

Preliminary issues

- 1) At the close of the defence cases counsel for the second accused applied that the accused be examined by a psychiatrist to ascertain his mental state at the time of the commission of the offence. The application was granted on 4 March 2011. The psychiatrist's report took a long time to be compiled and was only made available in February 2014 – 3 years later.

The psychiatrist opined that accused 2 had no evidence of mental illness. The accused was mentally stable at the time he committed the crime and was responsible for his actions. He was fit to stand trial.

During the long wait for the psychiatrist report one of the court assessors Mr P. Hikwa unfortunately passed on. The court had to proceed in terms of section 8 of the High Court Act [Chapter 7:06].

The trial proceeded with one assessor with the consent of legal representatives of all the 3 accused persons.

THE STATE

Versus

WITNESS SIBANDA

And

CLEOPAS DUBE

And

MELUSI MPOFU

IN THE HIGH COURT OF ZIMBABWE

KAMOCHA J

BULAWAYO2, 3, 4, 11, 18 FEBRUARY 2011; 1, 3, 4 MARCH 2011;
24 JUNE 2013; 17 FEBRUARY 2014; 20 & 21 MAY 2014

T. Hove for the state

B. Ndove for 1st accused

R. Dzete for 2nd accused

P. Madzivire for 3rd accused

Criminal Trial

KAMOCHA J: The three accused who were aged 41 years, 24 years and 34 years respectively were charged with the crime of murder. It being alleged that on 18 January, 2010 at Golden Harmony Business Centre in Madlambuzi area of Matabeleland South Province, they did wrongfully, unlawfully and intentionally kill and murder Chebukani Khupe a male adult in his life time there being. They all tendered pleas of not guilty on arraignment.

The outline of the state case was read and produced as exhibit one and I do not intend to reproduce it here again. Similarly I shall not reproduce the defence outlines of the three accused persons which were read and produced as exhibits 2, 3 and 4 respectively.

I however, propose to reproduce the confirmed extra curial statements of each accused. The 1st accused had this to say in his confirmed statement:-

“I admit to the allegations leveled against me of assaulting and causing the death of Chebukani Khupe. What made me assault him was an argument about my cattle which were stolen on 21 June 2009, I suspect it was him and he said he would bring them.”

The statement was recorded at Madlambuzi Police Station on 21 January 2010 when matters were still fresh on his mind. It was confirmed at Plumtree Magistrates’ Court three

months later on 30 April, 2010. It was marked exhibit 5.

The sixth exhibit was the statement made by the 2nd accused on 21 January 2010 at the same police station and it reads:-

“I admit to the allegations leveled against me of assaulting and causing the death of Chebukani Khupe. What made me assault him is that when I was restraining him when he was fighting with Witness Sibanda, he held and strangled me.”

The statement was also confirmed on 30 April 2010, when events were still fresh on his mind.

Exhibit 7 was the 3rd accused’s confirmed statement which reads thus:-

“I do not admit to the allegations leveled against me. The reason being that I did not assault this person, I was restraining those who were fighting.”

It was also recorded on 21 January 2010 and confirmed on 30 April, 2010 at Plumtree Magistrates’ Court.

The 8th exhibit was an affidavit by Pascal Max Ndlovu who identified the body of the deceased to the pathologist who performed a post mortem examination of the deceased’s body and compiled the post mortem report exhibit 9.

The external examination showed the following marks of violence; there was a 7cm wound on the head, multiple bruises; swelling on the face and neck. Internal examination revealed the following; multiple rib fractures; the fractured ribs perforated both lungs causing bleeding into the chest; there was also blood into the abdomen; the liver was ruptured. The doctor opined in exhibit 13 that the ruptured liver was caused by a blunt object such as the knobkerrie mentioned in the summary of history or by being hit with fists or booted feet in the abdominal region.

He concluded that death was due to (a) hypovolemic shock; (b) perforated both lungs and ruptured liver following the assault.

The post mortem was produced as an exhibit by consent of all the legal practitioners representing the three accused persons. The evidence of the pathologist was accepted without the need to recite it *viva voce*.

Exhibit 10 was an Okapi knife whose dimensions are these:

Handle: 13cm long

Blade: 10cm

Weight: 0.07kg

The blade is very sharp and its end is also very sharp.

