

THE STATE

Versus

MONDLIWETHU SIWELA

And

MICHAEL SASUMA VUMA

IN THE HIGH COURT OF ZIMBABWE
DUBE-BANDA J with Assessors Mr Mashingaidze and Mr Dewa
BULAWAYO 25, 26 & 27 September 2023

Criminal trial

Mr. *K.M. Nyoni*, for the State
Mr. *D. Abraham*, for the 1st accused
Ms. *A. Mbeure*, for the 2nd accused

DUBE-BANDA J:

[1] The accused persons, Mr Mondliwethu Siwela (accused 1) and Mr Michael Sasuma Vuma (accused 2) are appearing before this court charged with the crime of murder as defined in section 47(1) of the Criminal Law (Codification and Reform) Act [Chapter 9:23] (Criminal Code). It being alleged that on 5 November 2021 the two accused persons assaulted Maxwell Dube (deceased) using fists and switches all over the body intending to kill him or realising that there is a real risk or possibility that their conduct may cause the death of the deceased and continued to engage in that conduct despite the risk or possibility.

[2] The accused persons were legally represented throughout the trial. In his plea accused 1 admitted that he assaulted the deceased but he did not intend to cause his death. Accused 2 admitted that he assaulted the deceased to remonstrate with him, and did not intend to cause his death. A plea of not guilty was entered as required by law. The State tendered an outline of the summary of the State case (Annexure A), which was read and is part of the record. The accused persons through their Counsel tendered their defence outlines (Annexures B and C respectively). The defence outlines were read and are part of the record.

[3] The following admissions by the accused persons were recorded in terms of s 314 of the Criminal Procedure and Evidence Act [Chapter 9:07] (CP & E Act). The admissions relate to the evidence of certain witnesses as it appears in the summary of the State case.

[3.1] The evidence of Dr. I. Jekeny is that he is a registered medical practitioner based at Mpilo Hospital. His evidence is that on 10 November 2021 he examined the remains of the deceased and compiled a post mortem (exhibit 1) depicting the injuries sustained by the deceased and the cause of his death. He observed that the cause of death was brain haemorrhage, head injuries and assault.

[3.2] The evidence of Polite Nkomo is that on 5 November 2021 at 7:30 p.m. she was at her shop at Matiwana Business Centre. First, accused 2 entered the shop, and after a short while the deceased entered the shop holding three okapi knives and money which he placed on the shop counter. He said he won the money at a gambling school. He opened one okapi knife saying "I want to kill someone today." He then ran outside the shop, and the two accused persons followed him. Accused 1 had a torch which he took from the shop. And after a while she heard a man's voice screaming. She went outside the shop to check what was happening, she saw torch lights a few metres away from the shop. She did not go closer to observe what was happening, thereafter she closed the shop and went home.

[3.3] The evidence of Forward Ndlovu is that on 5 November 2021 at around 8 p.m. he heard a voice of a person crying for help and checked what was happening. He saw accused 1 hitting the deceased with clenched fists several times all over the body and accused 2 assaulting him with switches several time all over the body. Accused 1 used both hands to tore deceased's clothes. He warned both accused persons to stop assaulting the deceased, but they did not heed the warning.

[3.4] The evidence of Cathrine Ndebele is that on 5 November 2021 deceased left home going to Matiwana Business centre and did not return home. She looked for the deceased and found him lying on the ground facing upwards. She tried to wake him up but he was unconscious. She saw several switches in the vicinity to where the deceased was lying down. The evidence of Edson Ncube is that he ferried the

deceased to Mayobodo Police Station and to Mayobodo Clinic. The evidence of Solomon Chaisimbi is that he is the investigating officer in this matter, and on 26 November 2021 he recorded warned and cautioned statements from the accused persons.

[4] The State tendered with the consent of the accused persons the following documentary and real exhibits: the Post Mortem Report No. 220/182/2021 (exhibit 1) compiled by Doctor I. Jekenya who examined the remains of the deceased. The confirmed warned and cautioned statement of the accused 1 (exhibit 2), and the confirmed statement of accused 2 (exhibit 3). Six mopani switches with the following measurements: weight 60g, length 75cm (exhibit 4.a); weight 170g, length 103cm (exhibit 4.b); weight 150g, length 75cm (exhibit 4.c); weight 200g, length 104cm (exhibit 4.d); weight 73g, length 37cm (exhibit 4.e); weight 70g, length 106.5cm (exhibit 4.f).

