

THE STATE

Versus

MTHABISI SEBELE

IN THE HIGH COURT OF ZIMBABWE

DUBE-BANDA J with Assessors Mr Ndlovu and Mr Ndubiwa
HWANGE 12 March & 13 March 2024

Criminal trial

M. Dube, for the State

C. Muleza with *Ms. J. Gaunje* for the accused

DUBE-BANDA J:

[1] The accused appears before this court on a charge of murder as defined in section 47 of the Criminal law (Codification and Reform) Act [Chapter 9:23]. It being alleged that on 28 October 2023 he unlawfully caused the death of Tarony Dube hereinafter referred to as the deceased by striking him once on the head with an axe, intending to kill him or realising that there is a real risk or possibility that his conduct may cause the death of deceased and continued to engage in that conduct despite the risk or possibility.

[2] The accused, who was legally represented throughout the trial pleaded not guilty to the charge. The State tendered an outline of the summary of the State case (Annexure A), and the accused tendered his defence outline (Annexure B) and are now part of the record. In his defence outline the accused stated that he struck the deceased with an axe in self-defence. Further, in the defence outline and his evidence the accused repeatedly raised the issue of provocation, contending that the deceased disrespected and undermined him. These defences deserve closer scrutiny.

[3] The accused made admissions in terms of s 314 of the Criminal Procedure and Evidence Act [Chapter 9:07] (CP & E Act). The admissions relate to the evidence of certain witnesses as it appears in the summary of the State case.

[3.1] The evidence of Alice Dube. Her evidence is that she is 16 years of age doing Form 4. The accused and the deceased were both her boyfriends. On the 28 October 2023 and at 1400hours she left home for Mabanda grounds. She was in the company of

her friends and they were going to play netball with other girls. The accused and his friends Mthobeki, Sheperd and Mbongeni were watching them play. The deceased and other locals were also present and watching them play.

[3.2] At 1700 hours she and her friends left the grounds going home. The accused followed them and stopped her. The accused was holding an axe and he asked the reason she was still dating the deceased when he had asked her to break up with him. She did not respond and the accused threatened to assault her. The accused asked her about deceased 's whereabouts and she told him that she left him behind at the grounds. She continued walking home and when she was about to get there the deceased caught up with them. The accused asked her to choose who she wanted between him and the deceased, she suggested that she would tell Mbongeni her choice in their absence. Mbongeni was walking behind them in the company of Sheperd and Mthobeki. She then walked with Mbongeni ahead of the group and she told him that her choice was the deceased. She thereafter walked home and left the group at the scene.

[3.3] The evidence of Mthobeki Donga. His evidence is that the accused and the deceased were both his friends. On the 28 October 2023 at 1500 hours he went to Mabanda grounds to watch netball games. On his way he met up with the accused and Sheperd. The accused was holding an axe. The accused gave him the axe handle and he remained with the axe head. They watched the games together with the deceased. At 1700 hours the games ended. The accused took his axe handle and followed his girlfriend Alice who had gone home. The deceased followed them. AT 1730 hours he followed them. He was with Mbongeni and Sheperd. They caught up with them by the river. The accused asked Alice to tell Mbongeni who she preferred between him and the deceased. Mbongeni and Alice moved away. Mbongeni came back and told them that Alice had chosen the deceased. Alice had left for home. They continued with their journey home and when they approached abandoned fields near the homesteads the accused asked deceased why he proposing love to Alice when he knew very well that she was his girlfriend. An altercation arose between the accused and the deceased. The accused who was holding an axe. He asked this witness, Sheperd and Mbongeni to search them for any weapons before he could engage in a fight with deceased. This witness searched Sheperd whom he suspected had a knife. The accused lifted the axe to strike the deceased but the deceased got hold of the axe. The accused and the

deceased wrestled over the axe. Accused overpowered the deceased. The accused then struck the deceased once on the forehead with the axe. The accused ran away holding the axe. The deceased fell to the ground and bled profusely. He was in pain and could not talk.

