

THE STATE

Versus

THEMBINKOSI DUBE

IN THE HIGH COURT OF ZIMBABWE
BERE J with Assessors Mr F. Dube and Mr T.E. Ndlovu
HWANGE CIRCUIT COURT 8 & 9 MARCH 2016

Criminal Trial

Miss N. Munsaka for the state
E. Mashindi for the accused

BERE J: Thembinkosi Dube (the accused) pleaded not guilty to the charge of murder as defined in s 47 (1) of the Criminal Law (Codification and Reform) Act [Chapter 9:23]. The state's allegations are that on the 23rd of April 2015 the accused murdered Rabson Tshuma (the deceased).

The facts in this case which are not in dispute can be summarised as follows: On the fateful day the accused, the deceased and other villagers were drinking home-made beer at Alvinah Nyoni's homestead in Janke Village in Lupane. During the course of the drinking the accused and the deceased were dancing to some music played from the radio. The beer drinking and the merrymaking started in the morning and spilled over to early evening around 18:00 hours.

Without any prior warning the accused armed himself with a pestle weighing 2 800 grams and used it to strike the deceased twice on the head. The post mortem report (exhibit 2) noted that the deceased suffered multiple skull fractures with multiple bone fragments. The same report concludes that the cause of death was (1) severe cerebral damage; (2) multiple skull fractures with multiple bone fractures; and (3) severe head trauma due to beating injury.

The two pestle or log blows delivered by the accused were so strong that they claimed the deceased's life on the spot. An attempt to resuscitate his life through rudimentary first aid was not helpful at all.

In denying the allegations of murder the accused raised self-defence as his dominant defence and went on to feebly attempt to raise the defence of intoxication.

Before making a detailed analysis of the evidence in this case I propose to deal first with the requirements of the two defences raised by the accused person. Our codified law as provided in section 253 of the Code¹ does recognize that in a proper case the defence of self defence can be a complete defence if successfully pleaded. The section is framed as follows:

“253. Requirements for defence of person to be a complete defence

- (1) subject to this part, the fact that a person accused of a crime was defending himself or herself or another person against an unlawful attack when he or she did not omit to do anything which is an essential element of the crime shall be a complete defence to the charge if –
 - (a) when he or she did not omit to do the thing, the unlawful attack had commenced or was imminent or he or she believed on reasonable grounds that the unlawful attack had commenced or was imminent, and
 - (b) his or her conduct was necessary to avert the unlawful attack and he or she could not otherwise escape from or avert the attack or he or she, believed on reasonable grounds that his or her conduct was necessary to avert the unlawful attack and that he or she could not otherwise escape from or avert the attack and
 - (c) the means he or she used to avert the unlawful were reasonable in all the circumstances; and
 - (d) any harm or injury caused by his or her conduct –
 - (i) was caused to the attacker and not to any innocent third party; and
 - (ii) was that grossly disproportionate to that liable to be caused by the unlawful attack.

- (2) In determining whether or not the requirements specified in subsection (1) have been satisfied in any case, the court shall take due account of the circumstances in which the accused found himself or herself, including any knowledge or capability he or she may have had and any stress or fear that may have been operating on his or her mind.”

Section 221 of the same code does not recognize voluntary intoxication as a defence to crimes like murder which require proof of intention. This is so where despite intoxication, the accused retains the requisite intention to commit the crime charged. Such voluntary intoxication, if established can only be considered as mitigatory after conviction. Section 222 of the same Code does not render voluntary intoxication a full defence even in circumstances where such intoxication rendered an accused incapable of forming the requisite intention for the offence charged which factor does not arise in this case because the evidence suggests the accused was in full control of his faculties throughout.

It is with the above legal position in mind that the evidence led by both the state and the defence has to be analysed.

The evidence and its analysis

In its quest to secure the conviction of the accused person the state relied on the evidence as recorded in its summary of the following witness: Mthokozisi Ncube, Alvina Ncube, Absalom Sibanda and Doctor Roberto Trecu as well as the *viva voce* evidence of Trust Ncube and Phosiwe Nyoni.

