

THE STATE

Versus

LAUD NGULUBE

And

TOBIAS DUBE

And

GIVEMORE NGWENYA

IN THE HIGH COURT OF ZIMBABWE

MANGOTA J with Assessors Mr Ndlovu and Mr Sobantu

BULAWAYO 14 & 15 May, 14, 15 , 30 August and 6 September 2024

Criminal Trial

K. Jaravaza for the state

T. Tashaya for the 1st & 2nd accused persons

S.Mutandi for the 4th accused

MANGOTA J

The accused persons are charged with one count of murder as defined in section 47 of the Criminal Law Codification and Reform Act (Chapter 9:23) (“the Act”) and another count of attempted murder as defined in section 189 as read with section 47 of the Act.

The allegations of the State in respect of the first count are that, on the evening of 20 August, 2020 and at Arda Balu Estate’s main gate in Umguza, the one or the other or all of the accused persons attacked one Enerst Dube with a machete and an axe and, in the process, killed, or caused the death of, the latter person (“the deceased”). The State alleges, further, that, when the accused attacked the deceased, they intended to kill him or cause his death. It alleges that they realized a real risk or possibility of death ensuing from their conduct and, their realization of a real risk or possibility notwithstanding, they persisted in their unwholesome conduct.

The State’s allegations in respect of the second offence is that, on the evening of 20 August, 2020 and at Arda Balu Estate’s main gate in Umguza, the accused persons assaulted one Ashley Manyemba with a blunt object on the latter’s head and left him for dead. It claims that, when they assaulted their victim in the manner described, they intended to kill him or they realized that there was a real risk or possibility of him dying but, their realization of a real risk or possibility notwithstanding, they continued to engage in their unlawful conduct.

All the three accused pleaded not guilty to the two charges. None of them admits having ever been at the scene of crime. All of them raise the defence of the *alibi*. They, in many respects, challenge the State to prove its case against them beyond reasonable doubt.

The first accused, for instance, was arrested at Kizinet Dube's homestead on the morning of 21 August, 2020. He alleges that he had gone to the homestead in question to drink beer with many of his workmates. He states that he works as a gold miner at Master Cecil Mine. He claims that, when the neighbourhood police arrested him, he thought that it was to do with the debt which his friend owed to Kizinet Dube who operates a shebeen at her homestead. He states that he told the police who arrested him that, on the day of the alleged offence, he left his work-place with his workmates and went to Joko Mine Bottlestore where he drank beer from 6 pm of 20 August, 2020 to 4 am of the following day. He denies having arrived at the Bottlestore at 10 pm of 20 August, 2020 as one of the State witnesses is alleging. He insists that nothing which was recovered from him links him to the offence(s). He denies that he arrived at Kizinet Dube's homestead in the company of accused persons 3 and 4 or that he arrived there carrying a khaki jacket.

Accused 2 states that he is self-employed as a gold paner at Joke Mine. He claims that, on 20 August, 2020 he left his place of work at 7 pm going to Joke Mine Bottlestore where he joined others and drank beer till early hours of the following day. He was arrested from Joke Bottlestore, according to him. He denies knowing any of his co-accused whom he claims he only met when he was in police custody. He denies having anything recovered from him which belongs to the deceased. He challenges the State to prove its allegations against him.

Accused 4's defence is brisk. He states that, on the day of the alleged offences, he was at Greenhaven which is along Victoria Falls road where he was drinking with his friend one JB or Samamo. He claims that he spent the night of 20 August, 2020 drinking beer at Greenhaven. He only went to Kizinet Dube's shebeen in the morning of the following day from where the police arrested him, according to him. He claims that, when he got arrested, he was of the view that he was being arrested for being in a shebeen without a mask as this was during the period of the covid pandemic. He states that it was only when he was at Sauerstown Police Station that he was told that he had been arrested for murder. He denies having ever acted in common purpose with accused 1 and 4, as the State is alleging.

The physical act (*actus reus*) accompanied by the requisite mental state (*mens rea*) complete the definition of the crime of murder. The physical act is the application of force on the person of another. It is sometimes synonymously referred to as assault, attack and/or such like words. The mental state, *mens rea*, is the intention to kill, or to cause the death of, another person. It more often than not manifests itself in the assailant's act of planning to kill, and/or actually killing, his or her victim. It may also manifest itself in the assailant's appreciation of the consequences of his or her unlawful conduct and the assailant's continued intention to cause the consequences to occur regardless of his or her appreciation of the same. This, in legal parlance, is referred to as constructive intention or legal intent.

