

THE STATE

versus

SIKHALA ZHOU

HIGH COURT OF ZIMBABWE

MAWADZE J, MASVINGO, 03, 04 AUGUST; 22, 29 SEPTEMBER; 29, 30 NOVEMBER,
2017 AND 02 FEBRUARY 2018

Criminal Trial

Assessors

1. Mr Gweru
2. Mr Mushuku

B.E. Mathose, for the state
F. Chakabuda for the accused

MAWADZE J: We decided to proceed with this judgment without the benefit of counsel for accused's written closing submissions. This so because counsel had promised to file written submissions by 20 December 2017. This matter has been outstanding for a long time. The accused is alleged to have caused the death of his father Sikhala Zhou who is his namesake by striking him with an axe several times on the head and neck on 6 November 2016 in contravention of s 47 (1) of the Criminal Law Codification and Reform, Act) [*Chapter 9:23*].

The 24-year-old accused and his 65-year-old father the now deceased stayed at the same homestead in Sikhala Village, Chief Mazhetese, Mwenezi, Masvingo.

On 6 November 2016 at about 1900 hrs the accused, the now deceased and a relative Trymore Speni (Trymore) arrived at the now deceased's homestead from a beer drink. They

were all drunk. A quarrel ensued between the accused and the now deceased, his father. The now deceased was alleging that the accused was not willing to help the now deceased with chores to be done at home and went on to disown the accused as his son. The state alleges this incensed the accused who proceeded to set on fire the now deceased's three huts. It is alleged the accused then took an axe to attack his father the now deceased but Trymore intervened in order to restrain the accused. The state alleges the accused struck Trymore with the axe. Thereafter it is said the accused advanced towards his father the now deceased and struck him with an axe several times killing him instantly.

The defence raised by the accused throws any possible explanation at the court as it were. It is like a dog's breakfast. The accused alleges provocation, voluntary intoxication, self-defence and defence of a third party. To cap it all the accused denies that he fatally attacked his father the now deceased. Instead accused tendered a plea of guilty to the lesser charge of culpable homicide. The basis for such a limited plea remained blurred.

In his deceased outline the accused said he had drunk copious amounts of the traditional brew together with his father the now deceased and a close relative Trymore on the day in question. As a result, he said they were all excessively drunk when they all staggered home from a Mr Ndlovu's homestead where there was a beer drink. It is the accused's case that upon arrival home his father the now deceased attacked accused's mother (*now deceased's wife*) who is crippled. The accused said he then intervened to try and rescue his mother but Trymore in his drunken state believed the accused was attacking the now deceased. Trymore took an axe in order to attack the accused but the accused disarmed him. Accused said Trymore then picked a stone in order to hit the accused and the accused used the axe to frighten Trymore causing Trymore to flee. The accused said in the midst of this commotion his father the now deceased took a machete intending to attack his wife who is accused's mother. The accused said his mother called out for help and that in response the accused in a bid to rescue his mother who is the now deceased's wife struck the now deceased with the blunt part of the axe he had taken from Trymore. The accused said he directed the blow at the now deceased's back. The accused said the now deceased fell on to some sharp part of a plough or harrow and that this metal object pierced the now deceased's head. At that stage Trymore picked a glowing piece of firewood and threw it at the accused. The accused said he managed to duck and Trymore missed the accused. The piece of glowing firewood fell onto the roof of one of the huts and all three huts caught fire. At that stage he

said Trymore fled. The accused said realising the mayhem at the homestead he also fled and only came back the next day after which he was surprisingly arrested. Accused said this explains why he refused to sign the extra curial statement the police forced him to give.

In conclusion the accused said he only struck his father the now deceased once on the back with the blunt and not the sharp part of the axe. He said he did so while in a drunken stupor and acting in a fit of rage. Further he said he acted in defence of his mother who was about to be struck with a machete by accused's father the now deceased.