[3.4] The evidence of Sergeant Ncube. His evidence is that he is a member of the Zimbabwe Republic Police. On 29 October 2023 the police received a report about this case. He went to Tsholotsho hospital where he examined deceased's body. The deceased had a deep cut on the forehead and his clothes were blood stained. The witness attended the scene where he noticed blood stains on the ground. There were also struggle marks. He recovered the murder weapon.

[3.5] The evidence Doctor Acosta. His evidence is that he is a registered pathologist based at United Bulawayo Hospitals. On the 30 October 2023 and during the course of his duties he examined the remains of the Deceased and compiled his findings in post mortem report no 1225/1034/2023.

[3.6] The evidence of Delight Chamisa. Her evidence is that he is employed by the Department of Social Services as a Probation Officer based at Tsholotsho. During the course of her duties, she carried out an assessment on the accused and compiled her findings in a report.

[4] The State with the consent of the accused tendered into evidence the Post Mortem Report No. 77/56/2023 exhibit 2 compiled by Dr. Maibelys Gavila Acosta who concluded that the cause of death was a severe brain injury; skull bone fracture and subarchnoid and hemorrhage; and severe head trauma. And a confirmed warned and cautioned statement of the accused exhibit 1; and an axe exhibit 3 with the following measurements: length of handle 40cm; circumference of handle 7cm; length of blade 12cm; with of blade at its Sharp end 5cm; and weight 300g.

[5] The State called two *viva voce* witnesses and the accused testified in his own defence. The evidence of the witnesses will be summarised briefly.

[6] The first to testify for the State was Mbongeni Moyo. His evidence was that he was informed by the accused and the deceased that Alice was refusing to tell them her choice between the two and preferred to tell him. Alice then told him to tell the accused that she was

no longer interested in him. He then informed the two that Alice preferred the deceased over the accused. The accused said he had no problem. On the way the accused asked the deceased why he proposed love to his girlfriend, and the deceased said any girl can be proposed love too. The accused invited the deceased to a fight saying he disrespected him by proposing love to his girlfriend. The accused then said it was better that the two be searched for weapons. This witness refused to search the two for weapons. Mthobeki said Sheperd (also known as Melusi) had a knife, and Sheperd disputed that he had a knife. He was searched and no knife was found and the deceased was searched and he had no weapon. The accused was holding an axe. The sun had set and the source of light was the moon. He was three and a half metres away from the accused and the deceased when they held each other. After they released each other, the accused struck the deceased with an axe on the head. He then examined the deceased and realised that he had been severely injured and was bleeding.

[7] Under cross examination he testified that Sheperd was the young brother to the deceased. He disputed that the deceased struck the accused with an elbow, and persisted that he did not see Sheperd carrying a knife. He testified that the accused said he did not want to fight with weapons so they had to be searched for weapons. Mbongeni conceded that he did not see when the two started holding each other. The accused struck the deceased after the two were no longer holding each other. He testified that it was not the first time for the accused to carry an axe. Mr Mbongeni Moyo came across as a witness who had a reasonable recall of events and was a credible witness. He conceded that he did not see how the accused and the deceased started wrestling over the axe. There is no reason not to accept his evidence.

[8] The second to testify was Sheperd Dube (also known as Melusi). He was young brother to the deceased. His evidence was that the accused alleged that he (the witness) had a knife, and he was then searched and no knife was found on him. He testified that the accused invited the deceased to a fight alleging that he disrespected him. The deceased said he was not prepared for a fight, and he handed over his keys to this witness. The accused advanced towards the deceased armed with an axe. The deceased asked Mthobeki to take the axe from the accused. This witness requested the axe from the accused and he refused and said that was the only weapon he had in his possession. The accused and the deceased got hold of each other, thereafter the deceased screamed and the accused ran away.

[9] Under cross examination Shepard testified that visibility was poor. He disputed that he had a knife. He testified that it was the accused who said the two must be searched for weapons

before the fight. Asked whether he saw when the fight started, he said when he turned, the two were already holding each other. When it was put to him that it was not the accused who threw the first blow, his answer was no one used a fist, they simultaneously grabbed each other. All in all, his evidence seems to lean more in casting the deceased in good light. On the crucial issue of when the two started holding each other he was honest that he did not see that, when he turned the two were already holding each other.

