THE STATE
versus
ZAPHANIA MUYAMBO

HIGH COURT OF ZIMBABWE
MWAYERA J
MUTARE, 4 and 13 June 2019 and 2, 8 and 31 July 2019

Criminal Trial

ASSESORS: 1. Mr Chipere
2. Mrs Mawoneke

J Chingwinyiso, for the State
P Nyakureba, for the Accused

MWAYERA J: The accused in this case pleaded not guilty to a charge of murder proffered by the State. It is alleged that on 14 October 2018 at Muyambo Homestead, Ukoto Village, Chief Musikavanhu, Chipinge, the accused unlawfully caused the death of Joel Muyambo by striking him on the head once with a log with an intention to kill him or realising that there was a real risk or possibility that his conduct might cause death and continued to engage in that conduct despite the risk or possibility. The accused was thus charged with murder as defined on s 47 1 (a) or (b) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*].

The accused's defence was basically that he only hit the deceased once after disarming the deceased of the log in question. According to the accused, the deceased indiscriminately assaulted him with a log over allegations of witchcraft which the deceased labelled against accused and his brother the deceased's father. In short, the accused raised the defence of self.

The brief facts forming the basis of the allegations are that the accused approached the deceased's homestead on 14 October 2018 and accused deceased of disrespecting, belittling and undermining his father Amos Muyambo. The accused slapped the deceased and was restrained by Shingai Simango who caused accused to go to his homestead. The accused later came back and continued the confrontation with the deceased. The accused was again restrained by one Caroline Mabangure who took him to his homestead. The accused returned to deceased's homestead and this time he struck the deceased with a log once on the head.

Immediately the deceased fell to the ground and he collapsed having lost consciousness and sustained injuries from which he passed on the following morning.

In this case, it is not in dispute that the accused struck the deceased with a log once on the head although accused argues that the log produced in court was not the one he used. It is also common cause that after the blow the deceased sustained injuries from which he passed on. The Post Mortem Report compiled by Doctor Stephen Mbiri who examined the remains of the deceased concluded that the cause of death was severe head injury secondary to assault. The Post Mortem Report was tendered as exh 1 by consent. The only issue that falls for determination is whether or not the accused had the intention to kill the deceased given the self-defence raised by the accused.

The State adduced evidence from 12 witnesses, 5 of whom had evidence formerly admitted in terms of s 314 of the Criminal Procedure and Evidence Act [*Chapter 9:06*]. The evidence of Marshall Chirume a teacher who ferried the deceased to the hospital before he passed on, and Fanuel Kutadza a nurse who attended to the now deceased was formerly admitted. Also admitted was evidence of Mica Jambaya a member of the neighbourhood watch committee who arrested the accused and handed him over to the police. Joseph Shumba the investigating officer's evidence was not contentious and thus formerly admitted. Also formerly admitted was the evidence of Edmore Faya an employee of Zimpost Checheche who weighed and measured the log and compiled a certificate tendered as exh 4 establishing weight as 3, 65kg and length as 1, 65 metres.

We must point out at this stage that this is a case which unnecessarily dragged on as the other 7 witnesses gave oral evidence even in circumstances where their evidence was on common cause aspects. The doctor for example examined the remains and concluded cause of death was severe head injury due to assault. The accused in his defence did not deny striking the deceased on the head once using a log even though he argued that the log was not the same one produced in court. The common cause aspect is he admitted using a log on the head and certainly a log is not a stick or switch. Injuries occurred from which deceased succumbed to death. The Doctor Stephen Mbiri gave his evidence well.

Shingai Simango's evidence was again on common cause aspects. He confirmed accused's version that on the day on question upon arrival at the deceased's homestead, the accused, accused the deceased of belittling and undermining his father. The accused slapped the accused once on the face and he was restrained by the witness who escorted him for about

50 metres towards his homestead. The witness's evidence was beyond reproach. His evidence was not contentious and could have been formerly admitted.

Wadzanai Muyambo's evidence was also on common cause aspects. Her evidence tallied on material aspects with that of Shingirai Simango and Etaso Muyambo. The whole fraca started with accused confronting deceased whom he accused of disrespecting, belittling and undermining the authority of his father one Amos Muyambo. The accused was restrained and he later returned. The accused was retrained by Shingirai Simango, Etaso Muyambo and Caroline Mabangure who escorted accused to his homestead. The witnesses Wadzanai Muyambo later heard Etaso Muyambo calling out that the accused had injured the deceased. Apparently the accused had returned and struck the deceased whom she observed lying unconscious on the ground while accused walked towards his homestead. The witness Wadzanai Muyambo's evidence was straight forward and not exaggerated as she confined herself to what she observed when outside the kitchen hut.