The axe accused used was produced as Exhibit 2(a). The certificate of weight Exhibit 2(b) shows its weight as 1,03kg, its length is 73.5 cm being the handle and the blade is 14 cm. All we noted about the axe is that is a lethal weapon which if used can inflict fatal injuries.

Dr Sasa whose evidence was admitted in terms of s 314 of the Criminal Procedure and Evidence Act, [Cap 9:07] examined the now deceased's body on 8 November 2016 at Neshuro hospital. He compiled Exhibit 1 the post mortem report. As per the post mortem report the following injuries were noted;

- i. 3 deep lacerations on the head
- ii. one deep laceration at the back
- iii. 1st and 2nd degree burns on the body and torso

Dr Sasa concluded that the cause of death was the penetrative head wounds or injuries. The cause of the now deceased's death is not being disputed. What the accused seems to dispute is how the now deceased sustained those fatal injuries.

The state led evidence from Trymore Speni, Priviledge Zhou and the investigating officer Tinos Munengwa. The accused gave evidence and was unable to call his wife to testify as he said he did not know the current whereabouts of his wife since his incarceration on this charge.

The issue we have to resolve is how the now deceased was fatally injured. In doing so we shall revert to the evidence placed before us. Further, we shall examine whether the numerous defences raised by the accused are available to him.

We now turn to the evidence.

Tinos Munengwa

Tinos Munengwa (Tinos) is the investigating officer and we did not find his evidence to be material. He attended the scene of the incident after the now deceased's death. This was now on 7 November 2016. The accused had already been apprehended by members of the public and the alleged murder weapon the axe Exhibit 2 recovered. He noted the injuries on the now deceased's body especially the three wounds at the back of the head and one at the back. The accused made indications to him. He also saw the three torched huts. Trymore was present and had injuries allegedly inflicted by the accused but Trymore declined to press criminal charges against the accused. Lastly he noted that the now deceased was lying on a flat rock surface where there were no other items like a plough or harrow.

Tinos' evidence was not challenged by the accused.

Both Trymore Speni and Privilege Zhou are eye witnesses to how the now deceased was fatally injured. It is their critical evidence which we shall now deal with.

Trymore Speni (Trymore)

Trymore regarded the now deceased as a cousin on account of their mothers being sisters. He has his own homestead in the same village with the accused and the now deceased.

Trymore said on the day in question 6 November 2016 he went with the now deceased to do some piece job at a nearby co-operative. Thereafter they proceeded to a beer drink at Ndlovu's homestead where they found accused present drinking beer and after a short period of time they decided to leave being three of them. They were carrying some beer which they intended to consume at the homestead of the now deceased and accused.

Trymore said on arrival at that homestead, before even drinking the beer they had brought the now deceased asked why accused had not finished thatching one of the now deceased's huts. The accused in a rude manner retorted that he was not the now deceased's employee. A quarrel then ensued between accused and the now deceased.

According to Trymore the now deceased was saying accused should obey him if he was indeed his son lest he would disown the accused. The accused in turn was incensed by

this and demanded to be shown his real father. He said the two started to shout at each other and Trymore decided to leave but the now deceased's wife who is accused's mother pleaded with him to remain lest the accused and the now deceased would be violent as accused held his father the now deceased by the collar. Trymore said he then restrained the accused by standing between accused and the now deceased. The accused was threatening to set on fire the 3 huts at the homestead belonging to the now deceased and Trymore pleaded with the accused not to act in that manner as accused had picked a burning piece of firewood.

It is Trymore's evidence that the accused then took an axe Exhibit 2(a) and Trymore tried to disarm him. As the two struggled over that axe the accused struck Trymore with the axe on the upper limb and above the right eye. Trymore has visible healed scars on his upper limb and above the right eye.

After having been struck with the axe Trymore said he fell down unconscious. When he regained consciousness he realised that the three huts were on fire.