[10] At the conclusion of the testimony of Shepard Dube the prosecution closed the State case.

[11] The accused testified in his defence. His evidence was that he was carrying an axe because his father asked him to go to head donkeys. He did not proceed to head the donkeys because Mbongeni said they could do that the following morning. He decided to watch the net ball matches. After sun set, he left the grounds with girl-friend Alice, and as they were walking the deceased emerged. He joined them and they walked together and he asked the deceased the reason he was dated his girlfriend. The deceased said a girl belongs to everyone. He then suggested that Alice chose whom she loved between the two of them, and the deceased agreed. Alice said she was going to communicate her decision to Mbongeni. Mbongeni informed them that Alice had chosen the deceased. The accused testified that he accepted Alice's decision and told the deceased not to do it again because they were friends. The deceased said he was not afraid of him, and the accused also said he was not afraid of him. The accused testified that he thought the deceased was disrespecting him because he was younger than him. The accused suggested that both be searched so that they do not fight with weapons and injure each other. He then asked Mthobeki to take the axe, but he (Mthobeki) said Shepard was in possession of a knife. He asked Shepard to surrender the knife, he said he did not have a knife but keys only. Mthobeki insisted that he had seen Shepard in possession of a knife. He did not surrender the axe because he thought Shepard (brother to deceased) had a knife. At that point the deceased got hold of the axe, and the two started wrestling over the axe. The deceased then hit the accused with an elbow on the nose and he started bleeding. He managed to push the deceased and he (accused) remained in possession of the axe. He wanted to strike him with the back side of the axe, but unnoticed he struck him with the sharp end. He said he struck him with the axe to open the way of escape as he was not interested in the fight and that he thought Shepard had a knife.

[12] Under cross examination the accused testified that he was not happy that the deceased who was his friend had taken his girlfriend. He testified that the two i.e., the accused and the deceased agreed to a fight because they were undermining each other, and they were looking forward to respecting each other after the fight. At the time moment he struck deceased with an axe he thought the deceased's brother had a knife. The accused was also bleeding on the nose. He conceded that Shepard did not produce any weapon, although he believed he had a knife. He testified that they were wrestling over the axe, and the deceased hit him with an elbow on the nose. He overpowered the deceased and remained with the axe, and struck him on the head once. Put to him that Mbongeni did not see the deceased elbowing him, he said it was because it was dark.

[13] The accused was generally a good witness. However, he lied when he testified that he wanted to struck the deceased with the back of the axe and that he did not want to strike the head. The court is not entitled to say that because he lied on these issues, he is therefore likely to be a criminal. Untruthful evidence does not always justify the conclusion that the accused is guilty. The weight to be attached thereto must be related to the circumstances of each case. (*S v Mtswene* 1985 (1) SA 590 (A)). It is possible that an innocent person may put up a lie because he thinks that the truth is unlikely to be sufficiently plausible. See *Tumahole Bereng v R* [1949] AC 253 (PC); *R v Rama* 1966 (2) SA 395 (A). This is the position in this case, the view of this court is that he lied because he thought if he admitted that he chose to use the sharp end of the axe on the head his case will look bad.

[14] The court finds the following facts either common cause or proved by the evidence. The accused and the deceased were friends. The accused had a girlfriend called Alice Dube. The deceased knew that Alice was the accused's girlfriend. Notwithstanding this knowledge, he proposed love to her and she accepted his proposal and the two fell in love. On 28 October 2023 Alice was playing net ball, deceased and the accused were part of the spectators. At around 1700 hours Alice left the playing ground and the accused followed her and the two walked together. The deceased followed and caught up with them. Along the way, the accused asked Alice to choose the one she loved, and she suggested that she would inform Mbongela of her choice. She informed Mbongela that her choice was the deceased. This angered the accused; he believed that the deceased whom he considered a friend had betrayed him by snatching his girlfriend. The evidence suggests that it is the accused who invited the deceased

to a fight. The accused requested that they be searched for weapons, so that no weapon is used during the fight.