[5] The State called one witness to give oral evidence and the accused persons testified in their own defence. The evidence of the witnesses will be summarised very briefly.

[6] The State called the evidence of Calistas Moyo. He testified that the deceased was his cousin brother and the accused persons are local villagers. He said near Matiwana Business Centre at approximately between 7 p.m. and 8 p.m. he heard a voice of someone groaning and calling out the names of the accused persons and asking why they were killing him. He proceeded to the scene and saw that the accused persons were beating up the deceased. Accused 1 was sitting on the chest of the deceased and punching him with fists. Accused 2 was using a switch and beating him on his back. He testified that he got hold of accused 1 by the shirt to get him off the chest of the deceased. The witness was then pushed by accused 2, he fell down and had bruises on his arms. He became afraid then decided to leave scene and go to his home.

[7] Under cross-examination by Counsel for accused 1, the witness testified that there was a torch that was illuminating the scene and as a result visibility was good. He said the deceased was lying down facing upwards and the accused 1 sitting on his chest. Under cross-examination by Counsel for accused 2, he testified that he did not know the reason the accused persons were beating up the deceased. Accused 2 was using switches to beat up the

deceased. He tried to reprimand the accused persons to stop beating up the deceased, but they did not heed his reprimand. Counsel put it to the witness that after the reprimand accused 2 left the scene, this was disputed and the witness said he left the two still beating up the deceased. Answering to the question by the court, he said accused 2 was beating up deceased using a switch taken from a mopane tree.

[8] The court's view is that Mr Calistas Moyo was a very good witness, he was honest and candid in his evidence. His evidence is corroborated by the evidence of Forward Ndlovu whose evidence was admitted in terms of s 314 of the CP&E Act. He gave a correct version of what he saw and did at the scene. His evidence is accepted as a correct account of what he saw, and it is accepted without reservation.

[9] After the evidence of Calistas Moyo the prosecution closed the State case.

[10] Accused 1 testified in his defence. He testified that he arrived at Matiwana Business Centre at approximately 11 a.m. He bought himself beer and started drinking, and at around 12 O'clock the deceased joined him and they consumed beer together. Later accused 2 arrived and bought his beer, and sat on a different bench. The drinking of beer continued until sun-set. The deceased went outside the shop, and when he returned, he was holding knives in both hands, and saying he felt like killing a person. The accused testified that he asked deceased as to who he wanted to kill, and at that point the deceased attempted to stab him. Accused 1 said he then took his bags intending to go home, and when outside the deceased throw stones at him. He testified that he returned to the shop and asked for a torch telling the people therein that the deceased was fighting him. He invited accused 2 so that the two could accompany each other to their respective homes. The deceased throw bricks at the two, and he was still holding a knife. The deceased fled and the two pursued him for the purpose of disarming and remonstrating with him. When they caught up with him, he turned back and accused 1 punched him with a fist and he fell down. He said it was that fall that caused the deceased head injury. Accused 1 testified that he started beating up the deceased asking him to surrender the knives he had in his possession. He disarmed him of one knife and continued beating up him demanding the other knife. He said he assaulted him on the body, but did not punch the head. Accused 2 was beating the deceased with a switch.

[11] Under cross examination by Counsel of accused 2, accused 1 testified that his intention was to remonstrate with the deceased that he must not produce weapons. He said the knives that were carried by the deceased were taken by the police. Under cross examination by State Counsel, he testified that he beat up the deceased, and he died as a result of the injuries he inflicted on him. He said he punched deceased and he fell down headlong, and that is what caused the head injury seen by the doctor who examined his remains. He said after the deceased fell down, he sat on his chest, because he wanted him to surrender the knife. He did not count the punches he unleashed against the deceased. Accused 2 joined in beating up the deceased. He conceded that Calistas Moyo arrived at the scene. He disputed that Calistas Moyo tried to push him to get off the chest of the deceased. He did not see accused 2 pushing Calistas Moyo. When asked a direct question whether the deceased provoked him, his answer was in the shop they were some elderly people so that they wanted to remonstrate with him against producing knives. He conceded that the deceased did not mention the person he wanted to kill. Asked the reason why the two accused were the one who were provoked, his answer was because the accused persons were the young ones in the shop. Accused 1 conceded that after the beating they left the deceased at the scene and he was found at the same place the following morning.