Exhibit 11 was a walking stick/knobkerrie. It is 89cm long, weighing 0.480 kg. The circumference of the head is 13cm. Exhibit 12 is a piece of granite rock weighing 2.16kg.

The last exhibit is a letter from the pathologist responding to the public prosecutor who

had sought to know the cause of the perforation of both lungs and ruptured liver. I have already alluded to contents of exhibit 13 when dealing with exhibit 9 the post mortem report. The 13th exhibit was produced by consent. Its contents are accepted as they appear in it.

The evidence of the following witness was admitted as it appear in the state outline by consent in terms of the provisions of section 314 of the Criminal Procedure and Evidence Act [Chapter 9:07]; Phiri Lynette, Constable Zhou, Collin Tshabangu, Sternfort Siziba and doctor A.R. Casteiianos.

The state then called four witnesses to give *viva voce* evidence. Namely Sibukeli Khumalo, Precious Akanyang Ndebele, Samuel Tapapiwa Khupe and Kumbulani Batho.

The first witness was Sibukile Khumalo who lives at Vili village at Ndolwane in the Madlambuzi area of Plumtree. She knew accused Witness Sibanda and Cleopas Dube prior to this case.

On the fateful day – 18 January 2010 Cleopas Dube – “Cleopas” accused 2 arrived at the shops in the company of Melusi Mpofu – “Melusi” accused 3 at about 2pm. The first accused – Witness only arrived at the shops around 4pm to join accused 2 and 3.

On arrival accused one told her that she should not be surprised to see him at the shopping centre, because the second accused had phoned him no less than 5 times requesting him to meet him and the 3rd accused at the bottle store.

At about 5pm when she got out of the shop and stood by the store verandah she heard accused saying, “Chebukani Khupe will today give me my cattle”

At around 6pm she closed the shop and went to prepare food at the kitchen. At around 7pm she heard accused saying, “Where is Chebukani who has red eyes or blood shot eyes?”

She then could hear commotion and noise from outside the shop. On going to check what was taking place she discovered that the many people who had been sitting in the store verandah had fled. Accused 2 – Cleopas was making the noise which is usually made by spirit mediums – rolling on the ground like a ball and also jumping up.

From time to time accused 2 advanced towards where the deceased was being beaten up by accused 1 and 3 and joined them in doing so. While the three jointly assaulted the deceased accused one kept on asking, “Where are my cattle? Where are my cattle?”

The deceased did not respond. He only uttered words in Kalanga language to this effect “Do not assault me gentlemen”

On realizing that the three accused had severely assaulted the deceased she moved closer to where the assault was being perpetrated and called accused 1 to come closer to her. Which he did. Accused 2 and 3 remained with the deceased who was then lying down.

As the 1st accused had gone closer to her she told him that they should stop assaulting the deceased and apologized on his behalf. She went on to tell him that they had assaulted him enough and they should not assault him anymore. They should let the police deal with him if he had done any wrong. While accused 1 appeared to appreciate her suggestion, the 3rd accused grabbed hold of the deceased by his belt on the back and dragged him. His face and legs were

in contact with the ground as he was being dragged away for about 9 to 10 metres after which the accused threw him onto the ground facing up. Accused 2 and 3 continued to assault him by jumping onto him and kicking him with shod feet. They trampled onto his chest and abdomen using severe force.

I pause to observe that the multiple rib fractures and ruptured liver were likely to have been caused by the stamping and kicks on the deceased's chest and abdomen perpetrated by the second and 3rd accused jointly as the deceased lay helplessly on the ground facing up.

The assault only stopped when the 3rd accused took a bucket of water and poured it onto accused 2 who was said to have "Mangoromera" – an ardent desire to beat others. The fighting spirit in him disappeared after water was poured on him. The accused had removed his pair of trousers and T-shirt. He only had boxer's shorts. When his fighting mood was over, he picked up his pair of trousers and T-shirt. He also picked up the deceased's T-shirt which he threw at deceased's body. He then left the scene and went to sleep at his girlfriend's place.

