

THE STATE

Versus

THEMBINKOSI SIBANDA

IN THE HIGH COURT OF ZIMBABWE

DUBE-BANDA J with Assessors M rNdlovu and Mr Bazwi
HWANGE CIRCUIT COURT 13 and 14 OCTOBER 2020

Criminal trial

Mrs. C Gorerino, for the state
Ms J Change and L. Manyeza, for the accused

DUBE-BANDA J: The accused is charged with the crime of murder as defined in section 47 of the Criminal Law (Codification and Reform) Act Chapter 9:23. It being alleged that on the 26 June 2019, along a footpath between Bubude Business Centre and Sifungo Line, Tsholotsho the accused unlawfully head butted Mboneni Ndlovu (deceased) twice on the head below the left ear intending to kill him or realising that there is a real risk or possibility that his conduct may cause the death of the deceased and continued to engage in that conduct despite the risk or possibility. The accused pleaded not guilty to the charge.

Accused was legally represented throughout the trial. The State tendered an outline of the state case. It shall not be necessary to repeat the entire contents of the state outline. It now forms part of the record. The accused tendered into the record an outline of his defence case.

The state produced a confirmed warned and cautioned statement recorded by the police at ZRP Tsholotsho, on 26 June 2019. The statement was confirmed by a magistrate on the 15 July 2019. The statement reads:

I am pleading guilty to the allegations levelled against me that I caused the now deceased's death. I left the beer garden in the company of Fundani Ncube, Qinisela Sibanda and the now deceased Mboneni Ndlovu. We crossed a road and the now late separated with us and used another path. We continued walking along the road until we got to the corner of the fence of Bubude Primary School. At this point Fundani Ncube and Qinisile Sibanda continued going home and I diverted to go and see my girlfriend, but I did not find her. I went back to join the road which I was using. On the way, I met the now deceased. I head butted him twice behind the left ear. I was holding a knife when I head butted the now late. The now deceased fell to the ground and the knife which I was holding also fell next to him. I then took a paper bag which had one roll of cabbage, tomatoes, potatoes and candles. I took these items to my homestead. When I left the scene, the now deceased called out at me after travelling a short distance. I responded but I proceeded with my journey. I arrived home with the now deceased's property.

I retired to bed. The following morning I went back to where I left the now late. I found the now deceased not there, but there was a trace of a wheelbarrow. I followed the wheelbarrow trace up to Bubude clinic. When I arrived there the now late had passed away. Many people who were at the clinic went to the direction of where I had left the now deceased. I followed them and when we were about to arrive to the scene, I told Thabani that there was no need of tracking the footprints because I am the one who committed the offense. Thabani effected citizenship arrest on me. He tied my hand with a wire and I set down. Police officers found me seated near the scene of the crime

The state tendered a post mortem report compiled by Dr Pesanai at United Bulawayo Hospitals on 28 June 2019. Following an examination of the remains of the deceased, the pathologist concluded that the cause of death was:

1. Subarachnoid haemorrhage
2. Head injury
3. Assault

The state produced the following real exhibits: jean trousers black in colour, with blood stains close to the hem of the trousers; pair of black shoes with blood stains at the top, with print of a tyre mark; three candles, white in colour, with blood stains; okapi knife with a brown handle and iron blade, length of blade 10 cm, length of handle 14 cm, wide part of the blade 2 cm, tip of the blade 4 mm, width of the wooden handle 2 cm, total weight 17 grams, with an engravement at the end of the handle.

State case

The state led oral testimony from three witnesses. The first to testify was Fundani Ncube. He resides at his own homestead, Nkwai Line, Mahlathini area, Tsholotsho. He knew the deceased during his life time, he was his uncle. The accused is a local person. On the 26 June 2019, the witness was at Ngqethuka Bottle Store where he was drinking beer. He left the bottle store when it was closing, he was in the company of deceased, accused and one Qinisela Sibanda. Deceased was carrying a plastic bag. They parted ways with the deceased as he took another to his home. After walking for some distance, the accused said he was diverting his route and going to his girl-friend's place.

In the following morning at approximately 0600 hours, this witness found the deceased lying down in agony along a footpath. He observed that the deceased's face was swollen and there was blood coming out of his mouth and nose. His head had blood clots mixed with soil.

The witness discovered an okapi knife with a brown wooden handle underneath the deceased. There was a catapult next to the deceased. The witness and other villagers carried the deceased to the nearby clinic. The deceased was pronounced dead upon arrival at the clinic. The villagers tracked the foot prints and shoe prints, and eventually effected a citizen's arrest on the accused. The accused's shoes and jean trousers had blood stains. At the accused's home, the villagers recovered a plastic bag with cabbage, potatoes, a pack of tomatoes and three candles.