[12] The court's view is that accused 1 lied when he said he punched he did not punch the deceased on his head. His evidence in this regard is at variance with the injuries observed by the doctor who examined the remains of the deceased, it is also at variance with the evidence of Calistas Moyo and Forward Ndlovu a s 314 witness. Again, accused 1 lied when he testified that the deceased through bricks at them, if it was so, he would have said it in his confirmed statement, which was recorded when the events were still recent. The accused 1 then closed his defence case.

[13] The material part of accused 2 testified is that he bought his beer and started drinking. He saw the deceased holding knives saying he felt like killing a person. The deceased went out of the shop, and he followed and the two stood at the veranda. He then told the deceased not to produce weapons in the presence of elders. The deceased then insulted him about his mother's private parts. Thereafter, he deceased attacked him with a knife and his shirt was torn in the process. Accused 2 testified that he fled and deceased gave chase, when he entered the shop deceased remained standing outside in the darkness. He said deceased poked

accused 1 with the butt of a knife. Outside the shop deceased came armed with some bricks, and threw them at the accused persons. The two then chased him for the purposes of disarming him, after catching up with him accused 1 beat him up with fists and accused 2 with mopani switches. He used three switches and beat him on the buttocks and the back. He testified that when Calistas Moyo arrived at the scene, he stopped beating up the deceased, and he was now frightened about what they had done. He left the scene and at that point deceased was lying down. He does not know what caused the deceased head injury. Counsel for accused 1 did not cross examine accused 2. Under cross examination by State Counsel, accused 2 testified that he did not intend to cause the death of the deceased.

[14] The court's view is that accused 2 lied when he testified that he stopped beating up the deceased when Calistas Moyo arrived at the scene. The contention by the two accused that they beat up the deceased to force him to surrender weapons is a lie. The evidence of Calistas Moyo that he tried to refrain the two from continuing to assault deceased is corroborated by accused 2 in his confirmed statement. The evidence of the two accused persons where it is at variance with the evidence of Calistas Moyo and the evidence of the s 314 witnesses will be rejected as false.

[15] The following facts are either common cause or proved by evidence; on 5 November 2021 the two accused persons and the deceased were consuming beer at a bar located at Matiwana Business Centre. At approximately 19:30 p.m. the deceased entered the shop holding three okapi knives. He opened one knife and said he wanted to kill someone on that day. The utterances by the deceased did not go down well with the two accused persons, when the deceased left the shop, the accused persons pursued him. The deceased tried to flee, but the two apprehended him within a short distance, and accused 1 struck him with a fist and deceased fell down. Accused I was carrying a torch which he took from the shop. The two accused persons started to assault the deceased, accused 1 was using clenched fists and accused 2 mopani switches. The deceased cried and his voice was heard by Polite Nkomo and Forward Ndlovu s 314 witnesses and Calistas Moyo. The two were assaulting the deceased indiscriminately all over the body. Both Forward Ndlovu and Calistas Moyo warned the accused person to stop assaulting the deceased, but they did not heed the warning. The assault continued was prolonged. The two accused left the deceased at the scene of crime, and he was found the following morning lying down on the ground facing upwards. He was

unconscious. He remained unconscious until he died on 9 November 2021. The evidence shows that the injuries on the deceased were inflicted by the accused persons. The injuries inflicted by the accused persons caused the death of the deceased.

[16] It is trite law that the *onus* rests on the State to prove the guilty of the accused beyond a reasonable doubt in order to secure a conviction. There is no *onus* on the accused to prove his innocence. This principle is trite in our law. However, proof beyond reasonable doubt does not mean proof beyond a shadow of doubt. The law would fail to protect the community if it required such proof because it will rarely be achieved. See *Musimike v The State* SC 57/20.

[17] The accused persons take up intoxication as a defence in this case. There is evidence that the accused persons consumed alcohol on the day they caused the death of the deceased. There is however no evidence of the type of beer they were drinking and its alcoholic content. Again, the accused persons' recall of events is so clear that it could not be said that they were so beside themselves with intoxication when they assaulted the deceased. They knew exactly what they were doing and for what purpose. Therefore, the defence of intoxication as provided in s 220 of the Criminal Code is not available to the accused persons in whatever form as a defence.

