

**THE STATE**

**Versus**

**NOBERT MAPOPE**

IN THE HIGH COURT OF ZIMBABWE  
DUBE-BANDA J  
BULAWAYO 28 JUNE 2022 & 29 JUNE 2022

**Criminal trial**

*T. Muduma* for the State  
*Mrs S Drau* for the accused

**DUBE-BANDA J:**

**Introduction**

1. The accused person is charged with the crime of murder as defined in section 47 (1) of the Criminal Law (Codification and Reform) Act [Chapter 9:23]. It being alleged that on the 26 May 2018, at Corner Helen Lane and Harold Road, Kensington he shot Tinashe Mutema (deceased) at the back and once on the lower backbone intending to kill him or realising that there was a real risk or possibility that his conduct may cause his death continued to engage in that conduct despite the risk or possibility of death.
2. The accused pleaded not guilty to the charge. He was legally represented throughout the trial. The State tendered an outline of the State case, which is before court and marked Annexure A. The accused tendered his defence outline and is before court and marked Annexure B. In brief the accused's defence is that he shot and killed now deceased in self-defence.

**The State Case**

3. In opening the State case State Counsel with the consent of the accused tendered the following documentary exhibits: post-mortem report number 499-198-2018 (Ext. 1); and a CID Forensic Ballistics Report (Ext. 2).
  
4. The State Counsel further sought and obtained admissions from the accused in terms of section 314 of the Criminal Procedure & Evidence Act [*Chapter 9:07*] (CP & E Act). These related to the evidence of the following witnesses as contained in the summary of the State case:
  - i. The evidence of Brian Mwazikana. His evidence is that he is a member of the Zimbabwe Republic Police (ZRP) stationed at Criminal Intelligence Unit. Nothing more is said in the summary of the State case except that his evidence is similar and corroborates that of James Chomunakira. The evidence of Kudzai Munemo. All that is contained in the outline of the State case is that he is a duly attested member of the ZRP currently stationed at CID Hillside, and that his evidence is similar and corroborates that of Matizha Tafara.
  
  - ii. The evidence of Sunboy Sibanda. His evidence is that he is a member of the ZRP. His evidence is that he saw a group of approximately +/- twenty male persons running towards the direction where there was the accused. He then heard four gun-shots coming from the direction of the accused. Few seconds later he heard accused saying “sit down.” The accused advised him that he had shot the now deceased and this witness then alerted the other teams who quickly arrived at the scene.
  
  - iii. The evidence of Phakamani Sibanda. His evidence was that he resides at Shangani Mine compound and is a gold panner. He knew now deceased during his life time. On the 26<sup>th</sup> May 2018, at around 0700 hours in the company of Nyasha Ndiweni, Givemore Nyirenda, the now deceased and other four locals from Kensington were gathered around a fire next to their panning pits. They realised that they were surrounded by police officers but from a distance. They panicked and fled into different directions. It was during that commotion that

he heard gun shots, he is not sure how many gun shots were fired as he was running away.

- iv. He heard someone crying for help but did not know who that person was. He did not see the police officer who fired the gun as he ran and hid inside a pit which was approximately a meter deep. He was arrested by two police officers who removed him from the pit and they took three shovels, three axes and a gold detector which they had left near the pits. He escorted the police officers to a place where Nyasha Ndiweni and Givemore Nyirenda were arrested. That is when he saw the now deceased lying on the ground.
- v. The evidence of Nyasha Ndiweni. His evidence was that he resides at Shangani Mine compound and is a gold panner. He was in the company of Phakamani Sibanda and others already mentioned by Phakamani Sibanda. After noticing that they were surrounded by the police he ran away from the panning pits leaving his tools. After he ran about 300 metres he hid in a thick bush nearby. He heard gun shots and could not remember the actual number as there was a stampede with every one trying to escape. He heard of the now deceased crying for help but could not see him because of the thick bush. Two officers saw him and arrested him. He was taken to a place where Phakamani Sibanda and Givemore Nyirenda were. Police officers recovered three axes, three shovels and a gold detector near the fire place. These are the things that the gold panners left behind when they ran away.
- vi. The evidence of Cynthia Mupungu. Her evidence is that she is a member of the ZRP and the investigating officer in this matter. On the 26 August 2018, she was tasked to investigate a murder case involving the accused. On the 28 May 2018, a post mortem report was done by Doctor Pesanai at United Bulawayo Hospitals. On the 19 July 2018, the FN rifle and spent cartridges were sent to CID Forensic Ballistics for examination and the report indicates that the chamber and barrel showed gunshot residue an indication that the weapon was fired. A warned and cautioned statement was recorded from the accused.

