THE STATE

Versus

PRIDE PHIRI

And

FREEDOM NCUBE

IN THE HIGH COURT OF ZIMBABWE
DUBE-BANDA J with Assessors Mr. Mashingaidze and Mr Dewa
BULAWAYO 22, 23 February 2024, 23 July 2024, & 15 August 2024

Criminal trial

T. Muduma for the State
M. Mahaso for the 1st accused
P. Butshe for the 2nd accused

DUBE-BANDA J:

[1] The accused are appearing before this court charged with the crime of murder as defined in s 47 of the Criminal Law (Codification and Reform) Act [Chapter 9:23] ("Criminal Law Code"). It being alleged that accused 1, accused 2 and one Justice Mbedzi - who is not in this trial - on 26 December 2021 assaulted Cleoparton Nyathi ("deceased") by stabbing him with a knife, assaulting him with mopane switch and hitting him with stones, intending to kill him or realising that there was a real risk or possibility that their conduct may cause the death of the deceased and continued to engage in that conduct despite the risk or possibility.

[2] The two accused who were legally represented throughout the trial pleaded not guilty to the charge. The prosecutor tendered an Outline of the State case and is marked Annexure "A", and the accused persons tendered their respective defence outlines. Accused 1's defence outline is marked Annexure "B" and accused 2's defence outline is Annexure "C". The outlines were read into record. In his defence outline, accused 1 stated that he saw the deceased who had robbed and stabbed his relative, and followed him with the intention of arresting and handing him over to the police. When he asked the deceased why he robbed and stabbed his relative, the deceased put his hand in his pocket and the accused thought he was drawing a knife. He then stabbed him in a pre-emptive attack. He stated further that he had no intention of causing the death of the deceased. In his defence outline accused 2 stated that he joined a group that

was pursuing persons who were alleged to have carried out a robbery. None of any group members had any visible weapons. Near Siyaso Garage the group came across the deceased and one Mkhululi Nyathi. Mkhululi Nyathi escaped and accused 2 chased him for over 200 metres, but failed to apprehend him. Accused 2 then returned to where he left the group, and on arrival he found the deceased blood soaked. Out of anger he took a mopane switch and struck deceased three times on the legs. He stated further that he had no common purpose with the one who stabbed the deceased, since stabbing was outside the common design of the group members.

The State case

[3] The two 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. These are:

[3.1] The evidence of Otilia Ndou. Her evidence is that on 26 December 2021 at 1700 hours she heard that people who stabbed Dumisani Moyo the previous day had been seen at Siyaso Garage, Beitbridge. Otilia Ndou in the company of accused 1 and 2 ran to the Garage. At the Garage, accused 1 and 2 ran to the direction of the deceased and his colleagues. She remained at the Garage hoping that the accused persons would apprehend the robbers. After 30 minutes she got to know that accused 1 and 2 had seriously injured the deceased.

[3.2] The evidence of Mkhululi Nyathi. His evidence is that the deceased was his young brother. On 26 December 2021 at around 1810 hours, he and the deceased accompanied Wedzerai Zhou, Lacardia Mazise and Evidence Hove to relieve themselves at a bush near Siyaso Garage. He saw the two accused persons in the company of Justice Mbezi running towards them until they surrounded them. Accused 1 withdrew an okapi knife and tried to stab him, he ran way and the accused persons gave chase and hit him with a stone on his right hand. He returned to the scene after about ten minutes and found deceased lying facing downwards, his clothes tattered and soaked in blood.

[3.3] The evidence of Walter Muchena. His evidence is that he is a member of the Zimbabwe Republic Police (ZRP) and the investigating officer in this matter. He attended the scene and recorded warned and cautioned statements and took them for confirmation at the Magistrates Court.

[3.4] The evidence of Doctor Linos Samhere. His evidence is that he is a medical practitioner stationed at Beitbridge District Hospital. He examined the remains of the deceased and compiled his finding in Post Mortem Report No. 411569.

