

THE STATE
versus
TAWANDA MAPHOSA
and
NORBERT MAPHOSA

HIGH NCOURT OF ZIMBABWE
MUZENDA J
MUTARE, 20 and 29 October2020, 4, 5 and 12 November 2020

ASSESSORS: 1. Mr Chagonda
2. Mr Chipere

Criminal Trial

Mrs J Matsikidze, for the State
B. N Mungure, for the 1st accused
K. G Muraicho, for the 2nd accused

MUZENDA J: the two accused step brothers are jointly charged for Murder as defined in s 47 (1) (a) or (b) of the Criminal Law (Codification and Reform) Act, [*Chapter 9:23*]. The state alleges that at Machona Village, Chief Garahwa, Chipinge, the accused persons both and each or one of them unlawfully caused the death of Manyowa Simango by assaulting her with unknown objects all over the body intending to kill Manyowa Simango or realising that there was a real risk or possibility that their conduct might cause death and continued to engage in that conduct despite the risk or possibility resulting in injuries from which Manyowa Simango died.

From the summary of the state, the 2 accused and deceased were all residents of Machona Village, Chief Garahwa, Chipinge. As of September 2019, first accused had lost a child. His family believed that the child's death had been caused by the deceased through supernatural means. First accused remained aggrieved.

On 8 September 2019 the accused persons were both at a fellow villager's home drinking traditional brew. The deceased later arrived at the same homestead and joined fellow women. Both accused noticed her arrival. Later deceased left the beer drink and went home. The two deceased followed deceased and struck her with unknown objects on the head crushing it leading to her death. Her remains were discovered by her juvenile relative.

Both accused pleaded not guilty to the charge.

The first accused's defence is that of an alibi. He indicates that he will incorporate into his defence outline his warned and cautioned statement. He will also add that he was not present with second accused at the place where the alleged murder occurred. On 8 September 2019 first accused says he left second accused at the beer drink around 1500 hours and went to his homestead where he met Maxwell Haisa. First accused states that from that time he never left his homestead during the night until 9 September at 0600 when accused 2 called at his homestead asking for matches. First accused later accompanied second accused that morning to go to where second accused's wife was. He says that he knows nothing about the charge and prayed for his acquittal.

The second accused on the other hand states in his defence outline that on the day in question he was with first accused since midday. First accused intimated to him that deceased had caused the death of his (first accused) child and was bewitching the family. Second accused says he brushed aside the topic and the two continued drinking in the company of fellow revellers at Chichongwe homestead.

Later in the evening second accused decided to leave the beer drink for his home. First accused enquired from him whether the now deceased was still at the beer drink and first accused asked second accused to enquire about her from the people present. Accused 2 complied. He was informed that she left and he advised first accused. The two of them left the beer drink and on their way home the first accused asked accused 2 for company to pass through the now deceased's homestead. Accused 2 agreed. They arrived at deceased's home and found her present at her bedroom door's step. Accused 2 says he saw first accused picking a stone and crushed deceased's head who fell on her back. Out of fear second accused says he fled away. First accused caught up with him later and threatened to attack him if he discloses the incident to anyone. Second accused prays that he be found not guilty and acquitted.

The state led its evidence from two police witnesses. The first witness to be called by the state was Detective Sergeant Peter Kasora. He told the court that on 9 September 2019 he attended the scene in the company of the investigating officer. He observed deceased lying by the door way facing downwards. He also noted a deep wound on the deceased's head stretching from the frontal part of the head to the occipital region, deceased's body was in a pool of blood.

The first witness saw some shoe prints meaning that someone had been at that place. The shoe prints were traced going on a westerly direction, they then disappeared by the tarmac road, Tanganda/Ngundu highway.

Three days later after the first attendance, the first witness returned to the scene for further investigations. The detective established that accused had had a misunderstanding concerning witchcraft. The police went to accused 2's place of residence and recovered a pair of black shoes whose soles were cracked and upon comparison with the shoe prints observed at the scene, the shoe prints matched. The shoes were admitted in court as evidence and marked as exh 3. However the witness initially interviewed second accused he professed ignorance of exh 3 stating that he only had a pair of white tackies. According to the first witness, accused 2 told the detectives that the stone used in stoning deceased was thrown into a latrine toilet.

