THE STATE

Versus

FREDY TSANANGURA

IN THE HIGH COURT OF ZIMBABWE
DUBE-BANDA J with Assessors Mr A.B. Mpofu and Mr E. Shumba
GWERU CIRCUIT COURT18 & 19 MAY 2023

Criminal trial

N. Ndlovu, for the State
Ms. H. Magazini, for the accused

DUBE-BANDA J:

[1] The accused, Mr Fredy Tsanangura, is appearing before this court charged with the crime of murder as defined in section 47(1) of the Criminal Law (Codification and Reform) Act Chapter 9:23 (Criminal Code). It being alleged that on 8 April 2019 the accused unlawfully caused the death of Elphas Tsanangura (deceased) by manual strangulation intending to kill him or realising that there is a real risk or possibility that his conduct may cause the death of the deceased and continued to engage in that conduct despite the risk or possibility.

[2] The State tendered an outline of the summary of the State case (Annexure A), which was read into the record. The accused, who was legally represented throughout his trial, admitted the charge. However, a plea of not guilty was however entered as required by law. He tendered a defence outline (Annexure B) which was read into the record. He admitted that he caused the death of the deceased by strangulation but pleaded the defences of provocation and intoxication.

[3] The following admissions by the accused were noted in terms of s 314 of the Criminal Procedure and Evidence Act [Chapter 9:07]. The admissions relate to the evidence of certain witnesses as it appears in the summary of the State case. That is the evidence of:

> [3.1] Dr S Pesanai a registered medical practitioner practising as a Pathologist. That he examined the remains of the deceased and compiled a post mortem report (Exhibit 1)

depicting the injuries sustained by the deceased and concluding that the cause of death was: asphyxia and strangulation.

[3.2] The evidence of Thompson Mapiye as it appears in the summary of the state case, who says that he is a member of the neighbourhood watch committee. He arrested the accused and took custody of the body of the deceased, and handed over both the accused and the body of the deceased to the police officers who attended the scene. And the evidence of Doctor Reginald Mhene who first examined the body of the deceased and observed froth and mucus from the mouth and nose and concluded that he died of asphyxia and strangulation.

[3.3] The evidence of police officers who attended the scene, investigated the matter and recorded a statement from the accused. The summary of their evidence is that the body of the deceased did not suffer any further injuries when it was in the custody of the police.

[4] The State tendered by consent the following documentary exhibits: a confirmed warned and cautioned statement of the accused (Exhibit 1), and the Post Mortem Report (Exhibit 2) complied by Dr S Pesanai.

[5] The State called two *viva voce* witnesses and the accused testified in his own defence. We will summarise the evidence very briefly.

[6] The first state witness was Moses Imbayarwo (Imbayarwo). He testified that he is related to the accused and was also related to the deceased. The accused and the deceased were brothers and he is married to their sister, i.e., he is their brother-in-law. On 8 April 2019 the accused and the deceased were at his homestead drinking beer. He testified that the two were very drunk. The two were quarrelling and they fought with clenched fists. He remonstrated with them and they stopped the fight. After a little while they resumed the quarrelling, again he calmed them down. He testified that when he thought the dispute was over, he briefly left them alone and when he returned after a short while he saw the deceased lying down facing upwards and the accused seated on top of him. The accused fled and he gave chase and caught up with him, and brought him back to the homestead. He informed the accused that the deceased had died.

[7] Under cross examination Imbayarwo testified that he left the deceased and the accused alone for about ten minutes, and on his return that is when he found the accused seated on top

of the deceased. The accused's hands were on the deceased's chest. He did not see the accused strangulating the deceased. He testified that the accused fled and he gave chase and caught up with him about one hundred metres away.

[8] Our evaluation is that Imbayarwo was a good and credible witness. He just testified about what he witnessed and no more. For example, he was honest that he did not see the accused strangulating the deceased. We accept his evidence without reservation.

[9] The second witness was Irene Taruvinga (Taruvinga), she testified that she is related to the accused, and was also related to the deceased. On the date in question, she observed that the accused and the deceased appeared drunk. The two quarrelled and started fighting. She saw the accused sitting on top of the deceased. She testified that she pushed the accused off the deceased. The accused fled and was chased and caught by Imbayarwo the first witness.

[10] Under cross examination, she testified that she did not know what the accused and the deceased were quarrelling about. She does not know who provoked the other. She pushed the accused who was sitting on top of the deceased.

[11] After this evidence the State closed its case.

[12] Ms. Taruvinga appeared to be a credible and honest witness. She gave a correct version of what she witnessed. No exaggeration. We accept her account of what happened without qualification.