[4] The prosecutor produced with the consent of the accused persons the following exhibits: accused 1's confirmed statement (Exhibit 1); accused 2's confirmed statement (Exhibit 2); and Post Mortem Report No. 411569 (Exhibit 3). In his statement accused 1 stated that he had been informed by Otilia Ndou that the robbers were at Siyaso Garage. He managed to grab the deceased and assaulted him using his hands. The deceased put his hands inside the pocket, and he thought he was drawing a knife. The accused 1 then draw a knife and stabbed deceased four times, twice on the back, once on the buttocks and once below the neck. The deceased bled profusely. In his statement accused 2 stated that he did not stab the deceased. He chased a certain person who was in the company of the deceased but failed to apprehend him. When he returned to the scene, he saw deceased oozing blood and his clothes drenched in blood. He took a stick and hit the deceased on his legs about ten times. The Post Mortem Report states that the cause of death was: exsanguination; severed left common carotid artery; and stab wound on the neck.

[5] The State called two witnesses and each accused person testified in his defence. The evidence of these witnesses will be summarised briefly.

[6] The first to testify for the prosecution was Evidence Hove. Her evidence was that on 26 December 2021 at around 1800 hours, she was at Siyaso Garage with her friends. They asked Mkhululi Nyathi and deceased to accompany them to the bush because they wanted to relief themselves. The deceased was not in possession of a knife. She then saw the two accused with Justice Mbedzi running towards them. Accused 1 produced an okapi knife and tried to stab Mkhululi Nyathi but he managed to run away. Accused 1 then turned to the deceased and stabbed him fifteen times, on the neck, chest and back. She was five metres from where the stabbing was taking place. Accused 2 did not stab the deceased, he was using his hands.

[7] Under cross examination by Mr *Mahaso* for counsel for accused 1, Evidence Hove testified that the previous day a friend of the deceased robbed one Dumisani Moyo. She however agreed that there was an allegation that it was the deceased and Mkhululi Nyathi who robbed Dumisani Moyo. She categorically disputed that it was deceased and Mkhululi Nyathi who carried out the robbery. She denied that accused 1 and other persons approached the deceased and

Mkhululi Nyathi and confronted them about the alleged robbery of Dumisani Moyo. She rebuffed the suggestion that when accused 1 approached the deceased, the deceased reached for his pocket which prompted the accused 1 to draw a knife and stab him. She said the deceased did not put his hands in the pocket, it was accused 1 who was holding an okapi knife. The deceased when he was being stabbed complained that he was being injured.

[8] Under cross examination by Mr *Butshe* for accused 2, Evidence Hove disputed the suggestion that she and her friends drank beer the whole night proceeding the date of the stabbing. She testified that the first accused 1 tried to stab Mkhululi Nyathi, who then ran away. And she said she saw accused 2 chasing Mkhululi Nyathi who was running away. When he returned, he found deceased already stabbed. She did not see accused 1 picking a mopane switch and beating the deceased. Evidence Hove came across as a witness who had a reasonable recall of events. She appeared to be a credible and honest witness and her evidence is accepted without qualification and without hesitation. Where there are differences between her evidence and the evidence of other witnesses, her version is preferred.

[9] The second witness to testify for the prosecution was Wedzerai Zhou. Her evidence was that on the date of this incident occurred, she was in the company of deceased, Mkhululi Nyathi, and Evidence Hove. Accused 1, accused 2 and Justice Mbedzi approached her group running, got hold of Mkhululi Nyathi by collar and accused 1 and 2 drew okapi knives. They demanded that Mkhululi Nyathi gives them a satchel and a bag of money which they took. Mkhululi Nyathi struck accused 1's hand which was holding a knife, the knife fell down and he Mkhululi Nyathi managed to ran away. The two accused gave chase but failed to catch him. On their return they asked the deceased to give them a bag and money, and he denied taking the bag and money. The deceased tried to run away, he was tripped and he fell down. They started assaulting him, accused 1 stabbed him on the neck twice. Accused 2 was present at the time deceased was stabbed, he had a knife but did not stab the deceased, he was beating him with hands and switches. After being stabbed accused 1 took a switch and beat the deceased saying he was faking death.

