

THE STATE

versus

EDWARD MUCHINI

HIGH COURT OF ZIMBABWE

MAWADZE J

MASVINGO, 23 January, & 10 February, 2017

Assessors

Mr Dhauramanzi

Mr Gweru

Criminal Trial

Mr B.E. Mathose, for the state

Mr L. Muvengeranwa, for the accused

MAWADZE J: The accused is facing the charge of murder as defined in s 47(1) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*].

The charge is that on 22nd December 2014 at Chiwichabeture Village 2, Triangle the accused unlawfully caused the death of JAMES MUCHINI by striking him with a wooden hoe handle several times on the back and on the head intending to kill or realising 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.

The accused then aged 22 years and the now deceased then aged 26 years were siblings and stayed in the same village. It is common cause that prior to that fateful day a dispute arose pertaining to use of their father's cattle for ploughing. There are minor differences raised by the state and the defence as to the nature and scope of the dispute.

Apparently accused the now deceased could not plough together in their respective fields and their father decided to give accused 4 cattle to use as he had none of his and now deceased two cattle as he had two of his own. It is not clear what sparked the dispute on the day in question but after accused spanned the 4 cattle their father stopped now deceased from doing the same saying he wanted to discuss certain issues with the now deceased. This did not go down well with the now deceased who insisted in spanning the cattle. Their father then tried to prevent the now deceased from leaving the cattle pen with the spanned cattle and the now deceased reacted in a physical manner.

It is alleged the now deceased then assaulted their father and mother which caused the now accused to be involved.

The State alleges that the accused who was armed with a hoe handle struck the now deceased on the back causing him to flee. It is said accused chased after the now deceased and struck him with the hoe handle on the head killing him instantly.

In his defence outline the accused raises the defence of self-defence in respect of himself and that of their parents. The accused also alleges he was provoked by the now deceased's conduct hence the defence of provocation.

The accused said he saw the now deceased attacking their father with a log used to close the cattle pen causing their father to fall down. He said the now deceased then turned on their mother whom he hit with clenched fists. The accused said he tried to defend their parents but the now deceased said he wanted to kill them and then flee to South Africa. As a precautionary measure accused said he approached the now deceased armed with a hoe handle but the now deceased attacked him with clenched fists. The accused said he then hit back assaulting the now deceased on the back with the hoe handle causing the now deceased to flee. The accused said the now deceased was looking for stones to attack the accused but the accused chased after him upto a stream. At the stream accused said the now deceased picked stones and hit the accused twice. The accused said he reacted by hitting the now deceased on the back with the hoe handle but one blow accidentally struck the now deceased on the head.

The cause of the now deceased's death is not in issue. As per Exhibit 1 the post mortem report compiled by Dr P.N. Magande on 23 December 2014 the deceased had a skull

fracture and died as a result of the head injury. The accused admitted that he is the one who inflicted the head injury with Exhibit 3(a) being the hoe handle whose description is as per Exhibit 3(b) as it was one metre in length and weighed 0.96 kg.

In his Confirmed Warned and Cautioned Statement, the accused gave a similar account as per his defence outline. The only notable difference being that in his Confirmed Warned and Cautioned Statement he said at the stream he struck the now deceased twice on the head with the hoe handle killing him instantly thus making no reference to single blow in the defence outline which he alludes to an accident as he had aimed the back of the now deceased.

The State only led *viva voce* evidence from one witness the now deceased's wife BRENDA MANDIZVIDZA. The evidence of other witnesses was accepted in terms of s 314 of the Criminal Procedure and Evidence Act [*Cap 9:07*] and these are;

- (a) HERIKANOS TEVERA a member of the special constabulary who first attended the scene of crime and later witnessed the accused's indications leading to the recovery of Exhibit 3(a) the hoe handle and also the recording of Exhibit 2 accused's Confirmed Warned and Cautioned Statement.
- (b) FARAI MAKAYA a police officer whose testimony is similar to that of Phanuel Munjakanja
- (c) PHANUEL MUJAKANJA who is the Investigating Officer who attended the scene of crime and recorded both accused's indications and the Warned and Cautioned Statement. He noted that the now deceased had injuries on the head, the back and had bruises on the arms. He recovered the hoe handle Exhibit 3(a) and caused the compilation of Exhibit 1 the post mortem report.
- (d) DR MAGANDE who examined the now deceased and compiled Exhibit 1 the post mortem report

We now turn to the evidence of the now deceased's wife BRENDA MANDIZVIDZA (Brenda).

