

THE STATE
versus
DENFORD NYAMANDE

HIGH COURT OF ZIMBABWE
MUNGWARI J
HARARE, 5 October 2022, 29 &30 November 2022

Criminal Trial

Assessors: Mr *Jemwa*
Mr *Shenje*

J Mugebe, for the state
M Tshuma for the accused

MUNGWARI J: The accused was indicted before this court facing two counts of murder as defined in s 47(1) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. The charge was that he brutally attacked his 87 year old father, Felix Taonana Chiodza and his 89 year old father's sister Angela Bhunu with lethal weapons and inflicted mortal injuries on them.

In detail, the allegations are that Denford Nyamande (hereinafter "the accused") had a long standing dispute with his father Felix Taonana Chiodza (hereinafter "1st deceased") and his father's sister Angela Bhunu (hereinafter "2nd deceased") which stemmed from allegations of witchcraft. The accused believed that the two were responsible for bewitching him and bringing misfortunes and illness in his life. Consequently, on 22 March 2021 the accused left his place of work at Dema in Seke communal lands. He proceeded to 1st deceased's place of residence in Marumisa village Murehwa. He found the 1st deceased alone in his bedroom hut. He picked an axe which was in the room and struck the 1st deceased once on the left hand and twice on the head with the back of the axe. The 1st deceased died instantly. The accused closed the door to the hut and proceeded to Chidziva village where the 2nd deceased resided. There, he found the 2nd deceased alone in her house. He had in hand a 200ml zimbo spirit can which he was drinking from. He confronted the 2nd deceased and demanded that she remove the spell that she had cast upon him which he alleged was the source of his misfortunes. When that did not happen, he picked a hoe that was in the house and hit her with it twice on

the head until the hoe handle broke. The 2nd deceased bled to death. He left the empty alcohol container at the scene and disappeared until his arrest.

The accused denied the double homicide charges of murder. In his defence outline he stated that he had no intention of killing the deceased as they were both his relatives. His account of the events which led to the double tragedy was that, sometime in 2019 after the family had been hounded by a series of misfortunes, a prophet was brought to the 1st deceased's homestead in order to conduct a cleansing ceremony. During the ceremony which saw family members converging at the 1st deceased's homestead, the prophet had removed some witchcraft apparatus from the 1st deceased's homestead. At this gathering the 1st deceased had confessed to owning the witchcraft paraphernalia. Before the prophet left he also fingered the 2nd deceased as a key participant in the black occult. He warned those gathered that she too was in possession of witchcraft apparatus which required exorcism. Since that demonstration the accused believed that the 1st and 2nd deceased dabbled in witchcraft for different purposes which included causing his misfortunes.

The accused further alleged that a clear illustration of the practice of witchcraft by the two deceased occurred the following year in December 2020. He visited the 1st deceased at his homestead. On that day he had felt excruciating body pains as he was cleaning the 1st deceased's yard. He had confronted the 1st deceased who warned him not to inform anyone about it. Strangely though, after speaking to the 1st deceased about the ailment he immediately felt better. He was certain that the 1st deceased had through his occultist powers released him from the pain he had felt. It made sense to him therefore that when he fell sick in March 2021, he approached the 1st deceased for relief because this time around the illness was severe. He experienced pain in his feet. He said more alarmingly his genital organs shrunk. Before he set out to get assistance he engaged the 1st deceased who promised to relieve him of the pain. On the fateful day he left Dema where he was working, for Marumisa village where the 1st deceased resided. Expecting to get assistance like before, the accused was surprised when the 1st deceased spurned his request and even referred him to the 2nd deceased for assistance. A misunderstanding ensued between the two and in the heat of the moment the accused picked an axe which was in the 1st deceased's hut and struck him with it until he fell. Still on his quest for relief from the pain, he left the premises en route to 2nd deceased's place. Along the way he bought a bottle of Zimbo beer. He arrived at 2nd deceased's place with it in hand. He confronted the 2nd deceased who professed ignorance on the source of his illness. She referred him back to the 1st deceased. She insisted that she was

also a victim of the 1st deceased's witchcraft and informed him that the 1st deceased had a shrub in his possession that he could use to cure him. Driven by the intense body pains that he was feeling the accused "lost it" and using a hoe handle that he picked inside her house he assaulted the 2nd deceased. Thereafter, he went away.