[18] Accused 1 also raises the defence of provocation. This common law defence has been codified in ss 238 and 239 of the Criminal Code. At its best the accused persons' version is that the deceased produced okapi knives, and attempted to stab both of them, accused 1 inside the shop and accused 2 at the veranda. He insulted accused 2 mentioning her mother's private parts. The undisputed evidence is that the deceased ran out of the shop, the two pursued him with accused 1 carrying a torch, accused 1 strike him with a clenched fist, and he fell down headlong. The two started to assault him. Thereafter, he was heard screaming by Polite Nkomo, Calistas Moyo and Forward Ndlovu.

[19] The provocation is alleged to have happened inside the bar. The accused had the presence of mind to pursue the deceased who was fleeing from them. They caught up with him and started assaulting him viciously. The assault was prolonged. Calistas Moyo and Forward Ndlovu warned them to stop the assault, but they did not heed the warning. The provocation was not such that a reasonable person would lose his self-control, again it was

not sufficient to make a reasonable person in the accused's position and circumstances to lose self-control and assault the deceased in a vicious manner they did causing him to be unconscious leading to his death. Provocation as a defence is not available to the accused persons.

[20] It is the two accused persons who assaulted the deceased. It is of no consequence as to who inflicted the fatal blow. The two accused are caught by the doctrine of common purpose which is part of our law. Section 196A of the Criminal Code deal with the liability of co-perpetrators who knowingly associate for common purpose of committing a crime or crimes. Common purpose is present when two or more persons having a common goal to commit a crime, act together in order to achieve that purpose, the conduct of each of them in the execution of that purpose is imputed to the others. The two accused persons exited the bar together, pursued the deceased together, caught up with him together, and assaulted him together. The two left the deceased for dead together. The fatal blow inflicted by each one of them in the execution of their purpose is imputed to the other.

[21] Mr *Nyoni* Counsel for the State sought a verdict of guilty to Murder, and Mr *Abraham* Counsel for the accused 1 submitted that the accused should be found guilty of the lesser crime of culpable homicide. Ms. *Mbeure* submitted that accused 2 should be found guilty of assault or in the worst-case culpable homicide. For the court to return a conviction of murder in terms of s 47(1) of the Criminal Code, the State must prove beyond a reasonable doubt that the two accused persons in assaulting the deceased using fists and switches all over the body intended to kill him or realised that there was a real risk or possibility that their conduct may cause the death of the deceased and continued to engage in that conduct despite the risk or possibility. In this case the question is whether even if death was not their aim and object but in the process of assaulting the deceased, they foresaw death as a substantially certain result of their activity and proceeded regardless as to whether death occurred?

[22] Accused 1 by his own version he struck deceased with a fist causing him to fall down headlong. Thereafter he assaulted him with clenched fists all over the body. In fact, in his confirmed statement, he says he also used mopani switches to assault the deceased all over the body. Accused 2 used mopani switches to assault the deceased. Six pieces of mopani switches were found at the scene of crime and are exhibits before court. Some of them are

very big and qualify to be called logs. The assault was callous. The post mortem report shows that the deceased had multiple whip lashes like injuries on the whole body; multiple scalp and facial bruises; swollen face and scalp (skin covering the head); and swollen traumatised left shoulder. The CT scan showed a right sided intraventricular haemorrhage (bleeding into the brain system). The assault rendered the deceased unconscious, and he did not regain consciousness until he died. According to the post mortem, the deceased died of brain haemorrhage; head injury and assault. The cause of death is consistent with the vicious assault perpetrated on the deceased by the accused persons.

[23] Accused 1 punched deceased and he fell headlong, despite such fall the two continued to perpetrate a protracted and callous assault on him, punching him with clenched fists and beating him with mopani switches and logs. After that protracted assault, the two left the deceased at the scene of crime. They left the deceased lying helplessly on the ground facing upwards, that is the same position he was found in the following morning. They assaulted him until he became unconscious. A human body is made of flesh and blood, and there is a limit to what it can endure such assault. The injuries depicted on the post mortem report shows that the deceased was assaulted beyond what a human body can endure. This is not a case of culpable homicide. Culpable homicide has no place in such a case. This is a case of murder. While assaulting the deceased the two objectively foresaw the death of the deceased as a substantially certain result of that assault and proceeded regardless. See (*S v Mugwanda* 2002 (1) ZLR 547 (S); *S v Tailo & Anor* HB 126/22).

[24] Having carefully weighed the evidence adduced as a whole in this trial it is clear that the State has proved its case beyond a reasonable doubt against the accused persons. It is no longer necessary in our law to specify whether the accused is guilty of murder in terms of s 47(1) (a) or (b). See *Mapfoche & Another v The State* SC 84/21.

