

THE STATE
versus
PRIDE MOYO

HIGH COURT OF ZIMBABWE
MOYO J with Assessors Ms C. J Baye and Mr A. B Mpofu
GWERU CIRCUIT 21 AND 22 MAY 2019

Criminal Trial

M Ndlovu for the state
S Kandambeu for the accused

MOYO J: The accused person faces a charge of murder, it being alleged that on the 4th of December 2014, and at village 8H, Musadza Resettlement Scheme, the accused unlawfully caused the death of Taurai Mudzingwa by striking him with an axe on the head once.

The following were tendered into the court record;

1. The state summary
2. The defence outline
3. The accused's confirmed warned and cautioned statement
4. The post mortem report
5. The axe that was allegedly used in the commission of the offence.

They were all duly marked. The evidence of the following witnesses was tendered into the court record in terms of the law.

1. Shepherd Mudzingwa
2. Oscar Mudzingwa
3. Lloyd Kwaramba
4. Farai Chikerema
5. Edwin Mhonda
6. Dr S Pesanai

Two witnesses gave *viva voce* evidence for the state. These were, Sibusisiwe Ncube and her husband Clement Ndlovu. They both own the homestead where the deceased was allegedly assaulted.

Sibusisiwe Ncube told the court that she had a beer party where she had brewed beer for sale, there were numerous patrons. One of the patrons spilled the beer that Sibusisiwe Ncube sold in the kitchen resulting in an altercation that involved a number of people including accused and deceased. Accused and deceased also ended up fighting each other. Sibusisiwe Ncube told the court that she would not dispute that deceased could have punched accused first as she was bending and attending to the spilled beer.

This she had been told was suggested by the accused in his defence outline. She said she did not see that but would not dispute it. After the commotion and the spilling of the beer, her husband then caused people to disperse and to go to their homes. She later saw deceased who had left without his shirt come back to look for it. Deceased was injured at the back of his head by a catapult stone.

As she went into the kitchen, she heard accused saying he could kill the deceased. She then saw him running carrying an axe, she saw him through the kitchen door as he came from that direction. She then heard a cracking sound and she later realized that deceased had been struck on the head with an axe. Those were the material respects of Sibusisiwe Ncube's testimony.

Clement Ndlovu, told the court that beer was spilled in the kitchen resulting in a commotion, causing him to dismiss people from the homestead. After people had left he saw accused near a tree. He later saw accused proceeding and striking deceased with an axe. Deceased fell down and accused fled. He said he had taken beer on the day in question but that he was moderately drunk. He stated a crucial aspect of the state case as follows:

“I saw accused proceed from his position near the tree and striking deceased.”

He further confirmed that at the time the accused attacked the deceased he was not under an attack.

The accused gave evidence for the defence. The defence case was that the deceased, accused, and others were involved in the commotion that ensued after the spilling of the beer in the kitchen and that subsequently accused and deceased. She fought such fight ended when

deceased and his relatives were sent away by the owner of the homestead. Deceased however, later came back, with an axe, accosted accused who wrestled with deceased for the axe. This is the crucial aspect of this case, because that is when the deceased was fatally assaulted which is what this court has to deal with, that is under what circumstances was deceased assaulted? About this crucial moment accused says in his evidence in chief.

“I was walking to where I intended to sit against the wall. I then saw deceased coming where I was. He then said he could kill me and I said he should not. He was carrying an axe.”

He further went on to say

“It was not long that we wrestled for the axe. He then let go of the axe. At that point I was afraid that he would strike me, I moved the axe aside and I noticed that he had been struck on the head.”

Accused was later asked during cross examination how he wrestled the axe from the deceased and he said “I twisted the axe and it was during the twisting that he got struck.”

Accused in paragraph 9 of his defence outline pleads self defence he says therein”

“--- when he grabbed the axe from the deceased he did what he thought was going to be done to him with the axe.”

In that paragraph he further says he did not have the intention to kill the deceased as he only struck him once.

In paragraph 10 of his defence outline accused says he was defending himself considering the circumstances he found himself in.

This is where the problem is, on one hand, accused gives an impression that he struck deceased accidentally with the axe as he wrestled it from him. On the other hand, he tells us that he wrestled the axe from the deceased. Deceased let go of the axe and he (accused) moved the axe aside and then noticed that deceased had been struck by the axe.

These two versions, although different because one says had deceased was struck while they wrestled, meaning deceased also still held the axe, and on the other hand he was struck after he had let go of the axe and accused moved the axe aside, both, give the impression that accused never wielded the axe aiming it at the deceased, but somehow, as they wrestled, or when deceased had let go of the axe and accused moved it aside, deceased was struck.

It's not only these two versions that create a problem but in fact accused has a third version, in his defence outline where he says he gave the deceased a taste of his own medicine by striking him once on the head as he feared, deceased's stature, that perhaps deceased was armed, or that he could use some bricks to assault accused.