In essence the accused pleaded the defence of provocation.

COMMON CAUSE ISSUES

The facts of this matter are largely undisputed and can be summed up as follows:

1. There had been a long standing dispute between the accused and the deceased persons arising from allegations of witchcraft
2. On the fateful day the accused approached the both deceased persons and confronted them over his belief that they were bewitching him and causing him untold suffering.
3. The accused took an axe and hit the 1st deceased repeatedly with it.
4. The 1st deceased sustained severe injuries from which he died.
5. The accused caused the death of the 1st deceased
6. The accused proceeded to the 2nd deceased house
7. He picked a hoe handle and used it to assault the 2nd deceased repeatedly
8. The 2nd deceased sustained mortal injuries
9. The accused left the empty Zimbo beer can from which he had been drinking when he arrived at 2nd deceased's house
10. He caused the death of the 2nd deceased

STATE CASE

Prosecution opened its case by applying to tender the autopsy reports that were compiled by Doctor Yoandry Olay Mayedo a pathologist employed at Parirenyatwa Hospital. The doctor had examined the remains of both deceased on 8 April 2021. On the 1st deceased, the doctor noted surface wounds on the left eyebrow and left ear and internal head injuries. In the final analysis he concluded that death was as a result of brain injury, left temporal commutes bones fracture and severe head trauma. With the consent of the defence the postmortem report was duly admitted into evidence as exhibit no 1. The cause of the 1st deceased's death was therefore uncontentious.

Likewise the defence also did not object to the admission of the postmortem report that was compiled after examination of the remains of the 2nd deceased. The examination confirmed that the cause of death was as a result of brain injury, right front parieto temporal

commutes bones and severe head trauma. The cause of 2nd deceased's death was also undisputed.

The state thereafter applied to produce the accused's confirmed, warned and cautioned statements. The first related to the death of the 1st deceased whilst the 2nd related to the 2nd deceased. The defence consented to the admission of both statements. The statements were confirmed by a magistrate sitting at Murehwa on 1 April 2021. The statements were accordingly admitted as exhibit no 3 and 4 respectively. In exhibit 3 the accused mentioned the following relevant factors under caution:

"On 22 March 2021 I left Dema going to our rural home in Murewa. I arrived at our rural home, I proceeded to the deceased's house Felix Taonana Chiodza and I talked to him concerning my sickness but he insisted that he does not know anything. During that time we had an altercation and I got angry, I took an axe which was near in Felix Taonana Chiodza's kitchen and I struck him once on his left hand and twice on the head. He then fell in that kitchen and I left him there since there was no one around. I left around 1600 hours. I left the axe handle which I had used there."

Exhibit 4 in part said the following "...During that time I got angry and I took a small hoe which was in her house and struck her twice using the backside of that small hoe and she fell down, the hoe handle broke near where one uses to hold it. I then closed her bedroom door and I left her in that house. At around past six on the same day I then returned to Dema and I arrived the following morning which was now Tuesday. I left the hoe handle which I had used in that house. I had partake the beer called Zimbo."

In addition to the above, the evidence of James Gwadabira, Noah Madise, Reason Makoni, Eric Chiwara and Shame Gurure was formally admitted in terms of s 314 of the Criminal Procedure and Evidence Act [Chapter 9:07] (the CP&E A) as it appears in the state's summary of evidence.

The evidence of those witnesses established the following relevant facts:

1. After the commission of the offences the accused went on the run and misrepresented to colleagues that he was in the rural areas burying the deceased when he was not.
2. On 22 March 2021 the accused was seen in the vicinity of Marumisa village
3. Noah Madise discovered the dead body of the 1st deceased inside the house lying in a pool of blood.

4. James Gwadibira discovered the body of the 2nd deceased lying on the floor with deep cuts on the head area. There were signs that a struggle had taken place. There was also an empty 200 ml Zimbo cane spirit container close by.

ISSUE FOR DETERMINATION

From the above, it is evident that the only issue for determination in this trial is whether in causing the death of 1st and 2nd deceased the accused intended to kill the deceased. The evidence of the witnesses will therefore be assessed in light of the issue which needs resolution

ORAL EVIDENCE

The State led *viva voce evidence* from two witnesses namely Ambrose Marumisa, and Thomas Sasanhira. The accused on the other hand was the sole witness for the defence.

