

THE STATE  
versus  
VICTOR DINGA

HIGH COURT OF ZIMBABWE  
MWAYERA J  
MUTARE, 20 May, 4 and 10 June 2019 and 28 June 2019

### **Criminal Trial**

ASSESORS: 1. Mr Mudzinge  
2. Mr Magorokosho

Mrs *J Matsikidze*, the State  
Ms *E Ngorima*, for the Accused

MWAYERA J: In this case precious human life was viciously lost in circumstances where love for money took over respect of the sanctity of human life. The accused pleaded not guilty to a charge of murder as defined in s 47 1 (a) or (b) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*].

It is alleged by the state that on 29 September, 2018 in the morning the accused invited the deceased to accompany him to Martin Forest for purposes of carrying planks for a fee. Upon arrival at Martin Forest, the accused suddenly pulled out a machete which was hidden in his trousers and struck the deceased on the neck and above the left ear with an intention to kill the deceased or with the realisation that there was a real risk or possibility that his conduct might cause death and despite the realisation and risk proceeded to strike the deceased thereby unlawfully and intentionally killing the deceased. The accused sought to rely on the provisions of s 263 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. The accused's defence was essentially that he was forced by circumstances to kill the deceased in order to raise money to sustain himself and his family.

The state adduced evidence from 9 witnesses as follows: Aaron Mashava gave oral evidence. The witness who is married to the accused's sister recounted how the accused approached him at his shop on the night in question. He told the court that accused requested him to place a small bag in the refrigerator for him. Further that, the accused requested him not to open the bag. Upon inquiry accused revealed to him that the bag contained human

body parts. The witness did not take lightly to this revelation thus he requested accused to leave. He refused to assist the accused who departed from his shop carrying his bag with him. The witness closed his shop shortly after the accused had left and proceeded to inform a church pastor one Blessing Mushanguri that the accused had body parts. This led to a chain of reports to the councillor of the ward one Eddie Njanji, Blessing Murata a special constabulary and finally to the police investigating officer Free Jarati and other details who assisted namely Macdonald Chiwandamira and Ronald Bank Mariko.

After the initial report was made follow ups were made with the accused at his homestead and the bag with human body parts was recovered from a disused toilet through indications from accused. The witness Aaron Mashava's evidence was very straight forward as he portrayed that he was shocked by the accused's revelation. Further he declined to have any association with accused's dealings. It emanated from the witness, the fact that he reported and caused the accused's arrest is the reason why accused in his warned and cautioned statement sought to implicate the witness. The accused confirmed this in his evidence when he stated that he in his warned and cautioned statement sought to implicate the witness because he was bitter over the report and arrest. The witness, Aaron Mashava gave his evidence well and in a straight forward manner. He revealed that accused used to be employed at a company called Golly in Mutare and that at some stage he worked with accused leaving him guarding his car while the witness proceeded to wholesalers to order goods for his shop. At the time of the alleged commission of the offence the accused was no longer assisting him in guarding his car as they had only worked for about a month and he realised the accused was not responsible enough as he would leave the car unattended proceeding to smoke. He enjoyed a good relationship with accused as brothers in law.

All the other state witnesses' evidence was formerly admitted as appears on the summary of the state case. The evidence was on common cause aspects after the event when Aaron Mashava in the company of the other state witnesses swiftly approached the accused and the police recovered the body parts.

The accused subsequently led the police to the scene of crime from which the remains of the deceased Cephas Murarenjama was recovered. The remains were taken for post-mortem and Doctor T. Njenjera compiled a post-mortem report which was tendered as exh 1 by consent. The doctor observed that body parts were missing and he observed some parts in a separate bag. These include the eyes, the heart, the penis and testicles. According to the doctor's report the upper limb was missing. The doctor also observed that the chest cavity

was open. The skull was fractured with exploded brain tissue. The doctor concluded that the cause of death was severe head injury and exsanguination. Photographs depicting the body of the deceased with some body parts missing were also tendered in evidence as exh 4. The harvested body parts photographs were also produced as exh 4 in the photo album. Also adduced in evidence as exh 2 is accused's confirmed warned and cautioned statement which in essence outlined how the deceased lost his life and some body parts were harvested. The machete and certificate of weight were tendered as exh 3 and 3 (a) by consent with the certificate of weight revealing the standard machete weighing 0,56kg and measuring 53cm in length. The sketch plan showing the general layout of the scene of crime as per indications from the accused and witnesses to the police details was also produced as exh 5 by consent.

The accused in turn maintained that he committed the offence so as to raise money for a better living for himself and his family. He claimed that he had come across information to the effect that certain body parts like the ones he harvested were tradeable in South Africa and that he would raise an amount of money to the tune of US\$50 000-00. He during his defence case made it clear he had not been sent or influenced by his brother in law Aaron Mashava, the state witness but was eager to proceed to South Africa to sell body parts and then come back and buy a house in town and also a car and have a good living. He stressed that he implicated the state witness in his warned and cautioned statement because of anger that had the witness kept the bag in the refrigerator and not alerted the police he would have accomplished his mission.