The above-described set of circumstances are all bundled up in Section 47 of the Act. The section defines the crime of murder. It falls under the heading Crimes Against the Person. It reads as follows:

“(1) Any persons who causes the death of another person-

- (a) *Intending to kill the other person; or*
- (b) *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 real risk or possibility shall be guilty of murder”.*

An act falls into the definition of an attempt if one of the elements of the offence is not fulfilled. Attempted murder, for instance, has the complete intention to kill, or to cause the death of, another person. It becomes an attempt when the assailant’s conduct does not go to the act of killing a person or when it falls short of the completed *actus reus*. Attempt is defined in section 189 of the Act. This reads:

“(1) *Subject to subsection (1), any person who –*

- a) Intending to commit a crime, whether in terms of this Code or any other enactment; or*
- b) Realising that there is a real risk or possibility that a crime, whether in terms of this Code or any other enactment, may be committed, does or omits to do anything in preparation for or in furtherance of the commission of the crime, shall be guilty of attempting to commit the crime concerned”.*

The maxim which states that he who alleges must prove has survived the test of times for a considerable duration. It, in fact, has remained true for all times, so to speak. Reference is made in the mentioned regard to such case authorities as *R v Difford*, 1937 AD 370 at 373; *S v Mapfumo and Others*, 1983 (1) ZLR 250 (S) as well as the learned writings of Van Der Linden’s *Institutes of Holland*, 3rd edition, page 155 in which the following excerpts appear in their undiluted form:

- i) The *onus* of proof is on him who affirms and not on him who denies;
- ii) The *onus* of proof is on the plaintiff, not on the defendant who, on failure of proof of the plaintiff must be absolved, although he himself has not proved anything;
- iii) If the plaintiff and the defendant both state a fact in a different way, the plaintiff must first prove that which he affirms.

The above-mentioned set of circumstances enjoin the State to prove the guilt of the accused persons. It alleges that they killed the deceased. It alleges further that they attempted to kill Ashley Manyemba. Because it is affirming, it must prove beyond reasonable doubt that which it is affirming.

In line with the *onus* which rests upon it, the State produced a number of exhibits and called a number of witnesses to the witness stand. The witnesses and the exhibits speak to the accused’s alleged commission of the two offences. Among the exhibits which the State produced are the following:

- i) the exhibits list;
- ii) the post mortem report relating to the deceased;
- iii) the medical report relating to Ashley Manyemba;

- iv) The 303 rifle with serial number 1086 and magazine with six (6) live rounds allegedly recovered from accused 1 and 4;
- v) a blood-stained machete allegedly collected from accused 1;
- vi) a blood-stained axe allegedly collected from accused 2;
- vii) a blood-stained okapi knife allegedly collected from accused 4;
- viii) a creamy coat with green linings on the sleeves allegedly collected from accused 1 and 4;
- ix) a blue polo T-shirt allegedly collected from accused 1;
- x) a torn navy blue trousers allegedly collected from accused 3;
- xi) an All-star maroon tennis shoe allegedly collected from accused 2;
- xii) a white tennis shoe written Ellesse allegedly collected from accused 4;
- xiii) a yellow lanyard with handcuff keys and padlock keys allegedly recovered from accused 2;
- xiv) an affidavit by Dr. Dhlamini – and
- xv) a fire-arm certificate with serial number 1086 for Wellock Security Company.

These were marked exhibits 1, 2,3,4,5,6,7,8,9,10,11,12,13,14 and 15 respectively. The State led evidence from one Ashley Manyemba who is the victim in the attempted murder charge, one Joseph Chimucheka-an employee of Wellock Security Company whose staff provided security at Arda Balu Estate. He supervised the deceased and Ashley Manyemba during the time of the alleged offences, one Promise Sibanda, the shopkeeper at Joker Mine Bottle Store, one Shelton Manjemanje, a member of the Zimbabwe Republic Police who was stationed at Sauerstown Police Station at the time of the crimes, one Kezinet Dube of Plot number 6, Hellenvale, Umguza. She ran a shebeen outlet at her father's homestead at the time, one Brown Dube, father to Kezinet Dube and a member of the Neighbourhood Watch Committee which operates under Sauerstown Police Station and one Clemence Mbofana who is the investigations officer in respect of the two offences which the State preferred against the accused persons.

At the close of the case for the parties, we directed the State to file and serve upon the defence its closing submissions on or before 21 August, 2024. We directed counsel for the accused persons to file and serve upon the State their respective submissions on or before 23 August, 2024.

The State filed its closing submissions on 20 August, 2024. The first and second accused persons filed their closing submissions on 27 August, 2024. The fourth accused filed his written submissions on 30 August, 2024. He gave no explanation for his inaction which, in some way or other, is akin to dereliction of duty without any plausible reason on the part of counsel for him. Be that as it may, his inaction or the delay of the first and second accused persons in filing their submissions within the stipulated *dies* would not deter us from adjudicating on the evidence which the parties placed before us. We only point out the observed anomalies not for any adverse purposes but only for showing the commitment, or lack of it, on the part of some of the parties who are before us and no more than that.

