

THE STATE`

Versus

CENT MOYO

IN THE HIGH COURT OF ZIMBABWE
DUBE-BANDA J
BULAWAYO 7, 8 JUNE 2022 AND 9 JUNE 2022

Criminal trial

T. Muduma for the State
S. Huni for the accused

DUBE-BANDA J:

1. The accused person is charged with the crime of murder as defined in section 47 (1) of the Criminal Law (Codification and Reform) Act [Chapter 9:23]. It being alleged that on the 19th October 2022, at Mpopoma River, Methodist Village, Bulawayo he unlawfully caused the death of Thulani Tembo (hereinafter referred to as the “deceased”) by shooting him with a CZ pistol on the abdomen intending to kill him or realising that there was a real risk or possibility that his conduct may cause death continued to engage in that conduct despite the risk or possibility.
2. 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 his defence outline and is before court and marked Annexure B.

State case

3. State counsel with the consent of the accused tendered the following documentary exhibits: accused’s confirmed warned and cautioned statement (Ext. 1); post-mortem report number 197/159/2020 (Ext. 2); and a CID Forensic Ballistic Report (Ext. 3).

4. The State Counsel further sought and obtained admissions from the accused in terms of section 314 of the Criminal Procedure & Evidence Act [*Chapter 9:07*] (CP & E Act). These related to the evidence of the following witnesses as contained in the summary of the State case:
 - i. The evidence of Ojilive Sibanda. His evidence is that he is a member of the Zimbabwe Republic Police (ZRP). He is stationed at Pumula Police Station. On the 19th October 2020, at around 1400 hours he received a report from the accused that he had shot the deceased who was poaching for sand at Mpopoma River, Methodist Village. He attended the scene where the deceased and his colleagues were found poaching sand as well as where the accused shot the deceased. He recovered the pistol from the accused and a spent cartridge. He also managed to look for the Nissan UD Truck that was used to carry poached sand and also found its driver.
 - ii. The evidence of Doctor I. Jekonya. His evidence is that he is a qualified Medical Practitioner based at Mpilo Hospital. On the 3rd November 2020, and during the course of his duties he examined the remains of the deceased and compiled his findings in the post mortem report number 197/159/2020 (Ext. 2).

5. The State called three witnesses. We are going to briefly summarise their evidence. The first to testify was Mandlenkosi Mhlanga. His evidence was that on the 19th October 2020, in the company of now deceased and Vodloza Sibanda they were poaching sand in the Mpopoma River. He was the driver of the Nissan UD Truck that was used to carry poached sand. Vodloza Sibanda and the now deceased were loaders. His evidence is that when the Rangers approached he started the Truck and drove past the vehicle used by the Rangers. The Rangers pursued them. The two i.e. Vodloza Sibanda and the now deceased were seated in the loading box. As he drove past the Rangers' vehicle, a Ranger shot one rear wheel of the Truck. He did not see whom among the Rangers shot the wheel. The Rangers pursued the Truck, and at some point

blocked it with their Council vehicle. He made a U-turn, and at that point he saw the accused disembarking from their vehicle and approached the Truck. He continued driving, and he heard someone who was in the loading box of the Truck saying he had been shot. It was the deceased who was shot. He checked and realised that deceased had put his hands on the stomach. He did not stop to check. The now deceased was taken to Luveve Police Station and then to Mpilo Hospital for treatment.