[13] The accused testified that he was not denying the charge. He had good relations with the deceased. The two were brothers and on the date of this incident they went for a beer drink together. He caused the injuries inflicted on the deceased. The two were drunk. The deceased struck him with a cup they were using to drink beer. As they were fighting, he got hold of the deceased's throat, and he (deceased) fell down backwards. He testified that he poured water on the deceased trying to make him regain consciousness, however he had died. He did not have an intention to cause the death of the deceased, he was merely drunk. He was not sitting on top of the deceased; he was merely trying to lift him up.

[14] Under cross examination he testified that he was drunk. The two were drinking beer from the morning to the evening on 7 April 2019. They continued with their drinking on 8 April 2019, the date the deceased died. He got hold of the deceased's neck, and he (deceased) fell on his back. He held the deceased's throat for a short while, and that is what caused his death. He testified that he sat on top of the deceased while providing first aid. Still under cross examination he testified that he sat on top of the deceased as he was trying to lift him and make him sit on a chair. He was not fleeing; he was going to report the matter to the police.

[15] In his evidence the accused was in some instances was peddling falsehoods. He lied when he testified that he administered first aid on the deceased. He lied that he sat on the deceased to administer first aid. He lied when he testified that he did not flee from Imbayarwo's homestead but he was going to report the incident at the police station. His evidence is rejected where it is at variance of the common cause facts, probabilities of the case and the evidence of State witnesses.

[16] After this evidence the defence closed its case.

[17] The established facts are the accused and the deceased were intoxicated. The accused strangled the deceased to death. In his confirmed extra curial statement, he mentioned that there was fight between him and the deceased, he strangled him and he died. In his defence outline he accepts that he strangled the deceased to death. Even in his evidence in this court he accepted that he caused the death of the deceased by strangulation. The injuries on the deceased were caused by the accused. The actions of the accused caused the death of the deceased.

[18] It is trite law that the *onus* rests on the State to prove the guilty of the accused beyond a reasonable doubt in order to secure a conviction. There is no *onus* on the accused to prove his innocence. This principle is trite in our law. The dispute that remains is whether the accused was badly intoxicated that acted without realising at all what he is doing. Was the accused so intoxicated that he had a blackout resulting from the intoxication? This is an accused person who was demonstrably in control of all his mental faculties. He had the presence of mind inconsistent with one who did not know what he was doing. We say so because the accused has a clear recollection of the events of 7 and 8 April 2019. The two i.e., him and deceased embarked on a beer drinking spree. On 8 April when they were at the homestead of Imbayarwo

the deceased struck him with a cup they were using to drink beer. The two started fighting. He got hold of deceased's neck and deceased fell backwards. Going by his version, he tried to administer first aid on the deceased. He ran for about one hundred metres before Imbayarwo caught up with him and brought him back to homestead.

[19] In his defence outline he is clear that on 8 April 2019 he was drinking beer with his brother the now deceased. That the dispute between the two was started by the deceased, it turned over a cup of beer and a goat. They fought the first time they were restrained, and they fought the second time using fists and open hands, they were again stopped. They fought the third time and he then strangled the deceased to death.

[20] The accused's recall of events is so clear that it could not be said that he was so beside himself with intoxication as not really to know what he was doing. He knew what he was doing. He did not suffer a blackout as a result of intoxication. In the circumstances, we conclude that the accused was indeed capable of formulating an intention, knowledge or realization as required by the law. Therefore, the defence of intoxication as provided for in s 220 of the Criminal Code is not available to him in whatever form as a defence. It is accordingly rejected.

[21] The accused also raises the defence of provocation. This common law defence has been codified in s 238 and s 239 of the Criminal Code. Accepting the accused's version that he was provoked by the deceased; in that he struck him with a cup they were using to drink beer. The provocation was not such that a reasonable person would lose his self-control, again it was not sufficient to make a reasonable person in the accused's position and circumstances to lose self-control and strangulate the deceased to death. The concession by Mr *Ndlovu* that the accused be found guilty of the lesser crime of culpable homicide was not properly made.

[22] The totality of the evidence shows that the accused intended to kill the deceased; or realised that there was a real risk or possibility that his conduct may cause death, and continued to engage in that conduct despite the risk or possibility. The accused strangulated the deceased until he died. The post mortem report clear that strangulation caused the death of the deceased. He died of asphyxia and strangulation. Having carefully weighed the evidence adduced as a whole in this trial we are satisfied that the State has proved it case beyond a reasonable doubt against the accused person.