Trymore said as he struggled to leave this homestead he saw accused who was still armed with the axe. The accused threatened to further harm him but for some reason accused left Trymore and went behind one of the huts. At that stage Trymore realised the accused was chasing after the now deceased wielding the axe. He said the now deceased fell down. By then Trymore was still bleeding profusely and losing strength. He fell down. As he lay down Trymore said he heard a thudding sound which he described as "kaa, kaa, kaa" like someone cutting a dry tree. This was accompanied by the accused's utterances that he was finishing off the now deceased and would burn the body.

Trymore testified that a fellow villager one Jealous Bako then arrived inquiring what was happening. The accused lied that the now deceased and Trymore had attacked the accused. Trymore realised the now deceased had died.

Under cross examination Trymore said the accused was moderately drunk just like himself and the now deceased. He said the accused was able to carry beer in a container without a lid and did not spill the beer. He disagreed therefore that accused was excessively drunk. Trymore refuted that any person tried to attack the accused or accused's mother but that accused was the aggressor. He dismissed as false accused's version of events as per accused's defence outline insisting that the now deceased never took a machete. Instead he

said it is the accused who took an axe and injured Trymore. Trymore said while he did not see the accused striking the now deceased with an axe he nonetheless saw accused chasing the now deceased wielding an axe. He refuted that accused mother was under any attack. Trymore denied torching the huts and only gained consciousness when the huts were burning. Lastly he said the accused was known to be a person of violent disposition.

In our assessment Trymore gave his evidence well. Although he had taken alcohol he had a fair recollection of events of that day. In our view he did not seek to exaggerate his evidence. Instead he limited himself to what he saw. As an example he was truthful that he did not see how accused allegedly struck the now deceased with the axe or how accused torched the huts. Indeed, he was fair as he blamed both the now deceased and accused for starting the quarrel or misunderstanding. Clearly he has no motive to falsely incriminate the accused. In fact, to show his sincerity he declined to press charges against the accused despite being harmed with the axe. Trymore answered all questions put to him in cross examination in an impressive manner. We therefore find no cause not to accept his evidence.

Privilege Zhou (Privileged)

Privilege is now 16 years old and is born to the now deceased's daughter. Accused is her maternal uncle. At the material time she was staying with the now deceased and the accused at the same homestead. She testified that on 6 November 2016 she was at home with accused's wife, the now deceased's wife (accused's mother) who is crippled, a neighbour Joyce and some other young children.

Privilege said the accused, the now deceased and Trymore arrived in the evening from a beer drink and accused and the now deceased were shouting at each other. She did not know what had sparked the misunderstanding. All she heard was the now deceased saying accused was not his son and accused threatening to torch the huts. Her evidence is that the accused took a piece of glowing firewood and some grass which he lit and threw on the roof of one of huts. Within a short period, all the 3 huts caught fire.

Privilege then explained how the now deceased was fatally injured. She said accused took an axe trying to attack the now deceased which forced Trymore to try and disarm the accused. She said accused struck Trymore with the axe above the right eye and fled leaving Trymore injured.

After about 10 minutes she said accused returned as Trymore was struggling to get up in order to flee. She said accused threatened to further harm Trymore but turned to the now deceased still wielding the axe. The deceased tried to flee but accused chased after him. She graphically described how accused fatally attacked the now deceased as follows;

- i. She said accused first struck the now deceased with the axe on the back as the now deceased tried to run around one of the huts
- ii. She said the accused persued the now deceased, tripped him by the doorway causing the now deceased to fall.
- iii. She said as the now deceased was on the ground accused delivered two or three blows with the axe which were all directed to the back of the now deceased's head. The deceased died instantly.

Privilege said after this frightening act they all fled and alerted a member of the neighbourhood watch committee about the now deceased's death who is called Bako. Since the huts were still burning they had to lift accused's mother who is crippled from the burning huts. The accused was only apprehended the next day.

