

THE STATE

Versus

REASON SIBANDA

IN THE HIGH COURT OF ZIMBABWE

DUBE-BANDA J with Assessors Mr Ndlovu and Mr Bazwi

HWANGE CIRCUIT COURT 7 AND 12 OCTOBER 2020

Criminal trial

Mr. B. Tshabalala, for the state

Ms 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 is alleged that on the 28th of February 2020, at 0100 hours at the Council Beerhall, Bandala Bus Centre, Inyathi, the accused unlawfully struck Lovemore Nxumalo (deceased) with an axe handle and a bicycle chain several times on the head and all over the body, intending to kill him or realising that there is a real 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 tendered a plea of guilty to the lesser crime of culpable homicide. This plea was not accepted by the State.

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 Inyathi, on 29 February 2020. The statement was confirmed by a magistrate on the 2nd March 2020. The statement reads:

I admit to the charge levelled against me. The reason behind committing this offence is that the now deceased and his friends once assaulted me with an axe before. They were about twelve in number such that I recovered whilst I was in hospital. This is the reason why I lost control over committing this offence and prior to this incident the now deceased had promised to assault me again. Therefore thus why I decided to assault him before he does.

The state tendered a post mortem report compiled by Dr I. Jekeny at United Bulawayo Hospitals on 1st March 2020. Following an examination of the remains of the deceased, the pathologist concluded that the cause of death was:

1. Massive subdural haematoma
2. Multiple skull bones fractures
3. Severe head injury
4. Assault

An axe handle recovered was produced by the state as an exhibit. Its measurements are as follows: length 85 cm; weight 1.2 kg; width 6 cm; colour brown; made of wood. Again, the bicycle chain was recovered and is before court as an exhibit. Its measurements are: weight 385grams; length 132 cm; width 6mm; colour brown; made of iron.

State case

The state led oral testimony from two witnesses. The first to testify was Amos Sibanda. He resides at stand 48 Makonjeni homestead, Badala, Inyathi. He knows the accused as a local person, and the deceased was his neighbour. On the 28 February 2020, he was seated with his friends consuming beer at the Council veranda, Badala Business Centre, Inyathi. About a few metres was there a gambling school. He had a thudding noise, he stood up and checked and saw the deceased lying on the ground. Deceased struggled to raise his head, the accused struck him with an axe handle. He tried to raise his head for the second time, accused struck him again with the same axe handle. Accused was holding the axe handle with two hands. When deceased was lying on the ground, accused stepped on his chest, he then struck him with a bicycle chain. He struck on the chest. This witness identified the axe handle and the chain used by the accused. This happened at night, but there was a source of light. After assaulting the deceased accused left and proceeded to his homestead.

The second witness was Lyton Moyo, he resides at Village 3 Badala, Inyathi. The accused is his neighbour. He knew the deceased during his lifetime. Accused came to the gambling school, he wanted to play using a cellphone, which was rejected by the gamblers. Accused had no money to gamble, so he left the gambling school, later the accused returned to the gambling school.

Deceased was in the gambling school. When accused came for the first time, he did not talk to the deceased. Again, when he came for the second time, he did not talk to the deceased. When he came for the second time, he threatened this witness, and the witness left the gambling school and went to his home. As he was leaving, he had a cracking sound.

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. That is the evidence of Nkosana Nduna. The accused and the deceased were his neighbours of this witness at Badala Village. On the 28th February 2020, at 0100 hours the witness was at a gambling school at the Council Beerhall at Badala Business Centre. The Accused tried to gamble using a cellphone but all the gamblers refused because the phone was an old phone and valueless. The deceased arrived at the gambling school and the accused left as if going towards his homestead. After a few minutes the accused came back and called out to Sa Wisdom and Lyton Moyo saying “watch out” and “*basop*”. Sa Wisdom and Lyton moved away. The accused produced a one metre axe handle and struck the deceased three times on the shoulders, neck and head, the deceased fell to the ground facing upwards. The witness moved a few metres away. The accused then said to the deceased “you assaulted me with your friends”. The deceased tried to raise his head up, the accused further struck him with log. The accused then said “I want to chop your head and carry it away with me”.

The accused then struck the deceased on the other side of the face. The deceased was groaning in pain. The accused continued to assault the deceased with the axe handle. The accused went behind a tank nearby and came back carrying a bicycle chain. He further assaulted the deceased with it on the face and the head. The accused then left the scene carrying his two weapons and said that he was going for Promise. The witness went closer to the deceased and observed that the deceased had wounds on the head and that he was now bleeding. The deceased tried to get up but he fell down. Deceased was later ferried to the hospital in a motor vehicle.