The first witness also interviewed first accused who denied any knowledge about the death of the deceased. First accused did not make any indications.

First witness further testified that second accused made indications at the scene and showed the police where he was standing watching the first accused picking up a stone which first accused used in assaulting the now deceased. Second accused also showed police the position where the shoe print evidenced the cover of the house where second accused was. First witness told the court that he witnessed the warned and cautioned statement of second accused.

Under cross-examination by Mr *Mungure*, for first accused, the witness told the court that first accused informed the police about the alibi that on the day in question, first accused did not leave his place from the late afternoon till the next morning and that he was with Maxwell Haisi. However, the first witness stated that police investigated the alibi and established that Maxwell Haisi indeed exists but had gone back to South Africa a few weeks before the murder incident. The witness reiterated that first accused was arrested by the police after second accused implicated him. He also added that it was first accused who had lost a child who allegedly died through unnatural means.

Under cross-examination by Mr *Muraicho* who was representing second accused, the witness told the court that when he interviewed first accused, first accused told him that accused 2 was responsible for the death of the deceased. First accused had remained standing at a distance of 20 metres when second accused attacked the deceased, the witness testified. To the first witness first accused told the police that although the deceased child belonged to first accused, he (second) accused committed the offence. The witness could not tell the court the exact role played by second accused at the scene. Later on the witness added that the shoe prints at the scene went as far as to the door where the deceased's body was lying and they also showed that they exited. During clarification in court the first witness conceded that the second

accused refused to sign the indications made at the scene, and also remarked that accused 2 cooperated with the police during investigations.

The second state witness was Detective Assistant Misheck Masoka the investigation officer. He told the court that first accused was implicated by accused 2. He confirmed that the shoe prints spotted at the scene led to the arrest of second accused. The second accused narrated to the second witness what led to the death of the now deceased, the motive behind the killing of the deceased by the first accused, and how first accused killed the now deceased. The witness also told the court that after the first accused killed the now deceased, accused 2 told him that first accused whistled to second accused and both of them left the scene together and parted ways later. The two accused shared the same father but have different mothers. First accused lost his child.

When the second witness interrogated first accused, the latter totally denied any involvement in the matter. The second witness stated that none of the two accused spoke about Maxwell Haisi. However he had heard from the first witness that the name was mentioned but upon verification by the police it was established that Maxwell Haisi had gone to South Africa, a few weeks before the death of the deceased.

The second witness further told the court that second accused was standing at point B on the sketch plan where the shoe print was noticed, a distance of two (2) metres from deceased's bedroom. According to second accused, first accused picked the lethal stone approximately eighteen (18) metres from the point where deceased was before her demise. Second accused told the investigating officer that he played no role in the murder of the now deceased, he was just standing watching from a distance. The witness related to court that after the fatal blow, according to second accused, first accused threw away the stone.

The second witness confirmed that the injury on the deceased was on the head stretching from the parietal area to the occipital region on the lateral side of the head though the second witness could not tell as to which side of the head the wound was, but he described it as very deep given the volume of blood which was at the scene. The shoes, exh 3, was confirmed as those belonging to second accused, who confirmed that he accompanied the first accused.

Under cross-examination by first accused's counsel second witness repeated that upon interviewing first accused about the matter first accused professed ignorance of the matter. The second state witness also confirmed that first accused informed the police details that first accused left Chichongwe beer drink at 1500 hours. The witness did not verify the veracity of

first accused's *alibi* since the first witness had already done the verification, however the police had established that Maxwell Haisi had already left for South Africa before the fatal incident revolting to the now deceased. The second witness told the court that first accused did not tell him that at the time second accused was at deceased's place, first accused was with Maxwell Haisi

