THE STATE

Versus

MEMBER NYATHI

And

BRUCE NGWENYA

IN THE HIGH COURT OF ZIMBABWE
MANGOTA J with Assessors Mr Mashingayidze & Mr Sobantu
BULAWAYO 18 JUNE 2024 & 13 & 27 SEPTEMBER 2024

Criminal Trial

Ms C. Mabhena for the State
S. Mguni for 1st accused
T. T. Khumalo for 2nd accused

MANGOTA J

The accused persons are charged with the crime of murder. The allegations against them are that at 7.30 pm of 30 March, 2023 and at the homestead of one Robert Maphosa, Tjewondo Village in Maphisa, Kezi, they assaulted Robert Maphosa and, in the process, killed or caused the death of, Robert Maphosa ("the deceased"). They allegedly struck the deceased once on the left side of his chin, once on the left ear, once on the back of his head and once on the right side of his head. The claim of the State is that, when the accused assaulted the deceased in the manner described, they intended to kill or cause the death of their victim. It asserts that, in assaulting the deceased as they did, they realized a real risk or possibility that their conduct may result in the death of the deceased and, their realization of the real risk or possibility notwithstanding, they persisted with their unlawful conduct.

The accused pleaded not guilty to the charge of murder. They challenged the State to prove its case against them. The first accused raises the defence of the self. He states that he arrived at his home in the evening of 30 March, 2023 from Maphisa where he works as a gold miner and found his wife not at home. He claims that he found accused 2 who works for him at his home with his minor children. He asserts that he left his home in the company of accused 2 who was going to his home as he went to the grazing land to look for his cattle. He states that, on their

way to the grazing lands, they passed through the deceased's home where he found the deceased sitting outside his hut with his wife who, on seeing accused 2 and him approaching, took to her heels. The deceased charged at accused 2 and him wielding an axe with which he struck him on his collar bone forcing the accused to fall to the ground, according to him. He alleges that accused 2 intervened and disarmed the deceased and, in the scuffle which ensued between accused 2 and the deceased, the second accused injured the deceased. He claims that accused 2 and him returned to his home having abandoned his mission to go and round up the cattle. He states that the deceased followed him to his home insisting that the accused should kill him. He alleges that the deceased's clothes were blood-stained and the deceased, he claims, fell down and became unconscious. He states that accused 2 and him took the deceased out of his homestead to a place where they extract pit sand. He claims that they left him there as they went to inform the neighbourhood watch police of what had occurred. He states that, on their return with the neighbourhood watch police, they found the deceased dead. He prays that he be acquitted of murder and be found guilty of culpable homicide.

Like his co-accused, accused 2 prays that he be acquitted of murder and be convicted of culpable homicide. The first part of his defence outline is, in substance, on all fours with that of the first accused. He admits that on the date in question he was at accused 1's homestead. He states that, when accused 1 arrived, he notified him of his intention to leave to go to his own homestead. It is his testimony that accused 1 accompanied him saying he was going to the grazing lands to round up his cattle. He alleges that his home is in the direction of the grazing lands. He claims that, as they passed by the homestead of the deceased, they saw the deceased sited outside with the wife of the first accused. He claims that accused 1 entered the premises of the deceased and he remained outside of the same as accused 1 inquired from the deceased why the latter person was with his wife. The accused's wife ran away, according to him. He alleges that the deceased ran into his kitchen hut from where he emerged and approached the first accused with the result that a scuffle ensued between accused 1 and the deceased. He claims that, in a flash of a moment, he saw the first accused lying down holding his left shoulder. He states that he got into the premises of the deceased in a bid to stop the scuffle. He claims that when the deceased saw him, the deceased left the first accused and charged at him. He asserts that he picked up a log which was nearby and assaulted the deceased with it. It is his testimony that accused 1 got onto his feet, ran to the deceased and snatched the axe from him and assaulted the latter person with the back of the axe. He states that they left the deceased

at his homestead, discontinued their journey and returned to the first accused's home. He claims that a while later, the deceased arrived at accused 1's home shouting insults. He states that the first accused went out of his kitchen and he remained in the same. He alleges that he does not know what transpired between accused 1 and the deceased. He states that accused 1 told him that the deceased had fallen down and was unconscious. It is his testimony that accused 1 requested him to assist him to carry the deceased out of his homestead and he complied. He states that accused 1 and him decided to notify the police about the incident. He claims that he left going to his own home from where he was arrested on the morning of the following day and charged with the crime of murder of the deceased. He alleges that he acted in defence of accused 1 when he struck the deceased with the log.