[10] Counsel for accused 1 did not cross exam Wedzerai Hove. Under cross examination by Mr *Butshe* this witness testified that she heard that one Dumisani Moyo had been robbed. She said accused 2 had a knife. And accused 1,2 and Justice Mbedzi pursued Mkhululi Nyathi. When put to her that the purpose of the accused persons was to apprehend robbers, her answer

was that it was a question of mistaken identity, because at the police station the accused persons said they stabbed the wrong person. Wedzerai Hove had a tendency of exaggerating and adding things that did not happen. She wanted to cast the accused persons in bad light as much as possible. For example, she says accused 2 drew a knife. This cannot be the truth because the evidence of Evidence Hove is that only accused 1 drew a knife. Further, the evidence of Mkhululi Nyathi shows that only accused 1 drew a knife. Again, she was not truthful when she testified that both accused 1 and 2 pursued Mkhululi Nyathi. Where her evidence differs with that of Evidence Hove and the established facts, her evidence is rejected. In the final analysis of her as a witness, she was a poor witness.

[11] After the conclusion of the evidence of Wedzerai Hove, the prosecution closed the State case.

The defence case

[12] Accused 1 testified in his defence. His evidence was that on 26 December 2021, he made a follow up of the people whom he was told robbed and stabbed Dumisani Moyo and found them at a bush near Siyaso Garage. He tried to talk to the deceased "who was not in an understanding mood." He then saw the deceased putting his hand in his pocket and he got frightened and stabbed him with a knife, and he did not think that he was going to die.

[13] Under cross examination by Mr *Busthe* he testified that when the group started looking for the deceased it was not armed, and it did not discuss about violence to be meted out to the deceased. He had picked the knife when he was running towards the deceased, but he did not intend to stab anyone. Accused 1 confirmed that accused 2 did not know that he had a knife in his pocket. He said before he stabbed the deceased one Mkhululi Nyathi ran away from the scene. At the moment he stabbed the deceased accused 2 was not present.

[14] Under cross examination by Mr *Muduma* counsel for the State, accused 1 testified that the aim of his group was to apprehend the deceased and his group and take them to the police. The group was not apprehended because Mkhululi Nyathi ran away and the deceased put his hand into his pocket and he stabbed him. He said he used a 25cm vegetable knife. He stabbed the deceased three or four times, once on the shoulder near the neck, once on the back and twice on the buttocks. He conceded that the deceased was not threat to him.

[15] Accused 1 was untruthful in a material respect. He fabricated a version that the deceased put his hand into pocket which made him assume that deceased was drawing a knife. This is a fabricated version because the evidence of Evidence Hove shows that the deceased did not put his hand inside his pocket. It is accused 1 who immediately draw a knife, first he attempted to stab Mkhululi Nyathi who escaped and he turned and stabbed the deceased. The evidence of Mkhululi Nyathi admitted in terms of s 314 is that accused 1, 2 and Justice Mbedzi approached the deceased and his group running and surrounded them, accused 1 drew an okapi knife and tried to stab Mkhululi Nyathi who ran away. Further accused 1 in his confirmed statement stated that he grabbed the deceased and started to assault him with hands, it was when deceased put his hands in the pocket that he drew a knife and stabbed him. He does not even say which hand deceased put in the pocket, i.e., left or right hand because he could not have put both hands at the same time as accused 1 suggests. Accused 1 fabricated this version to create a defence of self-defence. In the circumstances, we do not accept accused 1's version of events where it is at variance with the oral evidence of Evidence Hove, and where it differs from the evidence of Mkhululi Nyathi and accused 2. Accused 1 also lied that he picked the knife on the way to Siyaso Garage. Under cross examination on this issue, he faired very bad. It is clear that he always had the knife in his possession. He further did not disclose that he stabbed the deceased on the chest, causing the laceration to the lung observed by the doctor. In the final analysis of him as a witness, he was a poor and dishonest witness

[16] At the conclusion of his evidence, accused 1 closed his defence case.

[17] Accused 2 testified that on 26 December he joined a group which had about fifteen to twenty people that ended at Siyaso Garage. He joined the group because he had heard that it was pursuing people who robbed Dumisani Moyo and Webster Mupfunde. The aim of the group was to apprehend the robbers. He did not know that any member of the group was armed. When the group found the alleged robbers, one man fled and he gave chase but failed to apprehend him. He returned to the group and found deceased lying down and he had blood stains. He did not know that someone would stab the deceased. He saw accused 1 beating the deceased, and he also took a switch and beat him. He could not remember the number of times he stuck the deceased with a switch, but it could be five times. He targeted his legs.

