

**THE STATE**

**Versus**

**THABANI NDLOVU**

**And**

**FREEMAN NDLOVU**

**And**

**MENZENI TSHUMA**

IN THE HIGH COURT OF ZIMBABWE

MAKONESE J with Assessors Mr E. Mashingaidze & Mr M. Ndlovu  
BULAWAYO 17, 18 & 19 JULY 2018

**Criminal Trial**

*Ms S. Ndlovu* for the state  
*M. Mpofu* for 1<sup>st</sup> accused  
*R. Ndou* for 2<sup>nd</sup> accused  
*N. Sibanda* for 3<sup>rd</sup> accused

**MAKONESE J:** Accused persons have been arraigned in this court on allegations of murder. Accused one was aged 24 years at the time of this offence. Accused two is a juvenile and at the time of the commission of the offence was aged 16 years. Accused three was aged 35 years at the relevant time. The deceased was aged 44 years old and he resided in the Nyabane area of Plumtree. The allegations against the accused persons are that on the 19<sup>th</sup> September 2017 the accused persons assaulted Ndabezinhle Ncube intending to kill him or realising that there was a real risk and possibility that their conduct may cause his death. The accused persons pleaded not guilty to the charges.

The state tendered an outline of the state case exhibit 1. Accused one's defence outline was tendered by his defence counsel and marked as exhibit 2. Accused one contends that on the day in question the three accused persons were drinking traditional beer when accused three told them that the deceased had assaulted his father, one Stanley Granger. Accused three then told

them that they go to the deceased's place of residence to reprimand him. On their way they passed by Michael Ndlovu's place who joined them. On arrival at the deceased's residence Michael Ndlovu pointed the house in which the deceased was sleeping. The accused persons approached the deceased's house and knocked at the door. When the deceased eventually opened the door he became aggressive and threatened to assault them. Accused one assaulted deceased using his bare hands and kicked him until he fell to the ground. Accused one stated that unbeknown to him Michael Ndlovu struck the deceased with a knobkerrie and they left the deceased lying on the ground. Accused one contends that he was drunk and that his conduct was affected by the ingestion of alcohol. This was accused one's version as set out in his defence outline. In his defence outline, accused two, stated that on the fateful day he was asked by first accused person to accompany him to Botera Village. Upon arrival at a certain homestead accused one knocked on a door in which the deceased was sleeping. As soon as the deceased opened his door, accused one launched an attack upon the deceased using clenched fists. Accused two states that he was paralysed by fear and followed instructions from accused one. He was threatened with assault if he failed to carry out instructions given to him. Accused two states that they took deceased outside his house to a bushy area where accused one continued to assault the deceased. Accused two states that he was forced to clap the deceased. Upon arrival of Stanley Granger the accused persons were refrained from further assaulting the deceased.

In his defence outline accused three states that on the day in question they approached the deceased for the purpose of establishing why the deceased had assaulted his father the previous week. Accused three states that on arrival at the deceased's residence they asked him to accompany them to their father's homestead in order to discuss the issue. The deceased hurled insults at the accused persons and the first and second accused persons started fighting with the deceased. Accused three states that when the fight was going on he only stood by as he could not participate in the fight due to his disability. Accused three denied assaulting the deceased at any stage during that night.

The accused persons' confirmed warned and cautioned statements were produced by the state. The contents of these statements confirm that the accused persons assaulted the deceased. Accused one's confirmed warned and cautioned statement is in the following terms:

*"I admit to the allegations levelled against me of murdering Ndabezihle Ncube. What transpired is that Menzeni Tshuma told us that Ndabezihle Ncube had assaulted is father Stanley Granger and was in a relationship with his girlfriend Lungile Ngwenya. After telling us, we immediately headed to Ndabezihle Ncube's homestead. Upon arrival, Freeman and I entered Ndabezihle's homestead. We knocked and he opened the door. We immediately pulled him out of the yard. When we arrived where we had left Menzeni Tshuma, I assaulted him using an open palm and he fell to the ground. Menzeni lifted my bicycle and used it to assault him on the head three times and he started bleeding. I assaulted him on the head using booted feet several times and also stepped on him. When we saw that he was injured we left him lying down where we had assaulted him and I went to my home. Freeman assaulted Ndabezihle using an open palm when we were leaving his place of residence. That is all."*