In its ordinary layman's language, murder is the act of one person killing another person. It is not present where a person kills an animal which is not a human being. As a crime, murder more often than not manifests itself in the application of force by one person upon the person of another. The application of force must be prohibited by law. For the crime of murder to be complete, the person who applies force upon another person must intend to kill, or cause the death of, his victim. Where the intention to kill or to cause death is absent, the elements of the crime of murder are not satisfied and the assailant cannot be convicted of murder. He may be convicted of some such crime as is a competent verdict on a charge of murder, if he (includes she) is not acquitted of the crime.

The above-described set of circumstances are appropriately described in Section 47 of the Criminal Law Codification and Reform Act (Chapter 9:23). The section defines the crime of murder in a clear and succinct manner. It reads:

"(1) Any person who causes the death of another person-

a) *intending to kill the other person; or*
b) *realizing that there is a real risk or possibility that his or her conduct may cause death, and continues to engage in that conduct despite the real risk or possibility, shall be guilty of murder".*

A reading of the foregoing definition shows that, for a person who kills another person to be convicted of murder, he (includes she) must have assaulted his victim, in the majority of cases, with a considerable degree of force and with the requisite intention to kill, or to cause the death of, the latter. He must, in short, have the requisite *actus reus* which is accompanied by the

requisite *mens rea* respectively. Where one of the stated two elements is not present, the crime of murder cannot be sustained. Another crime which may be born out of murder, depending on the evidence which is adduced, may be found to exist.

Having defined the crime of murder as we have done, our next port of call is to consider the circumstances of the accused persons and ascertain whether or not they killed the deceased. In our consideration of such circumstances, we remain alive to the fact that the duty to prove the guilt of the accused persons lies on no one else but on the State. The duty in question is *in sync* with such decided case authorities as *R* v *Difford,* 1937 AD 370 at 373 and *S* v *Mapfumo & Ors,* 1983 (1) ZLR 250. These and many others in which the principle which relates to the *onus* of proof was appropriately enunciated ride on the learned writings of Van Der Linden's *Institutes of Holland,* 3rd edition, page 155 as well as on many learned works of other text book authors of law of ancient times.

The obvious fact which we state in this part of the judgment is that it is not on the accused, but on the prosecution, that the *onus* of proof rests. As the court was pleased to remark in *S* v *Kuiper,* 2000 (1) ZLR 113 (S) at 118 C:

"…no onus rests on the accused to convince the court of the truth of any explanation he gives. If he gives an explanation, even if that explanation is improbable, the court is not entitled to convict unless it is satisfied, not only that the explanation is improbable, but that beyond reasonable doubt it is false."

It is on the strength of its need to prove its case against the accused persons that the State lined up six (6) witnesses and produced three (3) exhibits in its effort to establish its case. It, in fact, produced the following exhibits which, in its view, support the guilt of the accused persons:

i) the post-mortem report which relates to the cause of death of the deceased;
ii) the first accused person's confirmed warned and cautioned statement – and
iii) the second accused person's confirmed warned and cautioned statement.

We marked those documents exhibits 1, 2 and 3 respectively. It led evidence, in the order which is stated herein, from five (5), of its six (6), witnesses. These comprise one Peter Dube who, at the time, was a member of the neighbourhood watch committee, one Sincengani Mpofu, a member of the Zimbabwe Republic Police who received the report of the death of the deceased, one Betty Tshuma who allegedly heard the deceased crying out for help from his home, one

Matthew Ncube, the deceased's brother, one Ishmael Ndebele, a member of the Zimbabwe Republic Police who was stationed at Maphisa Police Station at the time of the alleged offence. He exhumed the body of the deceased from a shallow grave which was in the field of the first accuse and a Dr Sanganai Pesanayi who, at our invitation, took the stand to shed light on the contents of the post-mortem report.