AMBROSE MARUMISA (Ambrose)

He is the village head in Marumisa where the double deaths occurred. The witness confirmed that from the year 2014 when he assumed the position of village head, the two deceased persons and the accused used to have serious family disputes. The accused and his brother Daniel Nyamande believed that the deceased were bewitching them. For this reason he had presided over seven of their disputes. It was also this witnesses' evidence that on 27 December 2020, the 1st deceased came to his place of residence and informed him that the accused was threatening to kill him. He was also approached by the 2nd deceased, on 1 January 2021 who also requested him to mediate between herself and 1st deceased on the one hand and the accused and his brother Daniel Nyamande on the other. She advised him that the two were accusing them of bewitching them. He was not surprised therefore when on 22 March 2021 he heard that the deceased persons had died at the hands of the accused given the strained and frosty relations that existed.

The witness's evidence was clear and straight forward. He was an honest witness who did not seem to take sides. His evidence served to put the court in the picture of the disputes pitting the accused person against the two deceased persons. The following crucial evidence was extracted from this witness:

- a. He led evidence that he as the village head, encouraged the accused person and his family which included both deceased persons to consult a traditional healer after allegations of witchcraft were levelled against the 2 deceased persons.

- b. He confirmed that in 2019 he gave permission to Daniel and the accused to bring in a prophet.
- c. He also confirmed that the prophet came although he has no knowledge of what the prophet did.
- d. He confirmed that both deceased believed in the use of traditional medicine and that the two consulted a traditional healer after the death of the accused's brother. He told the court that this came out of the discussion he had with the family of the 1st deceased who included the 2nd deceased. He had advised the family to go back to the same healer in a bid to remove the spell as he believed the family might have been given something that was causing disputes amongst its members.

Significantly the witness outlined the intention that the accused had. Through the complaints of the two deceased he informed the court that the accused had threatened to kill the deceased on account of the witchcraft allegations.

No meaningful cross examination of this witness was done. We found the witness credible and reliable in his testimony.

THOMAS SASANHIRA (Thomas)

The witness a police officer based in Murehwa was the investigating officer in the matter. He attended both scenes in question and recovered the weapons which were used to commit the two crimes. At the 1st scene he recovered an axe that was tendered in this court as exhibit 5. At the second scene he recovered a broken hoe handle which was also marked exhibit 6. The witness ferried the two bodies for postmortem examination. He referred the docket to CID Homicide for further management.

His evidence was straightforward and served to explain the investigations which were carried out as well as identify the weapons that were used to commit the offences. The court's observations on exhibit 5(the axe) were that, the axe is a crude homemade axe with a sharp blade 5-8cms in length. In addition to this the certificate of weight that was tendered stated that it weighed 0,530 kg and measured 0, 70 metres in length. A combination of these factors led us to conclude that the weapon is lethal.

We also observed that exhibit 6 (hoe handle), which comprised two thick broken pieces of what we perceived to be the hoe handle was in fact another primitive looking weapon. We also noted that the head was encrusted with dried blood. The first piece measured 50-60cm whilst the off- cut measured a mere 10cm.The thick, 70cm long would

have presented an equally lethal weapon when utilized upon a frail 89 year old defenseless woman.

DEFENCE EVIDENCE-DENFORD NYAMANDE

The accused sought to abide by his defence outline. He narrated the background to his belief that his father and aunt had subjected him to witchcraft. In addition his evidence was that on the fateful day he travelled all the way from his workplace in Seke to 1st deceased's homestead. Upon arrival he expected the 1st deceased to relieve him of the pain as he had done the first time. When that did not happen he got angry and proceeded to assault the deceased several times. He also told the court that he did not know that his actions would lead to deceased's death. From there he proceeded to the 2nd deceased's place where he had been referred to by his father. He assaulted the 2nd accused several times after she professed ignorance of his illness. When the accused was asked during his evidence in chief whether he intended to kill the deceased persons, he responded that he thought he was just assaulting them.