The second witness was Ntuthuko Moyo, he resides at his own homestead, Mhlaba Line, Mahlathini area, Tsholotsho. He knew the deceased during his lifetime, he was his village head. The accused is a local villager. He was part of the community members who effected a citizen's arrest on the accused. He was also part of the people who recovered the plastic bag containing potatoes, tomatoes, cabbage and candles at the accused's home. He identified the black jean trousers and the black shoes as having been worn by the accused when he was arrested on the 27 June 2019.

The third to testify was Duduzile Tshuma, she is the accused's wife. The accused consented, in terms of section 247(3) of the Criminal Procedure and Evidence Act [Chapter 9:07], that his wife testifying at the instance of the prosecution. She resides at Thembikosi Sibanda's homestead, Sifungo Line, Mahlathini area, Tsholotsho. The deceased was the village head for the area. On the 27 June 2019, at 0300 hours, the accused came home with a plastic bag containing a cabbage head, potatoes, tomatoes and candles. The accused said to her, "*here is relish.*" He told her that he bought the groceries. The accused left home early in the morning going to do "piece work," immediately thereafter villagers came home, asked to search her bedroom, she allowed them, and they went in and removed the plastic bag brought by the accused. It contained a cabbage head, potatoes, tomatoes and three candles.

The prosecutor sought admissions from the accused in terms of s 314 of the Criminal Procedure & Evidence Act [Chapter 9:07]. The accused admitted the evidence of certain witnesses as contained in the summary of the state case. The first was the evidence of Thobekile Moyo, she resides at her own homestead, Guduza Line, Mahlathini area, Tsholotsho. The accused and deceased were her neighbours. The deceased was also the village head. On the 26th of June 2019, this witness was selling vegetables in front of Ngqethuka Store at Bubude Business Centre. At 1900 hours, the deceased bought some vegetables from her, a cabbage head, three potatoes and a pack of tomatoes which she put in a plastic bag. The deceased then proceeded to Ngqethuka bottle store. The following morning she received a report about this

case and proceeded to the scene where other villagers were gathered. The deceased had already been ferried to clinic. At the scene, Ntuthuka Moyo brought a plastic bag which contained a cabbage head, three potatoes, a pack of tomatoes and three candles that were said to have been recovered from accused's house. She identified the vegetables as the ones she had sold to the deceased the previous night. The cabbage had some blood stains on it.

The second was the evidence of Samantha Ncube, she resides at Wimbo Ndlovu's homestead, Mathetshaneni line, Mahlathini area Tsholotsho. The accused is a neighbour. The deceased was her uncle. On the 26th of June 2019, at 2000 hours the deceased came to Ngethuka Bottle Store where she is a bar lady and left with her a plastic bag with a cabbage, three potatoes a pack of tomatoes and three candles for safe keeping. The deceased went drinking with accused, Qinisela Sibanda and Fundani Ncube. At around 2200 hours, deceased requested for his groceries from the witness and left for home. He was still in the company of the accused, Fundani and Qinisela. The following morning the witness received a report about this case. On the same day Constable Busumani brought a plastic bag containing a cabbage head, three potatoes, a pack of tomatoes and three candles and asked her to identify the property. She identified the property as that of the deceased that he had left in her custody while he went drinking.

The third is the evidence of Thabani Ncube, he resides at his own homestead, Mhalaba line, Mahlathini area, Tsholotsho. The accused is his nephew. The deceased was a neighbour. On the 26th of June 2019, the witness was at Siphamandla Bottle Store, Bubude Business Centre where he was drinking beer with accused, deceased and Qinisela Sibanda. At about 2130 hours, the witness left the Bottle Store for home. Accused, deceased, Qinisela and Fundani remained behind drinking. Accused assured the witness that he was going to take care of deceased who was drunk. The following morning at 0700 hours, on his way to the borehole the witness received a report about this case. He proceeded to the scene. The deceased had already been taken to the clinic.

The fourth is the evidence of Mkhonzeni Ndlovu, he resides at Mboneni Ndlovu's homestead, Sifungo Line, Mahlathini area, Tsholotsho. The accused is his cousin and they used to do piece jobs together. The deceased was his father. On the 27th of June 2019, at around 0700 hours the witness received a report that the deceased was lying injured along a footpath close to Bubude Primary School. The witness went to the scene. The witness was shown an

okapi knife with a brown wooden handle by Constable Busumni. The witness identified the knife as that of the accused as he used to carry it with him when they did piece jobs.