Brenda who is 23 years old had been married to the now deceased for 4 years and they had one child. She said soon after the now deceased's burial her in laws ordered her to return to her maternal home.

Brenda confirmed the dispute over the use of cattle for draught power as already outlined and said accused and the now deceased only used the cattle for one day after their father had given each one cattle to use before this fateful day. She confirmed that his father in law stopped the now deceased from spanning the cattle on day in question when accused had already spanned his own set of cattle saying, he, the father in law had issues to further discuss with the now deceased over the use of these cattle. She said the now deceased disagreed insisting that he be allowed to proceed to go and plough the fields and hold discussions later.

In her evidence Brenda said after the now deceased spanned the cattle and Brenda was leading them out of the cattle pen her father in law blocked the exit of the cattle pen using a log and this incensed the now deceased who jumped out of the cattle pen and removed the log. She said her mother in law who was also present at the cattle pen intervened by assaulting the now deceased with fists but the now deceased pushed her to the ground. She said her father in law in turn assaulted the now deceased with fists and he too was pushed away and fell down.

Brenda said the accused who was apparently lurking in the vicinity stealthily approached the now deceased from behind and hit him very hard with Exhibit 3(a) the hoe handle. She said the now deceased who was taken by surprise staggered when the first blow was delivered on the back and when two further blows landed on the back the now deceased ran away for his dear life with the accused in hot pursuit still armed with the hoe handle. She said her mother in law followed in the same direction and she remained with her father in law at the cattle pen but followed later. Brenda said as she approached the stream she heard the thudding sound of someone being assaulted apparently with a hoe handle. Moments later she said she met the accused who was still wielding the hoe handle and as accused passed her he told her to go and collect her dead husband as accused said he had killed him.

Brenda said she rushed to the scene where the now deceased was lying down and her mother in law sent her to fetch a bucket of water which was poured on the now deceased. She said this was to no avail as the now deceased was already dead lying facing down with blood oozing from the injured head. Brenda said her father in law who had arrived confirmed the now deceased was dead. She said moments later the accused arrived at the scene wielding a matchet saying if the deceased was alive he had intended to cut his hands and legs but the father in law told accused that the now deceased was dead. Brenda said her mother in law,

father in law and accused ferried the now deceased's body in a wheel barrow to their homestead but the village head advised them to take the deceased's body back to the scene of crime for police to attend which they did.

According to Brenda a member of the special constabulary first attended the scene and accused lied that he had hit the now deceased with some stones on the head and even picked 3 stones as the one he had used. She her mother in law coerced to corroborate accused's false story saying she could not afford to have accused incarcerated but Brenda revealed the truth that accused had used a hoe handle. She said the accused only told the truth when other police details from Triangle arrived and questioned accused who capitulated and retrieved the blood stained hoe handle he had hidden in some hedge.

Under cross examination Brenda did not at all change her evidence. *Mr Muvengeranwa* for the accused sought to portray her as a bitter widow who was hurt by the demise of her late husband and being caused to leave the matrimonial home. She indeed confirmed that her in laws unceremoniously and with undue haste caused her to leave the matrimonial home. She also confirmed that she was hurt by the loss of her husband and now has to fend for the child alone. Brenda however insisted she simply narrated the truth of what happened.

Brenda denied that that her in laws were assaulted by the now deceased in the manner alleged but that the now deceased just pushed away both of them and that none of her in laws was in any danger or injured. She dismissed as untrue that when accused arrived and attacked the now deceased her in laws were under any attack as both had already gotten up. She also dismissed as untrue that accused even attempted to talk to the now deceased upon his arrival but just attacked the now deceased who never fought back or hit accused. Brenda was clear that she did not witness the fatal attack of the now deceased by the accused at the stream but only witnessed 3 blows delivered by accused on now deceased's back at the cattle pen before now deceased fled from the scene.