[23] The accused person is charged with murder as defined in s 47(1) of the Criminal Law (Codification and Reform) Act, [Chapter 9:23]. It is no longer necessary in our law to distinguish whether the accused is guilty of murder in terms of s 47(1) (a) or (b). See: *Mapfoche & Another v The State* SC 84/21.

In the result: Accused is found guilty of murder as defined in section 47 (1) of the Criminal Law (Codification & Reform Act) [Chapter 9:23].

Sentence

[24] Mr. Tsanangura, this Court found you guilty of the crime of murder as defined in s 47(1) of the Criminal Code. Mr *Ndlovu* submitted that this murder was not committed in aggravating circumstances as provided in s 47 (2) of the Criminal Code. I agree. In the result this murder was not committed in aggravating circumstances.

[25] It is now the task of this court to impose an appropriate sentence. In sentencing you this court has to take into account all relevant factors, afford each the appropriate weight thereto and strike a balance between the various interests. In determining a sentence which is just and fair, this court will have regard to the triad of factors that have to be considered as set out in case law, e.g., in the case of *S v Zinn* 1969 (2) SA 537 (A). This Court must therefore take into account your personal circumstances, the nature of the crime including the gravity and extent thereof and the interests of the community. Whilst it is so that a court must always endeavour to exercise a measure of mercy, however, sight must not be lost on the purpose and objectives of punishment. In *S v Rabie* 1975 (4) SA 855 (AD) at 862G-H, the court held that: "Punishment should fit the criminal as well as the crime, be fair to society, and be blended with a measure of mercy according to the circumstances."

[26] This means that a court should consider the objectives of punishment which is that of prevention, deterrence, reformation and retribution and a court must decide what punishment would best serve the interests of justice. A court should also be cautious in weighing the elements under consideration and not unnecessarily elevate one element of above others, rather, a balance must be struck amongst these factors and between the interests of the accused and that of society.

[27] We will now turn to the facts of this case and the submissions made by your Counsel and Counsel for the State.

[28] In mitigation of sentence, your Counsel addressed the court and placed factors which she urged this court to take into account in order to impose a lesser sentence to you in respect of the crime of which you had been convicted. Your personal circumstances are as follows: you are 48 years old, and you were 44 years at the time of the commission of this offence. You are married and a father of three children, one is still a minor. You are a communal farmer.

[29] Counsel urged this court to take into account that you caused the death of your brother, and you will have to leave with this stigma for the rest of your life. And that you apologised and made peace with the deceased's family. You are a first offender. You were in pre-trial incarceration for two months.

[30] Mr *Ndlovu* submitted that a life was needlessly lost, and the prevalence of the crimes of murder require this court to pass a deterrent and exemplary sentence. This court was urged to emphasise the sanctity of human life.

[31] On the acceptable evidence, it has to be accepted that the you were intoxicated at the time you committed this crime. The effects of the intake of alcohol on an accused has always been considered when imposing sentence, and is further authorised by the Criminal Code. In *S v Ndhlovu* (2) 1965 (4) SA 692 (A) 695 C-D the (then) Appeal Court stated:

> "Intoxication is one of humanity's age-old frailties, which may, depending on the circumstances, reduce the moral blameworthiness of a crime, and may even evoke a touch of compassion through the perceptive understanding that man, seeking solace or pleasure in liquor, may easily over-indulge and thereby do the things which sober he would not do."

[32] There is evidence that you and the deceased had a good relationship. Without the intoxication you would not have caused the death of your brother.

[34] In considering sentence this court takes into account that you might have been provoked by the deceased. You did not use a weapon in attacking the deceased. It is accepted as a signal of remorse that you have made peace with the deceased' s family. Again, in your favour you are a first offender. And right from the time of your arrest you did not dispute that it is you who caused the death of the deceased. All these factors somehow diminish your moral blameworthiness.

[35] On the other hand the offence for which you have been convicted of is a grave and serious. The prevalence of the crime of murder is such that cognisance is sometimes lost of the extreme consequences that flow from it. A life is ended. And with it the enjoyment of all of the rights vested in that person: the right to dignity, the right to equality and freedom, and the right to life itself. Not only is a life ended, but the lives of family and friends are irreparably altered and damaged.

[36] It is incumbent on this court to emphasize the sanctity of human life. Society frowns at the taking of another human being's life. The courts must send a loud and clear message that the killing of a fellow human being will not be tolerated.

[37] On a balanced consideration of the totality of the evidence and the facts of this case, this court considers that the following sentence will meet the justice of this case:

You are sentenced to 10 years imprisonment.

National Prosecuting Authority, state's legal practitioners
Mkushi & Maupa, accused's legal practitioners