

THE STATE

Versus

MTHULISI SIBANDA

IN THE HIGH COURT OF ZIMBABWE
KABASA J with Assessors Mrs. C. Baye and Mr E. Shumba
GWERU 29 and 30 JANUARY 2024

Criminal Trial

M. Mhene, for the state
B. Balamanja for the accused

KABASA J: The accused appeared before us on a charge of murder as defined in section 47 (1) of the Criminal Law (Codification and Reform) Act, Chapter 9:23 to which he pleaded not guilty.

The state alleges that on 3 September 2020 the accused in the company of Knowledge Museni went to Drunkard 21 Mine Safago in Shurugwi where they saw the now deceased who was seated in a tent. The accused signaled the now deceased to come out of the tent which he did. They proceeded behind the tent where the accused proceeded to stab the now deceased once on the chest. The now deceased managed to run away but collapsed after about 400 metres. He was ferried to Gweru Provincial hospital where he was certified dead on arrival.

In his defence the accused explained that prior to 3 September 2020 the now deceased had fought with Knowledge which fight resulted in Knowledge sustaining a stab wound. On 3 September the accused went to Drunkard 21 Mine to mill his gold ore and he was then informed that Knowledge and one Tamsanqa had had another fight with the now deceased. He tried to investigate following the direction they had taken. He stumbled upon a spoor of blood. People who were strangers to him were coming from the direction where the spoor of blood was leading to. He decided to flee for fear that they would turn on him to avenge the attack on the now deceased. He was later arrested and upon his arrest the Police assaulted him forcing him to admit to the charge. The statement he was induced to give was later

confirmed by a Magistrate but the Police Officers who had threatened him were allowed to sit in court during the confirmation proceedings.

In seeking to prove its case the state produced the post-mortem report which gave the cause of death as:-

Acute anemia

Hepatic laceration

Stab wound

The marks of violence observed by the doctor who conducted the post-mortem were:-

- a) Incised wound, 5 cm x 2 cm in the chest, 8th intercostal arch at 5 cm from sternum.
- b) Abundant free blood in thoracic cavity and
- c) Laceration in the right lobe of the liver which had a pale cut surface.

The doctor's evidence was admitted in terms of section 314 of the Criminal Procedure and Evidence Act, Chapter 9:07. The evidence of seven witnesses was also similarly admitted.

The witnesses' evidence chronicled the events which occurred after the now deceased was stabbed. Ephraim Nhimba was the one who ferried the now deceased to a clinic and to hospital where the deceased was pronounced dead. James Murandani is the now deceased's father who was informed of the incident and accompanied the deceased to hospital. He checked the now deceased's body and observed a stab wound on the right side of the chest. The now deceased informed him of the identity of the person who had stabbed him. On arrival at the hospital the now deceased was certified dead. The other witnesses were the Police Officer who attended the scene and observed the spoor of blood on the route the now deceased had taken, and the arresting detail who arrested the accused in Lower Gweru with the assistance of gold panners. Saul Bikwi was the Police Officer who ferried the deceased's body for post-mortem examination which examination was done by Doctor Juana Rodriguez Gregori after the body was identified by a Police Officer, one Welcome Dube.

The Police Officer who witnessed the recording of accused's warned and cautioned statement and later took him for indications had his evidence admitted and so was not called to testify.

The state then led evidence from four state witnesses. The first witness was Godknows Masengu. He was with the now deceased on the fateful day. His testimony was to the effect that he accompanied the now deceased to look for cattle. When they arrived at Drunkard 21 mine they decided to join some people who were seated in a tent. The accused arrived shortly thereafter in the company of his colleague and he was holding a metal object which was sharp at the tip. He did not see how the accused summoned the now deceased but he saw the now deceased going to where the accused was. Just then people shouted that there were people chasing each other. He then saw the accused and his colleague running after the now deceased but they did not catch up with him. He followed the now deceased and on getting to where he was he had his hand on his chest and uttered the words "I have been killed my son." He was ferried to hospital but was pronounced dead soon after arrival.

This witness gave a detailed and clear account of the events of this day. He observed the accused for about 2-3 minutes in broad daylight. At the time of such observation all was well and so it cannot be suggested that there was anything that militated against the witness's ability to observe the people who summoned his uncle, the now deceased and left with him. As the accused ran after the now deceased the witness was able to observe him and noticed the sharp object he was carrying.

Is it possible that this identification was honest but mistaken? (*S v Mutters & Anor* S 66-89, *S v Makoni & Ors* S 67-89).

Granted this witness did not know the accused before this day but when he met him he did not have a mere fleeting glance at him. This is because when the accused arrived he greeted the now deceased before they went behind the tent. Shortly thereafter the witness had reason to take note of the same accused who was now chasing after the now deceased. This was his uncle who he was with on their mission to find their cattle. Surely he would have had reason to have interest in taking note of this person who was chasing after his uncle. After failing to catch up with him the accused returned to where this witness was and so he had another opportunity to observe him before he left following the now deceased.