[15] The accused was carrying an axe. There is a factual dispute about how the tussling over the axe started. There are two possible scenarios: the first is by Mthobeki Donga who said the accused lifted the axe to strike the deceased but the deceased got hold of the axe. The accused and the deceased wrestled over the axe. The second is by the accused who testified that the deceased got hold of the axe, and the two started wrestling over the axe, and the deceased hit him with an elbow on the nose and he started bleeding. Mbongeni Moyo testified in chief that he was three and a half metres away from the accused and the deceased when they grabbed of each other. After they released each other, the accused struck the deceased with an axe on the head. Shepard Dube testified in chief that the two grabbed each other, the deceased screamed and the accused ran away. The net effect of it all is that the State adduced conflicting evidence on this crucial issue. It will be incorrect for this court to rely on Mthobeki Donga's evidence and ignore the evidence adduced by the State which suggests that the two simultaneously grabbed each other. The two *viva voce* witnesses did not testify about the accused lifting the axe to strike the deceased and the deceased getting hold of it. In such a case the accused is entitled to the benefit of doubt, i.e., a factual finding that it was the deceased who wrestled the axe from him and a tussle ensued resulting in the accused overpowering him, pushing him and striking him once on the head. The facts and the evidence show that the injuries sustained by the deceased were caused by the accused. The post mortem report shows that the injuries inflicted by the accused caused the death of the deceased.

[16] The accused raised the issue of provocation although it was not directly pleaded. He repeatedly said the deceased undermined and disrespected him by snatching his girlfriend, worse still when the two were friends. It is common cause that the accused inflicted the fatal blow that caused the death of the deceased. He was provoked in that the deceased snatched his girlfriend, worse that the two were friends. Further, it was the deceased who followed up the accused and Alice after they had left the playing grounds. On the facts of this case, this provocation would not reasonably be regarded as sufficient ground for the loss of self-control that made the accused act against the deceased the way he did. Therefore, the defence of provocation as codified in s 239 of the Criminal Law Code is not available to the accused in whatever form as a defence. See *S v Ndlovu* HB 293/17; *S v Nangana* 1982 (1) ZLR 150 (S).

[17] The accused specifically pleaded self-defence. In terms of the law in this jurisdiction the defence of “self-defence” has been codified in section 253 of the Criminal Law (Codification and Reform) Act [Chapter 9:23]. In respect of the attack, it is required that the attack must be unlawful, must have commenced or was imminent, while the defensive act must be directed against the attacker and necessary to avert the attack. It is further required that the means used must be necessary in the circumstances. The *onus* is on the State to prove beyond reasonable doubt that the requirements for self-defence did not exist, or that the bounds of self-defence had been exceeded.

[18] In his book, *A Guide to the Criminal Law of Zimbabwe*, at page 45, the author Prof. G. Feltoe states as follows:

“The law provides that a person is entitled to take reasonable steps to defend himself against an unlawful attack. Harm, and sometimes death, may be inflicted on the assailant in order to wade off the attack.”

[19] In determining whether an accused has met the requirements for the defence of self-defence it must always be borne in mind that the trial court must avoid taking an armchair approach in the assessment of the situation faced by the accused. It is easy, after the event and far from the dust of the conflict in which the accused was involved, to find possible ways and means through which the accused could possibly have averted the deceased’s death. (*See S v Manyekete* HS -386-81.) The court must in its examination of the evidence and the facts factor into the equation that the accused had no luxury to rationalize and he had to act and act immediately. *See S v Mpofo* 1969 (1) SA 334.

[20] There is also the question of onus. No onus rest on the accused to convince this court of the truth of any explanation that he gives. If he gives an explanation, even if that explanation be improbable, the court is not entitled to convict, unless it is satisfied not only that the explanation is improbable but that beyond any reasonable doubt it is false. If there is any possibility therefore of his explanation being true then he is entitled to the benefit of doubt. (*See Diffort* 1937 (AD) 370). The onus is on the state throughout to prove beyond reasonable doubt that the accused is guilty of the offence with which he has been charged. Should the accused’s version or evidence be found to be reasonably possibly true, he would be entitled to the benefit of doubt.