- vii. The evidence of David Sibanda. His evidence is that he is a member of the ZRP. On the 31<sup>st</sup> August 2018, at 0940 hours he witnessed the recording of a warned and cautioned statement from the accused. The accused gave his statement freely and voluntarily in the presence of his legal practitioner.
  - viii. The evidence of Doctor Sanganai Pesanai. His evidence is that he is a duly attested medical practitioner based at United Bulawayo Hospitals. On the 28 May 2018, and during his duties he examined the remains of the now deceased and recorded his findings in a post mortem report number 499/498/2018. His conclusions were that the cause of death was haemorrhagic shock, haemopneumothorax, penetrating chest trauma and gunshot wound.
5. The State called two witnesses who gave *viva voce* evidence. We summarise their evidence and our findings on their credibility. The first to testify was James Chomunakira. His evidence was that he is a member of ZRP. He holds the rank of Assistant Inspector. On the 26 May 2018, he was the ground commander of the operation called “No to illegal Mining.” He was briefed about the operation in the presence of other members including the accused. The team had three fire arms, and accused was given an FN Rifle. When the team arrived at the targeted area, i.e. Kensington it was divided into three groups. One group was led by the accused person. After leaving accused and his group this witness proceeded to another point with some of the team members. The members who were seated in the loading box of the police vehicle informed him that they heard a gunshot coming from the direction where they had left accused and his group. When he and others returned running to where they had left accused and his team, he saw gold panners running away from the direction where they had left accused and his group. He said they were many gold panners and they managed to arrest some of them.
  6. He received a phone call from the accused saying he must run to where he was as soon as possible. When he got to the point where the accused was, he saw him holding a firearm and he was shivering. The accused showed this witness a man who was lying

on the ground. Accused said a group of gold panners advanced towards him and attacked him with shovels. He said he fired three warning shots in the air, and then shot the man who was lying on the ground. He said the man he shot was advancing and attacking him. This witness noticed that the accused was not stable, he then disarmed him. He could not comment on the allegation that accused shot the now deceased who was fleeing, because he was not with the (him) accused at that time.

7. The firearm that was taken from the accused had two live rounds in the magazine. Accused was holding two empty cartridges in his hands. This witness checked around and picked two more cartridges. The Rifle chamber was empty. He noticed that the now deceased was bleeding on the left side of the abdomen. He could not tell whether he was shot from the front or back. The now deceased was transported to United Bulawayo Hospitals. When this witness left the hospital the now deceased was still alive.
8. Under cross examination this witness testified that he was one hundred metres from the point where accused shot at the now deceased. He did not talk to the now deceased because he was groaning in pain. When it was put to him that he did not see how now deceased was shot, he repeated that when the shooting occurred he was not with the accused person.
9. Mr James Chomunakira came across as a witness who had a reasonable recall of events. His evidence was not challenged in any material respects and there is no reason not to accept it.
10. The second witness to testify was Matizha Tafara. His evidence was that he was a member of the ZRP. He was part of the team that was deployed under the operation called “No to illegal mining.” When the team arrived at the targeted area, i.e. Kensington he remained with the group that was led by the accused. The objective was to arrest the gold panners. When the panners noticed the presence of the police they ran towards the direction of the police. The gold panners were approximately twenty and they were carrying picks and axes. He retreated and took cover in the bush. He heard four gunshots. He was about ten to fifteen metres from the accused when he heard the gunshots. He did not see what happened between the accused and the gold panners

because there was a thick bush. When it was suggested to him that the accused says he shot the now deceased in self-defence, his answer was he had no comment.

11. When he heard accused saying “sit down sit down” he then emerged from where he had taken cover and arrested two gold panners. He recovered three axes and two picks and a shovel. These were recovered three metres from where the now deceased was lying.
12. Under cross examination his evidence was that in accused’s group there were four and the accused was the only one who was armed. The police officers were ten to fifteen meters apart, because their aim was to encircle the gold panners. When it was suggested to him that the gold panners attacked accused’s group, his answer was he could not tell whether they were attacking or they just panicked. When it was suggested to him that the accused shot deceased in self-defence, he agreed.
13. Generally, we hold the view that Matizha Tafara told the truth. We make a positive finding on his credibility
14. At the conclusion of the testimony of Matizha Tafara the prosecution closed the State case.