The second accused also gave a warned and cautioned statement, which was confirmed by a magistrate at Plumtree on the 18<sup>th</sup> October 2017. It is in the following terms:

*"I do not admit to the allegations levelled against me of murdering Ndabezihle Ncube. What I know is that Thabani Ndlovu sent me to hold the deceased while he assaulted him using clenched fists. We then dragged Ndabezihle Ncube out of the homestead when we reached outside the yard Thabani Ndlovu continued to assault him using clenched fists. Thabani Ndlovu instructed me to assault Ndabezihle Ncube once on the cheek using an open palm. Thabani Ndlovu continued to assault Ndabezihle Ncube until he fell to the ground. When he fell to the ground, he stepped on him and assaulted him on the head using booted feet. Menzeni Tshuma arrived carrying a bicycle and used it to assault Ndabezihle Ncube on the chest several times. Thabani Ndlovu continued to assault him using booted feet and stepping on his chest and head. I stood there with fear that they were going to injure Ndabezihle. Whilst they were still assaulting Ndabezihle, Stanley Granger arrived and we assisted each other in refraining Menzeni Tshuma and Thabani Ndlovu. That is all."*

It is necessary to set out the accused three's warned and cautioned statement, which is in the following terms:

*“I admit to the allegations levelled against me of murdering Ndabezihle Ncube. What happened is that Ndabezihle Ncube assaulted my father Stanley Granger in the month of July. He was also in a relationship with my girlfriend Lindiwe Ngwenya and this did not go down well with me. I kept a grudge against him. On the day we assaulted him, I told Thabani Ndlovu and Freeman Ndlovu that Ndabezihle Ncube troubled me. The three of us organised ourselves proceeding to his place of residence. Upon arrival, Thabani Ndlovu and Freeman Ndlovu entered into the yard and took Ndabezihle out of his room. When they came with him, Thabani Ndlovu assaulted him using an open palm and he fell to the ground. I lifted a bicycle and used it to assault him twice on the head but I did not see where exactly I had assaulted him because it was dark. Thabani Ndlovu assaulted Ndabezihle using booted feet on the head several times and he stepped on his head several times. I did not see Freeman Ndlovu assaulting the deceased. We left him lying on the ground where we had assaulted him. I then went to my place of residence. I was apprehended while I was still at my place of residence. That is all.”*

The state produced a post mortem report compiled by Dr I. Jekonya after an examination of the remains of the deceased. The cause of death is listed as:

- (a) Gastric contents aspiration hypoxia
- (b) Severe chest injuries
- (c) Multiple trauma

On marks of violence the pathologist observed the following injuries:

- (a) 2cm vertical wound just to the left eye
- (b) Extensive right fronto-parietal and tempore soft tissue haematoma
- (c) Bruised left chest wall

On the internal examination the post mortem report reveals that the deceased suffered the following injuries:

- (a) No fracture
- (b) Oedematous brain with florid traumatic subarachnoid haemorrhages
- (c) Gastric contents in the airway
- (d) Partially collapsed right lung from pneumothorax. Left lung extensively bruised.

Both lungs contain gastric contents. Bruised inner chest wall.

(e) Sterno- mamubrial fracture

The knobkerrie used in the assault of the deceased was produced as an exhibit. It weighs 600 grammes, its measured length is 68cm and the circumference of its head is 26cm. The state produced as its last exhibit a SUPA ATX Mountain Bike. There was evidence of blood stains on the crank set of the bicycle.