6. His evidence is that he did not drive close to the vehicle of the Rangers. The now deceased was kneeling on top of the sand in the loading box. He heard a sound of one gun shot. He disputed that the bullet first hit the truck, ricocheted and then struck the now deceased. His evidence was that the accused directly fired into the loading box of the Truck.
7. In cross examination this witness conceded that they were poaching sand, and it was illegal. He testified that the vehicle used by the Rangers was a City of Bulawayo vehicle and clearly marked as such. He conceded that they were fleeing to avoid arrest. When it was suggested to him that he could not tell the court what exactly happened at the scene of shooting, his answer was that he noticed the accused disembarking from the vehicle and moving towards the Truck holding a fire-arm. As he continued driving he lost sight of the accused. He did not hear the gun shots. He became aware of the shooting when the now deceased told him that he had been shot.
8. The second witness to testify was Vodloza Sibanda. His evidence was that he was in the company of Mandlenkosi Mhlanga (1st State witness) and the now deceased and they were sand poaching in the bush. When the Rangers approached, they jumped into the Truck and tried to escape. He was with the now deceased in the loading box. The Rangers gave chase for about 2.1 kilometres. When their Truck made a U-Turn, accused disembarked from the vehicle and shot at the deceased. He only heard the sound of gunfire, and could not say the number of times accused fired the gun. He saw accused shooting at their Truck, and deceased started screaming saying he had been shot.

9. In cross examination he testified that they were fleeing to avoid arrest. He said he did not hear the first gun shot fired before the Truck made a U-turn because of the noise caused by the Truck. He then said he heard a gunshot fired by the accused. Asked the number of the gunshots he heard, he said he did not count. Asked whether a bullet hit the vehicle, his answer was he would not know much about that. Asked by the court he first said he was seated in the loading box close to the head of the Truck. He also said they were standing in the loading box facing the front. He said accused shot from a distance of 45 metres.

10. The third witness to testify was Prosper Chidume. He is a member of the ZRP and the investigating officer in this matter. On the 23rd October 2020, he saw now deceased at the hospital. He observed that the now deceased had a gunshot on the lower left of the abdomen. He recovered the bullet that was removed from the deceased's body. The bullet head was taken to Forensic Department in Harare. On the 24th October 2020, he visited the scene of crime, and observed that the Rangers pursued the Truck for a distance of 2.4 kilometres. He saw a mark on the left side of the loading box of the truck, and could not tell whether it was caused by a bullet. The outer rear tyre of the Truck was damaged by the Rangers.

11. At the conclusion of the testimony of Proper Chidume, the State closed its case.

Defence case

12. Accused testified in his defence and called two witness, Mr Qhubekani Banda (Banda) and Mr Mduduzi Nxumalo (Nxumalo).

13. Accused testified that he is a Ranger in the employ of the Bulawayo City Council. He has been so employed for a period of twenty-six years. Part of his duties are to prevent sand poaching, and where it occurs to arrest the perpetrators. On the 19th October 2020, he had a team of Rangers which was patrolling at Mazwi Game Park. When the team arrived at a place frequented by sand poachers, he remained behind with a student on attachment while the other members of the team continued

- patrolling the area. A few minutes after the team had left he heard a gunshot. He then saw a Truck being driven at high speed, and his team mates pursuing using their Council vehicle. He noticed that one of the rear tyres of the Truck had been damaged.
14. He got in the vehicle and joined the pursuit of the Truck. When the Truck got to where they were some rocks, it made a sudden U-turn, he then sensed danger that the Truck was going to crush them all and he jumped out of the Council vehicle, and drew out his pistol. He fired a warning shot in the air, the Truck swerved and at that point he aimed the gun at the front wheel which is on the left hand side and fired a shot. The bullet missed the wheel and hit the body of the Truck. The Truck did not stop, it was then being driven towards Luveve, Bulawayo. After the two gunshots the team of Rangers went to Pumula Police Station to file a report.
15. In cross examination accused testified that he was armed with a CZ 9 mm pistol. He was trained in the use of a firearm. He said he fired the first shot as a warning as the Truck was coming straight towards his team, he fired the second shot aiming to hit the wheel, so that the driver would stop the Truck and then the sand poachers would be arrested. He fired the shots from a ten metre point. After firing the two shots he did not realise that he had injured someone.
16. The second witness to testify for the defence was Banda. His evidence is that he was a Council employee. He is not a Ranger. On the 19th October 2020, he was the driver of the vehicle used by the Rangers. At Mawzi Game Park the team saw soil poachers using a UD Truck. The poachers jumped into the Truck and drove towards the vehicle used by the team of Rangers. The Truck approached at high speed, this witness then pulled their vehicle off the road to avoid a collision. After the Truck had passed, one Nxumalo a Ranger shot one rear wheel. The Truck continued moving, the team then picked up accused and the student on attachment where they had remained taking photographs. The team continued pursuing the Truck. The Truck made a sudden U-turn and was driven straight towards the vehicle of the Rangers. The accused jumped out of the vehicle and fired two shots. The Truck did not stop.

