

THE STATE

Versus

TALENT BWERONOFA

IN THE HIGH COURT OF ZIMBABWE
DUBE-BANDA J with Assessors Mr Matemba and Ms Sithole
GWERU 27 AND 28 MAY 2021

Criminal Trial

Ms. Chikuni, for the State
Ms. Nyeverai, 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) [Chapter 9:23]. It is alleged that on or about the 8th May 2018, and or near Wanderer Mine, Shurugwi, in the Midlands Province, the accused person unlawfully caused the death of Hardlife Delight Jvangwe (deceased) by throwing stones at him and causing him to fall into a deep shaft 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 produced a confirmed warned and cautioned statement recorded by the police on the 8th May 2018. The statement was confirmed by a magistrate on the 9th May 2018. It is before court as Exhibit 1. The statement reads:

I do not admit to the allegations that I killed or caused the death of Hardlife Jvangwe, but I slapped him twice with open hands on the head. I took a chisel from the ground near one Harare intending to threaten Hardlife Jvangwe with it but James Banya took it away from me. I picked a stone and threw it at Hardlife Jvangwe. Hardlife Jvangwe left in a hurry in the company of Pasca Mlambo saying he was going to collect his mining syndicate. I started mining gold with Nyasha Munjanja. Whilst mining I was told by Evidence Murera that Hardlife Jvangwe, whom I had fought with had fallen into the mine shaft.

The State tendered a post mortem report compiled by Dr S Pesanai, at United Bulawayo Hospitals on 11 May 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: severe subarachnoid haemorrhage; skull fractures; and head injury in unclear circumstances.

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 S. Pesanai, who examined the remains of the deceased and recorded a post mortem report. The evidence of James Banyana, whose evidence is that on the 8th May 2018, at 0001 hours, the deceased and Pasca Mlambo arrived at the mining site, they appeared drunk. The deceased ordered people to move away from his mining site. The accused person slapped the deceased several times on the face, and he further picked a chisel intending to hit deceased with it. The witness took the chisel from the accused. The accused took a stone and threw it towards the deceased. Deceased ran away. The body of the deceased was found 150 meters down the shaft. The evidence of Vumindaba Mpofu, the investigating officer in this matter. He recorded a warned and cautioned statement from the accused, and such statement was confirmed by a magistrate. The evidence of other members of the investigating team, which is substantially similar to the evidence of the investigating officer.

The state called two witnesses and accused testified in his own defence. We are going to summarise the evidence briefly. The first state witness to testify was Pasca Mlambo. He resides at Chibvongodze Village, Chief Munyika, Gutu in Masvingo. He knows the accused as an artisanal miner in Wanderer Area. He knew deceased during his lifetime as his uncle. On the 8th May 2018, deceased and the witness proceeded to the underground tunnel of B and B Mine, Wanderer, in Shurugwi. The two found accused and other persons mining. The deceased asked accused what time his group would finish mining, because he (deceased) and the witness also wanted to mine. A misunderstanding arose between accused and the deceased. Accused slapped deceased with open hands on the cheeks. Accused picked a chisel intending to use it to assault the deceased. He was disarmed by James Banyana. Accused picked up a stone and threw it towards the deceased. He missed him. He picked another stone and started chasing after the deceased. The witness testified that he followed the two, i.e. accused and the deceased, then he met accused who was returning to his work station in the tunnel.

He then saw dust, and realised that deceased had fallen into the shaft. It was dark in the tunnel, the miners were using head torches. He noticed that deceased was drunk.