The state led oral testimony from two witnesses. The first to testify was **LINDIWE NGWENYA**. She was a girlfriend of the deceased. On the fateful night she was sleeping with the deceased when the accused persons arrived. She knew accused two and three prior to the commission of the offence. She narrated that she and the deceased had retired to bed around 9pm. Around 9:30pm the first accused knocked on the bedroom door. The deceased partially opened the door. As deceased was opening the door accused one and two forced themselves into the house by pushing the bedroom door. The witness stated that she managed to identify the accused persons since deceased's torch was on. Accused one grabbed the deceased by the collar accusing him of assaulting Stanley Granger (accused three's father). Accused one picked up a knobkerrie which was behind the door and used it to strike the deceased several times on the head. Fearing for her own safety, the witness jumped out through the window into the darkness. The witness indicated that she saw the accused persons dragging the deceased out of the yard towards Stanley Granger's house.

The court found this witness to be credible. Her evidence was simple to follow. There was no tinge of exaggeration. She was not contradicted in any material respects under cross examination. The second state witness was **MICHAEL NDLOVU**. He testified that he resides in the Nyabane area of Plumtree. On the day in question he was woken up by the accused persons at night. They said they wanted to purchase some dagga. The witness told accused persons that he did not have any that day. The accused persons left. About half an hour later he heard someone crying out for help. The witness rushed to the scene and upon arrival he found the deceased lying on the ground. Accused three was striking the deceased with the mountain bike. Accused one was kicking the deceased with booted feet. A little while later, the accused

persons were restrained from further assaulting the deceased by Stanley Granger who had also arrived at the scene. This witness stated that he did not witness accused two assaulting the deceased. The deceased was bleeding profusely. The three accused persons were taken away from the crime scene by Stanley Granger. This witness indicated that accused one was behaving as if he was possessed by some evil spirit as he assaulted the deceased.

The witness was subjected to extensive and intrusive cross examination. He gave an honest and candid account of the events as he recollected them. There was no reason for this witness to lie. His evidence is supported by the contents of the accused's confirmed warned and cautioned statements. He gave a truthful account of the events he had witnessed that night. We find him to be a credible witness.

The evidence of the under listed state witnesses as it appears in the outline of the state case was admitted into the record of proceedings by way of formal admissions in terms of section 314 of the Criminal Procedure and Evidence Act (Chapter 9:07); namely –

- (a) Feya Elphious Sibanda
- (b) Sifiso Mathuthu
- (c) Farai Dhobha
- (d) Dr I. Jekeny

The state closed its case.

The first accused person, **THABANI NDLOVU** gave evidence under oath. He admitted having gone to the deceased's homestead in the company of the other co-accused persons. He stated that he wanted to establish why the deceased had assaulted accused three's father. It was his suggestion that they proceed to the deceased's residence that night. The events that transpired at the deceased's homestead had several versions as the accused person's testimony unfolded. Accused one strenuously denied that he intended to cause the death of the deceased. He however admitted that he kicked the deceased several times on the head whilst he was lying down. He admitted having dragged the deceased outside his bedroom, with the assistance of

accused two. Before they got to Stanley Granger's homestead, the deceased was subjected to further assaults by the accused persons. He confirmed that accused three used the mountain bike to strike the deceased. The witness made certain indications of how accused three had raised the bicycle before striking the deceased on the chest and upper region of the body. Accused one conceded that accused two only slapped the deceased once on the face. Accused one contradicted both his defence outline and confirmed warned and cautioned statement in several respects. Accused one refuted the contents of the warned and cautioned statement claiming that he was just made to sign the statement.

The court found accused one to be an evasive and untruthful witness. He gave the impression that he was a peacemaker who wanted to bring the deceased to account. That version is not consistent with his assertions that they wanted to reprimand the deceased for having assaulted accused three's father. The witness blamed the effects of alcohol and suggested that his judgment could have been affected by the consumption of alcohol. The court rejects accused's testimony and finds that his defence is false. The evidence clearly shows that the attack on the deceased was planned. The attack led to the deceased suffering serious injuries as reflected in the post mortem report.