When accused 1 said he was also leaving she told him that he should not leave before he ascertained the deceased's condition. He was agreeable. She then went with accused 1 and 3 to where the deceased lay. When they got there she lit a torch and directed it at the deceased and she observed a stone exhibit 12 on the side of his head. She pushed the stone off the deceased's head and noticed a big wound from which blood was oozing out. Accused 1 saw the injury. She suggested to accused one and three to take the deceased to the clinic but they were not interested in doing that. Instead they left and went to accused one's home. As the two accused persons were leaving accused 1 said he was waiting for the police to come.

The witness said she sent for the deceased's wife to come. When she came the deceased's young brother was also present. They then got a wheelbarrow and carted the deceased to the clinic in it. But, the deceased passed away about 30 minutes after their arrival at the clinic.

The police were called. They arrested accused 2 – Cleopas first. Accused 1 and 3 were arrested later and all the accused persons were conveyed to Plumtree.

The witness told the court that by the time she arrived at the scene the deceased was already on the ground being assaulted by all the three accused persons. The first accused used a knobkerrie.

Under cross examination the witness said when she asked accused 1 to go closer to her she noticed that he had a knife in his possession but it was closed at that stage. It was also her evidence under cross examination that the commotion took about one and half hours. She was emphatic that the first accused assaulted deceased with the knobkerrie exhibit 11.

When cross examined by accused 3's lawyer she emphasized that the 3rd accused held the deceased's hands while the other two accused persons assaulted him. She reiterated that it was the 3rd accused who grabbed hold of the deceased by his belt from the back and dragged him for 9 to 10 metres to a place where he trampled on him with accused 2.

The evidence of this witness reveals that the 3 accused persons jointly assaulted the deceased. Each one of them played a part. The first accused started it all as he wanted the

deceased to give him back his stolen cattle. He assaulted the deceased with a knobkerrie. Accused 2 trampled onto the deceased as he lay on the ground. The 3rd accused held the deceased while the other two assaulted him. He dragged him to a place where he and accused 2 stamped on his chest and abdomen. The 3rd accused in fact played a major role.

The witness gave her evidence well and is worth to be believed. Her evidence revealed that the 3 accused persons had been drinking beer but were not very drunk but the deceased was very drunk.

The next state witness was Precious Akanyang Ndebele. She knew all the three accused persons. Accused 2 Cleopas Dube was her boyfriend that time. She was the bar maid at the bottle store on the fateful day. In the afternoon accused 2 and 3 arrived at the bottle store. Accused 2 asked to use her mobile phone to phone someone in Bulawayo. She allowed him the use of her phone. He went out of the shop to use the phone and returned the phone when he finished.

Accused 2 and 3 bought some beer and started drinking. They sat alone in the bottle store. They were later joined by the first accused and the drinking continued.

The deceased arrived at the bottle store around 4pm. He had paid for a crate of calabashes the previous day. He requested for is beer and she gave him one calabash at a time and he went out to drink with his friends who included Khumbulani, Tapapiwa and others whose names she did not know until it was finished. Thereafter the deceased entered the bottle store to light a cigarette.

It was at that stage that accused 1 said, "You are entering the bottle store for the last time. I should not find you outside."

The deceased did not respond but went out of the bottle store.

Accused 2 and 3 immediately followed him to where he had been sitting with his friends. The witness then heard bottles being smashed outside shortly after they had followed. Accused 1 had remained inside the bottle store. She then heard accused 2 saying to the deceased, "Sing the song that you have been singing." It was only then that accused 1 followed his colleagues. When he got to where they were, the three of them started assaulting the deceased. Accused one used a knobkerrie to assault him. She did not see what the others used as she was about 15 to 16 paces away and it was getting dark. The second accused went to the other side of the shop screaming. Accused 1 alleged that the deceased had stabbed the 2nd accused. The 1st accused went to collect the 2nd accused from where he was screaming. Accused 3 pinned down the deceased who was already on the ground. While the deceased was still in that position accused 1 hit him with his knobkerrie asking him where his cattle were. The deceased's reply was, "Do not beat me up gentlemen leave me alone."

The first accused hit the deceased with a knobkerrie all over the body. The second accused held the deceased and rolled on the ground with him. At that stage she noticed that deceased was no longer wearing his T-shirt and accused 2 was only wearing boxer's shorts. The 3rd accused requested for a bucket of water which she gave him. He poured the water on the 2nd accused who was then believed to have been under the influence of "mangromera".

