

THE STATE

Versus

QINISELA SIBANDA

IN THE HIGH COURT OF ZIMBABWE

BERE J with Assessors Mr F. Dube & Mr T.E. Ndlovu

HWANGE HIGH COURT CIRCUIT 11, 14 & 15 MARCH 2016

Criminal Trial

Miss N. Ngwasha for the state

S. Muvhiringi for the accused

BERE J: Qinisela Sibanda (the accused) stands charged with the crime of the murder of his girlfriend Judith Mlauzi (the deceased) who died in unclear circumstances on 13th of October 2015 at Galetus Village in Nyamandlovu here in Matabeleland North.

When this matter was initially presented to court both the state and the defence had opted for the lesser charge of culpable homicide. The court registered its reservations on the correctness of the approach opted for and the state had to reconsider its position. The result was that the case had to proceed on the substantive charge of murder in contravention of section 47 (1) of the Criminal Law (Codification and Reform) Act¹.

The facts in this case which are not in dispute are that at the time of her death the deceased was 33 years old. The accused was 30 years old. The two were in love and all appeared to be well. On the morning of 13th of October 2015 the deceased's mother sent the deceased to conduct some financial transaction in Bulawayo. When the deceased returned from Bulawayo she was seen in the company of the accused by Mduduzi Mpala, Linda Moyo and Norget Moyo. That was the last time the deceased was seen alive.

1. Chapter 9:23

Later on that day the deceased and the accused had a quarrel leading to the later fatally assaulting the deceased. The accused secretly buried the deceased's remains in a shallow grave. As fate would have it the deceased's remains were discovered by Professor Ncube (a 16 year old juvenile) who was looking for cattle. The deceased's remains were in a shallow grave. This discovery occurred three days after the accused had buried the deceased's remains.

From these facts the state alleged the accused had unlawfully and intentionally caused the deceased's death whilst the accused admitted to assaulting the deceased. He raised the defence of provocation and alleged that the assault he perpetrated on the deceased was meant to moderately chastise the deceased and not to cause her death. It was because of this that the accused offered a plea of culpable homicide.

When the deceased's remains were recovered they were in an advanced stage of decomposition. The post mortem report concluded that the deceased had died of cervical and head traumas in unknown circumstances.

The post mortem examination noted subgaleal haematoma on the left frontal region on the scalp with haemorrhagic infiltration below subgaleal haematoma. It also noted a skull bone fracture on the left frontal bone.

Analysis of evidence

In this case there is evidently starvation of direct evidence as it is only the accused who is privy to the actual circumstances surrounding the death of the deceased. It is only the accused person who knows what he used in assaulting the deceased and where on her body he assaulted her.

Despite this, the evidence led by the state is not without significance. The evidence of the deceased's mother Betty Mlaudzi is to the effect that when she realised the deceased had not returned home in time she approached her other daughter Thembie Mlaudzi to call the deceased on her cellphone.

Thembie Mlaudzi testified to the effect that she indeed called the deceased's three times and on each of those occasions the cellphone would be deliberately cut. On the fourth occasion the cellphone became unreachable. The evidence suggests this cellphone was eventually found in the possession of the accused person. The accused person confirmed that it was him who was constantly cutting Thembie's desperate calls.

It is quite significant that on the very day that the deceased disappeared this witness had phoned the accused to enquire the whereabouts of the deceased and the accused was categorical that he had not seen the deceased. On the very day the deceased's remains were discovered, the accused had beeped her on her cellphone and when she returned the call the accused maintained that he had not seen the deceased. It is clear that on all these occasions when the accused faked no knowledge of the whereabouts of the deceased, the truth is he knew that the deceased had died in his hands and that he had secretly buried her remains in a shallow grave.

Mduduzi Mpala's evidence that when he was going to the shops in the company of two other ladies he saw the accused who deliberately avoided him by hiding is equally quite revealing. Mpala who is the accused's cousin brother was quite clear that on seeing them the accused hid from him and when he turned after bypassing and exchanging greetings with the deceased who appeared to have been in a jovial mood, he was surprised to see the accused again in the company of the deceased and walking with her.