In our assessment Brenda gave her evidence well. As already said most of the facts in this case are common cause. What we find commendable about her is that she did not seek to exaggerate her evidence by placing herself at the scene where her husband was fatally attacked. She was honest enough to tell the court that she did not witness what happened at the stream where her husband the now deceased was fatally attacked. This is the hallmark of

a truthful witness. It would be inhumane to expect her not to be bitter about the loss of her husband and how she was hastily kicked out of the matrimonial home. We assess her as a credible witness who simply confined herself to what she witnessed. To her credit she even admitted that the now deceased assaulted his parents by pushing both of them to the ground. We accept her evidence.

We now turn to the accused's evidence. To a great extent the accused maintained the version he gave in Exhibit 2 his Confirmed Warned and Cautioned Statement, in his defence outline and evidence in chief.

The accused insisted in his evidence that it is the now deceased who attacked accused first when accused first approached the now deceased at the cattle pen. Accused said after he hit the now deceased with a hoe handle at the cattle he indeed chased after him when the now deceased fled. The accused maintained that he was again assaulted by the now deceased at the stream when he was pelted with stones on the stomach and leg. Accused insisted that it was when the now deceased tried to pick a third stone that accused hit him with hoe handle mistakenly on the head when he had directed the blow at the now deceased's back.

As already pointed out in his Confirmed Warned and Cautioned Statement accused said he hit the now deceased twice on the head with the hoe handle but in court he insisted it was once. In a bid to explain this disparity accused said he was caused by the police to exaggerate his evidence in his Warned and Cautioned Statement.

The accused flatly denied that he told Brenda that he had killed the now deceased or that he came back to the scene with a machete threatening further harm.

It was during the cross examination by *Mr Mathose* for the State that the accused's case collapsed like a deck of cards. The accused virtually wilted under precise questioning and it became very clear he was an untruthful witness.

The accused admitted that it was unnecessary for him to carry with him a hoe handle when he approached the now deceased at the cattle pen. He admitted not talking to the now deceased at the cattle pen before he attacked the now deceased. The accused admitted that it is the now deceased who in fact fled from the accused's attack at the cattle pen and that accused had no cause to chase after the now deceased as he did. In the most damning way accused admitted that when he chased after the now deceased he wanted to discipline him as

accused was now very angry. The accused admitted he had no cause to chase after the now deceased for the 60 – 100 m as the life of their parents was not in danger at all. In fact, accused said none of his parents was unconscious. Accused said what motivated him to chase after the now deceased was to exact revenge.

In relation to the fatal blow or blows accused admitted that he used excessive force when he hit the now deceased's head which fractured his skull and caused excessive bleeding. Further accused admitted that there was real risk or possibility that the now deceased could die from such an attack on the head with such high degree of force with a weapon like a hoe handle. The accused admitted hiding the hoe handle Exhibit 3 and that he initially lied to the police that he had attacked the now deceased with some stones.

The accused's version of events on how he attacked the now deceased is clearly improbable. It is inconceivable that accused would advance towards the now deceased who was pelting him with stones at the stream. The logical thing for accused to have done was to run away from danger not towards danger! No wonder why accused admitted that he fatally assaulted the now deceased on the head when the now deceased had fallen down. To his credit accused later admitted that his conduct was driven by anger rather than self-defence or provocation. To quote the accused he said;

‘I cannot understand the rage I felt that day which caused me to kill the deceased and I am hurting.’

The accused's mother JESIFINA MADA whom he called as a defence witness did not add value to accused's case at all. In our view all what Jesifina Mada demonstrated was that she was keen to save the accused's skin at all costs. In the process she ended up lying that when the now deceased allegedly assaulted both her husband and herself they both fell unconscious only to wake up after the now deceased's demise. Even the accused denied that she and her husband ever fell unconscious. All in all, she simply wanted to find a way to avoid testifying on how the accused attacked the now deceased firstly at the cattle pen and at the stream where she had followed the protagonists. No wonder she admitted that she is very fearful that accused would be imprisoned. We find her to be an unhelpful witness.

