

THE STATE
versus
OBEYMASAMBU

HIGH COURT OF ZIMBABWE
MUZENDA J
MUTARE, 28 and 29 January 2020

Criminal Trial

ASSESORS: 1. Mr Chagonda
2. Dr Sana

M Musarurwa, for the state
N Nhambura, for the accused

MUZENDA J: The accused is charged with the crime 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 that on 7 May 2019 and at Musanga Village, Chief Saunyama, Nyanga, the accused unlawfully caused the death of Emmanuel Nyasha Masambu by hitting him several times on the legs and head with a wooden pick-handle, intending to kill him or realising that there was a real risk or possibility that his conduct might cause death and continued to engage in that conduct despite the risk or possibility resulting in injuries from which the said Emmanuel Nyasha Masambu died.

The accused pleaded not guilty to the charge and stated in his defence outline that there was bad blood between him and the deceased who was his biological young brother. On 7 May 2019 the accused was in the company of his uncle Rodney Gwezere who resides in the same compound with the accused. As the accused was accompanying Rodney Gwezere to the house that he slept in accused saw a person emerging from a disused room where various tools are kept. Rodney Gwezere managed to identify the person that the accused had seen and he indicated that it was the deceased. The deceased started walking towards the direction where accused and Rodney were coming from. Accused expressed his displeasure on why the deceased had visited his homestead at night since the accused was misusing some of the items that were stored in the store-room. At that juncture the deceased started to insult the accused

and both parties exchanged harsh words. Deceased kept on walking towards the accused and the accused went away to avoid confrontation. The accused went straight to Mr. Dhokotera's residence, his uncle to inform him of what the deceased was doing. The accused did not get any answer. The accused proceeded to the residence of Patrick Gwezere, his uncle and informed him of what was transpiring. Accused was advised to go to his homestead so that the issue would be resolved on the following day. As accused arrived at his homestead he saw deceased standing near his house. The deceased then threw an object which looked like a small axe towards the accused and accused managed to dodge it. The deceased then picked a wooden pick-handle and assaulted the accused on his back. The accused then took the wooden pick-handle from the deceased. In the heat of the moment the accused struck the deceased twice on the legs and on the head. The accused shall therefore state that he acted in self defence and that the situation was exacerbated by the deceased who attacked the accused at his own homestead. Accused was provoked by the unwarranted attack from the deceased. He however believes that he might have used excessive force in defending himself. He shall state that he had no actual or constructive intention to kill the deceased. He prayed that he be found guilty of culpable homicide.

The state, by consent of the accused's counsel, produced the following:

- (a) the post mortem report, No 248875 prepared by Dr. Caroline T. Makadzange on 10 May 2019, which was marked exh 1. The doctor observed the following:
 - (i) bleeding both nostrils (clotted blood)
 - (ii) clotted blood in left ear
 - (iii) 3 lacerations on scalp noted
 - (iv) Bruises on both arms.

As a result of the examination the doctor concluded that the cause of death was severe head injury due to a blunt trauma.

- (b) Confirmed warned and cautioned statement of the accused which read as follows:

"I admit that I caused the death of Emmanuel Nyasha Masambu after I had assaulted him with pick handle. I struck him with force twice on the legs and twice on the head after he had come to my place in the night and tried to attack me with an axe."

The confirmed extra-crucial statement was marked exh 2.

- (c) Exhibit 3 was the wooden pick handle.

Exhibit 4 was the certificate of weight which showed that the handle measured 84cm and weighed 0,895 kilograms.

