

THE STATE**Versus****FORWARD MAPHALA NDLOVU**

IN THE HIGH COURT OF ZIMBABWE
KAMOCHA J with Assessors Mrs Dhlula and Mrs Moyo
BULAWAYO 1 AND 12 OCTOBER 2015

Criminal Trial

W. Mabhaudi state counsel
S. Mlaudzi defence counsel

KAMOCHA J: The accused who is aged 30 years pleaded not guilty to the crime of murder. The allegations were that in the evening of New Year's Day 2013 at Tibeli Business Centre, Guyu he did wrongfully, unlawfully and intentionally kill and murder Sarai Ndlovu a male adult during his lifetime therebeing.

The state produced and read its outline of the allegations against the accused as exhibit one and I do not propose to read it all over again. The accused's defence outline was also read and produced as exhibit two. His defence was summed in the first paragraph which reads as follows:

"The accused person will deny the charge and say:-

- (1) That on the night in question the deceased approached the accused, accusing him of disrespecting him by standing with his female child. In a state of rage, the deceased drew a knife and attempted to stab the accused. The accused then pushed the deceased a few steps away and fled from the scene. In a drunken stupor, the deceased attempted to chase after the accused. A few metres into the chase, the deceased fell enabling the accused to out run the deceased. That was the last time he accused saw the deceased. ..."

It is quite clear from the above that the accused was at the scene and had an altercation with the deceased during which the deceased allegedly drew out a knife. The accused then

allegedly pushed the armed deceased a few steps and managed to make good his escape. It is therefore common ground that there was a knife at the scene.

The third exhibit was a post mortem report by Dr S. Pesanai. Under the heading “Marks of violence” the doctor noted a laceration on the left neck measuring (6 x 2cm). Under “blood vessels” he noted that the jugular vein and carotid artery had been perforated. Under the heading “Larynx/trachea he observed a laceration 2cm below the vocal box”.

The doctor remarked that the post mortem was consistent with injuries caused by a sharp object, for example, a knife when regard is had to the injuries on the blood vessels which caused the deceased to die in less than 10 minutes after the assault.

The doctor concluded that death was due to (1) haemorrhagic shock; (2) sharp force trauma; (3) perforated neck vessels and (4) homicide. This evidence was produced by consent and the need to call the doctor did not arise.

This court observed that the 6 x 2cm laceration on the left side of the neck perforated the vial neck vessel causing instant death of the deceased *id est* in less than 10 minutes.

The issue to be determined by the court was: Who inflicted that fatal injury with the knife and how?

On the one hand the state’s story is that the injury was inflicted by the accused.

While on the other hand the accused postulated two possibilities. Firstly that the deceased who had drawn out a knife and was in hot pursuit of the accused could have possibly inflicted the injury on himself when he fell down in a drunken stupor. The second possibility was that the injury could have been inflicted by some unknown person.

The second suggestion does not make sense and does not need to detain us any further simply because it is common ground that the altercation was only between deceased and accused

and no one else. This was after deceased had harshly rebuked the accused for what he was doing so Seyisiwe. In an endeavour to establish how the deceased sustained the fatal injury the state adduced *viva voce* evidence from 2 witnesses.

The key witness was Thando Chimanga an 18 year old form 3 student at Christian College in Nketa 9. On the fateful day she was at the rural home of her parents at Tibeli Village at Guyu in the Gwanda area.

The deceased was her uncle but the accused was not known to her.

During the evening of 1 January, 2013 she was at Tibeli Business Centre with her uncle the deceased who was looking for his daughter named Petronella. While they were at the business centre they found Seyisiwe Moyo near Pindi Shop. They approached her and deceased asked if she had seen Petronella. As Seyisiwe was in the process of explaining when she had last seen Petronella the accused went to Seyisiwe and started caressing her. That did not go down well with the deceased who harshly rebuked the accused for caressing his daughter in his presence as he regarded Seyisiwe as his daughter. The accused then said, "I am sorry I am sorry" and moved backwards for about 2 ½ metres. Her observation was that the accused appeared to want to fight. The deceased appeared to have made the same observation as well and asked the accused if he wanted to fight. The accused said he did not want to fight. The accused went out of her sight into darkness briefly. The next thing she noticed was that the deceased's neck was being cut from behind. Blood gashed out of the deceased's neck and splashed onto her chest area. The deceased fell down on his back. When she checked his condition she concluded that he had died.

She said the suggestion that the deceased produced a knife and advanced towards the accused threatening to stab him was false. It was also not true that the accused pushed the deceased a few steps. She expressed surprise at the suggestion that the deceased could have injured himself. She opined that the deceased was injured by accused because he harshly rebuked him for caressing Seyisiwe in his presence.