17. Under cross examination he testified that when the accused jumped out of the vehicle and fired shots, he remained in the vehicle. He did not see where the bullets hit, he just heard the sound of gun fire.
18. The third witness to testify for the defence was Nxumalo. His evidence is that he is employed by Council as a Ranger. On the 19th October 2020, he was part of the team that was at Mazwi Game Park. When the Truck of the sand poachers passed their vehicle he fired one gunshot and hit one rear wheel of the Truck. The team picked the accused and the student where they had remained and continued pursuing the Truck. The Truck later made a sudden U-turn and was driven straight to the vehicle used by the Rangers. The accused jumped out of the vehicle, first fired a warning shot, and second aimed at the front wheel of the Truck. The Truck did not stop. After the shooting incident the Rangers reported the matter at Pumula Police Station.
19. At the conclusion of the testimony of Mduduzi Nxumalo, the defence closed its case.

Assessment of witnesses

20. Mr Mhlanga the first State witness was the driver of the Truck. On two occasions he attempted to run over the vehicle used by the Rangers. In cross examination on being asked about his attempts to collide with the Rangers' vehicle, he became evasive. He was doing this to save his own skin. Mr Sibanda the second State witness was also evasive and prevaricating. In evidence in chief he said accused shot at the now deceased. In cross examination it became clear that he did not see accused shooting at the now deceased. Mr Chidume was a good witness. He is a trained and professional police officer who was unfortunately subjected to unfair and irrelevant cross examination. However the material and admissible part of his evidence, as captured above was not challenged in any material respect and we accept it.
21. The accused was generally a satisfactory witness, we however noted that in one instance he was exaggerating, e.g. he was exaggerating when he said he was very

frightened at the time of the shooting. We do not agree that an officer of twenty-six years' experience would be frightened to the extent the accused wanted the court to believe. Further we do not believe him when he said he did not realise that he had injured someone. We say so because the evidence of Ojilive Sibanda was admitted in terms of section 314 of the CP & E Act, whose evidence is that accused made a report that he had shot someone. Nothing much turns of this exaggeration and this lie. In our law it is permissible either to accept or reject the evidence of a witness who has lied before or who has lied only with regard to a particular fact. Everything depends upon the particular circumstances of the case. In some instances accused persons lie not because they are guilty, but because they think the truth will darken their version. Accused's exaggeration and lie must be seen in this context. On the circumstances of this case our view is that the accused notwithstanding his exaggeration and lie he was generally a satisfactory witness.

22. Mr Banda 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. Mr Nxumalo appeared to be a credible and honest witness. He was not challenged in cross-examination in any material respects and we accept his account of what happened without qualification.

Analysis of the evidence

23. It is trite law that in a criminal trial the *onus* is on the State to prove the commission of the offence beyond reasonable doubt and that there is no *onus* on an accused person to prove his innocence.

24. In *R v Difford* 1937 AD 370 at 373 the court said:

No *onus* rests on the accused to convince the court of the truth of any explanation he gives. If he gives an explanation, even if that explanation be improbable, the court is not entitled to convict unless it is satisfied, not only that the explanation is improbable, but that beyond any reasonable doubt it is

false. If there is any reasonable possibility of his explanation being true, then he is entitled to his acquittal.

25. In *S v Schackell* 2001 (4) SA 1 (SCA) para @ 30 the court said:

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.

26. In *R v M* 1946 AD 1023, DAVIS AJA said the following at 1027:

And, I repeat, 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.

27. It is on the basis of these legal principles that the evidence and the facts in this matter must be analysed. See: *S v Kuiper* 2000 (1) ZLR 113 (S).