The record shows that the 303 rifle with serial number 1086 and the yellow lanyard with handcuff keys and padlock keys were with the deceased on the evening that he met his death. They were with him on the evening of 20 August, 2020. He had those as part of the

items which he used in the course and scope of his duties at Arda Balu Estate's main gate on the date in question. The testimony of Ashley Manyemba is relevant in the mentioned regard. He states to an equal effect.

Ashley Manyemba's evidence is that, at about 8.30 pm of 20 August, 2020 he was coming from home where he had gone to have his dinner and was on his way to his place of work, namely Arda Balu Estate's main gate, when three persons who were coming from the direction where he was going met and assaulted him. He claims that he did not identify his assailants because it was dark. He states that he suffered a wound on the left side of his head. His supervisor, one Joseph Chimucheka and the farm owner – a doctor by profession – rendered first aid to him to stop the bleeding and later took him to hospital for further management of his condition. His assailants, it would appear, left him for dead. They did not therefore complete their purpose.

Brown Dube and Kezinet Dube are father and daughter respectively. They corroborate each other on the allegation that accused 1, 3 and 4 came to Brown Dube's homestead on the morning of 21 August, 2020. Although Kezinet Dube, for a while, confuses accused 2 for accused 4 as having arrived at her father's homestead holding something which was wrapped in a creamy jacket, she quickly adjusts her evidence so that it remains *in sync* with that of her father who states, in clear and categorical terms, that accused 1, 4 and another came to his home at about 9 am of 21 August, 2020. Accused 1 and 4, he insists, were carrying the parcel which was wrapped in the creamy jacket. Evidence which unfolds shows that the 303 rifle was wrapped in the creamy jacket. Joseph Chimucheka identified the rifle in question when the police called upon him to do so. He also identified the yellow lanyard which the police allegedly recovered from accused 2 at Joker Mine Bottle Store on the morning of 21 August, 2020.

The chain of evidence shows that the 303 rifle and its magazine and the yellow lanyard with handcuff keys and padlock keys which the deceased was having on the evening of 20 August, 2020 were respectively allegedly recovered from accused 1 and 4, on the one hand and accused 2, on the other. They were recovered on the morning of 21 August, 2020 and at different places. The rifle and magazine were recovered from Brown Dube's homestead where accused 1, 4 and another had gone to drink beer. The lanyard was recovered from Joker Mine Bottle Store where accused 2 remained drinking beer when accused 1, 3 and 4 left the mentioned place in the early hours of 21 August, 2020. He was arrested from Joker Mine Bottle Store and an axe was allegedly recovered from him at the time of his arrest.

Prosper Sibanda weighs into the chain of evidence which the State led against the accused persons. He worked as a shopkeeper at Joker Mine Bottle Store at the time of the alleged offences. He states that at about 10 pm of 20 August, 2020 accused 1, 2, 4 and another came to the bottle store where they drank beer from about the mentioned time to about 4 am of the following day when accused 1, 4 and another departed from the bottle store leaving accused 2 at the same. These left when he closed the bottle store, according to him.

The narrative of the prosecution is told in a clear, cogent and straightforward manner. Its evidence is pieced together in a manner which makes it hard, if not impossible, for one to disbelieve it. Its pieces taken together make a complete whole which is constituted by one piece of evidence building upon the other in a very comprehensive way. It is not only

concrete but is also dispassionate. Its aim and object, it would appear, is to give a clear story of what occurred at Arda Balu Estate in Umguza on the evening of 20 August, 2020 and at Plot number 6, Hellensvale, Umguza as well as at Joker Mine Bottle Store on the morning of 21 August, 2020.

The chain of evidence which the State led connects the accused persons to the offence of murder in an irrefutable manner. They cannot explain the manner in which the items which were with the deceased on the evening of 20 August, 2020 were found in their respective possession on the morning of the following day. When the observed matter is read together with the evidence of Ashley Manyemba and that of Prosper Sibanda, the *nexus* becomes irresistibly real to a point where only a fool or the gullible would refuse to see reason in it. Ashley Manyemba was attacked by his assailants at about 8.30 pm of 20 August, 2020. Prosper Sibanda's testimony is that accused 1, 2, 4 and another arrived at the bottle store where he worked at around 10 pm of the date that the deceased met his death.

Apart from making a bare denial of the statements of the witnesses for the prosecution, none of the accused persons was able to tell why all these witnesses would team up to lie against him or them, if ever such occurred. None of the accused persons could advance a plausible reason as to why any of the witnesses would choose to tell a lie against any one of them. That the evidence which witnesses for the State told was so well-knit to a point which left no doubt in the mind of any right-thinking person that the accused persons killed the deceased and stole from him the 303 rifle and the lanyard with handcuff keys and padlock keys requires little, if any, debate.