The evidence of Assistant Inspector Vakayi Mahwite, a member of Zimbabwe Republic Police stationed at ZRP Inyathi was admitted in terms of section 314 of the Criminal Procedure and Evidence Act. He did not know the accused or the deceased. On the 29th of February 2020, the witness visited the scene of crime and observed blood stains on the ground. He interviewed witnesses. He also arrested the accused who had gone into hiding at a neighbouring Village

(Huntsman), Inyathi. The witness took the accused to his homestead at Bandala Village where he recovered a bicycle chain and a yellow axe handle. The witness also recorded a statement from the accused in the presence of Assistant Inspector Moyo.

We have had the opportunity of watching the state two witnesses when they testified in this court. The state witnesses gave their evidence in a calm and sequential manner. We distinctly formed an impression that they were truthful, honest and reliable as witnesses in this court. We can say here without any shadow of doubt that the state witnesses did not embellish their versions to disadvantage the accused. We accept their evidence as the truth of what happened on the 28 February 2020, when the accused assaulted the deceased.

This is the State case.

Defence case

The accused elected to give evidence under oath. He testified that on the 28 February 2020, he assaulted the deceased. The reason for the assault was that when he left the bar going home, he found that the deceased and his friends had waylaid him. The deceased drew a *machete* and said today we will finish you off. He ran away to the people who were at a gambling school. He produced a phone to gamble with, the deceased took it and put it in his pocket. That is the time he picked up an axe handle and struck the deceased.

On a previous occasion the deceased and his friends attacked the accused. They took his money. He was taken to hospital where he was hospitalised. The deceased came to the hospital for the purposes of attacking him again. He reported the matter to the police, the deceased was not arrested, but it is the accused who was arrested for assault instead. He did not intend to kill the deceased, but merely to reprimand him. He did not plan to kill the deceased, it just happened. In cross examination, accused raised the defence of self-defence. He avers that at the gambling school, the deceased took his phone and drew up a *machete*. He contended that he struck the *machete* two times, and the third time he struck the deceased.

We formed an impression that the accused was not telling the truth to this court. There are so many inconsistencies and improbabilities in the accused's version that we can say without any fear of contradiction that he was an untruthful, unreliable and untrustworthy witness whose evidence cannot be relied on. He changed and tailored his defence as the trial

progressed. His version of events cannot be accepted as representing a truth. The accused closed his defence case.

Analysis of evidence

Accused went to a gambling school, he had no money to gamble. He tried to gamble using his old and valueless cell phone, which the other gamblers rejected. When the deceased arrived at the gambling school the accused left going towards his homestead. After a few minutes the accused returned to the gambling school. He drew an axe handle and struck the deceased three times on the shoulders, neck and head, the deceased fell to the ground facing upwards. The witnesses could hear the sound of the axe handle as it landed on the deceased. He then said to the deceased “*you assaulted me with your friends*”. The deceased tried to raise himself to stand up, the accused further struck him with an axe handle. The accused then said “*I want to chop your head and carry it away with me.*” He was holding the axe handle with both hands. Deceased struggled to raise his head, the accused struck him with an axe handle. He tried to raise himself for the second time, accused struck him again with the same axe handle. The accused picked up a bicycle chain. He further assaulted the deceased with it on the face and the head. When deceased was lying on the ground, accused stepped on his chest, he then struck him with a bicycle chain. He hit him on the chest, head and face. The deceased suffered injuries and was lying in a pool of blood.

The injuries inflicted by the accused caused the death of the deceased. The accused accepts that it is the injuries that he inflicted that caused the death of the deceased. He accepts this fact in his confirmed warned and cautioned statement; defence outline;¹ and in his oral evidence in this court. The cause of death was massive epidural haematoma; multiple skull fractures; severe head injury and assault. According to the pathologist, severe force was used to inflict the massive epidural haematoma and the several multiple fractures. Such fractures are found when excessive force is used.

¹ That the deceased had assaulted him before and he sustained deep injuries. He was hospitalized for 3 months. On the day in question the deceased promised to assault him. Accused decided to assault him before deceased assaulted him again. He lost control and ended up committing the offence out of negligence. That he had no intention of killing the deceased, he only intended to discipline the deceased as he was now living in fear of assault.