In terms of s 253(1) of the Criminal Law Act (*Cap 9:23*) the defence of self-defence of a 3rd party is a complete defence for a charge of murder. In terms of s 239 of the Criminal Code [*Cap 9:23*] the defence of provocation is a partial defence to the charge of murder.

In our assessment of the facts and the evidence none of the two defences is available to the accused.

It cannot be said by any stretch of imagination that when accused chased after the now deceased who was running away for his dear life as accused was wielding a hoe handle, the accused was acting in self-defence or the defence of accused's parents. Even the accused admits to this fact. The accused was simply angry about the dispute involving draught power and wanted to discipline the now deceased. That is why he chased after the now deceased to exert revenge. The accused admitted that he administered the fatal blow when the now deceased had fallen down. This means when he fatally attacked the now deceased he was not acting in self-defence or defence of his parents. This explains why he initially lied to police that he had used stones to assault the now deceased and went on to hide the hoe handle.

From the facts before us there is nothing to suggest that accused was provoked to an extent that he lost control of his faculties or self-control. What could have provoked him to that extent? Nothing in our view. Even *Mr Muvengeranwa* for the accused concedes to these facts in his closing written submissions.

In our view it is competent for the court to convict an accused person on the evidence of a single credible witness. See s 269 of the Criminal Procedure and Evidence Act [*Cap 9:07*]. This court can completely rely on the evidence of Brenda. Indeed, there was no eye witness to the fatal attack but it can be inferred from the facts proved and admissions by the accused that the accused had the requisite intention to commit the offence.

While it may be accepted that accused may not have intended to kill his brother the now deceased when he attacked him at the stream, the manner in which the assault was perpetrated with a lot of force using a hoe handle fracturing the skull leads to the inescapable conclusion that the accused realised that there was a real risk or possibility that the now deceased would die but nonetheless continued to engage in that conduct oblivious of that risk or possibility. The accused may escape liability of murder with actual intent but cannot escape conviction of murder with constructive intent.

VERDICT: Guilt of murder with constructive intent as defined in s 47(1)(b) of the Criminal Law (Codification and Reform) Act, [*Cap 9:07*].

SENTENCE

The prevalence of cases of murder in Masvingo is alarming and it is in the legitimate interest of society that this court plays its role by imposing both deterrent and exemplary sentences. The sanctity of human life can never be over emphasised. We are alarmed by the readiness in which even young people resort to use of lethal or dangerous weapons after minor disputes. As a result, lives are lost. The lack of respect of life is just alarming.

The attack the accused perpetrated on the now deceased was senseless. The dispute could have been resolved through dialogue. Instead the accused chose to use a hoe handle to brutally attack his own brother who had in fact fled for his dear life which he nonetheless lost.

It is aggravating that the accused used severe force as he fractured the deceased's skull. What also elevates accused's moral blameworthiness is the accused's lack of remorse at the time of committing the offence and even to date. The accused was prepared to lie to the police on how the deceased had met his fate and he proceeded to conceal the murder weapon. In court the accused did not appear remorseful at all. It cannot be over emphasised that the court should frown upon the use of violence in solving domestic disputes.

We have not lost sight of the mitigatory factors in this case.

The accused was a youthful offender aged 22 years at the time of the commission of the offence. It is in accused's favour that he is a first offender, married with one child. The accused is of no means as he is unemployed with neither savings nor assets. The fact that accused killed his own brother would forever torment his conscience and that is punishment on its own. The accused will forever live with the stigma that he has the blood of his own flesh and blood on his hands.

To some extent the accused thought it was proper for him to discipline his elder brother the now deceased for engaging in a scuffle with their parents. The accused thought he should act in the manner he did to show his disdain of the now deceased's conduct.

All in all we believe the following sentence meets the justice of the case;

The accused is sentenced to 20 years imprisonment.

National Prosecuting Authority, counsel for the State

Legal Aid Directorate, pro deo counsel for the accused.