Etaso Muyambo gave *viva voce* evidence in a straight forward manner. She recounted how the accused struck the deceased with a stick and she then intervened. The accused dropped the switch and the two, that is accused and deceased pushed each other. Shortly thereafter Amos Muyambo arrived and immediately left to call Caroline Mabangure to assist in resolving the altercation. Caroline Mabangure an aunt to both accused and deceased came to restrain. Although she was visually challenged she was well known to the accused and deceased and was a respected elderly woman whom the accused also respected explaining why Amos Muyambo invited her to quell the altercation. The witness indeed quelled the altercation and took accused to his homestead. Shortly afterwards the accused broke out of his bedroom and went back to the scene.

The witness learnt moments later that accused had injured the accused as she heard Etaso Muyambo shout to that effect. She also went back to the scene and participated in rendering first aid to the deceased who was lying unconscious on the ground. There is nothing to criticise about the manner the witness testified. Her evidence tallied with the accused's evidence in so far as the fraca occurred and it tallied to a great extent with Etaso Muyambo's evidence in so far as accused was restrained but kept going back to the scene where he finally struck the deceased rendering him unconscious and occasioning the fatal blow.

Albert Homera a police detail who accompanied the investigating officer one Sergeant Joseph Shumba to the scene also gave oral evidence. He witnessed Etaso Muyambo identify a log used exh 2. He also witnessed accused making indications. The witness on being taken to

task on why more witnesses were not caused to give statements revealed that if people in the area Musikavanhu and Chisumbanje were reluctant to testify the police would not force them as the place was rampant and known for witchcraft. He was open and honest with the court that the superiors would summarise evidence in the way they best felt appropriate. The witness impressed the court as an honest young police officer who lacked sophistication and was bent on giving evidence as it is. His evidence actually made it clear that the summaries can just be on the tallying information leaving out part of the statements with differences. This however did not cloud the State case as evidence on the striking with a log was quite apparent and some witnesses gave oral evidence in court.

The evidence of all the State witnesses was generally straight forward and the credibility of the witness was quite apparent. We must comment that there were some difference in the testimonies of the State witness. However such discrepancies were immaterial given that Shingai Simango left the scene after the initial circumstances and he thought he had quelled the fraca accused having walked in the direction of his house. Wadzanai Muyambo was at the homestead when she witnessed the initial confrontation. After it was quelled she went indoors and was cooking only to be drawn to the scene by alarm raised by Etaso Muyambo that accused had injured the deceased. The witnsess Caroline Mabangure was only called to the scene after Amos Muaymbo had arrived after restraining the accused she went away only to come back after the screams from Elasto Muyambo alerting of the attack on deceased by the accused. The differences in details and narration are therefore understandable given the manner the scuffle ensued the intervention and breaks there to. The witnesses were not continuously in attendance and the fraca was not continuous without breaks upon intervention.

What is however clear, is that variations on witnesses versions do not taint the common cause aspect that the accused came to this homestead with an aim to discipline and or chastise the deceased who he accused of undermining and belittling him and his brother over allegations of witchcraft. That the accused proceeded to strike the deceased with a log on the head is not in dispute and it is the common thread running through the witnesses and accused's evidence. The minor discrepancies in the witnesses' version do not change the complexion of the matter. In the case of *S v Lawrence and Others* 1989 (2) ZLR 29 S, it was held:

> "…….discrepancies in a case must be of such a magnitude and value that they go to the root of that matter to such an extent that their presence would no doubt give a different complexion of the matter altogether."

See also *S v Wairosi* 2011 (1) ZLR 145 and *S v Dube* 1992 (2) ZLR 338. The summary

of the State case remains a precis based on deductions by the writer and minor variation in oral evidence cannot affect the credibility of witnesses who will be giving oral evidence truthfully as occurred in this case.

The defence seemed to take issue that more people gathered and that these ought to have been called to testify not relatives. We must comment that the fraca occurred in a domestic set up and most aspects are common cause. It was not necessary to summon the whole village given it is not in dispute that the accused struck the deceased once on the head. The accused person's confirmed warned and cautioned statement tallies with the State witnesses' version in so far as accused admitted assaulting the deceased as a way of disciplining him for belittling his father.

The confirmed warned and cautioned statement was adduced an evidence as exh 3 by consent. Also tendered as evidence is exh 5 the sketch plan depicting the general layout of the scene of crime per witness indications. Zaphania Muyambo and Etaso Muyambo indicated a log which they said was used to strike deceased. The witness's evidence when viewed with accused's own version that he used a log only confirms a log was used. It was not disputed there was a pile of logs for making a cattle pen at the campus in question. In the absence of accused producing the log he used while at the same time accepting he struck deceased with a log disputing the log tendered is really raising smoke without fire.