### **The defence case**

15. Accused testified in his defence. His evidence was that he is a member of the ZRP. On the 26<sup>th</sup> May 2018, he was in a team that was deployed at the Kensington area to arrest illegal gold panners. He was one of the three officers who were issued with firearms. He said they were informed that they were some gold panners who were wanted on murder allegations. He said they were given firearms because they were going to look for dangerous criminals who had killed someone three days ago. When the team arrived at the targeted i.e. Kensington they were divided into three groups. He was the leader of one of the groups, and he was the only one with a firearm in his group.
16. After walking about one hundred metres the group saw gold panners. The gold panners ran towards his group of police officers. He heard some gold panners saying “let us

disarm them.” His colleagues ran away and he remained alone. He realised that the panners were about to attack him, he then retreated. The panners kept on advancing towards him and he then fired a warning shot in the air. The panners kept on advancing and he fired a second warning shot in the air. After firing the second shot he heard a gunshot which was not fired by him. He fired a third warning shot in the air, a few panners ran away and some continued advancing towards him. At that point he said he heard another gunshot not fired by him. Some panners said “you have made us angrier.” They threw the shovels and picks towards him. He said he then pointed his fire arm into the bush, he was not aiming at anyone. He then walked to the place where his colleagues had ran to, and he saw the now deceased. The deceased was staggering and falling down. He was bleeding. He tried to make deceased sit down so he could provide him with first aid assistance, but he was resisting. He found cartridges far away from where he found the now deceased.

17. Under cross examination it was suggested to him that he was under imminent attack, his answer was the attack was severe and imminent. Asked about the distance between him and the panners when he fired the gun shots, his answer was that it was a distance of two and a half metres. He said they were shrubs between him and the panners such that they could only see each’s heads. He fired the fourth shot in the direction of the people who were attacking him. He could not deny that it was his fourth gunshot that struck the now deceased. It was put to him that in terms of the post mortem report, the now deceased was shot from the back, his answer was he could not dispute that finding.
18. The accused was generally not a satisfactory witness. He lied in a number of respects, e.g. he lied when he said they were briefed that some of the gold panners were wanted for murder. He lied when he said they were briefed that they were deployed to look for dangerous people who had killed someone three days before the date of the deployment. We say so because the head or ground commander of the operation James Chomunakira did not allude to such facts. If such a briefing was made the head of the operation would have said it in his evidence. Further these facts were not put to James Chomunakira in cross examination.

19. Accused lied when he testified that he heard two gun shots which were not fired by him. Accused fired four gun shots. Matizha Tafara was clear that he heard four gun shots. Four fired cartridge cases were picked from the scene and submitted to the Forensic Section and all were shown to have been fired from the FN Rifle that was carried by the accused.
20. In his evidence in court he was departing from his defence outline. In his defence outline he said the now deceased was advancing towards him and he shot aiming for his leg. In his evidence in court the accused was prevaricating and said he pointed his fire arm in the bush, and he was not aiming at anyone.
21. At the conclusion of the testimony of the accused, the defence case was closed.

### **Analysis of evidence**

22. The evidence of Sunboy Sibanda which was admitted in terms of section 314 of the Criminal Procedure and Evidence Act [Chapter 9:07] was that the accused advised him that he had shot the now deceased and this witness then alerted the other teams who quickly arrived at the scene. The evidence of James Chomunakira was that the accused showed him a man who was lying on the ground. He then told this witness that a group of gold panners advanced towards him attacking him with shovels. He said he fired three warning shots in the air, and then shot the man who was lying on the ground. The man who was lying on the ground is the now deceased.
23. In his defence outline accused said the deceased was the aggressor who attacked him and he was then forced to fight back in self-defence. He fired a shot aiming at the deceased's leg. The post mortem report shows that deceased died of injuries caused by a gunshot wound. We find it proven that injuries suffered by the now deceased were caused by the accused, and that the actions of the accused caused the death of the deceased.
24. The accused pleads self-defence. In paragraph two of his defence outline accused avers that:



He shall state that he shot three warning shots in the air and the deceased together with other gold panners continued to advance towards him with axes, machetes and shovels and there was no police officer in sight to assist. He then shot aiming for the deceased's leg as the deceased kept advancing. The deceased was the aggressor who attacked the accused forcing the accused to fight back in self-defence.

25. In terms of our law such a defence has been codified in section 253 of the Criminal Law (Codification and Reform) Act [Chapter 9:23]. 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 or take reasonable steps to defend another against an unlawful attack. Harm, and sometimes death, may be inflicted on the assailant in order to wade off the attack.