We were satisfied the witness had ample time to observe the accused and could not have been mistaken.

We are fortified in so concluding because the witness's evidence was materially corroborated by Douglas Mukutsha. Douglas had known the accused for about 3 months as he used to come to the mine where the witness worked.

On this day the accused came in the company of one he knew as "Wasu" and they had gold ore for milling. He then heard a voice calling out that there were people who were having "issues" outside. He took barely 2 steps from where he was seated and observed the accused chasing after the now deceased. The accused was carrying a sharp metal object. This "Wasu" was following behind the accused as they chased the now deceased. They did not catch up with him and after a few minutes he saw the accused and "Wasu" coming back walking very fast. He decided to check on the now deceased and saw him trying to run but falling at each attempt. He followed and found him lying on the ground and bleeding from an injury which was on his chest. He was crying uttering the words "I have been injured, I am dying." This witness is the one who called the mine driver who came and ferried the now deceased to hospital.

The witness's narration of the events was similar to the first witness except for the events which happened at the tent. This is because this witness was not at that place when accused and "Wasu" had their first encounter with the now deceased.

It is important to note that this witness was not known to the now deceased in a manner that would cause him to seek to falsely incriminate the accused. He knew the now deceased as a person whose home was near where he worked and knew accused as a person who used to come to that mine to mill his gold ore.

Why would this witness fail to recognize a person who he had known for 3 months? On this day he saw the accused in broad daylight and observed him as he chased after the deceased and also when he was walking back after he had failed to catch up with the now deceased.

The witness had ample time to observe the accused, had reason to observe him because of what was happening, observed him in broad daylight and recognized him as a person he knew. There was therefore no possibility of an honest but mistaken identification. (*S v Nkomo & Another* 1989 (3) ZLR 117 (S)).

We were satisfied that this witness was a credible witness whose evidence could be safely relied on.

The third witness was the one who recorded accused's warned and cautioned statement. He explained how he explained the accused's rights and denied assaulting the accused. He did not take part in the investigations of the matter as he was not based at Shurugwi at the time. After recording the statement he took the accused to court where the statement was confirmed. He was not present during the confirmation proceedings.

The witness who witnessed the recording of this statement had his evidence admitted as it appeared in the State Summary. It is baffling why such witness's evidence would be admitted if the accused was assaulted and gave the statement under duress.

The Magistrate who confirmed the statement also testified and explained the procedure followed in such proceedings. She explained that she would not have had reason to depart from such procedure and allow Police Officers to be present during confirmation proceedings. She is a Provincial Magistrate and has experience in such matters which she said militates against her conducting court proceedings in a manner contrary to statute.

Indeed why would a Magistrate of Provincial Magistrate grade conduct confirmation proceedings in a manner that goes against the legal requirements?

Is the accused so unfortunate that all the witnesses decided to lie against him including a Judicial Officer?

He would have the court believe that the injuries he allegedly received treatment for at Hwahwa prison bear testimony to the assault he suffered at the hands of the Police when they were forcing him to admit and yet in his defence outline he said he was badly assaulted by villagers upon his arrest. If he was forced to admit it follows the Police put words into his mouth. The recording officer was not part of the investigating team, how then would he have known of the detail that appears in the accused's statement?

In this statement the accused said:-

“I admit to the charges that are being leveled against me. I stabbed the now deceased with a knife made from a shovel metal. I stabbed him once on his chest in revenge as he had once stabbed my young brother Knowledge Museni with a knife during the month of July 2020 and I was also preventing myself from being stabbed since the now deceased had always been promising to stab me with a knife. I stabbed the now deceased while I was in the company of Knowledge Museni and Tamsanqa Sibanda. Knowledge Museni hit the now deceased with a chisel once on the back at the time when the now deceased was about to run away, the now deceased continued running away and he escaped. Tamsanqa Sibanda only chased the now deceased but he did not do anything else upon the now deceased. The now deceased escaped, Tamsanqa Sibanda, Knowledge Museni and I went to Chegutu where we eventually heard that the now deceased James Marandani had succumbed to the injuries and died. I never returned to Shurugwi until the day I was arrested in Lower Gweru on 28 May 2023.”

Where would the Police Officer get such detail? In terms of section 256 (1) of the Criminal Procedure and Evidence Act, Chapter 9:07, a confession made freely and voluntarily shall be admissible in evidence.

Section 256 (2) goes on to say a statement confirmed in terms of section 113 shall be received in evidence before any court upon its mere production by the Prosecutor without further proof.

The accused may however challenge such a statement but when he does the onus is on him to prove the inadmissibility of the confirmed warned and cautioned statement, albeit on a balance of probabilities.