Accused two, **FREEMAN NDLOVU** is a juvenile who at the age of 17 years was spending time in bad company. Accused two testified that he had been asked to accompany the 1<sup>st</sup> accused to deceased's residence that night. The accused person was at a beer drink. He states that he was not partaking of alcohol. One wonders what he was doing at night with adult persons at a beer drink. Accused two confirms that upon arrival at deceased's house, they forced themselves into the deceased's bedroom. Accused one immediately launched an attack upon the deceased with clenched fists. They dragged the deceased outside his bedroom and accused continued to assault the deceased. We reject the claim by the second accused that he was just a bystander and that he was coerced into clapping the deceased. The accused should have simply refused to go on a mission of vengeance against the deceased. We are not satisfied with the accused's narration of events. He was evasive and was not a credible witness. It is worth noting however, that accused two confirms that he witnessed accused 3 striking the deceased with the

mountain bike at least three times. He also made indications on how the third accused had used the bicycle to assault the deceased who was lying prone on the ground, injured and bleeding profusely.

Accused three **MENZENI TSHUMA**, gave evidence under oath. He, like his co-accused persons denied causing the injuries that led to the death of the deceased. Accused three admitted that on the night in question he had wheeled the bicycle to the deceased's homestead. He stated that he used the bicycle for balance as he has difficulty in walking due to his disability. Accused denied that he used the bicycle to assault the deceased. Instead, he avers that the deceased must have fallen on the bicycle as he was being assaulted by the other accused persons. The accused departed from the version in his confirmed warned and cautioned statement. He said he signed the statement under fear. He claimed that he was drunk and that his judgment was impaired by his intake of alcohol. Accused three confirms that accused one's behaviour on the day in question was rather unusual. He ventured to suggest that the first accused was pressured with some super natural powers.

We have no hesitation in rejecting the accused's version and his role in the assault of the deceased. Accused three made an attempt to portray himself as an innocent person who wanted to make peace between his father and the deceased. The accused failed to show how he was going to make peace with the deceased by extracting him from his house at night, leading to is serious and fatal assault. Accused admitted that he had an axe to grind with the deceased whom he accused of having snatched his "beloved" girlfriend, Lindiwe Ngwenya. Accused three's evidence was fraught with inconsistencies. He was not a credible witness. He sought to mislead the court by suggesting that deceased fell on the bicycle as he was being assaulted. Accused three at age 35 years was the oldest of the accused persons. He ought to have demonstrated maturity but instead embarked on an attack of the deceased. Accused three, inspite of his disability was able to deliver three fatal blows on the deceased using the bicycle. This was witnessed by 1<sup>st</sup> accused, 2<sup>nd</sup> accused and Michael Ndlovu. The accused was only refrained from further assaulting the deceased upon the arrival of Stanley Granger.



### **Analysis of the evidence**

The bulk of the evidence in this matter is common cause. The accused persons planned to confront the deceased in order to reprimand him. Upon arrival at the deceased's homestead, they forced their way into his bedroom. The accused persons were not on a mission of peace but of violence. Their sole object was to assault the deceased. It is not in dispute that the injuries inflicted upon the deceased are consistent with the post mortem report. The chest and head injuries are consistent with the kicks on the head and the bicycle being crushed on the deceased's chest. All the accused persons placed themselves at the scene of the crime but each downplayed his role in the assault. The court finds that the three accused persons conspired to launch an attack on the deceased. All the three participated in varying degrees in the assault of the deceased. There can be no doubt, however, the accused persons took advantage of the juvenile, the second accused. It would seem that although he was involved throughout at all stages of the assault, he did not possess the requisite intention to commit the crime of murder.