Turning to the accused as a witness, in the warned and cautioned statement the accused accepted assaulting or beating to instil discipline. In the defence outline and evidence in chief, the assault was modified to have been occasioned in self-defence. Further that, the deceased passed on because he was of thin skull. The lack of consistence in accused's version was also displayed in the cross examination of State witness. Even on common cause aspects the defence sought to challenge clear and straight forward evidence in a manner which exposed the accused as lacking genuiness.

We must mention that under cross-examination by the State counsel the accused buckled especially on the alleged injuries caused by the deceased whose attack he suggested he sought to defend himself from. First and foremost none of the State witnesses observed the drunk deceased threaten or assault the accused in any manner. If he had been attacked and had injuries he could have sought medical assistance. Firstly at St Peters Hospital where he followed up with money for deceased's treatments. Secondly when he appeared at court he could have mentioned the attack and injuries to the Magistrate during confirmation of warned and cautioned statement proceedings.

Exh 3 the warned and cautioned statement is devoid of mention of any injuries. Thirdly the accused could have been attended to at prisons. Checks made with Chipinge Prison for the medical records at the behest of the defence were to no avail. Despite saying he was attended to by nurses none of those were called to testify. All this given the evidence on record gives doubt to the accused's defence of self-defence. The defence which was only alluded to in defence outline appears to be an after thought to mislead the court. This is for the obvious reasons that the defence of self-defence is a complete defence, on a charge of murder as provided for in s 253 (1) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*].

However the defence can only be successfully raised if there is an unlawful attack or imminent attack and that the conduct engaged in is necessary to avert the unlawful attack and that the means used to avert the unlawful attack were reasonable in the circumstances and that only harm or injury caused was on the attacker and not grossly disproportionate to the harm averted. The requirements have to be all met in order for the defence of self-defence to succeed. See *S v Cecilia Mutemi* HH 729/16, *S v Moses Saunyama* HH 581/17.

In the present case there is no evidence that the accused was under attack from the deceased at all. He therefore cannot even begin to motivate the defence of self-defence as there was no unlawful attack on him. Even if we were to stretch imagination and accept that deceased who was drunk and confronted unexpectedly by accused armed himself with a log. The accused himself testified that he snatched the log and disarmed the deceased. This meant the accused's life was no longer in danger and thus there was no reason to aim the blow on deceased's head as occurred. The accused could have easily made good his escape. The requirement of self-defence cannot be met. In any event given the clear evidence of the State witness that the accused was the aggressor who approached and assaulted the deceased, there is no need to entertain the afterthought defence raised as a mere gamble to try luck. The defence crumbles as it cannot even be suggested in the absence of an unlawful attack.

In his defence the accused alluded to the deceased being of thin skull. Other than the allusion, there is no substantiation on the impact of the alluded thin skull. There was no evidence placed before the court to establish that the deceased had some exceptional physical peculiarities which led to his death from a blow which might not have resulted in death had the deceased not have such physical peculiarities. We make an observation that use of a log on the head causing immediate fall and unconsciousness cannot be said to be use of minimal but severe force. The thin skull rule as articulated in the Zimbabwean criminal law context is not vague and ambiguous.

It is clear the accused ought to take his victim as he is. That an accused who intentionally assaults his victim by striking him with a moderate blow does not necessarily escape liability. If death would not have resulted save for some exceptional physical peculiarity of his victim, such as eggshell skull or weak heart. See *R v Dikuni* 1940 SR 19, *R v Mara* 1965 RLR 494, *Chirau and Others* 17 180/78, *S v John* 1969 (2) RLR 23 and A Guide to Criminal Law of Zimbabwe. Professor G. Feltoe p 88 2nd ed aptly articulates the principle of thin skull Rule. In the present cases in the absence of medical evidence the court is being requested to semise and speculate that maybe the deceased died because he had a thin skull.

On the contrary given the evidence of aggression by the unrelenting accused and the use of a log to strike the head one cannot fail to detect intention. The comments by MALAN J in *S v Mlambo* 1957 (4) SA at 737 D-E are pertinent and ring true. In the circumstances of this case he stated:

> "….. if any assault is committed on a person which caused death either in ostentatiously or within a very short time thereafter….A court will be fully justified in drawing the inference that it was of such an aggravated nature that the assailants knew or ought to have known death might result."

These remarks were also cited with approval. In *S v Charles Mugwachari and Others* HH 119/85 at p 10. In the present case the deceased after being struck with a log on the head fell unconscious and he never recovered as he was pronounced dead in the morning. There was no break between the attack by the accused and the subsequent death. In fact it is common cause that the accused struck the deceased once with a log per his own admission even mentioned in the defence outline and as per evidence from the bulk of the State witnesses who were at the scene. The denial of the log tendered as exh and qualified caution of smaller log having been used in clear departure from defence outline does not break the causal link.

