

THE STATE

Versus

TRUST NDLOVU

IN THE HIGH COURT OF ZIMBABWE
DUBE-BANDA J with Assessors Mr Ndlovu and Mr Bazwi
HWANGE CIRCUIT COURT 5 OCTOBER 2020

Criminal Trial

Mrs M. Cheda for the state
Miss J. Change, for the accused

DUBE-BANDAJ: 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 20th January 2020 at Tshongokwe Business Centre, Chief Mabhikwa, Jotsholo, the accused unlawfully struck Themba Ndlovu (deceased) once on the head and once on the face with an axe intending to kill him or realising that there was a real risk and possibility that his conduct may cause his death but continued to engage in that conduct despite the risk or possibility. The accused denies the allegations and raises the defence of provocation.

The accused pleaded not guilty to the charge. He was legally represented throughout the trial. The State tendered an outline of the state case. 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.

It is not disputed that the accused and the deceased at a gambling school. The accused discovered that he had lost his wallet and suspected that the deceased had stolen it. He struck the deceased with an axe once on the back of the head and once on the face. The deceased died on the spot.

The state produced a confirmed warned and cautioned statement recorded by the police at ZRP Jotsholo on 20 January 2020. The statement was confirmed by a magistrate on the 4th January 2020. The statement reads:

I admit the charge of killing Themba Ndlovu on the 20th January 2020 which is preferred against me. I struck the deceased person with the back side of an axe upon suspicion that he

had stolen money from my wallet while I was asleep at gambling school. On asking him about it he denied and instead he became aggressive bracing for a fight. At the time I noticed that, I was frightened for he was known in the village to be bullying other villages. I therefore decided to attack him first for fear he would hurt me if given a chance to attack first. It was not my intention to kill the deceased person but meant to act in self-defence.

The state tendered a post mortem report compiled by Dr Juana Rodriguez Gregori at United Bulawayo Hospitals on 21 January 2020. Following an examination of the remains of the deceased, the pathologist concluded that the cause of death was:

1. subdural haematoma
2. skull bones fracture
3. head trauma

An axe recovered at the scene was produced by the state as an exhibit. Its measurements are as follows: length of handle 9.65 cm; circumference of handle 9.5 cm; length of axe blade 8 cm; width of axe blade 12 cm.

State case

The state led oral testimony from three witnesses. The first to testify was Sibonginkosi Sibanda. He resides at his own homestead, Buyu Village, Chief Mabhikwa, Jotsholo. He is known to the accused. He knew the deceased during his lifetime. On the 20th January 2020, at around 0600 hours, this witness was at Tshongokwe Business Centre waiting for transport to go to Jotsholo Business Centre. He saw the deceased sitting by the side of the road facing MK General Dealer Shop recharging his cell phone. This witness saw the accused taking an axe from a scotch cart belonging to Nqobile Nkomazana. The accused crossed the road to where the deceased was, and struck him once on the back of the head. The deceased fell down facing upwards. The witness heard the accused say “you take my money I worked hard for.” The witness told the accused that “you will kill someone.” The accused struck the deceased once again on the face with the axe.

The witness went to the scene and observed the deceased body’s lying in a pool of blood. The deceased was bleeding in the mouth, nose and ears. He had a wound at the back of the head and a cut on the face, on the left chin. The witness checked and saw that the deceased had died. After the assault on the deceased the accused tried to flee, he was however

stopped by Nqobile Nkomazana who picked stones and warned him not to flee. The accused was then tied to a mopane tree awaiting the arrival of the police.

The next witness for the state was Nqobile Nkomazana. He knew both the accused and the deceased as they were villagers in Jotsholo. On the 20 January 2020, at around 0600 hours this witness was at Tshongokwe Business Centre. He was sleeping in a scotch cart. He was awakened by noise from a group of people that had gathered across the road shouting “you have killed someone.” The witness saw the accused striking the now deceased once on the left chin with an axe. The deceased was lying on the ground facing upwards. The accused left the axe next to the deceased. The witness observed the deceased lying in a pool of blood, bleeding from the mouth, nose and ears. He had a wound on the back of the head and a cut on the face on the left chin. The axe that was used by the accused belonged to this witness. The accused attempted to flee, the witness picked up stones and threatened to stone him if he ran away. The witness apprehended the accused.