Most of the accused's evidence was on common cause aspects after the beans were spilt that he had body parts. He then led the police to the scene of crime. The accused and deceased were alone when the deceased met with his death and body parts were harvested. According to the accused he approached the deceased and solicited for help in carrying planks for a fee of \$5-00. The deceased was in the habit of doing menial jobs for other villagers in the community. The deceased agreed to go with the accused and when they were in the middle of the forest the unsuspecting deceased was hacked by the accused and he died instantly. During the defence case the accused outlined how he concealed the machete in his trousers and only took it out when they were in a secluded place. Immediately upon the death of the deceased the accused then removed the body parts of his choice for the intended trade in South Africa for a fee of up to US\$50 000-00.

The puzzle of how the deceased lost his life was completed by the accused when the accused recounted how he struck the deceased and harvested body parts. His evidence

dovetailed with the medical evidence and photographs produced in court. The accused's version was clear given Aaron Mashava had let the cat out of the bag by announcing that the accused had human body parts. There was no way out after being caught red handed with the human body parts

The deceased lost a lot of blood and this could have been as a result of the incisions made during the time accused harvested body parts. The draining of blood to levels that could not sustain life gave in to exsanguination as a cause of death. Further the accused stated he struck the deceased on the neck and head causing head injury again causing loss of blood and occasioning death of the deceased.

There is clear evidence that body parts were recovered from the accused and he led to the recovery of the rest of the body. The accused recounted events of the day showing his physical involvement in occasioning the death of deceased. The question that has to be answered given the charge of murder which he faces is whether or not in the face of the defence of necessity raised the essential elements which constitute the offence of murder can be sustained. Murder consist of both the *actus reas* and the *mens rea*.

The defence raised by the accused is provided for in s 263 of the criminal Law (Codification and Reform) Act [*Chapter 9:23*]. It provides that:

- (1) Subject to this Part, the fact that it was necessary for a person accused of a crime to do or omit to do anything that is an essential element of the crime in order to avoid harm to himself or herself or to another person shall be a complete defence to the charge if
  - (a) the harm which he or she sought to avoid would have resulted in
    - (i) death or serious bodily injury to himself or herself or to another person; or
    - (ii) considerable financial or proprietary loss to himself or herself; and
  - (b) he or she believed on reasonable grounds that the harm referred to in paragraph (a) had started to occur or was imminent; and
  - (c) the harm referred to in paragraph (a) did not arise through his or her own fault; and
  - (d) he or she believed on reasonable grounds that his or her conduct was necessary to avoid the harm referred to in paragraph (a) and that there was no other feasible way of avoiding it; and
  - (e) by his or her conduct he or she did no more harm than was reasonably necessary to avoid the harm referred to in paragraph (a), and the harm he or she did was not disproportionate to the harm referred to in paragraph (a).
- (2) In determining whether harm would cause considerable financial or proprietary loss to a person for the purposes of subparagraph (ii) of paragraph (a) of subsection (1), a court shall have regard to the financial or proprietary resources of the person concerned."

Further, s 264 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] goes on to give further requirements to be met for the defence of necessity to be a complete defence to a person accused of murder. It is apparent from the reading of s 264 that the harm that an accused seeking to rely on defence of necessity ought to be one which would have

resulted in his or her death or that of family and that he or she had no prior warning of the imminent harm and therefore would not have been able to forestall it. The defence is akin to the defence of self-defence and is not available by mere asking but only available if all the requirements outlined by the law are met. If all requirements are met and it is evident that more harm than was reasonably necessary was occasioned then the accused relying on the defence of necessity should be liable for negligently causing the death of another, culpable homicide. Provisions of s 265 of the Criminal Code are instructive. The defence in the present case sought to rely on provisions of s 265 and urged the court to hold that the accused was acting in compliance with defence of necessity but that he just exceeded the limits and as such should be acquitted of murder charges and be held liable for culpable homicide.

It is imperative for one to look at the circumstances of this case and see if indeed the accused struck the deceased in circumstances where liability can be vitiated by lack of intention occasioned by the defence of necessity. From the accused's version and sequence of events the accused is a married man. He was staying with his family at his father's homestead and there was no evidence that him and family were under threat of suffocation by lack of the basic necessities food, clothing and shelter. The accused testified he was staying well and was well provided for. He just desired a better life in an urban area. The accused and his family were under no attack at all from the deceased or any other members of the community. A reading of s 264 of the code does not give room for ambiguous interpretation to extend the defence to cover pursuit of material acquisition. The defence of necessity contemplated in s 263 and 264 is a defence that can only be relied on by an accused who would have done the act in a bid to defend himself or any other person from an attack or imminent danger which would have resulted in death of the victim. Killing another for ritual purposes or furtherance of material acquisition is certainly not encapsulated in the defence as outlined in s 263 and 264 of the Criminal Code. See *S v Magoge* 1988 (1) ZLR 163 and *S v Nicole* 1991 (1) ZLR.

