

STATE
versus
RAMSEY SADDAM CHIVETE MAKONI

HIGH COURT OF ZIMBABWE
MUZENDA J
MUTARE, 18 and 20 February 2020

Criminal Trial

ASSESORS: 1. Mr Chagonda
2. Dr Sana

Mrs *J Matsikidze*, for the State
C Maunga (Jr), for the Accused

MUZENDA J: Accused is charged with Murder as defined in s 47 (1) (a) or (b) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] it being alleged by the State that on 14 May 2019 and at Mapinge Village, Chief Mutema, Chipinge, accused unlawfully caused the death of Trust Muzvireki by striking him with wooden logs all over the body intending to kill Trust Muzvireki or realising that there was a real risk or possibility that his conduct might cause the death and continued to engage in that conduct despite the risk or possibility resulting in injuries from which Trust Muzvireki died.

The accused pleaded not guilty. In his defence outline produced in court, Annexure B, he stated that on 14 May 2019, he went to the deceased's place of residence to follow up on his stolen property namely two mobile cell phones. When he arrived at the homestead where deceased was, he asked him to return the cell phones. A misunderstanding between them broke out. The deceased armed himself with a log and accused disarmed him and assaulted deceased using the same log leading to the deceased's bleeding. Accused left the scene only to be informed of the passing on of the deceased later in the evening around 1900 hours. He states further that he did not intend to kill the now deceased and prays that he be acquitted of Murder and be convicted of culpable homicide in terms of s 49 of the Code.

The State summary, Annexure A, states that the accused and the deceased resided in different villages but under Chief Mutema in Chipinge District of Manicaland. On a day unknown to the prosecutor the two interacted over some cell phones which belonged to the

accused. On 14 May 2019 the accused approached the deceased who had paid a visit to his maternal aunt at Mapinge Village and demanded his cell phones. When these were not availed to him, the accused became irate and started assaulting the deceased all over the body using clenched hands. The deceased sought refuge in his aunt's kitchen but the belligerent accused pursued him and grabbed a log from the fire place which he used to assault the deceased. The accused went outside the kitchen and picked yet another log and used it to further assault the deceased all over his body rendering deceased unconscious. The deceased sustained multiple injuries from which he died. The post mortem report No. 104574C, produced by consent of accused's defence counsel and marked exh 3 shows that:

- (a) deceased's clothes were soaked in blood
- (b) there was a large laceration on the left cheek connecting skin and oral cavity
- (c) large laceration behind the right ear exposing occipital scalp
- (d) the head had a depressed skull fracture
- (e) bilateral compound tibial/fibula fractures

Dr Makumbe concluded that the cause of death was exsanguination.

The following witnesses evidence was admitted by court in terms of s 314 of the Criminal Procedure and Evidence Act [Chapter 9:07], Lucia Sithole, Trish Sithole, Timothy Mhlanga, Peter Chikukwa, Admire Kamangira, Tafadzwa Majachani and Dr Brian Makumbe. The State applied to have the evidence of Alec Mashawa and Lewis Mlambo to be expunged from the State summary since they were not located. In addition to the production of the post mortem report as exhibit, the State produced by consent the sketch plan exh 1, the accused's warned and cautioned statement, exh 2. Log one was also produced and marked exh 4, log 2 was marked exh 5, the certificate of weight for the 2 logs was produced and marked exh 6.

Lucia Sithole's undisputed evidence is that deceased was her nephew. On 14 May 2019 she was at Maundwa Clinic to receive donations when accused confronted her and confronted her and accused her of accommodating a thief at her place. Accused indicated to her that he was going to deceased in connection with his (accused's) phones. Before accused left, he threatened to collect her goats in lieu of the missing cell phones. When she later got home that afternoon she found the deceased lying dead in a pool of blood in the kitchen. She also observed multiple injuries on the deceased's head, face and limbs.

Trish Sithole is a juvenile who was at Lucia Sithole's homestead on 14 May 2019 when accused and his colleagues arrived. Her evidence is similar to Nelly Mtetwa in all material respects.

Trish Mhlanga is a member of the constabulary. He is the one who apprehended the accused at Nditore Business Centre.