As the deceased tried to get up he fell down again as he was then weak. In reaction to that accused 3 said words to the effect that if he tried to run away he would be killed. With those words he grabbed him by his belt from the back and dragged him for a distance of about 9 to 10 metres. When they were at that point the witness saw accused 2 jump high and landed on the deceased body on his feet like a wrestler.

When accused 1 wanted to leave at the end of it all the witness said the 1st witness said accused should not leave without ascertaining what the deceased's condition was. He was agreeable. When they got to where the deceased lay. Accused 1 used his mobile phone as a source of light. This witness also noticed a stone on the deceased's side of the head above the ear. She identified exhibit 12 the piece of granite rock. There was a wound on the head where the stone was. Accused 1 said he had the deceased's knife and he was not leaving it behind. The witness identified exhibit 10 the Okapi knife. Thereafter accused one and three left.

The 1st accused alleged that deceased had stabbed accused 2 with a knife which was not true. Accused 2 was not stabbed at all. Accused alleged that the knife belonged to deceased but he took it with him to his home. Why would he take it with him if it was not his? The knife was his.

This witness said she had no reason to tell lies against the 3 accused persons. In fact accused 2 was her boyfriend at that time. She took him from the scene to her house and left him there when she returned to the scene.

Under cross examination this witness was surprised at the suggestion that the deceased was fighting with the accused persons. She was emphatic that the deceased did not get the opportunity to hit back. The correct position was that he was being assaulted by the 3 accused persons.

The witness was equally surprised at the suggestion that deceased grabbed hold of accused one by the neck tightly throttling him. That is why accused 1 hit him with the knobkerrie at random. She was emphatic again that deceased never got the chance to hit back. The suggestion was clearly false and must be rejected.

The cross examination was completely in effective. Her story remained intact clear and easy to follow. It was clear from her evidence that the suggestion by accused 1 that the deceased had stabbed accused 2 with the Okapi knife was clearly false. He was never stabbed at all and had no stab wound.

The evidence of this witness corroborates the evidence of the first witness on all material points. The witness gave her testimony well and she was worth to be believed. This court accepts her evidence.

The third state witness was Samuel Tapapiwa Khupe a cousin of the deceased. He described the initial stage of the assault. He was at the bottle store as he was sitting down while deceased stood by his side accused 2 approached him and got hold of him by his elbows and pushed him against the wall. The witness who thought at that stage that that was some type of play asked accused 2 why he played in that manner. Accused 3 then asked the witness who he was to question the manner accused 2 was playing and smashed a beer bottle he had on the

ground and advanced towards him. The witness stood up. Accused 1 who had been standing nearby then struck the deceased on the forehead with a knobkerrie. All the patrons who were drinking beer scattered and ran in different directions. He also fled to his home. While he was at his home the first witness phoned him informing him that the three accused persons had seriously injured the deceased. He went back to the shopping centre only to find that the deceased had already been carted to the clinic in a wheelbarrow. He followed and by the time he got there the deceased had died.

The witness said he ran away after the first blow by accused 1 with a knobkerrie. He described what happened as terrible that was why the 12 to 13 patrons ran in different directions except for the two ladies who gave evidence.

Under cross examination it was suggested to this witness that the deceased had approached accused 1 in an aggressive manner wanting to strike him with 2 beer bottles. The witness expressed disbelief and said the accused was telling lies because he had not even spoken to him about anything. The witness was equally surprised at the suggestion that he had not just run away but as being chased away by accused 1.

This witness was also not shaken under cross examination. His evidence was well given. He is worth to be believed.

The last witness was Khumbulani Batho a blood brother of the deceased. His evidence corroborates that of the other witnesses. He saw accused 2 grabbing hold of the deceased on both elbows and pushing him against the wall. Accused three smashed bottles while the first accused struck deceased with a knobkerrie. The witness ran away from the scene to hide behind a small bush from where he watched the events as they unfolded. He saw accused 3 dragging deceased by his leg. He is the one who reported the murder to the police. Under cross examination this witness also categorically said deceased was on the receiving end. He had no chance to fight with the accused persons. He went further to state that there was no truth in the suggestion that deceased wanted to stab accused 2.

This witness also gave his evidence well and is worth to be believed. This court accepts his well given evidence.