The fifth is the evidence of Constable Tichaona Busumani, he is a member of ZRP based at Tsholotsho. He is the investigating officer. He knows accused and deceased only in connection with this case. On 27 June 2019, he attended the scene of the crime in Bubude area in the company of other police officers. He observed deceased's body at the clinic. The deceased's head and face were swollen. He proceeded to the scene where he found the accused and arrested him. The witness also recovered a plastic bag with a cabbage head, potatoes, tomatoes and candles recovered from accused's house. The cabbage had blood stains on it. The accused's shoes and jean trousers had blood stains on them. The witness recorded statements from witnesses. The okapi knife was identified by accused's wife as belonging to accused. The deceased's body was taken to Bulawayo for a post mortem examination.

We have had the opportunity of watching all the state witnesses when they testified in this court. We distinctly formed an impression that they were truthful, honest and reliable as witnesses in this court. We accept their evidence as the truth of what happened in connection with this case.

This is the state case.

Defence case

The accused elected to give evidence under oath. He testified that on the 26 June 2019, he was drinking beer at the local business centre. He was later joined by the deceased, whom he referred to as his grandfather. They were later joined by Qinisela Sibanda and Fundani Ncube. At around 11 p.m. they left going to their respective homes. The deceased took his route to his home and the three, i.e. accused, Fundani Ncube and Qinisela Sibanda, took their own route to their respective homes. Accused then parted from the other two saying he was going to see his girlfriend. He did not find his girlfriend, made a turn and followed the path which the deceased had taken. He left the path and joined the main road so that his wife, the following morning when going to the clinic would not see that he used the path. He walked following the road, saw something black. It was dark one could only see a distance of three metres. He asked whether it was a person, there was no response. He got closer to that black thing, a person stood up, he was shocked and head butted that person. This person fell down. This person tried to stand up, he got hold of accused's sleeve trying to stand, and accused head

butted him for the second time. Accused was holding a knife. He left it on the ground. At this point he recognised the person he had head butted as the deceased. The deceased called him, he turned and looked at him and did not answer. He realised that the deceased was drunk, he would leave his groceries in the bush, he then took the groceries to his own home. He told his wife that he had brought some relish. He left the deceased in the bush, because he thought he would insult him on the way. He intended to give the deceased his groceries the following morning. Under cross examination he told the court that even if he had used to groceries, he was going to buy and give the same groceries to the deceased. He did not intend to kill the deceased.

The testimony of the accused had an artificial ring to it almost as if he had been programmed to say what he was saying. We distinctly formed an impression that the accused was evading the truth and trying to mislead this court for the purposes of minimizing his role in the events that led to the death of the deceased. We find that the accused was a poor witness. Where his evidence contradicts that of the state witnesses, we reject it as false beyond a reasonable doubt.

Analysis of evidence

The accused accepts that he inflicted the injuries that caused the death of the deceased. He accepts this in his confirmed warned and cautioned statement which is before court as an exhibit. In his warned and cautioned statement he alleges he head butted the deceased twice behind the ear. Again he accepts this in his defence outline¹and oral evidence before this court. The cause of death was subarachnoid haemorrhage; head injury and assault. These are the injuries inflicted by the accused.

Accused wanted to rob the deceased of his groceries. He saw the deceased leaving the business centre carrying a plastic bag which contained the groceries. The deceased took a path leading to his home. Accused parted ways with Fundani Ncube and Qinisela Sibanda on the basis of a falsehood that he was going to see his girlfriend. He was in fact following the deceased to rob him of his groceries. That is the reason he was holding a lethal knife when he caught up with the deceased. That is the reason he removed his shoes and walked bare-footed when he caught up with the deceased. It is a falsehood that he removed his shoes so that his

¹The person held his arm then accused head butted him once on the head out of fear.

wife would not know he used that route. He was hiding his identity. He knew that it was going to be easy to identify him through his shoe prints. His shoe prints are unique, they leave a print of a tyre mark. In fact this is what eventually led to his arrest. That night was dark, Fundani Ncube says the visibility range was two and a half metres, while the accused says it was three metres. As a result of the fact that the deceased was very drunk and the darkness, accused thought the deceased was not going to identify him. When the deceased called out to the accused, he did not answer, this was to hide his identity.