The last witness for the state was Sergeant Mutanga. He is a member of the Zimbabwe Republic Police stationed at Jotsholo. He did not know the accused and the deceased. On the 20 January, he attended a murder scene accompanied by other police officers. This witness examined the body of the deceased and observed injuries at the back of the head and a cut on the face. The deceased was bleeding from the mouth, nose and ears. The witness searched the pockets of the deceased’s clothes and recovered a cellphone and a brown wallet containing 6 bond notes. Inside the wallet there was an I.D. card for the deceased. He had a box of matches and Econet recharge cards.

We have had the opportunity of watching all the state witnesses when they testified in this court. All the state witnesses gave their evidence in a calm, sequential and relaxed manner. We distinctly formed an impression that they were truthful, honest and reliable as witnesses in this court. We can say here without any shadow of doubt that the state witnesses did not embellish their versions to disadvantage the accused. We have no reason to reject or disregard their testimonies.

Defence case

The accused elected to give evidence under oath. He testified that he was 30 years old. Prior to his arrest, he was employed in Botswana. He knew the deceased during his life-

time. The deceased was a problematic person, he was a thief, and he would assault people. The accused did not like to be associated with such a person.

On the date before the incident, he accompanied his father and his wife to get transport to travel to his wife's homestead. The purpose of their travel was to pay a bride-price (*lobola*) to his wife's family. At the shopping centre, he drank alcohol until 1 a. m. He slept at the shopping centre hoping to get transport home in Nqobile Nkomazana's scotch cart. When he woke up in the morning he discovered that his wallet was missing. It also turned out that the wallet of accused's friend, one ThandolwenkosiKhumalo, was also missing. He made inquiries, and was told that his wallet was stolen by the now deceased. His wallet had 800 Pula and USD\$20.00. He approached the deceased who became very arrogant and threatening. He moved to Nqobile Nkomazana's scotch cart, picked up an axe, walked across the road, where the deceased was, him on the back of the head and on the chin with the axe. The deceased was not aware that he was about to be hit with an axe. He hit the deceased because he was afraid of him.

There are instances where the accused was untruthful, unreliable and untrustworthy as a witness. For instance when he said he wanted to strike the deceased and make him to fall to the ground, then he accused will report the theft of his money to the police. How do you report a person whom you have axed? They are many such falsehoods. Where his version contradicts that of state witnesses, we reject it as false beyond a reasonable doubt.

Analysis of the evidence

The accused suspected that the deceased had stolen his wallet that contained some money. He approached the deceased, and did not get any co-operation. He picked an axe from a scotch cart, struck the deceased twice, on the back of the head, and on the left chin. He used the back side of an axe, colloquially referred to as the dark side of the axe. Accused used severe force in striking the deceased. The first witness who was approximately 30 metres away from the scene, could hear the sound of the axe landing on the head of the deceased. Again, the post mortem report shows that severe force was used to strike the deceased, he suffered subdural haematoma,¹ skull bones fracture and head trauma. The strikes were directed at the head. After the first strike, the first witness warned the accused that he will kill

¹ A subdural hematoma (SDH) is a type of bleeding in which a collection of blood—usually associated with a traumatic brain injury—gathers between the inner layer of the dura mater and the arachnoid mater of the meninges surrounding the brain.

someone, notwithstanding the warning, the accused landed a second blow on the left chin of the deceased. The deceased died on the spot.

In his evidence before court, and in his confirmed warned and cautioned statement,² and in his defence outline ³ the accused does not dispute, in fact he accepts the version of the state witnesses in respect of the striking of the deceased with an axe. The facts around the striking with an axe are common cause.