Given the assertion of accused 2 which is to the effect that the distance between Arda Balu Estate to Joker Mine Bottle Store from where he was arrested is about five (5) Kilometres, the possibility that the accused killed the deceased and assaulted Ashley Manyemba around 8.00- 8.30 pm of 20 August, 2020 and walked their way to Joker Mine Bottle Store after the event becomes more probable than it is fanciful. It is understandable for the accused persons to make every effort to state that they arrived at Joker Mine Bottle Store earlier than 10 pm of 20 August, 2020. Like any person who has been caught in the net, so to speak, they would do or say anything which dissociates themselves from the offences. It is for the mentioned reason, if for no other, that they state that nothing which connects them to the offence(s) was recovered from them. By denying the charges, as they are doing, they are challenging the State to prove its case against all of them beyond reasonable doubt. The State was, in our view, able not only to rebut the defence of the *alibi* which each of the accused persons raised but also to connect all the three of them to the crime of murder with which they stand charged of.

The finding which we make is that accused 1 and 4 were in possession of the 303 rifle with its magazine and accused 2 was in possession of the lanyard with its handcuff keys and padlock keys. The doctrine of recent possession which the court enunciated in *R v Joremani*, 1968 (2) RLR 36; *R v Sitoli*, 1967 RLR 302 and *S v Chitsindi*, 1982 (2) ZLR 91 unravels the case of the accused persons in regard to the charge of murder which the prosecution preferred against them. They were found in possession of the items which were with the deceased on the evening of the date that he met his death. They cannot explain how they came to possess the 303 rifle together with its magazine and/or the lanyard which

the deceased was using when he was on duty at Arda Balu Estate's main gate on the evening of 20 August, 2020. For them to suggest that some person who is not them killed the deceased and they, somehow came across the items in question would be to stretch the faculty of the mind to unimaginable proportions. The logical conclusion which one comes to is that they killed the deceased and, in the process, stole from the latter the 303 rifle and the lanyard.

It is only natural and understandable for the accused persons against whom a charge or charges have been preferred to:

- a) dissociate himself from those with whom he committed the crime; and/or
- b) deny any knowledge of his or her co-accused person(s); and/or
- c) deny that the items of the deceased were recovered from him; and/or
- d) deny that the clothes which he was wearing on the date of his arrest were worn by him; and/or
- e) deny that he was at the scene of crime- all this with one object in mind which is invitation to the State to prove its case beyond reasonable doubt.

However, the dissociations and denials notwithstanding, evidence which mounts against him more often than not prove his guilt. This is a *fortiori* so where its presentation is easy to read and conclusions drawn from it leave the judge with little, if any, doubt that the dissociations and/or denials were made just for the sake of it without any clear intention on the part of the accused to contest the irrefutable testimony which has been led against him.

If it is accepted, as it should, that the accused persons killed the deceased and stole from him the items which have already been identified as well as referred to in this judgement, the possibility that they assaulted Ashley Manyemba cannot be regarded as a far-fetched idea. He did not identify his assailants. He states, however, that they were three in number and were coming from the direction where he was going- ie to his workplace. He describes the spot from where he was assaulted as having been near to where he was going to work. The rifle, he states, was with the deceased when he went to his home to have his dinner.

Further, the DNA test certificate which Dr Zepheniah Dhlamini prepared on 8 June, 2023 from samples of exhibits which he received from Detective Constable Clemence Mbofana of CID, Homicide, Bulawayo connects all the three accused persons to the offence of attempted murder of Ashley Manyemba. It does so through the blue polo golf T-shirt, the white tennis shoe and the okapi knife. The mentioned items connect accused 1, 2, and 4 respectively to the crime of attempted murder. The blood stains on each of them matched that of Ashley Manyemba. Save for their meaningless denial, non of them could explain how the blood of Ashley Manyemba came to be on the clothes which each of them was wearing.

The accused persons made efforts to dissociate themselves from each other. They each raised the defence of the *alibi*. They each denied having ever had the items which were either recovered, or collected, from them. Accused 1, in particular, put up a poor show of wanting to make us believe that Kezinet Dube had lied against him for a debt which his friend one Reason allegedly owed to her. All this was done by them as a way of running away from evidence which was mounting against them. They realized that if they admit

that they knew each other, the State's effort would be easier said than done. They therefore made it hard, if not impossible, for the State to prove its case. Their story was, however, not only improbable. It was also difficult of belief in the extreme sense of the word.

The State, in our view, proved its case in respect of the two charges beyond reasonable doubt. The accused persons are, in the result, found guilty of murder and guilty of attempted murder as charged.

National Prosecuting Authority, State's legal practitioners
Sengweni Legal Practice, 1st & 2nd accuseds' legal practitioners
Sandi & Matshakaile Attorneys at Law, 3rd accuseds' legal practitioners