deceased whilst the accused was still holding the stick. Accused freed himself and then struck the deceased till deceased felt the heat and dashed towards the exit gate where he had butted and broke the gate. He then landed heavily by his left side and to accused that is how the deceased sustained injuries on the shoulder, left leg and broken skull.

During cross examination by the State, he then unreservedly admitted that when he assaulted the deceased his blows on deceased's person were indiscriminate and rampant and chances were high that he was the author of the injuries observed by the doctor and indicated on the post mortem report. On the indications he openly admitted that he saw the wound on deceased's head yet throughout the trial he told the court that he did not see any visible injuries on the deceased on 15 October 2018. If the accused had been attacked by deceased or if he had fought with the deceased then surely he could have told the wife Janepha Murewa. To the wife he volunteered the truth, he had assaulted the deceased.

The restlessness of the accused, the panic mode and apprehension he exhibited after the assault clearly shows that the accused realised albeit too late that he had badly, brutally and mercilessly assaulted the deceased and left him in a helpless state. He resolved out of guilty conscience to go back and check on him and for certain he found him in a life threatening condition. For a court to come to a conclusion on the disputed issues, it must make findings on:

- (a) ***the credibility of the witnesses***. Now this depends on the court's impression about the veracity of the witness concerned which in turn depends on a variety of subsidiary factors such as:
- (i) the witness' candour and demeanour in the witness box.
 - (ii) his bias, latent and blatant.
 - (iii) internal contradictions in his evidence.
 - (iv) external contradiction with what was pleaded or put on his behalf or with established fact or with his own extra-curial statement or actions.
 - (v) the probability or improbability of particular aspects of his version, and
 - (vi) the calibre and agency of the performance compared to that of other witnesses testifying about the same incident or events.
- (b) ***the reliability of the witnesses***: this depends apart from the factors mentioned under (a) (i), (iv) and (v) above. On (i) the opportunities the witness concerned had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof.

(c) *the probabilities*: this necessitates an analysis and evaluation of the probability or improbabilities of each party's version on each of the disputed issues.

In the light of the assessment of (a), (b) and (c) the court will then as a final step determine whether the party burdened with the onus of proof has succeeded in discharging it. The hard case presumably rare occurs when a court's credibility findings compel it in one direction and its explanation of general probabilities in another. The more convincing the credibility findings the less convincing will be the evaluation of general probabilities. But when all factors are equipoised, probabilities prevail. ¹

In *S v Shemina*² DUMBUTSHENA CJ quoting *R v Sikosana* 1960 (4) SA 723 (AD) at 730 had this to say:

“If one puts aside far-fetched conjecture it seems to me that the circumstantial evidence in this case, consisting of so many probative factors all pointing in the same direction, leads one irresistibly to the conclusion that the appellant planned and executed the removal of an unwanted wife....”

On p 223 D-E the learned Chief Justice went on:

“In the instant case there is circumstantial evidence which is of great confirmatory value. It ties together what the appellant said in her confession and what she told other people.”

In casu, it is highly improbable that the accused would have fought with the deceased but did not sustain any injury. His clothes were not soiled yet he says he fell into a ploughed garden whose soil was wet. Virtually there was no evidence of assault on his person. When one compares the nature and gravity of deceased's wounds, injuries and bruises the unavoidable conclusion derived from the surrounding circumstances points to the fact that deceased was attacked and brutally assaulted by the accused. The accused lied to the police and to the court about the attack by the deceased. I am alive to the matter of the *S v Gijima*³ where His Lordship DUMBUTSHENA cautioned courts:

“An accused's untruthfulness standing by itself is not sufficient for a court to draw an inference of guilt because an innocent person may falsely deny certain facts because he fears that admitting them would put him in trouble.”

¹ SFW Group and Another v Martel and Others 2003 (1)SA 11 (SCA)

² 1987 (1) ZLR 215 (SC) at p.223 B-C

³ 1986 (1) ZLR 33 (SC) at 33 D

In as far as the accused told the police that deceased was stealing vegetable and butternuts, instead of dagga yes the above observation by the Chief Justice is apposite but he further went on to lie about deceased attacking him and him acting in defence of self. That defence is misplaced and we were unanimous in our resolve to dismiss it.

