

THE STATE
versus
BRIGHT ZITSATO

HIGH COURT OF ZIMBABWE
MAWADZE J
HARARE, 29 September 2014, 1 October 2014 and 5 December 2014

ASSESSORS: 1. Mr Chogugudza
 2. Mr Gweme

Criminal Trial

Mrs *F.C. Muronda*, for the State
Ms *B.N. Machanzi*, for the Defence

MAWADZE J: The accused is charged with murder as defined in s 47 of the Criminal law (Codification and Reform) Act [*Cap 9:23*]. It is alleged that on 3 June 2006 at Nyakusanwa Village Chief Chitsungo, Uzumba Maramba Pfungwe the accused Bright Zitsato unlawfully and with intent to kill caused the death of Charles Zitsato by striking him with a hoe handle (not axe handle) several times on the head and all over the body thereby causing injuries from which the said Charles Zitsato died.

The accused is the son of the now deceased Charles Zitsato who was then 62 years old. The now deceased resided at his rural home in Nyakusanwa Village, Uzumba, Maramba Pfungwe whereas the accused reside in Hatcliffe Harare as he was employed in Harare . On 3 June 2006 at about 2300hrs the accused arrived at the now deceased's homestead from Harare. It is alleged that accused then stated that the now deceased possessed goblins which were causing some misfortunes to the accused's life. It is alleged that the now deceased sensing danger tried to flee from the accused who picked a hoe handle, chased after the now deceased assaulting him several times on the head and all over the body with the hoe handle until deceased was unconscious. Deceased was taken to hospital and he died a week later on 10 June 2006 at Parirenyatwa Hospital in Harare. The State case is that deceased's cause of death is multiple skull fractures due to assault.

In his defence outline the accused seems not to put most of the facts alleged into issue. Accused explained that he indeed paid his parents a visit that night from Harare. Accused said he believes in witchcraft and believed that the now deceased was causing a series of misfortunes that were befalling the accused. On the day in question accused said he engaged the now deceased in an effort to bring to an end all deceased's alleged acts of wizardry affecting the accused but the now deceased flatly refused to do so despite indicating that he had the ability to resolve accused's misfortunes. The accused said he pleaded with the deceased but the deceased's response provoked and infuriated him to the point of assaulting the now deceased. In his defence the accused said the attack was a frenzied one in which the accused had lost control of himself. Further the accused said he assaulted the now deceased who was lying on a rocky area and that this might have contributed to the skull fractures deceased sustained. The accused also alleged that the now deceased did not receive medical attention timeously. The accused while admitting to assaulting the now deceased denied that he intended to cause deceased's death.

As per the post mortem report Exh 1 the cause of deceased's death is not in issue. The findings by Dr Humberto Morales is that deceased's cause of death is due to multiple skull fractures caused by the assault.

The accused's confirmed warned and cautioned statement Exh 2 is revealing on what accused said happened on the day in question and what motivated his conduct. Accused said;

“Yes, I admit the offence of assaulting my father with the intention of killing. The reasons being that I realised that I am living with my father's goblin. I do not have a wife, a personal home nor a specific life sustaining job. We went about consulting traditionalists and were made to see in the same light. I asked my father to sort-out the problem and he said

“That is a very small task to me, it is one I am able to tackle but I am unable to solve it if I am unwilling to do so”.

I became furious to the extent of assaulting him. I even talked about the matter in the presence of his elder brother and the Village Head, he was questioned but remained silent. That is all.”

The sketch plan produced by the consent as Exh 3 was drawn on the basis of the indications made by the accused, accused's aunt Rhoda Zitsato and accused's late mother Scholastic Marodza. As per accused's indications he started to assault the now deceased in the yard and deceased fled while being assaulted until he fell at point X well outside the yard at which point the assault continued until the now deceased was left injured at point X together with the hoe handle accused used to assault him.

The details of the hoe handle accused used to assault the now deceased are captured in Exh 4. The hoe handle is 74cm long, 7cm in diameter and weighs 800g. It is made of hard dry wood.