In response to questions put to him by second accused's counsel, second witness told the court that when second accused's initial caution was recorded by the first witness, he was not present. Second accused told the second witness that second accused was not sure as to how many blows first accused struck the now deceased. The second witness added that the second accused's response pertaining the disposal of the stone which was used to strike the now deceased prevaricated. At one time second accused stated that the stone was thrown into the pit toilet and later told the police that he did not know what happened to it. He also confirmed that if first accused whistled to second accused after first accused has assaulted the now deceased it would mean that second accused might not have been at the scene where first accused struck the now deceased. The second witness further pointed out that by the nature of the head injuries, it would show that there was more than one blow that was delivered. He told the court that the body of the deceased was half a metre from the door, the head was inside the hut, the palms were blood stained, and the body was in a pool of blood. The second accused's shoe prints were at the corner of the house. Second witness added that according to second accused, at one time second accused left his position and moved to peep into the house after deceased had been attacked and collapsed. After peeping second accused backtracked to his original position two metres from where deceased was lying. The second witness also maintained that first accused picked the stone from a pile of stones nearby. The second witness confirmed also that the shoe prints by the body of the deceased may have been contaminated by those people who discovered the death of the deceased. The visible shoe print two metres away from the body was the one which had been covered by a water bucket to preserve it. It was the very shoe print that led to the arrest of second accused. The second witness also indicated that accused 2 maintained his version that he was standing at the corner watching what accused one was doing then fled from the scene.

After the testimony of the state witness, the state case was closed.

Tawanda Maphosa, first accused gave evidence in court, he virtually maintained the contents of his defence outline. He added, however, that, second accused implicated him because second accused was jealousy of the rural house first accused inherited from his late

father. First accused reiterated that he left Chichongwe, homestead at 1500 hours on the day in question and went straight to the homestead where he remained with Maxwell Haisi until the following morning. He never went to deceased's homestead on the day or night deceased died.

During first accused's testimony in court, the court observed that he was restless and could not look at the bench. He struggled to answer simple questions especially on the time he left Chichongwe homestead. He gave confused evidence at one stage his defence counsel could hardly explain his demeanour in court. First accused tried to explain all this by stating that he was uneducated and only went up to grade 5 of the primary education. However some of the questions did not need academic knowledge they simply needed what can be termed everyday explanatory responses. He did not fair well in the witness box, he lied with disconcerting fluency. On the usage of alibi, he had undertaken to call Maxwell Haisi and there were three postponements of the matter to afford first accused to call the witness, the witness failed to turn up. The first accused was expected to establish his alibi that he was elsewhere at the material time of the demise of deceased, and prove that his story was probably true but he failed, the defence of *alibi* resultantly was not supported by evidence. The police detective probed on it and established that Maxwell Haisi had left for South Africa two weeks or so before the date the now deceased was murdered. We therefore reject first accused's alibi for these foregoing reasons.

Second accused took the witness box and also maintained what he had outlined in his defence outline. He repeated that he was with first accused at Chichongwe homestead from 1500 hours. He added that he was tasked to check the presence or otherwise of the deceased at Chichongwe homestead from the fellow revellers who were still present there. He left in the company of first accused and that it was around 6pm. On the way their respective homesteads, first accused proposed to him that second accused accompany him to the deceased's home.

The evidence of second accused is fairly detailed and contains information such as the nature behind the death of the deceased that first accused wanted to avenge the death of his (first accused's) child, the weapon and the manner first accused purportedly used to kill the now deceased. Some of the evidence of second accused finds vivid corroboration from the state witness, Nyarai Mwateteni's evidence is to effect that she took note of the presence of first accused at Chichongwe's homestead after 1800hours and observed him standing by the gate. She then also saw both accused leaving the beerdrink at Chichongwe going towards Machona business centre. Both police details, Detective Sergeant Peter Kasora and Detective Assistant Inspector Misheck Masoka, confirmed in court that second accused's version has been

consistently repeated on the events from Chichongwe homestead up to the time second accused ran away from the scene of the crime. Second accused stated that he had no motive in killing deceased. He used to enjoy cordial relations with first accused and was threatened by first accused if ever he dared reveal what he had seen occurring at deceased's place.