Peter Chikukwa works for Zimpost and based at Chipinge. On 6 September 2019 he weighed 2 logs and compiled a certificate of weight. Admire Kamangira is a police detail based at Chipinge Rural. On 14 May 2019 he attended the scene and upon arrival he inspected the body of the deceased and observed that it had multiple injuries including a deep cut on the cheek. Nelly Mtetwa then identified to him two logs that had been used to assault deceased by the accused, he recovered them. He witnessed the recording of accused's warned and cautioned statement as well as the accused's indications.

Tafadzwa Majachani is sergeant in the Zimbabwe Republic Police stationed at Chipinge Rural. He is the investigating officer. He also observed the injuries on the deceased's body, he recovered the 2 logs identified as the weapons used to kill the deceased. He recorded the indications and extra-curial statements of the accused. Dr B Makumbe is a medical practitioner based at Chipinge District Hospital. On 27 May 2019 he examined the remains of Trust Muzvireki and he compiled a post mortem report no. 104574C.

The majority of witnesses' evidence having been admitted by the defence, the State called Nelly Mtetwa to give oral evidence. She is 19 years of age and was deceased's wife. On 14 May 2019 she was at her maternal Aunt Lucia Sithole's homestead. Her aunt left for Maundwa Clinic. She later followed her. When she got to Maundwa Clinic, Lucia instructed her to go back to the homestead to go and call deceased to come to the clinic to assist her to ferry her luggage. On the way back to the homestead the witness saw accused and 2 other men following her. Accused spoke to her and chided her for marrying a thief. Accused told her that they were going to Lucia Sithole's place to collect their cell phones from deceased. Accused and Alec arrived at Lucia's homestead first. When the witness later on arrived, the accused and deceased were seated at the entrance of the kitchen and talking about the cell phones.

She heard the conversation between the accused and the deceased. When the accused demanded delivery of the cell phones from deceased, the latter informed accused that the cell phones were with someone in town and deceased will only hand over the cell phones to accused if accused pays deceased the money he owed him. When deceased gave that response to the accused, the accused attacked deceased. Both stood up and a fight ensued, however it was the

accused who attacked deceased first and deceased fought back in defence of self. None of the accused's friends restrained the pugilists. When the accused saw that deceased was having advantage over him, he went into the kitchen, picked up a log, exh 4 and struck the deceased. The person who went into the kitchen first was the deceased followed by the accused. When accused struck the deceased with exh 4, he went out of the kitchen and fetched the second leaner log, exh 5 and used it to assault the deceased. At that juncture Alec and his colleague ran away from the scene after realising that deceased had collapsed. He then picked the first log and dropped the two of them outside the kitchen hut and went away. At the time accused went outside the kitchen to pick exh 5, deceased was lying on the kitchen floor lifeless.

According to Nelly accused delivered several blows on the deceased's body, some landed on the head others on the back and buttocks. Both logs were used. Accused stopped the onslaught after realising that deceased was helpless and possibly dead. She identified both logs to the police. When she finally went to the kitchen where deceased was, she noticed that deceased's body was in a pool of blood, one of his eyes was protruding out and his body was swollen.

Under cross-examination by Mr *Maunga*, she stated that at first when she arrived at Lucia's homestead she saw accused dragging the deceased going towards the kitchen. She also saw the two fighting from outside the kitchen into the kitchen, she was standing directly at the kitchen door. During the assault by the accused, deceased did not retaliate, could not block and never cried when he was struck, when accused picked exh 4, the witness did not see accused using it but heard sounds of beating inside the kitchen, she perceived a slamming sound. After the testimony of this witness the State closed its case.

The defence opened its case by calling the accused. Accused is aged 22 years and was 21 years at the time the offence was committed. According to the accused on 14 May 2019 he found deceased at Lucia Sithole's homestead. He told deceased that he had come to get his cell phones from deceased. Deceased agreed to discuss the matter. Both walked to the kitchen hut. He denied dragging the deceased. Whilst at the kitchen the two sat down, deceased told accused that he had sold the cell phones. Accused proposed to deceased that deceased should go with him to the place where he had sold the cell phones but deceased told accused that he did not have the identity of the people who had bought the phones. Accused then proposed further to the deceased that deceased should accompany accused to his place and given manual work to do so that he works towards realisation of the value of the cell phones, deceased rejected the proposal.