“The objective test of private defence has the consequence that the court may decide that although the defendant believed that he was entitled to engage in a defensive attack, objectively viewed the situation was none in which he was justified in resorting to a defence, or if he was the steps taken in defence exceeded what was necessary to repel the attack.”⁴

We have weighed and outlined above factors which militate against the accused’s credibility and applied a common sense attitude, we are convinced beyond a reasonable doubt that the accused’s defence of self was an afterthought. Accused had made more than one warning to Zindoga and to his wife that if he found deceased stealing his dagga he was going to assault him and on 15 October 2018 he did exactly that. He used more than one stick and the deceased did not retaliate nor fight the accused.

What remains to be determined is whether accused intentionally killed the deceased? In the matter of *S v Mugwanda*⁵ CHIDYAUSIKU CJ ⁶ has this to say:

“The reasoning of the learned justice leading to the conclusion that the appellant and Gilbert had actual intent is not easy to follow. In this case there is no direct evidence in the *mens rea* of the appellant. The appellant’s vowed intention was not to kill the deceased but to assault him. It follows, therefore, that the *mens rea* of the appellant has to be inferred from the circumstances of the case. It is not an easy task to determine an accused’s *mens rea* in a case such as this is here a single stab wound inflicted to a vital part of the body results in death.”

On p. 579 the learned Chief Justice went on:

“1. The expression ‘intention to kill’ does not, in law, necessarily require that the accused should have applied his all to compassing the death of the deceased. It is sufficient if the accused subjectively foresaw the possibility of his act causing death and was reckless of such result. This from of intention is known as *dolus eventualis* as distinct from *dolus directus*.

2. The fact that objectively the accused ought to reasonably have foreseen such possibility is not sufficient. The distinction must be observed between what actually went on in the mind of the accused and what would have gone on in the mind of a *bonus pater familias* in the position of the accused. In other words, the distinction between subjective foresight and objective foreseeability must not become blurred. The *faction probanda* is *dolus*, not *culpa*. These two different concepts never coincide.

⁴ South African Criminal Law & Procedure, Vol. 1, J Burckell at p.417

⁵ 2002 (1) ZLR 574 (s)

⁶ At p. 578 C-D

3. Subjective foresight, like other factual issue may be proved by inference. To constitute proof beyond reasonable doubt, the inference must be the only one which can reasonably be drawn. If it cannot be so drawn up there is a reasonable possibility that subjectively the accused did not foresee, even if he thought reasonably to have done so, and even if he probably did so.”

We are satisfied that the only reasonable inference to be drawn is that the accused did foresee the death of the deceased as a substantially certain consequence of his brutal assault of deceased, indiscriminately including the vulnerable head. That manner of assault by accused is sufficient to establish beyond reasonable doubt that the appellant did foresee the possibility of the death of the deceased as a consequence of the assault and persisted with the assault regardless. On this basis accused should be found guilty of murder with constructive intent.

Sentence

Accused is aged 45 years and on medication for second degree HIV. He has 2 minor children he takes care of his wife who is also on medication. He paid 5 herd of cattle to deceased's family and greatly assisted in the transportation of deceased from Harare to Rusape for burial. He is very sorry for what he has done. He had been patient with the deceased for stealing his dagga for 3 years. On the day in question his intention was to punish the deceased not to kill him.

On the other hand notice must be taken that accused has been convicted of a very serious offence of murder. The sanctity of life is sacred. No matter how angry accused would have been with the deceased accused had no right to take the law into his own hands and assault the deceased. The deceased died a painful death.

However when it comes to sentence the court has to look at the interests of the offender as well as that of the society. The fundamental consideration is to rehabilitate the offender and make him fit to stay with others in the society. Looking at the mitigatory features and aggravatory circumstances the appropriate sentence in this matter is imprisonment. Accordingly the accused is sentenced as follows:

12 years imprisonment.