During cross examination, the accused confirmed that both deceased persons were old and defenseless and they did not even fight back. He also confirmed that he aimed at the most vulnerable parts of deceased's body.

From accused's evidence it was clear that he had no justification for his actions. He was not under any attack. He nevertheless used lethal weapons on two frail geriatrics with so much force such that they both sustained brain injuries. The 1st deceased sustained a fracture on the left temporal whilst the 2nd deceased sustained one on the right front of the head. A fracture indicates that severe force was used.

WHETHER THE ACCUSED LACKED INTENTION TO KILL BY REASON OF BELIEF IN WITCHCRAFT

In *S v Hamunakwadi* HH323/15 this court dealt with what it termed the witchcraft-provocation defence. It held that many cultures across Africa believe in the powers of witches, witch hunters and other traditional healers. It also found that unlike in other cultures where practising witchcraft can be equated to an alternative religion, in our society witches are irredeemably wicked. As a result the criminal law has often recognised the African person's belief in witchcraft which often leads to violence. It then held that such realisation has given rise to a defence called witchcraft-provocation and further that under that theory:

“accused persons could reduce their crimes or punishments upon proof that they believed they, or persons under their immediate care, were being bewitched and that this belief caused them to temporarily lose self- control.”

The court added, controversially so, in my view, that in some ways, that theory provides tacit recognition that in certain communities killing a “witch” is not merely explainable, or excusable, but praiseworthy.

I wish to start by saying I entirely agree with the court’s reasoning in *Hamunakwadi* (supra) on its views about how African communities see and embrace the existence of witches and their occultist practices. I am however constrained to take a slightly different approach in relation to the availability of the defence of witch-craft provocation to an accused who commits murder driven by his or her beliefs in witchcraft. Whilst I agree that the defences which an accused may successfully raise are not limited to those set out in chapter XIV of the Criminal Law Code and that other common law defences may still be applicable, the defence of witchcraft-provocation cannot be a standalone defence. Admittedly, a belief in witchcraft can drive an individual into committing a particular offence but the provisions of s101 of the Criminal Law Code make it impossible for that person to rely on witchcraft as a defence. It provides that:

101 Belief in witchcraft to operate in mitigation and not as a defence to crime

It shall not be a defence to murder, assault or any other crime that the accused was actuated by a genuine belief that the victim was a witch or wizard, a court convicting such person may take such belief into account when imposing sentence upon him or her for the crime.

Given the unambiguous construction of s101, I have no doubt that where an accused pleads witchcraft- provocation he/she is simply pleading the defence of provocation. In *S v Best Sibanda* HB 139/18, the accused pleaded what he called cumulative provocation. The court held the defence to mean that the accused was raising the defence of provocation. Any descriptive words before the term provocation are therefore immaterial. The reason for provocation in terms of s239 of the Criminal Law Code is not critical. The accused’s defence in this case will therefore be assessed purely against the requirements of the defence of provocation. See also the case of *S v Thsuma* HB 171/22.

S239 of the Criminal Law Code provides that:

- (1) If, after being provoked, a person does or omits to do anything resulting in the death of a person which would be an essential element of the crime of murder if done or omitted, as

the case may be, with the intention or realization referred to in section forty-seven, the person shall be guilty of culpable homicide if, as a result of the provocation—

- (a) he or she does not have the intention or realisation referred to in section forty-seven; or
 - (b) he or she has the intention or realization referred to in section forty-seven but has completely lost his or her self-control, the provocation being sufficient to make a reasonable person in his or her position and circumstances lose his or her self-control.
- (2) For the avoidance of doubt it is declared that if a court finds that a person accused of murder was provoked but that—
- (a) he or she did have the intention or realization referred to in section forty-seven; or
 - (b) the provocation was not sufficient to make a reasonable person in the accused's position and circumstances lose his or her self-control;
the accused shall not be entitled to a partial defence in terms of subsection (1) but the court may regard the provocation as mitigatory as provided for in section two hundred and thirty-eight.”