Now these three versions could not all have happened on this day.

It is either deceased was struck accidentally as they wrestled for the axe, or deceased was struck accidentally after he had let go of the axe and the accused was moving it aside.

A further problem with these diverse versions is that the post mortem report tells a different story. The deceased had his skull fractured from the left parietal region extending to the right parietal region. There was a laceration of the left parietal region measuring 11 cm. The Doctor also noticed that the brain was oozing out from the left parietal region.

These are severe injuries. Excessive force must have been used to strike a person, fracture their skull and cause the brain to ooze out. The Doctor also concluded that the deceased had a chop wound meaning he was struck with an axe. The accidental striking versions given by the accused are thus destroyed by the post mortem report which in fact corroborates the state account as given by Sibusisiwe Ncube and Clement Ndlovu. Our factual conclusion is therefore that accused as lying on this material aspect. His lies are further worsened by yet another version, that he struck the deceased with an axe in order to give him a taste of his own medicine because, he could not have struck deceased accidentally and at the same time intending to strike deceased.

Our conclusion is therefore that the accused is clearly lying on a material aspect of his defence because what happened outside the kitchen when deceased was struck is in fact the crux of the matter. This matter turns on what happened outside the kitchen when deceased had come back for his shirt. Accused could certainly not afford to be telling the court different stories of that account because in essence that is the only factual issue that this court has to determine. The lies work against the accused person and this court accordingly throws out his version as it cannot be held to be reasonably possibly true in the circumstances, in fact it is manifestly false. This court thus has the state case to rely on.

Sibusisiwe Ncube was a fair witness. She told the court that it is possible deceased could have punched accused first inside the kitchen although she did not see that as she was bending

attending to the spilt beer. If Sibusisiwe Ncube wanted to give a version against the accused in favour of the deceased she would have disputed that. Again, Sibusisiwe Ncube, told the court that she did not see accused actually striking the deceased. If she had an interest to nail the accused person at all costs she would have said she saw him strike the deceased. Although defence counsel challenged why she had not said that she had seen accused approaching wielding an axe, the totality of her evidence was fair. Even if one were to find that maybe she did not seem him but heard him at the end of the day that does not taint her account in that it is further corroborated by Clement Ndlovu, who said he saw accused proceeding to deceased and striking him with an axe. So that factual issue is resolved by Clement Ndlovu's account. Clement Ndlovu was also a fair witness as he admitted that he did not see many aspects of this case but he appears to have witnessed the crucial moment.

The post mortem report also corroborates Clement Ndlovu's account on how accused struck deceased, because the severe injuries show that the account by the witnesses that they saw accused lifting the axe and striking the deceased is true. His evidence on the lifting of the axe before accused struck deceased is consistent with excessive force which is also consistent with the severe injuries suffered by the deceased.

On account of the fact that we have thrown away accused's versions as being manifestly false, and on account of the fact that we have accepted the factual version of the state witnesses as corroborated by the post mortem report, there will be no need for us to assess whether the defence of self is available to the accused, for the simple reason that his version that there was an unlawful attack has been thrown away by this court and the states version that he attacked the deceased when there was no unlawful attack on him has been accepted. The issue of whether or not accused acted in self defence thus automatically falls away on the facts. We then proceed to assess what the accused person is guilty of.

Accused struck deceased on the head, a vulnerable part of the body, using a very big axe in the form of Exhibit 5, an axe itself being a lethal weapon. He used excessive force causing a severe fracture of the skull and causing the brain to ooze out. Such circumstances can only show that accused, even if he had not desired death, he must have foreseen that death was a substantially certain result from such an assault. It is for that reason that accused will be found guilty of murder with actual intent.

Sentence

The accused person is convicted of murder. Accused was 18 years at the time he committed this offence, he is a first offender, he was intoxicated at the material time, he has spent almost 2 years in pre-trial incarceration. However, accused violently struck an unarmed man severely on the head. He was punishing the deceased for an earlier altercation and was thus acting in revenge. Beer drinks have become death traps, many a time our young people engage in violent conduct at these beer parties which we are traditionally places for merry making. These courts have to show likeminded people that life remains sacred and that loss of life through violence will not be treated with kid gloves by these courts.

Our youths have to appreciate that we all have to be reasonable citizens and contribute constructively to the betterment of our society than to be engaging in acts of violence. The accused person is a youthful first offender, he has spent almost 2 years in custody before trial. This court has to balance such mitigating features, with the public interest. In the interests of justice an effective sentence of 20 years imprisonment, would have met the justice of this case. The accused person is however entitled to a discount on the 2 years that he has already spent in custody and it is for that reason that the accused person shall be sentenced to 18 years imprisonment.

*National Prosecuting Authority, state's legal practitioners
Chitere, Chidawanyika and Partners, accused's legal practitioners*