The recording officer’s evidence was supported by the witnessing Police Officer whose evidence was admitted. The accused was advised of his rights and we were satisfied the accused’s story was an attempt to deny a statement he knew he gave and whose detail could only have come from him.

Why would a person who is being forced bother to give the detail he gave? No impropriety was shown at the recording of the statement and at its confirmation.

We got the impression that the accused had a change of heart and sought to malign both the recording officer and the Magistrate who confirmed the statement in a desperate bid to disown such statement.

In *S v Bhebhe* S 129-02 MALABA JA (as he then was) cited with approval *R v Sambo* 1964 RLR 505 at 511 A-G where BEADLE CJ said :-

“If the accused mentions facts in his confession the knowledge of which he could only have come by being connected with the crime the mention of such facts, will, of course be most cogent evidence to show that the confession is genuine. But even if the accused may have been questioned by the Police on the very facts, their mention still has considerable probative value. If an accused freely makes a long statement and all the known facts fitting their proper sequence into this statement, this may often be sufficient reason on which to base a conclusion that the confession is genuine, even if the Police may previously have questioned the accused on these facts. Because unless the Police put the actual words of the statement into the accused’s mouth, if his only knowledge of the facts has come from Police questioning he is hardly likely to present a coherent and convincing story onto which all the known facts dovetail perfectly. A confession of such a type will often, therefore, itself, prove its genuineness.”

The accused was able to provide the detail of the stabbing which the witness had not been able to observe.

Even if it were to be said but for the accused’s confession there is no direct evidence linking him to the stabbing, the circumstantial evidence points to him as the perpetrator. (*R v Blom* 1932 AD 202).

He is the one who went behind the tent with the now deceased, he was the one who was armed with a sharp object, he was the one who was seen running after the deceased and the deceased was seen shortly thereafter mortally wounded. No one else could have wounded him except those who were chasing him. That stab wound could only have been inflicted between the time accused called him out of the tent and the period just before the now deceased started fleeing from the accused and his colleague. This is so because soon after that chase the deceased was seen with a stab wound on the chest crying out that he had been injured and was dying.

The accused's attempts to disown his statement, accuse the witnesses of lying against him, his lame explanation of why he fled from the scene only to be accounted for 2 years later and his attempt to push the blame on Knowledge who is at large exposed his lack of credibility.

He admitted frequenting Drunkard 21 Mine where the second witness worked and yet was still adamant that this witness did not recognize him as he was not with Knowledge when he arrived at the scene.

He was bent on denying just for the sake of it. We got the impression that he has no respect for the truth. We have no hesitation dismissing his story which was proved to be beyond doubt false.

What was his intention when he plunged a knife-like object into the now deceased's chest. Use of such a weapon on a human being and aimed at the chest which houses delicate internal organs can only lead to the conclusion that he intended to kill the deceased. He achieved that objective.

The state has proved its case beyond a reasonable doubt and the accused is consequently found guilty as charged.

Sentence

In assessing an appropriate sentence we considered that:-

The accused is a 28 year old first offender. The offence was committed on 3 September 2020 when he was 25 years old. At 25 he was relatively youthful.

Youthfulness is a strong mitigatory factor as the immaturity of youth often leads to irrational behavior. (*S v Zaranyika & Ors* 1995 (1) ZLR 270 (H), *S v Guri* HMU52-21)

The accused was arrested in May 2023 and has been in custody since. He has therefore been in pre-trial incarceration for about 8 months.

It appears the accused was sorry at the very end of the proceedings and that counts for something, albeit coming late into the proceedings.

In aggravation is the fact that the murder was premeditated. It was a revenge mission. The accused armed himself with a sharp object and chose to plunge it into a 20 year old's chest.

Pre-meditated murder shows a callousness that should be frowned upon by all right thinking people. Where the offence is committed under such circumstances the law says it is a murder committed in aggravating circumstances.

The 20 year old's life was mercilessly snuffed out, killing whatever dreams he had and causing pain to the parents who watched their son die. The parents were able to get to the scene and accompanied their son to hospital, a son who knew he was not going to make it as he did tell his father that he was dying.

One cannot begin to understand the pain these parents went through and are still going through.

The rate at which murders are occurring among gold panners is a cause for concern. It appears they are a law unto themselves with no respect for the sanctity of life. The courts must send a clear message that such conduct has no place in a civilized society.

Everyone has a right to life and life is a gift which should not be lost at the hands of another.

The sentence must fit the offender, the offence and be fair to society.

In coming up with an appropriate sentence the court must not adopt a vengeful attitude.

SI 146/23 gives a presumptive penalty of 20 years where a murder is committed in aggravatory circumstances.

Given the accused's age at the time of commission of the offence the presumptive penalty meets the justice of the case. We find no reason to go below or above 20 years.

The accused is accordingly sentenced to:-

20 years imprisonment.

National Prosecuting Authority, state's legal practitioners

Hlabano Law Chambers, accused's legal practitioners