Provocation is essentially speech or action by one person which makes another angry. Such speech or action is usually deliberate. By its nature as a defence provocation must occur suddenly as a result of an impulse. It happens without premeditation. In other words it refers to an instantaneous and spontaneous response to an event in which the accused has not time to cool off and weigh his options. The accused must have lost self-restraint on the spur of the moment. The defence is not available cumulatively. Provocation cannot build gradually. In instances where an accused is provoked no matter how intensely but has had the opportunity to cool off and does not suddenly react but lets the provocation fester waiting for an opportunity to strike back at the provocateur he waives his right to rely on this defence. As observed in *S V Best Sibanda* (supra) the rationale for that is self-evident. It is that where the accused person had all that time to think of and turn ideas in his head, he would have formulated the intention or realisation which s47 of the Criminal Law Code speaks to.

In this case, the question which then arises is whether, when the accused alleges that he was provoked by his father and aunt's practice of the dark art, the court ought, in the peculiar circumstances, to accept that as a partial defence and reduce his crime to one of culpable.

The circumstances of this case reveal an interesting story. The evidence before us shows that there were long standing accusations of practising witchcraft against both deceased persons by the accused and his brother Daniel. The village head's testimony is critical in this regard. As far back as 2014, the accused had started alleging being bewitched by the deceased persons. In 2019 with the permission of the village head, a prophet was called to cleanse the 1st deceased person's homestead. The prophet not only cleansed the

homestead but stated unequivocally that the 1st deceased was a wizard. He also added that the 2nd deceased was a witch and kept apparatus for the practice. It is not important whether the deceased persons practised witchcraft or not. What is key is that as far back as 2014, the accused knew or believed that the two practised the dark art. In December 2020, the accused had actually been bewitched and healed by 1st deceased person. He had experienced first-hand the 1st deceased's wizardry. On all those instances, he did not do anything. The incidents did not provoke him. He managed to put it at the back of his mind. In other words he allowed the provocation to rankle. He appeared to have waited for a convenient time to hit back at his tormentors. Even then, he was angry when he fell sick at his work place in Seke. He then travelled all the way from there to his rural areas somewhere close to Murehwa. When he got to 1st deceased's homestead he attacked him and left him for dead. He proceeded to 2nd deceased's place and equally attacked her in cold blood. There was absolutely no provocation to speak of in both instances. What is instead apparent is the clear premeditation to take revenge by the accused against the two whom he believed were the sources of his misfortunes and pain. Those grisly and macabre episodes come nowhere near satisfying the requirements of provocation. His every description of the events leading up to the killing of the deceased is completely divorced from a person who was provoked and acted impulsively.

He did not act in the "heat of passion" which would have resulted in loss of self-control as would prevent him from formulating the requisite intention or to realise the risk involved in the act constituting the crime charged. He deliberately set out to kill his father. He chose the weapon with which to kill. The evidence we have is that the 1st deceased was frail and old. The accused could have used his bare hands to assault him as he wanted us to believe. He instead, picked an axe and hacked him multiple times. He then left him to die and closed the door behind him. The same happened with 2nd deceased whose residence was a considerable distance from the 1st deceased's. By his own admission and in his confirmed warned and cautioned statement he bought a can of zimbo beer along the way, presumably to steady his nerves for the heinous job awaiting him ahead.

When he arrived, he used a hoe handle to smash the old woman's head. He left her in a pool of blood and walked away from the scene unbothered. He went into hiding and had the guts to misrepresent to his workmates that he was attending the burial of the two when in fact he was not. His belief in witchcraft played no part in these chilling murders. The accused wanted his father and aunt out of the way. We have it on good authority from the witness Ambrose that, he had earlier on threatened to kill the two accused and they had reported the

threats to him. The accused was therefore not angry but determined to carry out a calculated plot to eliminate them. When asked by the court whether he is still sick since the demise of the two he happily told the court that he had never fallen sick since then. Put differently, we find that the accused did not react to an act of provocation; plain or witchcraft -provocation. He carefully planned this murder and executed it with cold blooded precision. He was under no emotional stress when he planned to kill them over time. He had previously told the both deceased of his intention to kill them.

The belated attempt by Mr. *Tshuma* in his written closing submissions to raise the defence of non-pathological criminal incapacity in our view should not detain us. The reason for this is from the beginning the defence was never raised. It is surprising that the accused would even try to make it an issue at the 11th hour without placing any evidence of it before this court.