The state called Rhoda Zitsato accused's aunt and sister to the now deceased, Chriswell Zitsato accused's cousin and the investigating officer Sgt William Mwakonya.

The evidence of Chamunorwa Nyamhandu a member of the local neighbourhood watch committee, Dr E.M. Collins and Dr Humberto Morales was all admitted in terms of s 314 of the Criminal Procedure and Evidence Act [*Cap 9:07*]. The evidence of these witnesses can be summarised as follows;

Chamunorwa Nyamhandu a local neighbourhood watch committee member is the one who was called to the scene of crime on the night in question on 4 June 2006. He said on arrival he found the now deceased at the scene severely injured and he arrested accused. He recovered the hoe handle (Exh 4) used in the assault of the now deceased.

Dr E.M. Collins who was based at Parirenyatwa Hospital said the now deceased was brought at this referral hospital from Marondera Provincial Hospital on 6 June 2006. He examined the now deceased and noted that he had head injuries and fracture of the left radius (arm). The now deceased's condition on arrival was that he was unconscious and on life support system. He admitted the now deceased. It is common cause the now deceased died at the hospital 4 days later on 10 June 2006.

Dr Humberto Morales carried out the post mortem and compiled the report Exh 1 on 13 June 2006 in which he concluded that the cause of death was due to multiple skull fractures arising from the assault.

We turn to the evidence of the witnesses who testified in court.

Rhoda Zitsato (Rhoda) testified that on the day in question she had visited the now deceased when accused arrived from Harare at night. She said the now deceased had retired in his bedroom hut and only came into kitchen hut where Rhoda and Scholastic Marodza were later. Rhoda said accused informed her that he had an issue accused wanted Rhoda to ask the now deceased about. In response Rhoda said he told accused that they would discuss the issue the next morning without even asking the accused what the issue was all about. Rhoda said the now deceased who was in the kitchen hut then left with holding a cup of water as he was brushing his teeth. She said accused immediately followed him saying

“You are not going anywhere today.”

Rhoda said she suddenly heard footsteps of people chasing each other outside and she immediately came out of the kitchen hut with Scholastic Marodza shouting to accused that he should not chase after the now deceased. She said when they got out of the kitchen hut accused and now deceased were out of their sight. As they walked towards point X the place deceased fell down they met accused who was now coming back home. The accused then said to them that there was no need for them to go where the now deceased was as accused had already killed him. Rhoda said accused uttered the following words

“What are you going to do there (where now deceased was). I have killed him.”

Rhoda said they nonetheless proceeded to where the now deceased was and found him lying on his back, unconscious, unable to talk with blood all over him. Rhoda said she observed that the now deceased’s left upper arm was broken, his head was boggy, both the face and head were swollen with both eyes closed. She said the now deceased was unconscious and helpless and bleeding from both the nose and the mouth. She also observed a blood stained hoe handle at the scene which accused had used to assault the now deceased.

Under cross examination Rhoda denied that they discussed the issue of goblins that night. She said she only heard about this issue after the deceased’s death when prophets were called by some family members. She made it clear that she did not see how the accused assaulted the now deceased save to say that accused chased after the now deceased to point X where they found the now deceased badly injured and unconscious. She dismissed as false that there were stones at point X which could have fractured the now deceased’s skull. She also disputed that there was a delay in taking the now deceased to hospital saying deceased was taken to Mutawatawa hospital that same day and later died while still admitted at Parirenyatwa hospital.

The evidence of Rhoda was unchallenged. She is an old lady who gave her evidence well. Her testimony clearly shows that what accused said transpired in his defence outline is false. There was never a discussion held involving Rhoda, accused and the now deceased on the night in question over the issue of goblins.

From her evidence it is also clear that deceased did not fall on to a place where there were stones which could have possibly fractured his skull. Her evidence is also clear that there was no delay at all in taking the now deceased to hospital as accused had alleged.