[18] Mr *Mahaso* did not cross examine accused 2. Under cross examination by Mr *Muduma*, he testified that the aim of the group was to pursue the robbers. When they found the group,

one person ran away and he chased him, and on his return, he found the deceased injured, his shirt was blood stained. He beat deceased with a switch because he was angry.

[19] The version of the accused 2 of striking the deceased with a switch about five times is farfetched and is so improbable as to be false. Under cross examination Evidence Hove disputed this assertion. In his confirmed statement recorded on 29 December 2021 accused 2 stated that he used a stick and hit deceased about ten times on his legs. This version of using a switch is an attempt to down play the role he played in beating the deceased. He actually used a stick.

[20] At the end of his evidence accused 2 closed his defence case.

Analysis

[21] The following facts are either common cause, and not seriously disputed or found to be proved by evidence. Accused 1, 2 and Justice Mbedzi fortuitously met up with each other on the day in question and decided to pursue the alleged robbers, who they believed were the deceased and Mkhululi Nyathi. The accused persons met the group of deceased close to Siyaso Garage, and the accused persons must have been violent which caused Mkhululi Nyathi to flee. Accused 2 pursued Mkhululi Nyathi, however he was outpaced and he failed to apprehend him. In the absence of accused 2, accused 1 stabbing the deceased. The deceased sustained the injuries set out in the post mortem report following the stabbing by accused 1. On his return accused 2 found deceased having been fatally wounded, he however took a stick and struck him about ten times on the legs. The totality of the facts and the evidence adduced in this trial show that the injuries sustained by the deceased were caused by the accused 1. The post mortem report shows that the injuries inflicted by the accused 1 caused the death of the deceased.

Liability of accused 1

[22] Accused 1 confronted the deceased and proceeded with an indiscriminate and vicious knife attack on him. He stabbed the deceased many times, and according to Evidence Hove he stabbed him fifteen times. The post mortem report states that the deceased's body and clothes were soaked with blood. He had multiple deep lacerations on the left side of the neck, back, buttock, right hip area and right calf. He had a neck laceration approximately 18cm deep and several more. The left common carotid artery and internal jugular vein was lacerated. The laceration also punctured the apex of the left lung. The post mortem report corroborates the

evidence of Evidence Hove that accused 1 also stabbed deceased on the chest. Accused 1 attacked deceased who was neither armed nor fighting back with a knife. He directed the stab on the neck and the chest. He caused multiple deep lacerations on the neck, including an 18cm deep laceration. The knife perforated the lung. It is clear that he used excessive force in stabbing the deceased. No human being could endure such a stab wounds. No wonder the deceased died. Accused 1 was reckless and he foresaw death as possibility whilst stabbing the deceased and proceeded with the stabbing regardless as to whether death ensues.

Liability of accused 2

[23] Accused 2 did not stab the deceased, and was not present when accused 1 inflicted the fatal injuries. The injuries accused 2 inflicted, if any, using the stick did not cause the death of the deceased. The post mortem is clear that it is the stab wounds that caused the death of the deceased. State counsel argued that accused 2 is guilty of murder on the basis of common purpose, in that he had a common desire with accused 1 to cause the death of the deceased and each played a role in the furtherance of that common purpose.

[24] In *S v Motaung* [1990] ZASCA 75; 1990 (4) SA 485 (A) the court defined common purpose as a "purpose shared by two or more persons who act in concert towards the accomplishment of a common aim". The practical effect of the application of this doctrine is that "if two or more people, having a common purpose to commit a crime, act together in order to achieve that purpose, then the conduct of each of them in execution of that purpose is imputed to the others". The operation of the doctrine does not require each participant to know or foresee in detail the exact way in which the unlawful results are brought about. The State is not required to prove the causal connection between the acts of each participant and the consequence, for example in this case murder. There are two possible ways in which a common purpose may arise, first by prior conspiracy (agreement) to commit the crime in question: for example, where X and Y (or X, Y and Z) agree in advance to commit a particular crime, which implies a bilateral or multilateral act of association. Second by conduct (spontaneous association): for example, where X notices (or Y and Z) committing a crime, and simply joins in. This would be a unilateral act of association. This form of association is most commonly found in cases of mob violence. See Kemp *Criminal Law in South Africa* 2 ed (Oxford University Press, Cape Town 2012) at 235.