The evidence of Trust Ncube and Phosiwe Nyoni was particularly revealing in that it was able to counter beyond any reasonable doubt the alleged threats against the accused person by the deceased as put forward by the accused person. Both witnesses who had been drinking beer with the accused and the deceased during the day did not witness any altercation or any exchange of words between the deceased and the accused throughout the day. Trust who stayed on until the deceased was fatally struck did not hear of any conflict between the deceased and the accused. Both witnesses testified that if there had been a conflict or misunderstanding as the accused desperately tried to project, they could not have missed it.

The two state witnesses projected themselves as simple villagers who had no interest in this case other than telling the story as they saw it. To add to their credibility, none of them claimed to have seen the deceased being struck. They both testified to the thudding sound and seeing the deceased floored and helpless and immediately seeing the accused fleeing from the scene. The accused confirmed what the two witnesses testified to. There can be no credibility that goes beyond the one that coloured the evidence of these two witnesses. Their evidence ought to be accepted in its entirety.

The accused's testimony amounted to falling on his own sword. His evidence confirmed that he was not under attack by the accused. Not only this but his evidence confirmed that at the time he decided to attack the deceased, he had to walk for close to 20 metres to collect the murder weapon which he, in typical ambush fashion used to strike the deceased, not once but twice on the deceased's head, a very delicate part of a human body.

The accused accepted in his own testimony that he made sure he attacked the deceased after ensuring that he was not aware of the strike.

The accused's detailed and accurate narration of events did not give room to any suggestion that he was drunk to the extent of not being able to be in full control of his faculties. His evidence showed he clearly knew what he was doing and his every move was intelligently calculated.

The pre-meditation to strike the deceased is there for all to see. The attack on the unsuspecting deceased was well calculated and was carried out with devastating consequences on the deceased.

It is clearly established that at the time the accused delivered the two decisive blows on the deceased, the deceased was drinking beer and was posing no threat to the accused. The double striking was never meant to punish but to end the deceased's life and indeed the objective was realised with distinction.

The accused's running away from the scene is not without significance. It simply means that the accused appreciated that he had completed his mission, to kill the deceased. The crushing of the deceased's head as per post mortem report confirms this.

In such circumstances it would be idle thinking for the court not to find that the accused's prime intention was to kill the deceased. Counsel for the accused must be commended for making the concessions he made in court addresses. He correctly read the evidence. It is the proposed verdict that the court differs from him. Accused's counsel spoke in favour of a verdict of murder with constructive intent. I disagree.

The evidence as accepted gives no room to no any other verdict rather than an intention to kill. The accused is accordingly found guilty of murder with actual intent.

Sentence

In sentencing the accused person we will accept that despite the seriousness of the attack itself this murder was not committed in aggravating circumstances as perceived by this court.

We will accept as mitigatory that there is overwhelming evidence in this case which suggests that prior to the deceased's murder, the accused had been drinking home brewed beer and that he had done so for a considerable length of time.

In favour of the accused person we will accept that he has up until now lived a clean life. This is his first collision with the law although he has unfortunately started at the deeper end.

The accused is 36 years old and has the usual heavy family responsibilities, 3 children and a wife to look after, and from the look of it he is supposed to be the sole bread-winner.

In aggravation the court is concerned at the manner in which this offence was committed. It is made worse in that there was pre-meditation. The accused appeared to have kept vigil on his victim by sporadically dancing to the music with the deceased whilst he was waiting for the most opportune moment to strike.

The conduct of the accused made life look so cheap. Human life should never be made to look this cheap. It is sacred and must be respected.

Given the type of sentence that we intend to met out in this case it still gives the accused some hope of being reunited with his family some day. Unfortunately, the same cannot be said of the deceased. The deceased's family and relatives must permanently stay with the painful and harsh reality that they will never be physically united with the deceased.

We believe the accused must be removed from society for a considerable length of time. It is our hope that upon his return he would have undergone some reformation that allows him to be further integrated into society and be a worth member of society.

Sentence: 30 years imprisonment

Prosecutor General's Office, state's legal practitioners
Mashindi & Partners, accused's legal practitioners