We find that the accused's version that deceased took his cell phone and drew a machete is false. The deceased was struck with the axe handle as he was seated at the gambling school. Prior the striking of the deceased, there was no talk or quarrel between the accused and the deceased. The version about the deceased and his friends waylaying the accused; deceased drawing a *machete* and taking accused's cell phone were not put to state witnesses in cross examination. The accused introduced the *machete* story, as an afterthought in cross examination.

The State asks the court to convict the accused of murder with actual intent. The deceased died as a result of the injuries inflicted by the accused. Accused targeted the head multiple times with lethal weapons. He was striking with an axe handle holding it with both hands. He deployed severe force. He caused multiple skull fractures and severe head injury. When the deceased was trying to raise his head, he would strike it with an axe handle. He did this twice. When deceased was lying on the ground bleeding from the mouth, head and nose, he got a chain, continued to strike at the deceased with the chain. He used a chain to finish him off. He continued the strike the head. By his own mouth the accused said, "*I want to chop your head and carry it away with me.*" You cannot chop off the head, and leave a human being alive. Once the head is chopped off, it means death. That is what the accused desired and achieved.

In this case, accused desired death. Death was his aim and object, or in process of striking the deceased with an axe handle and bicycle chain he foresaw death as a substantially certain result of that activity and proceeded regardless as to whether this consequence occurs. See *S v Mugwanda* SC 215/01.

We are satisfied therefore, taking into account the entire conspectus of the evidence that the State had discharged the *onus* resting upon it to prove the guilt of the accused beyond reasonable doubt.

Verdict

Having carefully weighed the evidence adduced as a whole in the trial, the accused is found guilty of murder with actual intent as defined in terms section 47 (1) (a) of the Criminal Law (Codification & 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. You have been convicted of murder with actual intent in terms of section 47 (1) (a) of the Criminal Law (Codification and Reform) Act. Both defence counsel and state counsel submitted that this murder was committed in aggravating circumstances in terms of section 47 (2) (d), in that the victim was murdered in a public place. Mr *Tshabalala*, counsel for the State, later made a U-turn and submitted that the murder was not committed in aggravating circumstances. We do not accept that the definition of a public place as contained in section 35 of the Criminal Law (Codification and Reform) Act, includes a gambling school. We take the view that access to a gambling school is restricted to the gamblers only. We therefore find that this murder was not committed in aggravating circumstances.

To arrive at the appropriate sentence to be imposed, this court will look at your personal circumstances, take into account the nature of the offence you have been convicted of, factor in the interests of society, weigh same against the others and then blend them with the requisite measure of mercy.

We have been informed of your personal circumstances. You are 25 years old. You were 24 years at the time you committed this offence. You attained a Grade 4 level of education. You are a miner, earning US\$300.00 per month. You have a 3 roomed house at Inyathi. You were in custody for a period of seven months preceding this trial. You are a first offender.

The offence for which you have been convicted of is a grave and serious offence. The prevalence of the crime of murder is such that cognisance is sometimes lost of the extreme consequences that flow from it. A life is ended. And with it the enjoyment of all of the rights vested in that person: the right to dignity, the right to equality and freedom, and the right to life itself. Not only is a life ended, but the lives of family and friends are irreparably altered and damaged.

The act of punishment serves as retribution. It serves also to signify that such crimes will not be tolerated, that there is a significant and serious consequence to be suffered by the perpetrator. This is the task that a sentencing court is called upon to carry out. It is required to take proper cognisance of the nature of the crime and to determine a sentence which balances

the competing interests of the society and the individual perpetrator while meeting the objectives of punishment. It is a task rightly considered to be very difficult.

The mitigating factors in your favour pale into insignificance when consideration is given to the nature of the crime. The evidence shows that an extraordinary degree of violence was deployed against another human being. What a horrible way to end the life of another human being. This court must say it, and say it strongly that such conduct will not be tolerated. This court has taken a stand, and it will continue taking a stand, against this wanton violence and destruction of life. Such conduct must be punished, and punished severely.

You struck the deceased with an axe handle. As he was trying to raise his head, you would strike again. You were holding the axe handle with both hands. When he was lying helpless on the ground, you used a bicycle chain to finish him off. You used excessive force. You caused multiple skull fracture and severe head injury.

This court will not allow such a situation of anarchy to prevail in society. This court must send a proper message and a proper signal that no one should cause the death of another human being. The use of violence in settling scores must come to an end. No human being should die in this way.

However, after taking all factors into account, we are of the view that the following sentence will meet the justice of this case. In the result:

You are sentenced to 20 years imprisonment.

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