That the deceased was in the best of his health prior to the date that he met his death requires little, if any, debate. The contents of the post-mortem report, exhibit 1, speak to an equal effect. Apart from the wounds which were effected mostly on his head, every part of his person was normal. He was 68 years old and weighed 65 kilograms. The report shows that he was assaulted with an axe and he died of subarachnoid haemorrhage and chop wounds.

The question which begs the answer is: who effected the chop wounds upon the deceased. The narrative of the State is that the accused persons did effect the same. They, on their part, deny having ever assaulted the deceased let alone with an axe.

None of the witnesses of the prosecution testified to the effect that he or she saw the accused persons assaulting the deceased. The State therefore proceeded to prove its case by way of circumstantial, as opposed to direct, evidence. Proof of a matter through circumstantial evidence is acceptable in the law of evidence not only in our jurisdiction but also the world over. The court eloquently enunciated this form of proof of a matter in *Mayanga* v *The State,* HH-79-13 wherein it remarked that:

" Where a case rests upon circumstantial evidence, such evidence must satisfy the following test:

i) the circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established;

ii) those circumstances shall be of a definite tendency unerringly pointing towards the guilt of the accused;

iii) the circumstances, taken cumulatively, should form a chain so complete that there is no escape from the conclusion that, within all human probability, the crime was committed by the accused and no one else- and

iv) the circumstantial evidence must be complete and incapable of explanation by any other hypothesis than that of the guilt of the accused and such evidence should not

only be consistent with the guilt of the accused but should be inconsistent with his innocence".

On a proper application of the above-mentioned test to the circumstances of the present case, we observe that the accused persons make a partial admission of the assault of the deceased. They do so when they move us to find them not guilty of murder but guilty of culpable homicide. They cannot plead guilty to culpable homicide if they did not assault the deceased. By pleading guilty to the lesser offence of culpable homicide, the accused persons are, in effect admitting the element of the unlawful act which, in the legal parlance, is known as the *actus reus* and are denying the *mens rea* aspect of the case.

It is common cause that both of them went to the home of the deceased on the date that the latter person died. They called at the home of the deceased for a variety of reasons, according to them. The first accused was going to round his cattle from the grazing lands, so he asserts. The second accused person was going to his home, so he asserts as well. However, they somehow happen to have passed through the home of the deceased where they allege that they found the wife of the first accused sitting outside the hut of the deceased with the latter person and she, at their sight, took to her heels leaving the deceased challenging the first accused whom he (the deceased) assaulted as a result of which the second accused intervened to defend him. He, on his part, claims that he did not assault the deceased at all. If he did not do so, as he would have us believe, the question which remains without an answer is why is he pleading guilty to culpable homicide as he is doing. The answer to the same remains a matter for conjecture. He, on his part, does not explain the meaning and import of the alternative plea which he has tendered. Nor does he explain what he means when he states, as he is doing, that he was acting in defence of the self.

That the defences of the accused persons exhibit some signs of a rehearsed story is evident from what the second accused states. He claims that, when they came to the home of the deceased, he remained outside the premises as the first accused entered to inquire as to why the deceased was in the company of his wife. He states, further, that when he saw the first accused who was having a scuffle with the deceased lying down holding his left shoulder, he entered the deceased's premises with a view to stopping the scuffle whereupon the deceased charged at him. He claims that he picked a log which was nearby and assaulted the deceased with it. It is his testimony that, when he assaulted the deceased with the log, the first accused

got onto his feet, ran to the deceased from whom he snatched the axe which he was holding and assaulted the deceased with the back of it. He, in the process, ties the first accused to the assault of the deceased. The first accused states that he was the victim of the deceased. He, on his part, did not touch the deceased, according to him.