[25] This case does not concern the first form of common purpose, but only the second. For conduct to constitute active association, the common law requirements stated in *S v Mgedezi* 1989 (1) SA 687 (A) and codified in s 196A of the Criminal Law Code need to be met. These requirements are well-established. Firstly, the accused must have been present at the scene where, for example, the assault was being committed. Secondly, the accused must have been aware of the assault on the deceased. Thirdly, the accused must have intended to make common cause with those who were perpetrating the assault. Fourthly, the accused must have manifested a sharing of a common purpose with the perpetrators of the assault by performing some act of association with the conduct of the others. Fifthly, the accused must have had the requisite *mens rea* (intent). In the context of this case, accused 2 must have intended that the deceased be stabbed, or he must have foreseen the possibility of him being stabbed and must performed an act of association with recklessness as to whether or not the deceased was stabbed.

[26] It is trite law that in criminal matters the onus rests upon the prosecution to prove its case beyond reasonable doubt. When a court finds that the guilt of an accused has not been proved beyond reasonable doubt, even if there are suspicions that the accused was indeed the perpetrator or had common purpose with the actual perpetrator of the crime in question, the accused is entitled to an acquittal.

[27] Accused 2 did not know that accused 1 had a lethal knife in his possession. And accused 2 was not in possession of a knife himself. He was not aware that accused 1 would fatally stab the deceased. He was not present when accused 1 fatally stabbed the deceased. It cannot be said that he intended to make common purpose with accused 1 in relation to the stabbing of the deceased, because when he returned from pursuing Mkhululi Nyathi accused 1 had already delivered the fatal blow on the deceased. It would be stretching it too far to say because when the accused persons met the deceased and his group, they were violent, therefore accused 2 must have known that accused 1 will remain fatally stabbing the deceased. The evidence does not support the argument that accused 2 is guilty of murder on the basis of common purpose, in that he had a common desire with accused 1 to cause the death of the deceased and each played a role in the furtherance of that common purpose.

[28] In this matter, there are strong indications that the stabbing by accused 1 and assault by accused 2 constituted two separate acts. A break in between two periods of assault militates against a finding of continuity. There was no prior agreement that deceased must be stabbed.

Accused 1 stabbed deceased in the absence of accused 2. These facts point toward the two instances i.e., the stabbing by accused 1 and assault by a stick by accused 2 being separate occurrences. This was not a continuous act. Accused 2 beat the deceased when he had already been fatally stabbed. A close look at the post mortem report shows that the beating up by accused 2 did not cause the death of the deceased. Accused 2 joined in after the fatal blow. Section 58 of the Criminal Law Code deals with joining in after the fatal injury had been inflicted, it says:

> s 58 Joining in after fatal injury inflicted
>
> If—
>
> (a) a person does or omits to do anything in relation to another person which, if it caused that other person's death, would constitute murder, infanticide or culpable homicide; and
>
> (b) before he or she does or omits to do the thing referred to in paragraph (a), and independently of that act or omission, his or her victim has received injuries, whether in a fatal attack or otherwise, which subsequently cause the victim's death;
>
> he or she shall be guilty of—
>
> (i) murder, infanticide or culpable homicide, as the case may be, if his or her conduct accelerated the death of his or her victim; or
>
> (ii) attempted murder, attempted infanticide or assault, as may be appropriate, if his or her conduct did not accelerate the death of his or her victim.

[29] The post mortem report shows that the conduct of accused 2 in sticking the deceased with a stick did not accelerate the death of the deceased. Accused 2's conduct in covered by s 58(a)(ii), which require of the court the assess the conduct of the accused and see whether in the circumstances of the case he can be held guilty of attempted murder or assault. Accordance to the evidence accused 2 used a stick to beat up the deceased. He struck him ten times and did not accelerate the death. The conduct of accused 2 constitutes the crime of assault as defined in s 89 of the Criminal Law Code.