In conclusion, we are convinced that the detail reflected in the accused's confirmed warned and cautioned statements correctly reflects a criminal mind rather than an emotionally and psychologically pressured mind. Even if it were to be assumed in his favour that his belief in witchcraft played a part in prompting him to kill the two geriatrics, the acts of causing death were not done in the heat of the moment. At the time of commission of the offence, he had the capacity to appreciate and understand the wrongfulness of his actions which is why soon after the commission of the offence he went on the run. He knew that what he was doing and had done was wrong.

DISPOSITION

In the circumstances, we are convinced that the state proved its case beyond reasonable doubt. Accordingly, the accused is found guilty of both counts murder as defined in s 47 (1) of the Criminal Law Code as charged.

SENTENCE

In mitigation counsel for the accused submitted that the accused is 39 years old, has a wife and 3 children. He has the usual attendant responsibilities that are attached to any breadwinner in any family unit.

Counsel for the accused also urged the court to consider the accused's lived reality. The accused believed that the 2 deceased were bewitching him. The community he hails from believe in such the village head included. We are also alive to the fact that African communities see and embrace this practise. We took this as a significant mitigating factor in accordance with s101 of the Criminal Law Code which allows us, to take such belief into account when imposing sentence upon the accused if the evidence shows that the accused

was actuated by a genuine belief that the victim was a witch or wizard. The evidence placed before this court during trial convinced us of this fact.

In his favour too, the accused expressly asked for forgiveness from his relatives and all concerned. He informed the court that the spirits of his father and aunt will forever haunt him. The plea of forgiveness and show of remorse exhibited by the accused indicate a person who is contrite and fully appreciative of the import of his actions. We also considered this in arriving at the appropriate sentence.

In aggravation however we considered that these were callous murders of 2 defenceless octogenarians. Not just any octogenarians however, his blood relatives, his 87year old father and his father's 89year old sister. The frail 1st deceased was prevailed upon whilst he was alone in his house. He was hacked to death by the accused who then left him to die in cold blood. The accused closed the door behind and travelled a considerable distance to go and deal with the 2nd deceased. He found her alone in the room and mercilessly bludgeoned her to death. The savagery and barbarism of the attack was absolute. The accused gave the deceased no opportunity for their survival as illustrated by the fact that both deceaseds were frail and old. The pathologist stated that they both sustained head fractures and head trauma. The two certainly died painful deaths.

The court is required to consider the factors enumerated in s 47(2) and (3) of the Code, in the course of assessing an appropriate sentence following a conviction of murder. Firstly it is enjoined to take as an aggravating circumstance that the murders are two in number. Section 47(2)(b) states that it shall be aggravating if one or two murders were committed in the same episode. The evidence before us is that the accused arrived at the 1st deceased's homestead, murdered him and immediately thereafter set out for the 2nd deceased's where he also killed her. That behaviour brought him squarely into the ambit of the aggravating circumstance of having committed two murders in the same episode.

There is no question that these murders were premeditated as envisaged in s47 (3) (a). From the time the accused left his workplace he had the intention of dealing with the two in the event that they did not acquiesce to his demands. The evidence that is there shows that he had planned the murders beforehand. He had previously threatened to kill the two. He ultimately accomplished his objective.

The 1st deceased was 87 years old and the 2nd deceased 89years old. Those ages came out in the evidence before us. The doctor also confirmed the ages of the two deceased in the

post-mortem reports. Section 47 (3) (b) states that it is equally an aggravating circumstance where the victims of murder are above the age of 70 years.

Our discretion relating to sentence is constricted by s 47(4)(a) which prescribes that a person convicted of murder in aggravating circumstances such as in this case shall be sentenced to death, or to imprisonment for life or to imprisonment for any determinate period not less than 20 years .*In casu* there is a combination of three aggravating factors under which the murder was perpetrated. This increases the accused's moral blameworthiness. If it had not been for the significant witchcraft mitigating factor, the accused would have been a suitable candidate for the capital punishment. However the aggravating circumstances considered with the mitigating factors leave us to arrive at a finding that the following sentence is appropriate in the circumstances;

Both counts as one for purposes of sentencing: **35 years imprisonment.**

National Prosecuting Authority for the State's legal practitioners
Chinamasa, Mudimu & Maguranyanga for the Accused's legal practitioners