(d) Exhibit 5 was the sketch plan prepared by Assistant Inspector Musongora upon the indications made to him by the accused and state witnesses. Exhibit 5 reflects the following points and explained by the police detail:

- (i) Point C: “Indicates the fowl run where Obey Masambu says he took the pick handle which he used to assault Emmanuel Nyasha Masambu as indicated by Obey Masambu to Assistant Inspector Musongora and witnessed by Constable Chakururama.
- (ii) Point D: “Indicates first point of contact where Obey Masambu says he first assaulted Emmanuel Nyasha Masambu twice on the legs with the pick handle before Emmanuel ran away to point E as indicated by Obey Masambu.....
- (iii) Point E: “Indicates the point where Obey Masambu says Emmanuel Masambu fell down after he had assaulted him twice on the head as indicated by Obey Masambu.....
- (iv) Point F: “Indicates a Mutondo tree near the point where Obey Masambu says he assaulted Emmanuel Masambu twice on the head as indicated by Obey Masambu....”

The state applied in term of s 314 of the Criminal Procedure and Evidence Act [*Chapter 9:07*] to have the following witnesses’ evidence admitted as not being disputed and the defence indicated that that application was not opposed, hence it is recorded that the evidence of Gladys Masambu is not in dispute. She is the biological mother of both accused and deceased. Accused and deceased had had many quarrels before the fateful date and there was bad blood between them, she stated. On 7 May 2019 at around 2300 hours she was awakened by Rodney Gwezere who had brought the deceased to her. She saw the deceased standing against the wall of his bedroom in the moonlight. She tried to speak to the deceased and he was not responding. On 8 May 2019 she filed a report about the assault. She accompanied deceased to Nyanga District Hospital where deceased passed on. Tafadzwa Chakururama is a police detail based at Nyamaropa Police Station. He witnessed Rodney Gwezere and Beauty Ngarazi making indications. He saw blood at the scene of crime where the accused assaulted deceased. He also witnessed accused’s warned and cautioned statement and accused made his indications at the scene in his presence. Thomas Musongora is an assistant inspector in the police. He is the investigations officer. Witnesses and the accused made indications at the scene of the crime to him. He saw blood on the ground that had dropped from the deceased’s head. He is the one who drew the sketch plan, he also recovered the wooden pick handle and recorded accused’s warned and cautioned statement and caused same to be confirmed. Dr Caroline Makadzange carried out the post mortem report examination on the deceased’s body. She compiled a post mortem report exh 1. The evidence of Miasimbaashe Sambama the ambulance driver has no

much weight in this matter. Noah Douglas Posi is employed by Zimpost and stationed at Nyanga Post Office. He is one who weighed, the wooden pick handle, exh 3.

The state led evidence from Rodney Gwezere. He resides at Matanga Village, Chief Saunyama Nyanga. Both accused and deceased are his nephews, he is related to the mother of deceased's father. On 7 May 2019 he was with the accused at the latter's homestead. Accused's wife was also present. There is a disused hut at accused's homestead where accused's grandmother used to stay. Deceased had his bag there whilst accused and the witness were at the homestead they heard some noise and both went out to check. Upon accused's arrival at the hut he saw deceased carrying a bag on his shoulder. The witness told the court that the accused confronted deceased on what deceased wanted, he told deceased that he wanted to steal. Deceased told accused that he had nothing to steal since there was nothing worth stealing; deceased had simply come to collect his bag. Accused took deceased's bag so that he could hold it as exhibit that deceased was a thief, he went to Patrick Gwezera's homestead to show him. When the accused returned to his homestead, he found deceased standing in front of accused's house and handed him back his bag. As soon as the deceased got his bag he turned away leaving accused's homestead, accused picked up a pick handle from the fowl run at his homestead and struck the deceased on his legs. Deceased fled and accused was in hot pursuit leaving the witness behind, when the witness caught up with the two, accused and deceased, he found deceased on the ground, the witness tried to remonstrate the accused over what accused was doing, accused obliged and threw the pick handle down, he proceeded to switch on the light of his cell phone to check at the deceased's condition and accused realised that he had badly injured the deceased. The witness observed blood flowing from the deceased's head, ears, nostrils and his mouth. The accused left the scene leaving the witness attending the deceased. The witness tried to call out deceased's name but there was no response, the witness attempted to lift the deceased and let him sit up but deceased could not sit upright, the witness then lifted up the deceased and took him to deceased's mother's homestead. The evidence of the witness as far as to what happened at Gladys Masambu's evidence is identical to Gladys evidence and needs no repetition. After Rodney Gwezera's testimony the state closed its case.