[30] In the circumstances, the prosecution has proved beyond a reasonable doubt that accused 1 is guilty of the crime of murder as defined in s 47(1) of the Criminal Law Code. In the case

of accused 2, the prosecution has not proved as required by the law that he is guilty of the crime of murder.

In the result, it is ordered as follows:

i. Accused 1 (Pride Phiri) is found guilty of murder as defined in s 47(1) of the Criminal Law (Codification and Reform) Act [Chapter 9:23].
ii. Accused 2 (Freedom Ncube) is not found guilty of murder but found guilty of assault as defined in s 89 of the Criminal Law (Codification and Reform) Act [Chapter 9:23].

Sentence

[31] In determining an appropriate sentence, a court will have regard to the personal circumstances of the offenders, the nature of the crime, and the interests of society. 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. This court must also factor into the equation the provisions of the Criminal Procedure (Sentencing Guidelines) Regulations, 2023.

[32] It is trite law that sentencing is about striking the correct balance between the crime, the offender and the interests of the community commonly referred to as the triad. See *S v Zinn* 1969 (2) SA 537 (A). A court should, when determining sentence, strive to accomplish and arrive at a judicious counterpoise between these elements in order to ensure that one element is not unduly emphasised at the expense of and to the exclusion of the others. In its consideration of an appropriate sentence, the court is mindful of the need to apply the established principles of deterrence, prevention, reformation, and retribution.

Accused 1

[33] The personal circumstances of the accused have been conveyed to the Court by his legal practitioner. The accused is now 26 years of age, at the time of offence being committed he was 24 years of age. He has been in custody for some two years eight months. He has neither

previous convictions nor pending cases. He is unmarried with twins aged 5 years old. He dropped out of school at Grade 7, and this was attributed to lack of financial resources to enable him to proceed to secondary education. He used to do general work and made an income of approximately US$150.00 per month. He has no assets of value and resides at his father's homestead. He is a first offender. Counsel emphasised that he is remorseful of having caused the death of the deceased. It is trite that where it is shown that the accused is remorseful this will be a factor to his benefit when the court considers an appropriate sentence. Again, in his favour the accused believed that he was pursuing robbers, and that the deceased was one of the robbers.

[34] This murder was horrific. It was executed with shocking brutality and cruelty against a defenceless person. The aggravating factors in the crime committed by the accused far outweighed his personal circumstances. In these circumstances, retribution and deterrence come to the fore and the appellant's personal circumstances recede to the background. The crime of murder is very prevalent. Murder is getting out of control. The society expects courts to pass sentences that should deter would-be criminals. In this particular case the moral blameworthiness of the accused 1 is acute, and the sentence must reflect this reality. However, the circumstances of this case permit a departure from the presumptive sentence provided for the Sentencing Guidelines.

Accused 2

[35] Again, the personal circumstances of this accused have been conveyed to the Court by his legal practitioner. The accused is now 23 years of age, at the time of offence being committed he was 21 years of age. He has been in custody for some two years seven months. He is not married and has a child aged 5 years old. He used to make a living by doing general work earning approximately US$100.00 per month. He dropped school at Grade 5. He has no assets of value. He is a first offender and he has always admitted that he assaulted the deceased. He is remorseful of having assaulted the deceased when he had already been fatally injured. He has been in pre-trial incarceration for 2 years and 7 months.

[19] This accused used a stick to assault the deceased who had already been fatally wounded. The deceased was already soaking in blood. Instead of assisting the wounded deceased, he inflicted more pain on him. In general, this kind of assault juxtaposed with the facts of this case

would warrant a sentence of direct imprisonment. However, this court takes into account that the accused has been in pre-trial incarceration for 2 years 7 months. It is for this reason that a sentence of direct imprisonment is not warranted and a wholly suspended sentence would not meet the justice of this case.

In the result the accused are sentenced as follows:

i. Accused is sentenced to 12 years imprisonment.

ii. Accused 2 is sentenced to 2 years wholly suspended for 5 years on condition the accused does not with that period commit an offence of which violence on the person of another is an element and of which upon conviction he is sentenced to imprisonment without the option of a fine.

National Prosecuting Authority State's legal practitioners
Liberty Mcijo & Associates accused's legal practitioners
Mathonsi Ncube Law Chamber accused 2's legal practitioners