### **The law**

The state has conceded that the first and second accused persons must be found guilty of murder with constructive intent. In terms of law, a person shall be guilty of murder with constructive intent (*dolus eventualis*), where he does not intend to cause the death of his victim, but reasonably foresees that as a result of his conduct, death might ensue. Where death is a substantial possibility arising from the conduct of the accused, he shall be guilty of murder with constructive intent. See; *S v Mugwanda* SC 19/02; *S v Sighwala* 1967 (4) SA 556 (A) and *S v Malinga & Ors* 1963 (1) SA 692 (AD). Defence counsel for accused one and two argued that accused persons should be found guilty of assault. The evidence clearly shows that it is accused one and three who brutally assaulted the deceased. Their blows were directed to the head and the upper parts of the body. The post mortem conducted on the remains of the deceased indicated that he sustained serious injuries. The blows must have been delivered with severe force. The defences of intoxication and provocation were not available to the

accused. This was conceded by accused's defence counsel. In the result, the court makes a specific finding that accused one and three intentionally and purposefully assaulted the deceased realising that death may ensue.

## **Conclusion**

In criminal cases, the state has the burden to prove its case beyond reasonable doubt. The accused person has no onus to prove the truthfulness of his defence. See; *R v Difford* 1937 AD 370. Where the accused however proffers a defence, such defence, must on the facts be reasonably possibly true. In this case, we have already found that the accused persons advanced false defences. Accused persons' versions in court under oath, could not be sustained on the facts. In the result, we are satisfied that the state has proved that accused persons foresaw the death of the accused. The state did not argue for a verdict of murder with actual intention. We agree with that position.

In the result we return the following verdict:

1. Accused one is found guilty of murder with constructive intent.
2. Accused two is found guilty of assault.
3. Accused three is found guilty of murder with constructive intent.

## **Sentence**

This case reflects the violent nature of our society. The accused persons embarked on a mission of vengeance and retribution against the deceased. They mounted a surprise attack on a person who was sleeping at the time. They pursued their objective with great determination and resolve. They forced their way into deceased's bedroom and without any warning launched a brutal physical attack upon his person. The accused persons showed no mercy on their victim. The injuries inflicted by the accused persons were severe. The court must, however, balance this against all the mitigating features of the case as articulated by defence counsel. All three accused persons are first offenders. This is their first brush with the law. Accused one is aged

24 years and has the usual family responsibilities. He has been in custody pending trial for the past 10 months. He however displayed no remorse in court. Instead he sought to downplay his role on the fateful night. A lengthy prison sentence is called for. In respect of accused two, he is a juvenile aged 17 years. He found himself in bad company. He has been convicted of assault. This court calls upon accused two to reflect on his conduct and mend his ways. There was no reason why he associated with persons older than himself in a criminal enterprise of this nature. Accused two deserves a second chance. Accused 3, is aged 35 years and is unwell. He has swollen knees and has arthritis. The clinical notes from prison indicate that he relies on painkillers to subdue the pain in his knees. He walks with some difficulty. The court shall take this into account and suspend a portion of his prison term.

In the result the accused persons are sentenced as follows:

**Accused one and three:** Each sentenced to 10 years imprisonment of which 3 years is suspended for five years on condition accused are not within that period convicted of any offence involving violence and for which upon conviction they are sentenced to a term of imprisonment without the option of a fine. Effective 7 years.

**Accused two:** Sentenced to 12 months imprisonment wholly suspended for 5 years on condition accused is not within that period convicted of any offence involving violence and for which upon conviction he is sentenced to imprisonment without the option of a fine.

*National Prosecuting Authority*, state's legal practitioners  
*Tanaka law Chambers*, 1<sup>st</sup> accused's legal practitioners  
*Mugiya & Macharaga & Partners*, 2<sup>nd</sup> accused's legal practitioners  
*Advocate Samp Mlaudzi & Partners*, 3<sup>rd</sup> accused's legal practitioners