In the result, accused 1 and accused 2 are found guilty of murder as defined in s 47 (1) of the Criminal Law (Codification & Reform Act) [Chapter 9:23].

Sentence

[25] Mr Siwela and Mr Vuma, this Court has convicted you of the crime of murder as defined in s 47 (1) of the Criminal Code. The murder you have been convicted of was not committed in aggravating circumstances as defined in s 47 (2) and (3) of the Criminal Code.

[26] It is now the task of this court to impose an appropriate sentence. In sentencing you this court has to take into account all relevant factors, afford each the appropriate weight thereto and strike a balance between the various interests. In determining a sentence which is just and fair, this court will have regard to the triad of factors that have to be considered as set out in case law, and the provisions of the Criminal Procedure (Sentencing Guidelines) Regulations, 2023. This Court must therefore take into account your personal circumstances, the nature of the crime including the gravity and extent thereof and the interests of the community. It is trite that a sentence must be blended with mercy. See *S v Rabie* 1975 (4) SA 855 (AD) at 862G-H. The right balance must be achieved. As sentence that is too light is as wrong as sentence too heavy. Both can bring the criminal justice system into disrepute. See *S v Matika* (HB 17 of 2006) [2006] ZWBHC 17 (15 March 2006). It is also trite as stated in case law that true mercy has nothing in common with soft weakness, or maudlin sympathy for the criminal or permissive tolerance. It is an element of justice itself. See *S v Matika (supra)*; *Graham v Odendaal* 1972(2) SA 611A at 614. Mercy must not be allowed to lead to condonation or minimisation of serious offences. See *S v Van der Westhuizen* 1974(4) SA 61(c) and *A guide to Sentencing in Zimbabwe* by G Feltoe at pages 2-3.

[27] Your personal circumstances have been placed on record. Accused 1 you are a first offender. You are 29 years old, and an artisanal miner. You are married with two minor children. You have been in pre-trial incarceration for approximately two years. For the purposes of sentence, the court accepts that you were intoxicated and that you were provoked by the deceased. You also contributed towards the funeral expenses of the deceased. Accused 2 you are a first offender, and you are 25 years old. Like accused 1 you have been in pre-trial incarceration of approximately two years.

[28] On the evidence before it has to be accepted that the you were intoxicated at the time you committed this crime. The effects of the intake of alcohol on an accused has always been considered when imposing sentence, and is further authorised by the Criminal Code. In *S v Ndhlovu* (2) 1965 (4) SA 692 (A) 695 C-D the (then) Appeal Court stated:

“Intoxication is one of humanity’s age-old frailties, which may, depending on the circumstances, reduce the moral blameworthiness of a crime, and may even evoke a touch of compassion through the perceptive understanding that man, seeking solace or pleasure in liquor, may easily over-indulge and thereby do the things which sober he would not do.”

[29] In considering sentence this court takes into account that you might have been provoked by the deceased. Again, in your favour you are a first offenders. And right from the time of your arrest you did not dispute that it is you who caused the death of the deceased. All these factors somehow diminish your moral blameworthiness.

[30] On the other hand the offence for which you have been convicted of is a grave and serious. 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. It is incumbent on this court to emphasize the sanctity of human life. Society frowns at the taking of another human being’s life. The courts must send a loud and clear message that the killing of a fellow human being will not be tolerated.

[31] It is aggravating that you assaulted the deceased until he lost consciousness, and he never regained consciousness until he died. Realising that you had mortally wounded the deceased, you left him at the scene until he was found there by his grandmother. You did not have the presence of mind to seek medical assistance for him. The assault was prolonged. You did not heed the warnings to stop the assault, you continued and continued. The post mortem report speaks of the brutality of the assault. This is the aspect of the case that makes you stand on slippery ground. The assault you perpetrated on the deceased was far beyond what a human being could endure. It was brutal and callous. No human being should have their life ended in such a violent manner. It is for these reasons that a direct and long prison term will meet the justice of the case.

[32] On a balanced consideration of the totality of the evidence and the facts of this case, this court considers that the following sentence will meet the justice of this case:

Each one of you is sentenced to 15 years imprisonment.

National Prosecuting Authority, state's legal practitioners
Gula-Ndebele & Partners, accused's legal practitioners