The accused raises a defence of provocation. He alleges that he was provoked and acted out of loss of self-control. This defence is provided in section 239 of the Criminal Law [Codification and Reform] Act, Chapter 9:07. The law accepts that when a person is provoked by the words or actions of another, he may lose his temper and cause harm to the person who provoked him. Despite the fact that in provocation cases the accused is responding to provocative behaviour, nonetheless the broad social policy must be to require persons to show restraint when subjected to provocation. In the process of social interaction, situations often arise where people are provoked, if the law allowed any type of provocation to justify violent action there would be anarchy. The law therefore seeks to encourage people to use self-restraint and to deter people from causing harm to others when they are provoked.⁴

Accused alleges that he was provoked because the deceased stole his money, and that when he confronted him he reacted violently. In his confirmed warned and cautioned statement the accused avers that he struck the deceased person with the back side of an axe upon suspicion that he had stolen money from his wallet while he was asleep at gambling school. It was just a suspicion. The accused picked an axe, walked between six to seven metres to strike the deceased. He could not have walked that distance under the spell of provocation. He struck the deceased for the first time, he was warned he would kill someone, he continued to land the second heavy blow on the deceased. Under cross examination, he said he wanted to cause the deceased pain, these are not the actions of a person who had lost self-control due to provocation.

² I admit the charge of killing Themba Ndlovu on the 20th January 2020 which is preferred against me. I struck the deceased person with the back side of an axe upon suspicion that he had stolen money from my wallet while I was asleep at gambling school.

³ Accused then picked up an axe from the scotch car a few metres away and struck the deceased once at the back of his head and once on his face before falling down to the ground.

⁴ G. Feltoe A Guilde to the Criminal Law in Zimbabwe 29.

We must pause here to observe that the accused has a clear recollection of the events of the day, and how he struck the deceased with an axe despite his claims for provocation and loss of self-control. This is not the behaviour of a person under provocation. We reject the defence of provocation.

We were told by almost all state witnesses, and the accused that the deceased was a thief, a trouble maker, and perennial criminal. However, all this, on the facts of this case, does not justify the actions of the accused.

Proof beyond reasonable doubt does mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence “of course it is possible, but not in the least probable”, the case is proved beyond reasonable doubt, but nothing short of that will suffice’. See *Miller v Minister of Pensions* [1947] ALL ER 372 at 373. The headnote in the matter of *S v Glegg* 1973 (1) SA 34 AD it is put this way:

The phrase “reasonable doubt” in the phrase “proof beyond reasonable doubt” cannot be precisely defined but it can well be said that it is a doubt which exists because of probabilities or possibilities which can be regarded as reasonable on the ground of generally accepted human knowledge and experience. Proof beyond reasonable doubt cannot be put on the same level as proof beyond the slightest doubt, because the *onus* of adducing proof as high as that would in practice lead to defeating the ends of criminal justice.

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. To deliberately strike another human with an axe, twice on the head entails an awareness of the real risk or possibility of death. The strikes were directed at a delicate and vulnerable part of the body. A lethal weapon was used. The 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 had 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 the 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

Mr Ndlovu, 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, factor in the interests of society, weigh same against the others and then blend them with the requisite measure of mercy.

The state has conceded that the murder you have been convicted of was not committed in aggravating circumstances. We take the view that the concession was properly made.

We have been informed that you are 30 years old. You are a first offender. Married with one child. Bread winner in your family. You were employed in Botswana earning 2500 pula per month. You have spent 10 months in custody awaiting this trial.

The offence for which you have been convicted of is a 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. 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.

The act of punishment serves as retribution. It serves also to signify that such crimes will not be tolerated, that there is a significant and serious consequence to be suffered by the

perpetrator. This is the task that a sentencing court is called upon to carry out. It is required to take proper cognisance of the nature of the crime and to determine a sentence which balances the competing interests of the society and the individual perpetrator while meeting the objectives of punishment. It is a task rightly considered to be very difficult.

The mitigating factors in your favour pale into insignificance when consideration is given to the nature of the crime. The evidence shows that an extraordinary degree of violence was deployed against another human being. 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.

The fact that you suspected the deceased to have stolen your money, did not permit you to axe him to death. Imagine if all people would axe to death the persons they suspect have stolen from them, there would be total anarchy. This court will not allow such a situation of anarchy to prevail in society. This court must send a proper message and a proper signal that no one, is allowed to take the life of another. The use of axes in settling scores must come to an end. No human being should be axed to death.

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

You are sentenced to 15 years imprisonment.

National Prosecuting Authority, state's legal practitioners
Mvhiringi & Associates, accused's legal practitioners