Deceased stood up attempting to run away and accused blocked his way. The deceased pushed the accused away in order to find a way out and a fight ensued. According to the accused, he fought back because the deceased had pushed him. Accused stated further that deceased who was heavier than him overpowered him. Accused's friends intervened advising the deceased to stop fighting accused well knowing that he was wrong. The deceased then dashed into the kitchen, picked up a log from the fire place. He used it to strike the accused on the left side of his body around the shoulders. Alec held deceased back and accused got a chance to wrestle the log from deceased's grip and using both hands struck deceased on the right cheek, then four times on the buttocks region. When he struck him deceased was still standing. Deceased then sat down and sought audience with accused. At that time deceased was bleeding from the cheek. Accused advised deceased that he would come back. Later he learnt that deceased had passed on.

Under cross-examination by the State counsel, accused admitted that he was angry with deceased over the issue of the cell phones. He denied owing deceased money. Accused was asked why he stood by the door whilst deceased was picking the log from the fire place and he told the court that he was afraid that deceased would bolt out and escape from him. He said that he sustained injuries from the assault perpetrated by the deceased. When deceased covered his head and cheek accused directed the blow on the thighs. Deceased was facing the walls covering his face as the accused was hitting him all over the body. Accused does not dispute the findings of the doctor as shown in the post mortem report and that he is the one who caused such injuries. He admitted that the log, exh 4, had a devastating impact upon landing on the head of the deceased. He broke deceased's legs, he admitted that any blow to the head can cause death but he left him when he was still alive. He also admits that when he saw the deceased bleeding he realised that he was going to die. He was also asked why the aspect that deceased struck him with a log does not appear in his defence outline and his response was that he had told his lawyer.

The evidence of Nelly Mtetwa was barely challenged by the defence. Accused during his testimony continually evaded questions and changed his versions as each new question was put to him. The accused had a bone to chew with deceased over the issue of cell phones. When he went to the deceased's place according to his own admission, he would not leave the place without a cell phone. Right from time he arrived at Lucia Sithole's place the accused was the aggressor, he dragged the deceased to the kitchen, he forced him to sit down, he blocked his way when he wanted to run away from the accused when deceased sought refuge in the kitchen,

accused blocked deceased by the door way, accused attacked deceased first before the fight when accused was being overpowered, he pulled a log and struck the deceased on the cheek then the head, waist and the legs. When the deceased was defenceless accused continued to pound on deceased's body. At the time all these blows were relentlessly rained on the deceased, deceased did not cry retaliate nor pose any danger to the deceased. Deceased acted like a sheep going to a slaughter and the accused was the assailant. We are satisfied that given the nature of evidence of Nelly Mtetwa, the accused was the aggressor throughout, deceased only reacted in self-defence.

The accused deliberately chose to hit the deceased on the head using a log 99cm long with a top end circumference of 23cm, and bottom circumference of 26cm weighing 2,225kg on the head using both hands, he also used log 2 measuring 134cm long with top end circumference of the same length weighing 2,200 kg. The 2 logs are very lethal and given the nature of injuries sustained by the deceased, great amount of force was used by the accused. There were deep lacerations on the occipital scalp, broken jaw, broken limbs and the deceased lost a lot of blood due to the injuries perpetrated by the accused.

We are satisfied that the accused had the necessary *mens rea* and *actus rea* to cause the death of Trust Muzvireki and accordingly he is found guilty of Murder with actual intent.

Sentence

Accused has been found guilty of murder with actual intent. He brutally murdered Trust Muzvireki on 14 of May 2019 whose age was around 25 years. The deceased died on the spot without crying, without assistance and lost a lot of blood with limbs broken and skull broken, right cheek dismembered and his death was uncalled for. The accused should have gone to the police or the courts to seek his relief than taking the law into his hands, goes to deceased's place and brutally assaulted him in the presence of his wife.

The death left a trauma on deceased's family. The action of the accused is highly reprehensible. He is fortunate that at the time he committed this offence he was 21 years old. He is a first offender and courts treats youthful first offenders with leniency. The offence committed however calls for a lengthier custodial sentence. I will take into account the time you had been in custody awaiting trial. Taking into account your mitigatory factors and aggravatory features submitted by the State you are sentenced as follows:

18 years imprisonment.

National Prosecuting Authority, State's legal practitioners
Maunga Maanda & Associates, accused's legal practitioners