It is evident, from the averments of the second accused, that the first accused was lying when he stated that he did not assault the deceased. He assaulted the deceased with the back of the axe, according to the testimony of the second accused. Both accused persons therefore assaulted the deceased as a matter of fact. Accused 1 assaulted him with the back of the axe and accused 2 assaulted him with the log. Their assault of the deceased rhymes with the evidence of Betty Tshuma who states that she heard the deceased crying out for help from his home. The stated matter shows that the assault of the deceased took place nowhere else but at the latter's home. It is from the same home that witnesses who attended to the scene of crime state that they observed the drag trail and blood from the deceased's home to the field of the first accused from where his body was found lying in a shallow grave. All witnesses for the prosecution corroborate each other's evidence on this vital point.

When the above-observed fact is taken together with the accused persons' plea to the lesser charge of culpable homicide, the effort which both of them made to conceal the fact that they killed the deceased with the requisite *mens rea* to murder the latter person becomes irresistible. The fact of the matter is that they both realized that if they admit that they assaulted their victim with the axe, the case of the State would be easier said than done. They, therefore, rehearsed their story so that it would remain in *sync* with the offence of culpable homicide as opposed to that of murder. The statement which they make which is to the effect that they returned to the first accused person's home and the deceased followed them to that home is, in our view, a clearly made up story. The correct position of the matter is that they dealt some fatal blows onto their victim and, with the intention to conceal the incriminating evidence, they dragged him into the field of the first accused where they buried him in a shallow grave from where his remains were later recovered by members of the Zimbabwe Republic Police assisted by members of the neighbourhood watch committee.

The accused persons were careful not to reveal the part of the body of the deceased where they directed their blows. All they said was that one of them assaulted him with the back of the axe and the other one assaulted him with the log. They remained alive to the fact that if they told

us that they directed their blows on to the head of the deceased, their plea of guilty to culpable homicide would not hold. They, therefore, left it to the State to prove that matter and it did so to our satisfaction. It proved, through the contents of the medical report, that they directed their blows onto the head of the deceased.

The warned and cautioned statements which each accused made after the event speak volumes of the assault which each one of them effected upon the deceased on the date that the latter met his death. The statements were confirmed by the magistrate on 22 June, 2023. The first accused person states in the same as follows:

"My name is Member Nyathi. I admit the charges (sic) of killing Robert Maphosa. I axed Robert Maphosa twice with the back of the axe on the head after he had fallen in love with my wife. After I axed him, I then carried him from his homestead and proceeded to bury him at my fields. I washed the clothes I was wearing to remove some blood. I also cleaned the axe and went back home and I placed it in the kitchen hut".

The second accused person states in his confirmed warned and cautioned statement as follows:

"My name is Bruce Ngwenya. I admit the charge of killing Robert Maphosa. I had an agreement with Nyathi Member to go and apprehend Robert Maphosa who was in a love affair with his wife. Upon my arrival at Robert Maphosa's homestead, Nyathi Member immediately axed Robert Maphosa with the back of an axe on the head and he fell to the ground. I also axed him twice on the head. I assisted Member Nyathi to carry the deceased and buried him inside Member Nyathi's field."

It is clear from the contents of the statements, exhibits 2 and 3, that the deceased was never aggressive to the one or the other or both of the accused persons. They assaulted him and he did not retaliate, it would appear. They offered him no chance to retaliate, so to speak. They went to his home with the resolve to deal with him for having allegedly been in an affair with the wife of the first accused. It is a lie for them to tell us, as they are doing, that the first accused was going to round up his cattle from the grazing lands or that the second accused was going to his own home when he and the first accused left the latter's home. If that was their mission, as they claim, they do not explain what caused them to abandon their respective missions as they appear to have done. The unbroken chain of evidence which connects them to the crime of murder is that they:

i) planned to go to the deceased's home with the specific intention to assault him;
ii) proceeded to the deceased's home armed with an axe or axes;
iii) using the axe or axes, assaulted the deceased and killed him in the process - and
iv) dragged the deceased to the first accused's field where they buried him in a shallow grave.