[21] The deceased followed the accused after he left the playing grounds. Further the court has given the accused the benefit of doubt and found that the deceased attempted to wrestle the axe from the him, and a tussle ensued. Again, the deceased struck the accused with his elbow on the nose and he bled. The accused said this in his confirmed warned and cautioned statement recorded four days after the event and repeated this version in this court. Again, because of the mobility of the situation and the poor visibility, Mbongeni and Shepard did not see the deceased striking the accused with his elbow. Further, whether Shepard had a knife or not is not the inquiry, the point is that the accused believed he had it, and believed that as a brother to the deceased the two would gang against him and injure him. During the tussle over the axe the accused overpowered the deceased, pushed him and then struck him once on the head and ran away.

[23] On the facts and the evidence of this case it cannot be said that the State has proved beyond a reasonable doubt that the accused intended to kill the deceased or subjectively foresaw that his conduct would result in the death of the deceased and reconciled herself with that possibility. It is so because the attack had commenced in that the deceased was wrestling the axe from the accused, the defensive act was directed against the attacker. However, the accused exceeded the lawful limits of self-defence. He struck the deceased with an axe on the head a delicate and vulnerable part of the human body with excessive force causing severe brain injury, skull bone fracture and subarchnoid hemorrhage and severe head trauma. The force used exceeded the limits of self-defence.

[24] In conclusion, there is simply not enough evidence to prove a case of murder beyond reasonable doubt. The accused is therefore entitled to the benefit of doubt. However, by striking the deceased with an axe in the manner he did, a reasonable man placed in the same circumstances as the accused would have foreseen the possibility of death and would have guarded against it. The conduct of the accused shows that he fell below the reasonable person standard. The accused ought, as a reasonable man, to have foreseen the death of the deceased and guarded against it. The accused was negligent and it was his negligence that led to the death of the deceased.

[25] This result will of course be a grave injustice if the accused intended to kill the deceased. But that does not justify the commission of an even more serious injustice of convicting the accused of murder without his guilt having been established beyond reasonable doubt. In the

circumstances the State has not proved a case of murder as defined in s 47 of the Criminal Law Code, but has proved a case of culpable homicide beyond a reasonable doubt.

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

[26] Mr. Sebele this court found you guilty of the crime of culpable homicide arising from the death of the deceased. The courts have stressed the importance of proportionality and balance between the crime, the criminal and the interests of society. It remains the paramount function of the sentencing court to independently apply its mind to the consideration of a sentence that is proportionate to the crime committed. The cardinal principle that the punishment should fit the crime should not be ignored. See *S v Zinn* 1969 (2) SA 537 (A). This court must also factor into the equation the provisions of the Criminal Procedure (Sentencing Guidelines) Regulations, 2023.

[27] It is often said that sentencing is the most difficult phase of a criminal trial, and rightly so. This case brings into sharp focus the dilemma that is often faced by the trial court when sentencing juveniles for violent crimes. For the purposes of assessing an appropriate sentence, the court takes into account that the accused was provoked. He left the playing grounds in the company of his girl-friend, and the deceased who had also fallen in love with the same girl followed and joined them. The deceased who was older than the accused had the temerity to say any girl can be proposed love to. This angered the accused, who considered the deceased his friend.

[28] The accused was 17 years old at the time he committed this offence. He was a child. The fact that he is now 18 old does not take away the fact that he was a child at the relevant time. In fact, he is now only 18 years two months old. A sentence of direct imprisonment will not meet the justice of this case. The sentence must be rehabilitative.

[29] On the other hand, a life was lost. Killing of another human being is unacceptable. However, each case must be decided on its own facts. In the result, the following sentence will meet the justice of this case.

The accused is sentenced to 3 years imprisonment wholly 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
Muvhiringi & Associates, accused's legal practitioners