Chriswell Zitsato, accused’s cousin confirmed that there was a history of an unresolved matter between accused and the now deceased. He said accused who was not a rural dweller but resided in Harare had last visited the rural home a year or so before this

incident. He said accused during that previous visit had set on fire the now deceased's hut. A family gathering was held and accused said he had burnt the hut because the now deceased, his father, was bewitching the accused resulting in accused being unable to marry, to find a permanent sustaining job and failing to generally reap the fruits of his labour. Chriswell Zitsato (Chriswell) said the now deceased vehemently denied all the allegations made against him by the accused and offered to sell his beast for the family to raise money to consult n'angas or prophets in order to verify accused's allegations. Chriswell said accused left for Harare and never returned so that the family could verify his allegations. Instead he said accused only returned a year later on the fateful night.

Chriswell testified that on the night in question he was woken up by his young brother Takesure Zitsato who reported that accused had arrived from Harare that night and severely assaulted the now deceased. He rushed to the scene and found the now deceased lying some 50m from the homestead near a gully. He said there were no stones at the place which could have injured the now deceased. Chriswell said he observed that the now deceased was severely injured, one of his hands was fractured and his head was as if had been crushed. There was blood all over the place. He confronted accused who indicated that he had assaulted the now deceased for the same reason that the now deceased was allegedly bewitching the accused. Just like Rhoda, Chriswell said accused was sober. Chriswell said it was only after deceased's death that accused brought some prophets to the family who were saying the deceased had goblins and had bewitched accused.

Under cross examination Chriswell said it was well known in the family well before deceased's death that accused was alleging that the now deceased was bewitching him. He denied that there was a delay in taking the now deceased to hospital.

Again evidence of Chriswell was largely unchallenged. He too did not witness the assault. He however confirmed the long outstanding animosity between accused and the now deceased over accused's allegations that the now deceased was bewitching him. He also shed light that accused was virtually an urbanite in Harare who occasionally visited the rural home for 2 or 3 days. Lastly he confirmed that accused is single and has no children.

The evidence of Sgt William Mwakonya (Sgt Mwakonya) explains his role as the investigating officer. He told the court that on 4 June 2006 at about 0700hrs the now deceased was brought to the Police Station in an 8 tonne lorry. He observed that the now deceased was unconscious, bleeding from the mouth and the ears. He observed that the now

deceased had a fractured left arm, was bleeding from the nose and mouth, was breathing with a lot of difficulty, his head was severely swollen and was unconscious.

Sgt Mwakonya said the accused had been arrested by a member of the Neighbourhood watch Committee Chamunorwa Nyamhandu and was in the same lorry. He observed that accused was sober and the hoe handle used in the assault was also brought and had blood stains. Accused explained to him that he has assaulted the now deceased because he was causing misfortunes to the accused. He immediately referred now deceased to Mutatawatawa hospital and charged accused with attempted murder. The now deceased due to his serious state was transferred to Parirenyatawa hospital. On 10 June 2006 he was advised that the now deceased had died in hospital. He proceeded to Parirenyatwa to have the post mortem examination done as per Exh 1. He proceeded to Murewa Prison where accused was being held and charged him with murder and recorded Exh 2 the confirmed warned and cautioned statement. Sgt Mwakonya said he revisited the scene of crime where accused, Rhoda and Scholastic Marodza made indications from which he drew Exh 3 the sketch plan. He took the hoe handle used to assault the now deceased for measurements and weight to be taken as per Exh 4. Sgt Mwakonya said he clearly observed the hoe handle and noted that it was not broken and that the blood stains were at the thickest end of the hoe handle where the hoe is tucked in or the head which to him showed that it is that part of the hoe handle which was used to assault the now deceased. No useful questions were put to Sgt Mwakonya in cross examination.

We now turn to the accused's case.

The accused gave evidence and did not call any witness.

In his evidence accused maintained that the now deceased was bewitching him causing him a lot of misfortunes which included the following:

- i. that he was unable to marry as he had an erection dysfunction hence could not have sexual intercourse.
- ii. that it takes him long to find a job and once he get the job he immediately loses it and would take ages to find another job.
- iii. that he had consulted n'angas on his own who told him that the now deceased had a goblin causing him all these problems, and that the prophets confirmed the same. The accused said it was explained to him by these n'angas and prophets that the now deceased had a female goblin which accused was forced to marry hence he cannot

have a wife or find employment. The accused who is now 33 years old said that problem started when he was about 20 years old.