The accused gave evidence and virtually adopted the course of events as outlined in his defence outline which has been extensively copied herein. Most issues were admitted by the accused, that on the day in question he recognised his late brother before he assaulted him. Accused admitted that there has been an outstanding dispute relating to a piece of land and was not happy when he saw deceased at his homestead on the night of 7 May 2019. Accused admits

assaulting deceased on the head twice, his indications at the scene quoted hereinabove, the accused showed police three places at point D, he assaulted deceased on the legs twice on the head, and at point F he delivered two more blows on the deceased's head, so it is apparent from the foregoing using accused's own admissible evidence, he hit deceased four times on the head with the pick handle. It is highly possible in the circumstances of this matter that accused could possibly have assaulted deceased on the head on more than four occasions given the nature of injuries on the deceased as shown on the post mortem report. Accused did not fair well in his defence case, we agree with the state that his evidence went into an overdrive completely contradicting himself in the process. His indications produced by the consent of his legal practitioner were disowned by the accused, moreso when he was asked to explain as to who brought the pick handle at the scene. The accused failed dismally to establish evidence which could show that he was acting in defence of self. From the evidence of Rodney Gwezere, it was accused who acted provocatively, he called deceased a thief, he snatched deceased's bag, upon restoring deceased's bag, when the deceased was leaving, accused runs to a fowl run picks up a pick handle and without provocation, launches an attack on the hapless deceased. The evidence of Rodney was not challenged on this aspect and we are satisfied beyond reasonable doubt the whole version of the accused being attacked by deceased, the latter using what appears at night to be an axe is farfetched. The version is incredible and we reject it totally. Accused had a score to settle with the deceased. From the sketch plan exh 5, the whole incident occurred within a periphery of accused's homestead at point F where deceased delivered, according to him, the last blow s on the head of the deceased. Deceased lost consciousness and the accused sensing the gravity of what he had done abandoned deceased and fled to Mozambique. We conclude that from point D, accused after assaulting deceased pursued him to both points E and F and during that the safety of the accused was not under any threat from the conduct of the deceased. Throughout deceased was a victim and he died a painful death.

The accused aimed a 0,895kg wooden pick handle on a vulnerable part of the body, the skull and delivered at least four blows on the head. The oozing of blood from the nostrils, mouth and ears shows that the deceased's life was shattered instantly by the impact of the blows. The accused was reckless and ruthless as to the manner he mercilessly delivered the blows on deceased's head.

We are satisfied that the accused had a prerequisite *mens rea* or actual intention to kill the deceased moreso when it is apparent that the accused targeted a delicate portion of a human

body, the head, the state had managed to prove beyond reasonable doubt that the accused is guilty of the charge of murder with actual intent.

SENTENCE

In assessing the appropriate sentence the court takes into account the mitigatory and aggravating aspects addressed by both counsel. Accused is 30 years, married and has a family to look after. The stigma of murdering his sibling will live with him forever. However the offence the accused had been convicted of is a very serious one taking into account that the accused callously launched a 0,895 kilogram wooden pick handle on deceased's head several times and relentlessly being even remorseless given the manner he had tried to present his defence before the court. The deceased obviously given the narration of the state witness coupled with what is reflected on the post mortem report died a painful death. Society must use civilised methods of resolving disputes than resorting to violence which unavoidably result in fatalities. The penalty for murder with actual intent is life imprisonment, however, the court will temper justice with mercy in this matter and try to impose a sentence that will at least try to rehabilitate the accused in view of the seriousness of the offence.

Accused is sentenced to 20 years imprisonment.

National Prosecuting Authority, state's legal practitioners
Mugadza Chinzamba & Partners , accused's legal practitioners