There is no evidence which shows that the deceased assaulted the one or the other or both of the accused as they would have us believe. The alleged self-defence which the first accused raises or the alleged defence of the first accused by the second accused as stated by the latter is an after-thought on the part of the accused persons. None of them mentioned the issue of having acted in defence of the self or defence of the other in their confirmed warned and cautioned statements. All the witnesses for the prosecution stated, in evidence, that the accused persons told them that they killed the deceased for having had an affair with the wife of the first accused. They cannot, in earnest, claim that they were not appreciative of what was happening when their warned and cautioned statement were being confirmed by the magistrate. The elaborate manner in which proceedings which relate to confirmation of statements of accused persons by the court is conducted- the questions of the court to the accused and the latter's responses to such- leaves no one in doubt that the accused persons made the statements which are the subject of confirmation proceedings freely and voluntarily.

The accused realize that the deceased cannot be resurrected from the dead and be made to return to planet earth to come and tell his own side of what happened to him at their hands. They therefore crafted a story which they hoped would see them off the hook, so to speak. The cracks which are inherent in the story which they crafted, unfortunately for them, cannot hold. They made every effort to tell lies as a way of warding off the blows which the prosecution was mounting against them.

The lies which the accused persons told only serve but to dent their own side of the case. They made every effort to patch up what they thought is a coherent story. The more they did so, the more fissures continued to emerge from the effort which they were making. Theirs was/is a cold-blooded murder which no one will condone let alone accept. Their attempt to challenge the confirmed warned and cautioned statements only serves to show the resolve which they intended. The resolve was to put the State to the strict proof of the allegations which it had preferred against them.

The State, it is our view, discharged the *onus* which rests upon it. It proved the guilt of each accused person beyond reasonable doubt. The accused persons are, in the result, found guilty of the crime of murder as charged.

27 SEPTEMBER 2024

SENTENCE

Assessing an appropriate punishment to impose on an accused person who has been convicted of a crime is the most difficult part of a judicial officer's work. He (includes she) has to perform a balancing act. He has to balance the factors which favour the accused and those which militate against him. He, in short, has to consider what weighs in his favour as measured against the interests of justice as viewed by society at large. He has to strike a balance between those competing interests and, in the process, arrive at a decision which is appropriate to the accused, society as represented by the State and the administration of justice as a whole.

It is in the mentioned spirit that we proceed to assess an appropriate sentence which we shall impose on the accused persons who are before us. They stand convicted of murder. The first accused has maintained an unblemished record for 61 years running to date. The second accused has remained and lived a crime-free life for 26 years. He is, however, in the twilight of his life. Both accused persons are, therefore, first offenders and family men. The first accused lost his younger wife as a result of the offence. She deserted him leaving her minor children without anyone who looks after them. The second accused has four minor children all of whom depend upon him for their livelihood.

It is always difficult for minor children who, through no fault of their own, find themselves in such difficult circumstances which they have to go through when those to whom they look up to for support decide to do the unthinkable and are, as a result, are committed to gaol. Innocent souls whom the culprit freely and voluntarily brought to planet earth, more often than not, suffer for the sins of the one who brings bread onto their table. It is, accordingly, pertinent for any potential offender to consider this sad reality before he makes up his mind to commit crime.

We note that the first accused person operated a gold mining project the operations of which appear to have ceased because of his incarceration. All those who worked for him and their families suffered the same fate as did the accused persons' minor children. All these persons are, in one way or the other, rendered destitute because of the accused's single act.

It is gratifying to learn that the accused persons regret their unwholesome conduct. We observe that they have been awaiting-trial-prisoners for sixteen (16) consecutive months. We accept that they so waited for this day not out of their own fault. They waited because the system of justice delivery failed them. It could, and should, have dealt with them a lot earlier than it did. The trauma which hanged over the head of each one of them as they waited for the day of reckoning cannot be understated. It is very real and very difficult to fathom for them. The trauma which they went through extends to the post- sentencing stage. All these matters weigh in their favour.