In his evidence the accused said he then engaged the now deceased and other family members including the late John Zitsato, the Village Head and others who questioned the now deceased but now deceased was unhelpful and did not resolve these problems.

In relation to the events of the fateful day, accused admitted, contrary to what he had said in the defence outline that he did not engage the now deceased on that day in question. Accused said the now deceased left the kitchen hut without discussing the issue serve to boast that he will solve the problem on his own terms and time. We are unable to agree with the accused on this aspect. Rhoda whose evidence was not challenged was that the issue of the now deceased bewitching the accused was never raised that night in the kitchen hut or outside within her hearing. She was clear that accused simply told her that he had some issues he wanted her to ask the now deceased about but she told accused they would discuss whatever issues he had the next morning and no further discussions were held. We find no reason for Rhoda to lie on this aspect moreso as accused did not challenge this evidence. Further Rhoda was clear that it is accused who followed the now deceased as he left the kitchen hut saying he would not go anywhere that day. She did not say the now deceased uttered the words accused refers to and again we are inclined to accept Rhoda's evidence.

Turning to the assault, the accused said as the now deceased walked out of the kitchen hut he uttered some words which made accused believe he would be assaulted. The accused was unable to explain why he would have formed that impression that the now deceased would attack him. As per Rhoda's uncontroverted evidence the now deceased left the kitchen hut with a cup of water brushing his teeth. It is the accused who followed him saying he should not leave and that accused would not allow that. The accused admitted that the now deceased was unarmed. Instead the accused admits that it is him, who on getting outside following the now deceased who picked the hoe handle. The accused admitted that it is this conduct which prompted the now deceased to run away and this dovetails with Rhoda's evidence that she immediately heard footsteps of accused chasing after the now deceased. Given this evidence by the accused, the mind boggles how accused alleges that he was acting in self-defence.

In his evidence the accused said armed with the hoe handle he pursued the now deceased and hit him with the hoe handle several times as he chased after him until he fell down. The accused said he directed the blows to the now deceased's back and stopped the

assault when deceased fell down. Accused said the now deceased fell on to a place where there are big stones and believes the big stones may have caused the deceased's skull fractures. Accused said he was unable to state the number of blows he delivered as they were many. Further he said he could not precisely say where he directed the blows as it was an indiscriminate assault. Accused said he was again unable to explain the injuries he inflicted on the deceased or the severity of those injuries as he never checked. He just left the hoe handle at scene leaving deceased lying down. Accused said he never checked if now deceased was alive or not before he left. The accused said this was all because he was very angry and failed to control his temper thus venting the anger on the now deceased's through the assault.

Our view is that the accused was unable to give any meaningful evidence on the material issue of how he assaulted the now deceased. We are however of the view that the accused has been untruthful on how he assaulted the now deceased. We have already dismissed the accused's version that deceased fell on to some big stones as all witnesses who were not challenged refuted this. In any case the nature of the injuries deceased sustained involving fractured left arm and multiple skull fractures are inconsistent with one hitting his head against the rock but consistent with an assault.

While it may be true that the accused assaulted deceased as he chased after him, it is not true as accused said he immediately stopped the assault when the now deceased fell down. This is so because of the nature of the injuries accused inflicted which include a fractured left arm and several skull fractures. It is improbable that the accused could have inflicted such injuries while hitting the now deceased who was running away. In all probabilities the injuries were inflicted when deceased was lying down and defenceless.

Under cross examination the accused admitted that he was pained by now deceased's denial of responsibility of causing misfortunes to him. The accused admitted that when he armed himself and chased after the now deceased he was not under any unlawful attack or threat. The accused was probed as to why he chased after the now deceased and he said he wanted to assault him. The accused was taken to task on how he used the hoe handle and he flatly refused to disclose which part he used. Sgt Mwakonya was clear that the thickest part of the hoe handle was blood stained hence this is the part the accused used. The accused grudgingly admitted that the injuries he inflicted caused the now deceased's death but disputed that he intended to kill the now deceased or that he did foresee that death would result.