The second witness to give oral evidence is Edson Nyavira. He resides at Village 15, Chief Munyikwa, in Gutu. He is an artisanal miner at Wanderer Mine, in Shurugwi. He knows accused person as a fellow gold panner. He knew deceased as a fellow gold panner and they came from the same rural home. This witness testified that on the date and time in issue, the two, i.e. Pasca Mlambo and deceased came to the mine, they were carrying cans of beer. Deceased was very drunk. They came to where other persons were working, and said they had come to work. A dispute arose between accused and deceased, it was about who had the right to mine at that point in time. Deceased poured beer on the accused and insulted him about his mother. Accused got angry and started slapping deceased with open hands. He slapped him on his cheeks. Accused picked a chisel, wanted to assault deceased with it, but he was disarmed. Deceased then ran away. Accused picked a stone and threw it towards the deceased. When deceased was running, he got to a curve in the tunnel. That is the point this witness last saw the deceased. The shaft was 250 metres from where this witness and other miners were, including the accused. Accused only moved three metres following the deceased, threw stones and returned to his work station. It was dark in the tunnel. Miners were using torches. Deceased had no torch. It was dark in the tunnel, and one could not find his way without a torch. After the conclusion of the testimony of Edson Nyavira, the prosecution closed its case.

Defence case

Accused testified that on the date and time in issue, Pasca Mlambo and the deceased came to the mine and found accused and other persons working. Deceased told accused that they, i.e. deceased and Pasca Mlambo wanted to mine, accused told him that it was not possible since accused and other persons were still mining. Deceased then insulted accused about his mother. Accused testified that after the insult, he got angry and slapped deceased with open hands twice. Deceased removed the trousers he was wearing on top of another trouser. He put his hands in the pocket. Accused picked up a chisel, and was disarmed by James Banya. Accused picked a stone threw it towards the deceased. Deceased then said he was going to collect his syndicate members. Deceased then went away with Pasca Mlambo. Accused testified that he told deceased that they will find him at his work station. Accused

testified that he does not know what happened as the two, i.e. deceased and Pasca Mlambo were walking out. The defence closed its case.

The law and analysis of evidence

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 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). See: *R v M* 1946 AD 1023 at 1027; *S v Jaffer* 1988 (2) SACR 84 (C) at 89D; 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). 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).

It is with these legal principles in mind that this court will proceed to analyse the evidence presented in this trial. It is common cause that the deceased fell into a mine shaft

and died. His body was found 150 metres down the shaft. The post mortem report speaks to the injuries that caused the death of the deceased. The cause of death is stated as subarachnoid haemorrhage; skull fractures; and head injury in unclear circumstances. There is no evidence that accused assaulted the deceased such as would cause such injuries. The only logical conclusion is that the deceased sustained such injuries when he fell into the 150 metre shaft.

There is no evidence before court about how the deceased fell into the shaft. The two state witnesses do not know what caused the deceased to fall into the shaft. Pasca Mlambo, was asked in cross examination whether he saw what caused deceased to fall into the shaft, his answer was, “*he did not know.*” Edson Nyavira also confirmed in cross examination that he did not see deceased falling into the shaft. Pasca Mlambo conceded in cross examination that deceased might have fallen in the shaft because of his drunkenness. This witness testified that he saw dust in the shaft, and realised that deceased had fallen into the shaft. This evidence places Pasca Mlambo close to where deceased fell into the shaft. Further, this evidence resonates with accused’s version that deceased went away with Pasca Mlambo. Our view is that this is what made Pasca Mlambo see the dust that was caused by the fall of the deceased.

Pasca Mlambo testified that accused picked another stone and started chasing after the deceased. The witness testified that he followed the two, i.e. accused and the deceased, then he met accused who was returning to his work station in the tunnel. We find this evidence of Pasca Mlambo to be false. First, Edson Nyavira, who impressed us as a credible and truthful witness, testified that accused only moved three meters, which suggests that he did not pursue the deceased, as suggested by Pasca Mlambo. Second, accused testified that when deceased was leaving he said he was going to collect his syndicate members. He left with Pasca Mlambo. Accused says he does not know what happened as the two, i.e. deceased and Pasca Mlambo were walking out. In cross examination, the accused was asked as to why Pasca Mlambo would testify that the deceased was running away from stones thrown by the accused. Accused was further asked, the reason why Pasca Mlambo would lie to this court. There is no duty upon an accused person to give any reason why a state witness might falsely implicate him. *S v Ipeleng* 1993 (2) SACR 185 (T) at 189c-d. We take the view that deceased

was not being pursued, he was going to look for re-enforcement, to attack accused. On the objective facts of this case, accused's version is reasonably possibly true.