26. CR Snyman in the well-known academic work, *Criminal Law* 6th edition, (2014) at page 102 defines private defence as follows:

A person acts in private defence, and her act is therefore lawful, if she uses force to repel an unlawful attack which has commenced, or is imminently threatening, upon her or somebody else's life, bodily integrity, property or other interest which deserves to be protected, provided the defensive act is necessary to protect the interest threatened, is directed against the attacker, and is reasonably proportionate to the attack.

27. In summary the requirements of self-defence are the following: an unlawful attack; upon the accused or a third party where the accused intervenes to protect that third party; the attack must have commenced or must be imminent; the action taken must be necessary to arrest the attack; and the means used to avert the attack must be reasonable.

28. None of the State witnesses were present at the scene where accused shot the now deceased. Phakamani Sibanda heard gunshots, and heard someone crying and at that time he did not know who was crying. Nyasha Ndiweni heard gun shots and heard now deceased crying for help but could not see him because of the thick bushes. James Chomunakira was about one hundred metres away from the point where accused shot

the now deceased. Matizha Tafara was hiding where he had taken cover when the shooting occurred.

29. We noted above that accused lied in a number of respects. But we are not entitled to say that because he lied, he is therefore guilty and a criminal. It is possible that an innocent person may put up a false story because he thinks the truth is unlikely to be sufficiently plausible. See: *S v Vera* 2003(1) ZLR 668 (H). Each case must be viewed and analysed on its own facts. We shall however balance and juxtapose these lies with other relevant evidence adduced during this trial.
  
30. The evidence of Sunboy Sibanda is that he saw a group of approximately +/- twenty male persons running towards the direction of the accused. He then heard four gunshots coming from the direction of the accused. Few seconds later he heard accused saying "sit down." This resonates with accused's version that he tried to make now deceased "sit down." Matizha Tafara testified that the gold panners were approximately twenty and they were carrying picks and axes. He retreated and took cover in the bush. He retreated and took cover because he was not armed and because he was fifteen metres from the accused who was armed, which left him vulnerable.
  
31. In his defence outline accused says he was under attack. The gold panners continued to advance towards him with axes, machetes and shovels and there was no police officer in sight to assist. We juxtapose this accused's version with that of Sunboy Sibanda and Matizha Tafara. We accept that on the evidence the accused was under attack by the gold panners.
  
32. The now deceased was shot at the back. The post mortem report is clear that the now deceased was shot from the back and the bullet head exited from the chest. Our view is that the now deceased was shot as he was fleeing. In his evidence in court accused says he shot the bush, and he was not aiming at anyone. We are of the view that he lied in his defence outline when he said aimed the leg of the now deceased. He could not have aimed the leg and shot him at the back and the bullet head exit through the chest. We take the view that he lied in his defence outline because believed that the truth will not be sufficiently plausible.

33. We noted earlier that accused lied in other respects. On the overall context of this case, we have given him a benefit of doubt. We find that taking into account the evidence of Sunboy Sibanda and Matizha Tafara accused's version is reasonably true in substance and we must decide the matter on the acceptance of that version. Minus his lies his version is true in substance. It resonates with the evidence of Sunboy Sibanda and Matizha Tafara. See: *R v Difford* 1937 AD 370; *S v Schackell* 2001 (4) SA 1 (SCA) *para @ 30*; *R v M* 1946 AD 1023; *S v Kuiper* 2000 (1) ZLR 113 (S).
34. It would be simplistic to say because he shot the now deceased at the back, he was therefore not under attack. The gold panners were approximately twenty in number. They had axes, machetes, picks and shovels. Our view is that he just fired at the attackers and struck the now deceased. On the basis of the fact that the State adduced no evidence about the actual shooting and that his version was not controverted we then make the following findings: we find in his favour that the attack was unlawful; and it was directed to the accused; it had commenced or was imminent; the action taken necessary to arrest the attack; and the means used to avert the attack were reasonable in the circumstances.
35. In our view, there is simply not enough evidence to prove the accused's guilt beyond reasonable doubt. He is therefore entitled to the benefit of doubt. The result will of course be a grave injustice if the accused in fact committed this crime. But that does not justify the commission of an even more serious injustice of convicting a person without his guilt having been established beyond reasonable doubt. See: *L v S* 2003(I) ALL SA 16 (SCA).
36. When all the evidence has been assessed and analysed, we are satisfied that the State failed to prove its case beyond a reasonable doubt, and consequently we find the accused not guilty.

Verdict: Accused is found not guilty and acquitted.

*National Prosecuting Authority* State's legal practitioners  
*Pundu & Company* accused's legal practitioners