28. The two State witnesses who were present at the scene of the shooting, did not see the accused firing the gunshots. Mhlanga only saw the accused disembarking from the vehicle carrying a firearm. He neither saw the accused firing nor heard the gun shots. Although the second witness Sibanda in his evidence in chief said deceased shot at the Truck, when asked in cross examination whether a bullet hit the Truck, his answer was he did not know much about that. These two witnesses who were themselves in the Truck with the now deceased did not see where the accused aimed his gun.

29. In his evidence accused said he first fired a warning shot, and then aimed at the front wheel, which he missed and the bullet hit the body of the Truck. There is nothing to

controvert accused's version on this critical issue. His evidence on this issue is reasonably possibly be true and we accept it.

30. The accused's witnesses Banda and Nxumalo testified about the first incident when the Truck was driven straight towards the vehicle of the Rangers. This prompted Banda to drive off the road to avoid a collision. This version was corroborated by Nxumalo. Nxumalo shot the rear wheel of the Truck.
31. In the second incident, after the U-turn, the accused and his two witnesses testified about the violence that was exhibited when the Truck was driven straight to their vehicle, this was the trigger that caused accused to jump out of the vehicle and fire two shots. We believe the accused and his witnesses on this issue, and reject the denials of Mhlanga and Sibanda who were determined to avoid an arrest by all means necessary, and in this court to suppress the truth if convenient to them to do so.
32. We therefore find the following facts proved; that on the 19th October 2020, the now deceased in the company of Mhlanga and Sibanda were poaching sand at Mpopoma River. At approximately 1300 hours they were approached by the team of Rangers from the Bulawayo City Council, they jumped into their Nissan UD Truck Reg. No. ADZ 4808. Mhlanga was the driver and the now deceased and Sibanda were kneeling or seated in the loading box of the Truck. The Truck was driven straight towards the Rangers' vehicle, which pulled off the road to avoid a collision. Nxumalo, a Ranger fired a shot with a CZ pistol and hit one rear tyre but the Truck did not stop.
33. The Rangers pursued the Truck, picked up accused and a student where they had remained and continued pursuing the Truck. The Truck made a U-turn and was driven straight to the vehicle used by the Rangers. Accused jumped off the vehicle, fired first a warning shot in the air, the Truck swerved and did not stop. While it was still moving the accused aimed another shot at the front wheel of the Truck, missed it and the bullet hit the body of the Truck and ricocheted and struck the now deceased who was kneeling or seated in the loading box of the Truck. We accept that the accused fired the second gunshot in trying to puncture the front wheel, force the Truck to stop and then arrest the deceased and his companions.

34. The next issue for determination is whether the State has proved that it is the accused who caused the injuries suffered by the deceased? In this regard we accept the evidence of Prosper Chidume, the investigating officer, that on the 23rd October 2020, he saw deceased at the hospital. He observed that deceased had a gunshot on the lower left of the abdomen. He recovered the bullet that was removed from the deceased's body. The bullet head was taken to Forensic Department in Harare. The Forensic Report (Ext. 3) shows that the test cases fired from accused's pistol matched the bullet head recovered from the body of the deceased. We find that the bullet removed from the body of the deceased was fired by the accused.
35. Further in his confirmed warned and cautioned statement (Ext. 1), the accused said, "..... Sensing danger, I jumped out, fired a warning shot. They did not stop. I then fired at one of their wheels. The bullet missed, ricochet off the side of the truck body and caught the complainant who was sitting at the back." Again in his evidence in court accused admitted that he fired two shots, first a warning shot and second he aimed the front wheel and missed it. Further immediately after the second shot, the now deceased held his stomach and told his companions that he had been shot. Therefore there is evidence that the injuries sustained by the now deceased were caused by the accused.
36. The next issue for determination is whether the State has proved that the injuries suffered by the now deceased caused his death? According to the post mortem report (Ext. 2) the death of the deceased was caused by peritonitis, bowel injury and gunshot. It further says the bullet from the entry point of the skin passed through the bone. This is evidence that the peritonitis and bowel injury all emanated from the gunshot. Put differently, it is the gunshot that caused the peritonitis and bowel injury which caused the death of the deceased. We find it proved that the injuries inflicted by the accused caused the death of the deceased.
37. The accused is charged with the crime of murder as defined in section 47(1) of the Criminal Law (Codification and Reform) Act. Mr *Muduma* counsel for the State conceded that on the evidence before court it cannot be said that the accused is guilty