Mr Chakabuda for the accused could not meaningful cross examine Privilege. We appreciate his predicament. Privilege was a brilliant witness. Her evidence was free flowing and damning to accused's case. In fact, she virtually sounded a death knell to accused's defence as she did not only corroborate Trymore but exposed the accused's defence as a pack of lies.

Privilege was clear that it is the accused who fatally attacked the now deceased not that some plough or harrow injured the now deceased. She was clear that the accused also injured Trymore with the axe. She exonerated Trymore from torching the huts or attacking the accused in any manner. We find no reason not to accept this young girl's evidence. She is an eye witness to all what happened.

It is our view that no useful purpose would be saved by dealing with the various defences raised by the accused. This matter can be resolved solely on factual rather than legal issues. The fact of the matter is that accused's defence is anchored on falsehoods. As a fact the accused was not meaningful provoked by his father the now deceased who merely asked him why he had not finished thatching the hut. From the evidence presented before us while

accused had consumed alcohol he sought to exaggerate his degree of intoxication. Judging by his own detailed and coherent evidence the accused fully appreciated what he was doing that night. It is abundantly clear that accused did not act in self-defence. He was never under attack from anyone. Infact the accused was the aggressor throughout. The accused's mother was never under attack hence it is a lie that the accused acted in her defence. As a fact it is the accused who inflicted the fatal injuries on the now deceased which are clearly spelt out in Exhibit 1 the post mortem report. The accused's intention is as clear as a blue sky. He intended to cause the now deceased's death an indeed he achieved that.

The accused armed himself with a lethal weapon Exhibit 2(a) the axe. He aimed blows at the now deceased's head with the axe. Consequently, he cannot escape liability for causing the now deceased's death with actual intent.

VERDICT: Guilty of contravening section 47(1)(a) of the Criminal Law (Codification and Reform Act) [*Cap 9:23*] Murder with actual intent.

REASONS FOR SENTENCE

We appreciated that it is a mammoth task for counsel for accused to make any meaningful submissions in mitigation. This was a callous and gruesome murder. It is in accused's favour that he is a first offender and thus deserve some measure of leniency. However, the nature of the offence he committed invariably warrants a lengthy custodial term.

We accept that the accused at 24 years of age may be regarded a s youthful offender. We are however cognisant of the fact that he is married with two children. The fact that accused is a rural and unsophisticated person is irrelevant to the offence he committed. Any illiterate person knows that it is wrong and unlawful to take the life of another. One of the ten commandments say "thou shall not kill". The accused fully appreciated this.

What may be mitigatory is that accused had taken alcohol hence his judgment may have been adversely affected. Again the evidence led showed that the accused was moderately drunk and fully appreciated his conduct. In our view voluntary intoxication has not meaningfully lowered accused's moral blameworthiness in this case.

The accused has suffered pre-trial incarceration of about 1 year and 3 months. Again this would not meaningfully reduce the sentence we shall impose. The offence of murder is inherently a very serious offence. It is even worse when a son takes the life of his own father moreso over such a trivial dispute.

The cases of murder are worryingly prevalent in Masvingo. A disturbing trend where children take the lives of their parents had developed. Where is our moral fabric? We should respect and cherish those who brought us on earth like our parents. Needless to say human blood is sacred and that the sanctity of human life cannot be over emphasised.

The accused on this day had decided to act in a violent manner. Trymore tried to knock sense in accused's head but he too was rewarded with an attack with an axe. He could have easily lost his life. The accused went on to torch the 3 huts belonging to his father. As has been said this homestead is now deserted and this all on account of accused's foolish conduct. It is amazing that even after taking the life of his father the accused did not show any remorse. An exemplary and deterrent sentence is called for.

In the result the accused is sentenced to 22 years imprisonment.

SENTENCE: 22 years imprisonment.

National Prosecuting Authority, counsel for the state

Chakabuda Foroma Law Chambers, pro deo counsel for the accused