The law only allows a person to take reasonable steps to defend himself or another against an unlawful attack and in so doing an attacker in justifiable circumstances can be killed see *S v Mabvumbe* HH 39-16, *S v Tafiresu* HMA and *S v Mudenda* HB 66/15. The accused must show that there was on imminent attack and action taken was reasonable. There is no room for stretching the defence to situations were out of greed and desire to be rich overnight one can seek to hide under the umbrella of hardships and poverty as justifying killing another let alone a person who has not attacked or have intentions of attacking the accused. As occurred in this case the deceased was an unsuspecting individual who agreed to

be hired for labour to ferry planks. He met with his death without having attacked or threatened the accused in any manner. The defence of necessity raised by the accused cannot be sustained in the circumstances and it is not available for the accused. The desire to get rich does not in any manner negate the intention of the accused. The accused was not under an attack warranting him to motivate the defence of necessity.

It is apparent from evidence that the accused set out with a motive to get body parts for resale to potential buyers in South Africa. He knew the essential parts and that they were tradeable for US\$50 000-00. The accused then embarked on a mission to scout and get a possible victim, who would not be easily traceable and who would not foil his mission by resistance. According to the accused's own version he settled for the deceased, a 60 year old unmarried man who lived on his own as his brothers were far away. The accused after statching away the murder weapon, the machete, concealed in his trousers lured the deceased to go and help him carrying planks for \$5-00. The piece job and fare was not real but just a bid to lure the victim to the secluded and isolated heart of the forest. While out in the forest the accused at the opportune time struck the unsuspecting victim with the machete, and he died instantly. The accused then reaped out the vital body parts for his mission and left the deceased's remains in the forest. He took the body parts for refrigeration so as to pursue to fruition his mission. It was at that stage that his brother in law upon learning of the gory deeds of the accused alerted the police. The chain and sequence of events falls squarely into the circumstances where the accused carefully premeditated and planned on the choice of victim, choice of weapon and lured the victim to a secluded place for purposes of execution of the carefully thought plan of killing a human being and harvesting essential body parts for the accused's own benefit. In the case of *S v Mungwanda* 2002 (1) ZLR 574 and *S v Sithole* SVC 16/07 the court clearly and ably described forms of intention. There is actual intention where one sets out with an aim to kill and proceeds to kill and actual intention when one sets out with a conduct when it is substantially certain that death will occur. There is also legal intention, the common law constructive intention see *S v Mhako* ZLR (2) 73 where one proceeds to cause death with realisation that their conduct has the risk or possibility of causing death. In this case the accused had the actual intention to kill.

In face of the glaring clear evidence of careful preplanning and determination envisaged by the accused in this case, one needs not seek microscopic eyes to discern that the accused set out with a motive and desire to kill the deceased in a vicious manner indicative of determination in achieving the set goal and the accused proceeded to execute his mission.

The accused had both the requisite *actus reas* and *mens rea* to kill the deceased. The accused has no defence to the charge and the state has proved the guilty of accused beyond reasonable doubt.

The accused is accordingly found guilty of murder with actual intention as defined in s 47 (1) (a) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*].

### **Sentence**

In passing sentence we have considered all mitigatory and aggravatory factors submitted by Ms *Ngorima* for the defence and Mrs *Matsikidze* for the state. We must hasten to mention that there is nothing much to consider as mitigatory given the brutal ritual related murder the accused stands convicted of. We have taken into consideration that the accused is a first offender who cooperated with the police. Further in mitigation are accused's personal circumstances. He is a young family man with dependants in the form of a wife and a 2 year old child. When the accused committed the offence he was 24 and he has been awaiting finalisation of this matter for about a year in custody. The pre-trial incarceration is not an easy period because of anxiety. That is all that can be said in mitigation.

The accused stands convicted of a spine chilling murder committed in the most brutal manner to an unsuspecting 60 year old man. A senior citizen was robbed of his life by accused's greed and love for material possessions. The meticulous planning and determination in achieving the unlawful enterprise increases the accused's moral blameworthiness. The court should indeed express revulsion at people who violently take away the God given and constitutionally enshrined right to life. The sanctity of the precious human life should not be understated at all. What aggravates the offence further in this case is the fact that the accused was living a comfortable life and had no reason to take away another man's life. The manner in which the accused set out to murder and harvest body parts is indicative of a heartless and cruel mind. The offence was committed due to laziness and greed. The accused is a menace and danger to the society and his removal from circulation is certainly called for. The accused stands convicted of a brutal and callous murder with actual intention in aggravatory circumstances warranting consideration of capital punishment. However, I am alive to ongoing debate on death penalty and I am also alive to the need to seek to match the offence to the offender, while at the same time tempering justice with mercy. A sentence which will enable the accused to reflect on his conduct while at the same

time showing society that intentional and unlawful killing of others will not be treated leniently is appropriate.

In this case having considered the circumstances of the murder, and having weighed mitigatory factors *visa vis* aggravatory factors a sentence of life imprisonment is viewed as appropriate.

Accordingly the accused is sentenced to life imprisonment.

*National Prosecuting Authority, State's legal practitioners  
Legal Aid Directorate, accused's legal practitioners*