of murder. The evidence was that the accused aimed the wheel, missed it and hit the body of the Truck, and the ricochet caused the bullet to hit the now deceased. There is no evidence that accused intended to kill the deceased or realised that there was a real risk or possibility that his conduct may cause death, and continued to engage in that conduct despite the risk or possibility. On the totality of the evidence the concession was properly taken.

38. Mr *Muduma* argued that accused must be found guilty of the crime of culpable homicide as defined in section 49 of the Criminal Law (codification and Reform) Act.

39. Professor G. Feltoe, in his book, *The Guide to Zimbabwean Criminal Law* p. 84 discusses the elements of the crime of culpable homicide. The learned author says:

Negligence is not a state of mind in actuality but rather a blameworthy absence of foresight. The objective test is applied. The issue is not what the accused himself intended or subjectively foresaw at the time the criminal consequence resulted. The central issue is whether the reasonable man placed in the same circumstances as the accused would have foreseen the possibility of the consequence and would have guarded against it.

40. The accused fired two shots. First was a warning shot, and the second was to immobilize the Truck, cause it to stop and then arrest the sand poachers. In the second shot he aimed the front left tyre and missed it, hit the body of the Truck, the bullet ricocheted and struck the deceased who was at the back of the Truck. The central issue is whether by aiming at a front tyre of a moving vehicle, could a reasonable person placed in the position of the accused foresee the possibility of missing the wheel, hitting the body of the truck and the bullet ricocheting and hitting a person seated or kneeling in the loading box of the Truck, and that person dying as a result of the wounds caused by the bullet head?

41. The central question must be answered within the context of the duties of the accused as a Ranger. His duties entail, among others to arrest sand poachers. Sand poachers were found poaching sand in his area of patrol. He was the most senior amongst the Rangers in his team. Sand poachers were evading arrest. In the first incident and in his

absence Nxumalo shot at the rear wheel of the Truck but it did not stop. In the second incident the accused fired a warning shot, and again the Truck did not stop. He then aimed a shot at the front wheel, missed it, hit the body of the Truck and the bullet ricocheted and struck the deceased who was in the loading box. On the facts of this case, we take the view that a reasonable person in the circumstances of the accused would not have foreseen that his conduct might bring about the death of the deceased. There were no steps accused should have taken to stop the bullet from hitting the body of the Truck and ricocheting and hitting the deceased.

42. This case is distinguishable from *S v Mlambo* HMT 19-18 where the accused pursued thieves, caught up with them and fired two warning shots into the air and another shot in the direction of the deceased and shot him in the head. He was convicted of culpable homicide. In *casu*, the accused aimed to hit the front wheel and missed it, the bullet ricocheted and hit the deceased who was in the loading box of the big Truck. There is nothing that the accused could have done to guard against the bullet ricocheting and hitting the deceased.
43. One may argue that trying to shot a wheel of a moving motor vehicle with people inside is negligence. In this case accused aimed at a wheel of a big truck, the wheels of such Truck are big. He could not have foreseen that he will miss the wheel, hit the body and the bullet ricochet to hit a person in the loading box and that person dying as a result of the injuries caused by the bullet.
44. Each case must be determined on its facts, and our view is that convicting the accused of culpable homicide on the facts of this case would be stretching the principle of negligence in culpable homicide cases too wide. Our view is that he cannot even be convicted of the crime of culpable homicide.
45. When all the evidence has been assessed, we are satisfied that the State failed to prove its case beyond a reasonable doubt, and consequently we find the accused not guilty.

Verdict: Accused is found not guilty and acquitted.

*National Prosecuting Authority, State's legal practitioners
Coghlan and Welsh, accused's legal practitioners*