We know from the evidence that it was dark in the tunnel. One could only find his way around the tunnel by use of a head torch. Deceased had no torch. It is clear then that he was trying to find his way in the dark. To compound matters, deceased was very drunk. Pasca Mlambo tried to underplay the deceased's level of drunkenness, however Edson Nyavira was clear that deceased was very drunk. The post mortem report confirms that the stomach contents of the deceased were smelling of alcohol. We take the view that the darkness and his drunkenness caused deceased to fall into the shaft.

Chikuni, counsel for the State, asked this court to make a factual finding that the conduct of the accused led to the death of the deceased. It is argued that it is the accused who threw stones at the deceased, causing him to run and fall into the shaft. According to section 11 of the Criminal Law (Codification and Reform) Act [Chapter 9:23], a person shall not be held criminally liable unless his or her conduct caused or substantially contributed to the consequence. A person's conduct is deemed to have caused or substantially contributed to a consequence if it is the factual cause of the consequence. What it means is that but for the conduct the consequence would not have occurred. The conduct should also be the legal cause of the consequence in that it must be a reasonably foreseeable consequence of such conduct or was brought about by a new cause after the conduct, which cause was itself a reasonably foreseeable consequence of the conduct. See: *The State v Kudakwashe Firisiyano* HH 564/14.

We do not agree with State counsel. First, there is no evidence that deceased was running away from a stone thrown by the accused when he fell into the shaft. The accepted evidence is that deceased was going to look for re-enforcement to attack the accused. Second, in such circumstances, to invoke section 11 of the Act would be to stretch the ambit of the empowering provision rather too far. On the evidence before us, we find that there is no evidence that the accused had done or omitted to do anything that caused the deceased to fall into the shaft. He cannot be guilty of any crime arising from the death of the deceased.

We note however, as submitted by State counsel and conceded by defence counsel that accused slapped deceased. There is also evidence before court that accused picked a chisel intending to strike the deceased. Further, he picked a stone and threw it towards the deceased. This conduct constitutes an assault as defined in section 89(1) Criminal Law (Codification and Reform) Act [Chapter 9:23]. Accused cannot escape being held accountable for such conduct. A conviction of assault is a competent verdict on the charge of murder. See: Section 274 Criminal Law (Codification and Reform) Act [Chapter 9:23].

Verdict

In the result, the accused is accordingly found not guilty of murder and found guilty of a lesser crime of assault in terms of section 89 (1) of the Criminal Law (Codification and Reform) Act [Chapter 9:23].

Sentence

Mr *Bwerinofa*, 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 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 26 years old. He was 23 years old when this offence was committed. He is not married. He is an artisanal miner. He looks after his two minor siblings. We factor into the sentencing equation that accused is a first offender. He has been in pre-trial incarceration for a period of 1 year 5 months. The court must weigh these mitigating features against the aggravating factors and the interests of justice.

We also factor into the sentencing equation the fact that deceased provoked the situation. Deceased poured beer on the accused and insulted him about his mother. In our society, an insult that mentions one's mother is considered very provocative. Notwithstanding the provocation, accused should have exercised restraint. Accused tried to put down fire by

fire, which is unacceptable in a civilised society. We also agree with State counsel, that violence among artisanal miners is on the increase, and this court must pass a sentence that shows that this violence is unacceptable and must come to a stop. However, we do not lose sight of the fact that accused has been convicted of assault, and that he has been in pre-trial incarceration for a period of 1 year 5 months.

After taking all factors into account, giving each factor due consideration, we are of the view that the following sentence will meet the justice of this case: the accused is sentenced to 3 months imprisonment, wholly suspended for 3 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
Mavhiringidze & Mashanyare, accused's legal practitioners