It is our finding that the accused is a person who believes in witchcraft and should have genuinely believed that his father the now deceased was responsible for his misfortunes. This is clear from accused's evidence and evidence of state witnesses. This explains why the accused did set on fire the now deceased's hut. It is this firm belief that the now deceased possessed goblins which were bringing misfortunes to the accused in his life and the perceived refusal by the now deceased to resolve the problem which motivated the accused to assault his father the now deceased.

It is our finding that the accused did not act in self-defence as defined in s 253 of the Criminal Code [*Cap: 9:23*] when he attacked the now deceased. The accused was not under threat and it is accused who armed himself and chased after the now deceased.

We dismiss as untrue that there was a delay in taking the now deceased to hospital. The accused himself left the deceased unconscious and offered no help. The now deceased was ferried to Mtawatawa Hospital, Marondera Provincial Hospital and Parirenyatwa Hospital but his life could not be saved due to the severity of the injuries inflicted.

It is our finding that the deceased died as a result of multiple skull fractures arising from assault and we reject accused's half-baked story that the now deceased hit his head against some stones. This leads us to the intention of the accused when he assaulted the now deceased.

The accused's intention can be inferred from his conduct and utterances. Before the assault accused was heard to say as per Rhoda's evidence that the now deceased was not going anywhere that night. After the assault accused met Rhoda and ominously announced that Rhoda and Scholastic Marodza were already late as they would not be able to save the now deceased's life. The accused used a lethal weapon, a hoe handle to brutally attack an old man on the head. It is clear several blows were delivered with a lot of force hence the fractured arm and multiple skull fractures. While the accused may not have intended to kill the now deceased, it has however been proved beyond reasonable doubt that when accused assaulted the now deceased in the said manner he did realise that there was a real risk or possibility that such conduct may cause the now deceased's death but nonetheless he ignored this risk or probability and proceed to seriously and fatally attack the now deceased.

We lastly consider whether the defence of provocation as defined in s 239 of the criminal code can be a partial defence to the charge of murder in the circumstances of this case.

Section 239 provides as follows;

“239. When provocation is partial defence to murder.

- (1) If after being provoked, a person does or omits to do anything which would be an essential element of the crime of murder if done or omitted, as the case may be, with intention or realising referred to in section forty-seven, the person should be guilty of culpable homicide if, as result of provocation –
 - (a) he or she does not have the intention or realization referred to in section forty-seven or
 - (b) he or she has the intention or realization referred to in section forty-seven but has completely lost his or her self-control, the provocation being sufficient to make a reasonable person in his or her position and circumstances lose his or her self-control.
- (2) For the avoidance of doubt it is declared that if a court finds that a person accused of murder was provoked but that –
 - (a) he or she did have the intention or realization referred to in section forty-seven; or
 - (b) the provocation was not sufficient to make a reasonable person in accused’s position and circumstances lose his or her self-control;
The accused shall not be entitled to a partial defence in terms of subsection (1) but the court may regard provocation as mitigation as provided in section two hundred and thirty eight.”

Our analysis of the evidence is that while accused harboured the belief in witchcraft, he was not at all provoked by the now deceased on the night in question either verbally or by conduct to such an extent that a reasonable person faced with same circumstances would lose self-control. As per Rhoda’s evidence there was no discussion between the accused and the now deceased and as accused was leaving it is accused who armed himself with a hoe handle and chased after the now deceased whom he wanted to assault for allegedly practicing wizardry and as a punishment for refusing in the past to do all that accused wanted in that regard.

The defence of provocation as defined in s 239 (2) (a) and (b) of the Criminal Code [Cap 9:23] is not available to the accused on the facts of this case.

Accordingly we find the accused guilty of murder as defined in s 47 (1) (b) of the Criminal Law [Codification and Reform] Act [Cap 9:23].

VERDICT: Guilty of murder as defined in s 47(1) (b) of the Criminal Code [Cap 9:23].