After having carefully looked at the evidence of the second accused we are certain that second accused's account is more probable and to some extent plausibly satisfactory. The involvement of second accused in the matter could have been well ably elucidated by first accused, but the latter chose to distance himself totally from the event. There is no contrary evidence juxtaposed to that of the second accused and we have no reason to disbelieve it. It might possibly be true in our view. The second accused was subjected to an excruciating cross-examination by first accused's and state counsel but he stood his ground and did falter on what happened on the day in question. We accept his evidence as credible and truthful. As to why he did not raise alarm when he realised what first accused was doing, human beings react differently when confronted by a horrendous situation when someone is murdered. The issue of white tackies though suspicious do not point to the involvement of the second accused in the fatal blow on the deceased. The second accused cooperated well with the police right from the first day.

Whether first accused is liable to the murder of the now deceased?

First accused's child died allegedly from unnatural means. According to second accused, first accused strongly believed that deceased had used unnatural means of witchcraft to cause his child's death. The first accused revealed all this to his step brother, second accused and did so outrageously. He was filled with anger and nursed a sense of revenging the death. However from the available facts and evidence, he did not tell second accused the exact date for that revenge and how he was going to execute it.

First accused was at Chichongwe homestead with second accused. We are satisfied that first accused indeed sent second accused to check the presence or otherwise of the now deceased. Having established that deceased had left first accused resolved to follow her to her homestead. First accused asked second accused to go with him. We are satisfied that first accused never left the company of second accused till first accused got to deceased's home. as already said hereinabove, we reject the defence of alibi advanced by the first accused. There was presence of first accused in the vicinity of the area in which the crime was committed. The first accused failed to give a cogent reason why Nyarai Mwateteni, Peter Kasora and second

accused could falsely implicate him. We reject first accused's reason that second accused was jealous of the house given to first accused by his late father. To the contrary first and second accused were very close to each other and confided in each. They were together before the incident before us and were together the very next day sharing a cigarette. There was no reason for second accused to be against the first accused, he simply told the truth and as already ruled herein, we accept his evidence.

The first accused had a belief in witchcraft and to him in that belief, there was justification for killing the person who is allegedly working the wicked deeds by witchcraft. First accused was obviously obsessed by the belief that the now deceased through the use of witchcraft caused his child's death. We do accept the evidence of the state and that of the second accused and come to a conclusion that the first accused had all the reasons for revenging his child's death which had occurred a month before the date of now deceased's death, first accused is the instigator of the death.

The next issue for determination is whether the first accused had the requisite *mens rea* to kill the now deceased? First accused had a pre-conceived plan to kill the now deceased, not out of a genuine belief in witchcraft but out of an evil sense of revenge. He deliberately calculated and by cold blooded means reminiscent of the burnings at the stake and the atrocities of medieval history executed the victim. In my view this is certainly not a case where there was merely appreciation of the risk of death from the assault perpetrated and recklessness as to whether that risk was fulfilled. This is one case where first accused can have had no substantial doubt that death would result from his conduct, that at least from the point that he had an actual intent to kill, whether or not it be labelled *dolus indirectus*.

First accused chose a stone which needed two hands to lift and bashed the now deceased's head. The murder of the deceased must have been premeditated, at least planned by first accused at an earlier stage. The choice of stone from a nearby pile of stones, to be used in killing the deceased, in our view clearly shows that first accused was determined to eliminate deceased's life. Deceased died on the spot. First accused only left the scene after being satisfied that the now deceased was beyond human aid. First accused took the law into his own hands and by a carefully planned stratagem, chose night time, to exact revenge for his son's death. First accused was beset with feelings of outrage and frustration because he felt that the now deceased caused the death of his son. He behaved as if he performed a public service by killing deceased as it was a feeling of satisfaction at having been able to bring just retribution upon deceased. First accused murdered a defenceless old woman without offering any provocation

who suffered a cruel death at the hands of the first accused. We are satisfied beyond any doubt that the first accused had the requisite *mens rea* in killing the now deceased.