Under cross-examination of this witness it was suggested that the witness could have been mistaken about the notion of the accused hiding away from him to which he reluctantly conceded. It was only when the accused was being led in evidence in chief after the witness had left the witness box that the accused stated that he had not avoided the young witness but that he had gone to answer to the call of nature. It is quite curious that this pointed suggestion was never put across to the witness to elicit his response.

The evidence of Admire Sibanda suggests that the shovel that was used by the accused in burying the deceased's remains was clandestinely taken from the homestead by the accused person.

Young Professor Ncube's evidence shows that the deceased's remains were discovered three days after the deceased had disappeared and on 16 October 2015. This discovery was immediately reported to the police. This was before the accused's arrest on Saturday the 17th of October 2015.

As stated in his defence outline the accused admits to assaulting the deceased but out of anger. He said that he punched the deceased three times on the side of the head and the deceased fell down and died. Built in his defence was the defence of provocation.

It is therefore necessary to deal with the legal requirements of provocation as a defence. Section 239 of the Criminal Law (Codification and Reform) (*supra*) recognizes the defence of provocation as a partial defence if successfully pleaded. Put simply our law recognizes that in certain situations a person may be provoked by another person's behaviour to the extent of losing self-control over his faculties and becomes incapable of forming the specific intent to kill his victim, and in such situation the accused would then be found guilty of culpable homicide. But if despite an accused being provoked he is still able to retain his intention to kill, the provocation will be taken as mitigatory. This position is clarified in section 239 (2) of the Code which is framed as follows:

- “(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 referred 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 ... But the court may regard the provocation as mitigatory as provided in section two hundred and thirty eight.”

In order for the court to closely deal with the defence of provocation or any other defence for that matter the court is called upon to thoroughly examine the circumstances the accused person finds himself in.

In the instant case the circumstances which the accused person found himself in came out clearly when he was being led by his counsel and it was to the following:

“After walking for some distance, a certain man emerged walking from behind us carrying a log. When this man approached us he said, “where are you taking my girlfriend to? I said I did not know that she was his girlfriend. At that time this man struck me with a log on the back of my head and I ran away ... When I ran away ... he got hold of the deceased and pulled her demanding to go with her but the deceased refused ... When she refused this man released her and she came back to me.”

The accused went on to say that along the way this incident caused a misunderstanding between him and the deceased. The result was a fight between the two which led the accused to assault the deceased in the manner already alleged.

It will be remembered that before the accused had allegedly fought with the deceased over this man, the deceased had told him that she had had a love relationship which had ended long back but this man was trying to impose himself against her.

It is the court's view that the conduct complained of by the accused as the cause of the assault could not have caused a reasonable person placed in the position of the accused to have lost self control in the manner alleged by the accused. This would be so because instead of going with this unidentified man the deceased chose to stick to the accused. A man who loves someone cannot punish her woman for publicly choosing to stick with him in the manner the deceased did.

The existence of this man was in fact doubtful as evidenced by the accused's failure to seek clarification or the identity of this man from the deceased which would have been the natural thing to do on the part of the accused. To the court this character remains fictitious.

Even if he did exist, the situation that was projected by the accused person could not have led to the accused's provocation.

To further demonstrate the short-comings of the story told by the accused person, it was only during his evidence in chief that he alluded to himself having fought with the deceased. This fight does not feature in both his defence outline or in his warned and cautioned statement. To further compound it, the accused had nothing to show for his alleged injury by the man he alluded to. This goes further to fortify the court's view that this man never existed at all. This character was created by the accused to cloud issues and we make it a specific finding of this court that the story about the accused being confronted and assaulted by the deceased's former boyfriend was a concocted story, it never occurred.

This then paves the way for us to deal with the other aspects of the accused's evidence of the admitted assault on the deceased with specific reference to the cause of death as expounded in the post mortem report and the related injuries outlined therein.

In his measured testimony the accused admitted to having assaulted the deceased using open hand (clapping her once), and thrice with clenched fists below her right ear just above the neck, as a result of which the deceased fell and died. The accused said that in assaulting the deceased he was merely moderately chastising her. He said he did not intend to kill her.

The accused's admitted assault must be consistent with the findings of the post-mortem report as regards the cause of death and the other related injuries noted.

The post mortem report concluded that the cause of death was cervical and head traumas in unknown circumstances. In addition it highlighted a collection of blood on the left side of the skull. Such a collection of blood as the court understands it implies such injuries were there before the death of the deceased.