The conduct of the accused of striking the deceased was the factual and legal cause of death as established by evidence. What is left to be determined is given the essential elements of the charge of murder accused faces what is the nature and degree of liability. In other words the question is whether or not with evidence placed before the court the State has proved murder with actual intention or murder with legal/constructive intention.

In the case of *S v Mugwanda* 2002 (1) ZLR 57 the Supreme Court ably described what constitutes actual intention were it stated:

> "…..for a court to return a verdict of murder with actual intent the court must be satisfied beyond reasonable doubt that:
> 1. the accused desired to bring about death of his victim and succeeded in completing that purpose, or

2. that while pursuing another objective, the accused foresaw the death of his victim as a substantially certain result of that activity and proceeded regardless."

See also *S v Lloyd Mukukuzi and Another* HH 577/17 in which the court commented on intention as follows:

> "It is the reckless disregard of the risk associated with their conduct which provides necessary *mens rea* in the case of specific intent crime like murder."

In the present case the accused set out to discipline the deceased for disrespecting and belittling him and his father by referring to them as wizards. Whatever the cause of the disrespect it was because of that perceived disrespect or belittling conduct that the deceased was struck with a log on the head and he fell to the ground unconscious with the eventual result being his death.

In the case of *S v Mema* HB 143/13 the court in dealing with *mens rea* in a murder charge spelt out that the nature of weapon used, the manner in which it was used and the part of the body which the weapon was directed are factors that are relevant to consider in establishing whether the accused had the intention to commit the crime. HUNGWE J (as he then was). In the *State v Lovmeore Kurangana* HH 267/17 commenting on intention remarked as follows:

> "Murder consists of unlawful not intentional killing of another human being. Where there is no expression of such an intent the law can infer such an intention from the accused's conduct and circumstances surrounding the commission of the offence and conclude that such intent existed in the accused's mind." (Underlining my emphasis.)

In this case the accused struck the deceased with a log on the head in circumstances where he could not have failed to realise the real risk attendant in striking the deceased on the head. The conduct was potentially pregnant with danger that death may occur. The evidence presented before the court by the State and defence clearly points out that the accused struck the deceased once on the head to discipline a chastise. In circumstances were given the nature of weapon used and the part of the body to which it was directed the head, intention can easily be detected resulting in the fatal consequence shortly afterwards.

The accused realised that by striking the deceased in that manner, there was a real risk or possibility of death occurring but notwithstanding the realisation, he continued to engage in the conduct culminating in the death of the deceased. Death was substantially certain in the circumstances.

The accused is accordingly found guilty of murder as defined in s 47 (1) (a) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*].

Sentence

In assessing sentence we have considered all mitigatory and aggravatory factors submitted by *Mr Nyakureba* and *Mr Chingwinyiso* respectively. It has been noted that the accused is a first offender, a family man with 2 wives and 13 children. The accused is the sole breadwinner and indeed the family will suffer during his absence. We have also taken note of the fact that the accused suffered pre-trial incarceration for about 10 months. The trauma that goes with anxiety of having a murder charge hanging on one's head cannot be ignored.

Further in mitigation is the fact that the accused murdered his own blood brother's son. Customarily he murdered his own flesh and blood. He will live all his life with the stigma that attaches to killing his own.

However clearly as observed by the State counsel, no discipline can be instilled by striking a 20 year old young man with a log on the head. The accused behaved in an aggressive and unrelenting manner when he struck the deceased with a lethal weapon on the head.

The murder was callous and most cruel given a number of people tried to restrain the accused to no avail. The accused's conduct on the day in question is deplorable. He robbed a young man of his life at a tender age for no cogent reason. If the deceased was ill mannered undermining his father's authority and even that of the accused there are civil manners of resolving disputes as opposed to violence.

In this case the violence occasioned death and courts have to show their abhorrence by passing severe sentence. Deterrence is called for not only to deter accused but like-minded people. We will not ignore that most of the State witnesses who testified actually labelled the deceased as a well-mannered young man. The question then is why was he robbed of his God given and constitutionally enshrined right to life?

The accused when he testified did not show any signs of regret or remorse such conduct only confirms he deserves to be removed from circulation in the society. The offence is deserving of a custodial sentence. As we pass sentence we are alive to the fact that the fatal blow was one and thus not protracted. It is with these factors in mind and having considered the nature of offence, the offender and interest of justice while at the same time tempering justice with mercy that an appropriate imprisonment sentence is imposed as follows:

19 years imprisonment.

National Prosecuting Authority, State's legal practitioners
Maunga, Maanda & Associates, Respondent's legal practitioners