The witness was cross-examined by the defence counsel but the cross-examination was ineffective. The accused story was not even put to her. This witness was worth to be believed. Her evidence reveals that the accused was at the business centre. He caressed Seyisiwe while she was talking to deceased about Petronella. Deceased harshly rebuked him. The witness could not recognize him but she was clear that the same person that was caressing Seyisiwe was the one who fatally cut the deceased in the neck. It is in fact common ground that accused was at the scene.

Sergeant Tawanda Tinhu attended the scene and found the deceased covered with a black plastic bag still lying on his back at the scene. He noticed blood all over. He observed that he had a deep cut on the neck. The witness said there was no truth in the suggestion that an injury like that could have been self inflicted. He looked around at the scene and did not see any knife. The court observes that if the deceased had accidentally inflicted the fatal injury on himself the knife would have been found at the scene.

After the evidence of this witness the state closed its case. Whereupon the defence counsel applied for a discharge of the accused claiming that the state had not made a prima facie case.

The application was clearly devoid of any merits. The accused was at the scene. He caressed Seyisiwe while deceased was talking to her quoting the anger of the deceased who rebuked him harshly. During the brief altercation the deceased's neck was fatally cut and he died instantly in less than 10 minutes. The neck was fatally cut with a sharp object which the accused said was a knife drawn out by the deceased. The accepted evidence was that deceased did not draw out any knife. The accepted evidence is that it was not true that deceased charged at accused wielding a knife in a bid to stab him. The deceased had no knife but the accused said there was a knife at the scene which was used to inflict the fatal injury on the deceased. It is very safe to conclude that it is the accused who had the knife which he used to cut the deceased's neck with. It was for the above reasons that the court had no hesitation in dismissing the application for a discharge at the end of the state case.

The accused was then put on his defence and he chose to give evidence but he had no witnesses to call. He was a pathetic witness who did not even trust his legal practitioner. At one stage he requested the court to permit him to cross-examine witnesses himself instead of his legal practitioner.

The accused sought to alter the reason why he was rebuked by deceased. He said the reason was that he was greeting Seyisiwe whom he knew. He stretched his hand to shake hands with her but she ignored his gesture. He then thought he had done wrong by trying to shake hands with her in front of her own people.

The accused said the deceased then emerged from the dark and said, "What are you doing to my children in my presence? You are disrespecting me."

This is a new story which does not make sense because the deceased could not have rebuked the accused for trying to greet Seyisiwe. The truth of the matter is that he was caressing her when she was talking to the deceased. Thando's evidence was not challenged on that point.

The accused was not worth to be believed. He prevaricated and was evasive. He lied about being chased by the deceased because deceased fell down immediately after he was cut in the neck and died instantly.

The accused wanted the court to believe that the deceased accidentally fatally injured himself with his knife which could have been removed from the scene by someone who disposed of it. This also is not tenable. The deceased had no knife. Thando did not see the deceased armed with any knife. It is the accused who has constantly talked about therebeing a knife at the scene.

This court prefers the evidence of the state witnesses to that of the accused which was full of the falsehoods as observed in this judgment.

The accused cut the deceased's neck just below the vocal box and perforated the jugular vein and carotid artery. The blow was aimed at a very vulnerable part of the body. The part is so vulnerable that deceased died on the spot in less than 10 minutes. The accused cut the neck when he was behind the deceased. This is a clear case of murder with actual intent.

In the result accused is convicted of murder with actual intent.

Sentence

There is very little that can be said in favour of the accused. He is a first offender who has two children who are being looked after by his parents. He had been drinking but was still in full control of his faculties. He has spent pre-trial incarceration for 2 years 10 months through no fault of his. That will be taken into account.

As against that the accused is aged 30 years but was aged 28 years at the time he committed the murder. He is in that age group which is causing untold suffering at beer drinks. The young people resort to violence at the slighted provocation. In many instances there is even no provocation at all.

In casu the accused was very rude and disrespectful. He went to Seyisiwe who was talking to a man who was 40 years and regarded Seyisiwe as his daughter and began to caress her right in his presence. She was not even his girlfriend as he was not in love with her. He admitted that. But when the deceased rebuked him for the bad behaviour and disrespect the accused decided to kill him for that. This is a bad case of murder. He killed him like a person who is slaughtering a goat or sheep in the rural areas. The rural folk cut the neck of the goat or sheep and allow blood to gash out.

The accused showed no remorse at all. He chose to tell lies from start to finish when the evidence against him was overwhelming and clear.

After cutting the vital blood vessels of the deceased the accused ran away with the murder weapon and the deceased died instantly. The accused deserves to be sent to prison for a long time for this horrendous murder. A life was unnecessarily lost. He killed a man who had heavy responsibilities. The deceased was married with 5 school going children. The eldest child had to drop out of school due to the death of her father who was employed in South Africa. The mother is a communal farmer. She is unable to adequately provide for the children. They were all attending school before their father was killed.

In the result I think the justice of this case will be met by a sentence of **thirty three years imprisonment.**

National Prosecuting Authority's Office, state's legal practitioners
Samp Mlaudzi & Partners, accused's legal practitioners