What comes out clearly from the evidence of the state witnesses is that the deceased was subjected to a gang assault by the three accused persons acting in concert. Each one of the accused had a part to play. This court has already found as a fact that the evidence of the state witnesses was well given in a clear and straight forward manner. This court prefers the well given evidence of the state witnesses to that of the accused persons. Wherever the accused persons' evidence conflicts with the well given evidence of the state witness this court prefers that of the state witnesses.

All the accused persons were not worth to be believed. Accused 1 and 2 had two stories each. The first one was contained in their confirmed extra curial statements wherein they confessed assaulting the deceased resulting in his death. These statements were made when events were still fresh on their minds. If what they had told the police was not true they would have told the confirming magistrate the correct position.

The second story is the one that they told the court. It was a hopeless afterthought and is hereby rejected. The court finds that accused 1 suspected the deceased of having stolen his cattle. He assaulted the deceased using his knobkerrie while he was being held by accused 3. He struck him while he was still on his feet and also hit him when he was on the ground. He only stopped when the first state witness persuaded him to desist.

The second accused took hold of the deceased by his elbows and pushed him against the wall. He trampled him on his chest and abdomen and also kicked him. He once jumped high like a wrestler and landed on his body with his shod feet.

The third accused denied liability from the on-set. The evidence however reveals that he played a prominent role. He smashed bottles and then held the deceased while his co-accused assaulted him. He grabbed hold of the deceased by his waist belt from the back as he lay down and dragged him for about 9 to 10 metres to a spot where he also kicked and stamped on his chest and abdomen.

His story that he was merely trying to stop his colleagues from attacking the deceased is clearly false and must be rejected. He actively participated in the gang attack on the deceased.

In unison the trio used a knobkerrie on the deceased. They kicked him all over the body. They trampled on him on his chest and abdomen with shod feet. Struck him with a piece of granite rock on his head. They assaulted the deceased for a long time. Death was a substantial certainty but the accused persons persisted with their assault.

I propose to find them guilty of murder with actual intent.

Reasons for Sentence

The accused persons were found guilty of murder with actual intent and should consider themselves extremely lucky to have escaped capital punishment. There is very little that can be said in their favour. The little that can be said in their favour is that they are all first offenders who have family commitments. But people should not conduct themselves in an irresponsible manner as that puts the lives of their families into jeopardy.

They suspected the deceased to have stolen 15 cattle of the first accused although they had no proof of that. Even in the event that they had proof they would have had no right to take the law into their hands and administer primitive mob justice which would be a recipe for chaos in a modern society.

They have spent 3 years in custody awaiting the finalization of their trial. This was caused by the inordinate delay to examine accused 2 whose legal practitioner wanted to be examined by a psychiatrist in terms of the Mental Health Act to ascertain his mental state.

The application for examination was granted by this court on 4 March 2011 and the psychiatrists report was only made available in February 2014.

All in all the accused persons have been in custody for 3 years which shall be taken off from the sentence imposed.

Looking at the other side of the coin the accused persons killed the deceased for a crime they had no proof that he had committed. The theft of the cattle had been reported to the

police but the police seemed not to have taken action because they had no evidence linking the deceased to the crime. That was why he was not arrested.

A life was unnecessarily lost. The deceased was brutally murdered. The accused persons kicked him all over the body. They stamped and trampled on his chest and abdomen. In the process they caused multiple rib fractures. The fractured ribs punctured both his lungs leading to bleeding in the chest cavity. They ruptured his liver leading to bleeding in the abdomen. He was hit with a knobkerrie. As if that was not enough he was hit with a 2kg granite rock on the head as if the accused persons were killing a snake.

This was a group murder which this court views in a very dim light. The accused persons were also lucky to have escaped life imprisonment. They need to be adequately punished for this brutal murder.

In the circumstances each one of them is sentence to:-

33 years imprisonment but the 3 years they spent awaiting the finalization of this case is taken off.

Effective: 30 years imprisonment.

Messrs Ndove, Museta & Partners, 1st accused's legal practitioners
Dube-Banda, Nzarayapenga & Partners, 2nd accused's legal practitioners
Messrs Joel Pincus, Konson & Wolhuter, 3rd accused's legal practitioners
The Prosecutor-General's Office legal practitioners for the state