Whether second accused is a *socius criminis*?

Mrs *Matsikidze* urged the court in her submissions to find second accused liable as a co-perpetrator in terms of s 196A of the Criminal Law (Codification and Reform) Act, [Chapter 9:23]. She submitted that where an accused knew that a crime is being planned or committed, he or she should be liable. In the matter of *Benson Muleya and 4 Others v The State* SC 69/88 MANYARARA JA on p 4 of the cyclostyle judgment clearly held as follows:

“In this regard two principles of our law strike me with the appropriate approach to be adopted to the present case. The first is that on *socius criminis* is guilty of the crime committed by his principals to the same extent as they are and, if the principals had a positive intent to kill a particular person, the *socius* must be held to have had a similar intent if he aids and abets them in that purpose in the knowledge that this was their avowed purpose even though his role is menial on. (See *S v Svuure* 1974 (2) SA 24 (RAD).

I would rephrase the second principle as follows: when a court finds it impossible to apportion guilt unevenly between accused persons on the evidence before it the court should treat them all in the same way. (See *R v Nemashakwe & Ors* 1967 RLR 127)”

As already analysed in this judgment the state did not manage to prove that the accused knew what first accused was going to do on that day. We cannot say that first accused planned the revenge with second accused. If he did, first accused did not reveal that to this court, the version of second accused remains unchallenged. He could not disclose what he had witnessed because he had been induced by threats which he actually believed. Those threats could have been immediate death or serious bodily harm, which there was no way of avoiding them than to remain silent. Second accused could not reasonably be expected to have resisted them. First accused did not meaningfully challenge second accused about these threats. The version of second accused may look improbable to first accused, but it was uncontradicted evidence and we accept it. Common purpose was not established by the state. (See *Raymond Stanley Chakwira* SC 75/85). We are of the unanimous opinion that the guilt of second accused was not proved to that degree of certainty which the law demands that upon a proper assessment of the evidence as a whole it is dangerous to convict second accused. When first accused picked up the lethal stone second accused thought first accused was going to sit with deceased. When second accused saw first accused bashing deceased, second accused fled from the scene, when first accused re-joined the second accused, he threatened him. There is no evidence of collusion between first and second accused. Second accused did not assist nor abet first accused in the

planning nor execution of the crime. The issue of shoe prints did not prove that other than being present at the scene second accused did anything else. The court will accept second accused's evidence as probably true in the circumstances and accord him the benefit of doubt.

Having said this we find first accused guilty of murder with actual intent. Second accused is found not guilty and acquitted.

SENTENCE

In assessing the appropriate sentence, the court will look at the personal circumstances of the accused as well as circumstances of this matter. In addition the court will look at the aggravatory factors advanced by the state.

Our courts believe that an unjustified and unlawful killing of a human life by another, deserves of any mercy. In my view this applies *a fortiori* to any brutally innovative method of murdering the victim such as adopted by first accused. Punishment should fit the criminal as well as the crime, be fair to the accused, and to society and be blended with a measure of mercy. (See *S v V* 1972 (3) SA 611 (AD) 614). The facts of youthfulness, less sophistication, mentally immature as well as psychological immaturity and the accused's environment will weigh considerably in his favour. A death sentence should only be imposed on a teenager where it actually appears that he killed out of interests of wickedness. An obsessive belief in witchcraft should also be considered in addition to the above. There is however no evidence placed before me that shows that there is a direct link between first accused's child's death and deceased. The injuries sustained by the deceased and the cold blooded murder perpetrated by the first accused would paint to a lengthy prison term. As we determine to attain scales of education in our country belief in witchcraft should be begin to gradually disappear and people should come to terms with death as a thing that can happen to anyone young or old.

Having cumulatively looked at all these factors the accused is sentenced as follows:
20 years imprisonment.

National Prosecuting Authority, for the State
Makombe & Associates, for the 1st Accused: Pro Deo
Mugadza Chinzamba & Associates, for the 2nd Accused: Pro Deo