The second accused person, as counsel for him correctly submits, showed immaturity when he involved himself in a matter which was none of his business. As one who was working for the first accused, he would have drawn a line between his work and the affairs of the first accused with the deceased. He would have told the first accused to sort out his misunderstanding with the deceased without his involvement. He does not state that the first accused coerced him into assisting him to assault the deceased as he did. He freely and voluntarily took it upon himself to commit the crime. He associated himself with the resolve of the first accused person. He had nothing to gain from assisting his employer in the manner that he did. His decision to assist adversely affects his young family in a most unfortunate, but very terrible, way.

Whilst the accused persons waited for this day for sixteen (16) months, they, to some extent, are the authors of their own fate. They denied the offence which they knew they had committed. Nothing prevented them from pleading guilty to the crime and have the same done with far much earlier than it has occurred. That notwithstanding, however, it is their right to deny the offence and the duty of the State to prove their guilt. This the State did to our satisfaction. It satisfied us that the two accused persons acted with a common purpose when they assaulted and killed the deceased.

Both accused persons accept the fact that they cannot get anything other than a term of imprisonment each for the crime which they committed. We agree with them on the stated matter. The question which remains without an answer is the length of the prison term which they have to undergo. A number of matters which militate against them will guide us in regard to the length of the prison term which is appropriate in the circumstances of the case. They planned to, and did actually, assault their victim whom they killed in the process. They went to his home armed with axes for the purpose. They effected fatal blows on his head until he

breathed his last. He lost his life at their own hands. They arrogated to themselves the power and authority to take life which they cannot give. Their moral turpitude is high in the extreme sense of the word. Their conduct cannot be condoned let alone accepted. It sends a shiver in the spinal cord of any person who has the occasion to learn of what they did.

Counsel for the State submits, in aggravation, that the deceased was a bread-winner of his five (5) grandchildren. These are children of his late children. Counsel submits further that the deceased's wife who was working in South Africa has since stopped working as she has become emotionally and mentally unstable following the death of her husband. All the mentioned innocent souls from either side of the divide have been put to untold and unnecessary suffering by the accused's unnecessary and unlawful conduct. Unnecessary because the first accused cannot tell us that he had no option but to assault and/or kill his victim as he did. He could easily have separated from his unfaithful wife if she, as he alleges, was having an illicit relationship with the deceased. That choice remained open to him to exercise. He, for reasons which are best known to himself, made up his mind to:

i) rope the second accused into his own scheme as well as mess- and
ii) team up with him to go and assault as well as kill his victim.

They killed the deceased with actual, as opposed to legal, intent. That fact alone weighs very heavily against both of them. No person has the power or authority to take another person's life. Only God, and him alone, has that authority. A person who takes another person's life must therefore be punished in such a way as would deter would-be offenders from acting as he did or does. Members of society must feel safe and sound under the law. If the law is not appropriately employed to protect them from such heinous conduct as that of the accused persons, then the law of the jungle would reign supreme making the mighty in muscle thrive at the expense of the weak.

Counsel for the State moves us to sentence each accused person to 20 years imprisonment. We disagree. It has never been, nor will it ever be, our intention to equate the crime of murder with actual intent which the accused persons committed with such crimes as rape and/or armed robbery. The suggested sentence fits very well with the mentioned offences. It has never been, nor will it ever be, our intention to trivialize what the accused persons did as the desired deterrence by offenders to kill would not be achieved. Our considered view is that accused persons who committed a cold-blooded murder of the deceased should get a stiff sentence

which is mitigated by all the factors which weigh in their favour as we tabulated them in the foregoing paragraphs of this part of the case.

We have considered all the circumstances of this matter. We sentence each accused person to 30 years imprisonment; 5 years imprisonment of which are suspended for 5 years on condition the accused does not, within that period, commit any offence involving assault for which he is sentenced to imprisonment without the option of a fine.

Effective sentence: 25 years imprisonment.

National Prosecuting Authority, State's legal practitioners
Messrs Dube, Mguni & Dube 1st accused's legal practitioners
Mlweli Ndlovu & Associates, 2nd accused's legal practitioners