Accused clearly recognised the deceased. His version that he did not recognise the deceased until the second head butt is a falsehood. He was with the deceased the better part of the day. The deceased had not changed clothes. He was still the same person he was drinking beer with, still putting on the same clothes. He followed the deceased for the purposes of robbing him. He took the groceries to his home. He told his wife that he bought the groceries. To say he took the groceries for safe keeping is a falsehood. He told his wife that he bought the groceries for the family. Under cross examination he made a U-turn and said he was going to replace deceased's groceries. All this is a clearly manufactured version. He head butted the deceased twice, leave him bleeding and helpless in the bush, and you say you took his groceries for safe keeping, this cannot be the truth.

The state seeks a conviction of murder in terms of section 47 (1) (b) of the Criminal Law (Codification and Reform) Act, which provides that any person who causes the death of another person realising that there is a real risk or possibility that his or her conduct may cause death, and continues to engage in that conduct despite the risk or possibility shall be guilty of murder. We find that the head butting was to subdue the deceased and facilitate the robbery. The real risk or possibility of death must not be inferred by hindsight from the fact of death. See *S v Mugwanda* SC 215/01. We cannot say on these facts that the accused realised 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 of death.

In his defence outline, the accused prays that he be acquitted of charge of murder and be found guilty of the lesser crime culpable homicide. Section 49 of the Criminal Law (Codification and Reform) Act, provides that any person who causes the death of another person negligently failing to realise that death may result from his or her conduct; or realising that death may result from his or her conduct and negligently failing to guard against that possibility shall be guilty of culpable homicide.

Accused accepts in his defence outline and in his oral evidence before court that the deceased was very drunk. In fact there is evidence from prosecution witnesses that the deceased was very drunk. He head butted a very drunk old man twice. He head butted him under the ear. The head butting was very severe. It caused subarachnoid haemorrhage² and head injury, which resulted in the death of the deceased. The deceased face was swollen, and there was blood coming from the mouth and nose. After such head butting, the accused left the deceased in the bush. Deceased was only discovered in the morning, ferried to the local clinic, where he died on admission.

The accused's actions are the cause of the death. It was objectively foreseeable or within the range of ordinary human experience that accused's actions would lead to the death of the deceased. It therefore means that the accused acted negligently by head butting the deceased twice under the ear. A reasonable person placed in a similar situation would have avoided acting in the manner the accused did. Accused negligently failed to realise that death may result from his conduct; or realising that death may result from his conduct and negligently failed to guard against that possibility.

Verdict

In the result, the accused is accordingly found not guilty of murder and found guilty of a lesser crime of culpable homicide in terms of section 49 of the Criminal Law (Codification and Reform) Act [Chapter 9:23].

Sentence

Mr. Sibanda, this Court must now decide what sentence is appropriate for the offence for which you have been found guilty. It is firmly established that in determining upon an appropriate sentence a court should have regard to the nature of the crime the accused has committed, the interests of the community and the individual circumstances of the accused. These considerations are commonly referred to as the '*Zinn triad*' after the often quoted decision of the Appellate Division that authoritatively confirmed them to be the relevant compass points. See *S v Zinn* 1969 (2) SA 537 (A).

² Bleeding in the space between the brain and the tissue covering the brain. Caused by head injury.

In determining an appropriate sentence, we are guided by the provisions of section 49 of the Criminal Law [Codification and Reform] Act Chapter 9:23. We factor into the equation the personal circumstances of the accused which are as follows, he is 32 years old. He is married to two wives, with a total of four minor children. He survives on piece what he calls piece work, and earns ZAR 600 per month. He has two donkeys. No savings. We also factor into the equation that you are a first offender.

However, we take into account that you has been convicted of a serious offence. A life was ended. It is incumbent on this court to emphasize the sanctity of human life. Society frowns against a person who by his own negligent conduct cause the death of another human being. The courts must send a loud and clear message that causing death, *albeit* negligently of fellow human being will not be tolerated.

The evidence shows that violence was deployed against a defenceless human being, who had done you no wrong, and who was merely working for himself and his family. The deceased was very drunk, going to his home to rest. You caused the death his death for the sole purpose of robbing him of his groceries. You deprived the community of a leader, who was a village head. All state witnesses testified that accused was a good man. You confirmed this by telling the court that he actually allocated you a stand in which you built your homestead. You caused the death of a good man.

Having taken all the factors into account, we take the view that the following sentence will meet the justice of this case, the accused is sentenced to 10 years imprisonment of which 2 years imprisonment is suspended for 5 years on condition the accused does not within that period commit an offence of which an assault or physical violence on the person of another is an element and for which upon conviction he is sentenced to a term of imprisonment without the option of a fine.

National Prosecuting Authority, state's legal practitioners
Mvhiringi & Associates, accused's legal practitioners