One of the most pronounced injuries highlighted in the post mortem report was "the skull bone fracture on the left frontal bone". In the court's view the fractured skull speaks to

substantial or excessive force having been used on the deceased's head. This kind of force, in the court's well considered view cannot possibly be consistent with the simple assault conceded to by the accused. The accused was conservative with the truth and his story cannot possibly exonerate him. The defence counsel must be commended for having acknowledged and concluded that in order to bring about the injuries as captured in the post mortem report excessive force must have been used. It is clear that the deceased must have been subjected to a protracted assault with a hard object.

The accused's strange appetite to mislead the court did not end with giving the court a minimal assault on the deceased. His stout effort to mislead the court is demonstrated by his statement in the "statement of agreed facts" (annexure I) that he assaulted the deceased all over the body with an unknown object.

The inconsistencies in the accused's testimony and the actions that he took after the deceased's death are a clear testimony of an example of someone who with his eyes wide open dives on his own set spear. He must naturally face the consequences of his own conduct.

This is a clear case where the accused's guilt is rooted in circumstantial evidence. The law on circumstantial evidence can be traced back to 1939 where WATERMEYER (JA) in the case of *R v Blom*¹ laid the foundational guidelines of our present law as follows:

- “(a) the inference sought to be drawn must be consistent with all the proved facts. If it is not the inference cannot be drawn.
- (b) the proved facts should be such that they exclude every ‘other’ reasonable inference from them save the one sought to be drawn. If they do not exclude other reasonable inferences, then there must be doubt whether the inference sought to be drawn is correct.”

See also the case of *S v Marange*² per KORSAH JA.

Applying these guidelines on guilt by circumstantial evidence, the proved facts which are found to have been established in this case can be summarised as follows.

- (a) The accused was the last person to have been seen in the company of the deceased at or around 18:00 hours on 13 October 2015, as per the testimony of Mduduzi Mpala and confirmed by the accused person himself. When last seen, the deceased was in a jovial mood.
- (b) As per his own testimony the accused person assaulted the deceased and the deceased died on the evening of 13 October 2015.

- 1. 1939 AD 188
- 2. 1991 (1) ZLR 244 (SC)

- (c) After the deceased died the accused person removed the deceased's clothes and hid them.
- (d) The accused clandestinely acquired a shovel and a rope which he used to secretly bury the deceased's remains in a shallow grave.
- (e) On the day the accused secretly buried the deceased's remains, he lied to the deceased's sister Thembie Mlaudzi that he had neither seen nor knew the whereabouts of the deceased.
- (f) That on the 16th of October 2015 the accused initiated a cellphone to Thembie who called him back and the accused made a fake enquiry about the whereabouts of the deceased and purported to want to assist Thembie locate the deceased when he knew that the deceased had died in his hands.
- (g) When the deceased's remains were fortuitously discovered by Professor Ncube and a report subsequently made to the police on 16th October 2015, on 17th of October the accused surrendered himself to the police leading to his arrest.
- (h) That when the deceased's remains were discovered the accused admitted to having assaulted the deceased leading to her death. The post mortem report's findings are inconsistent with the manner of assault as proffered by the accused person.

The cumulative effect of all these proven facts point to the accused as the person who killed the deceased. In making this finding the court is satisfied beyond a reasonable doubt that

the deceased must have been subjected to a protracted assault on among other vital organs the head and further that in doing so the accused must have used an object other than clenched fists.

In subjecting the deceased to an assault as he did the accused must have subjectively foresaw the real possibility of him fatally injuring the deceased and recklessly pursued with his assault leading to the inevitable death of the deceased.

Consequently, the accused must be found guilty of murder as informed by section 47 (1) (b) of the Criminal Law (Codification and Reform) Act [Chapter 9:23].

Sentence

We accept that although this is a bad case, the murder was not committed in aggravating circumstances.

In mitigation we commend the accused person for having accepted his liability though for a lesser charge of culpable homicide. In doing so the court's time in trying to unravel the author of this murder was saved.

This is the accused's first brush with the law as he has had a clean life.

The accused has been in custody ever since he was arrested on 17 October 2015 and the period he has spent in custody, although barely 5 months must have tormented him. That is punishment on its own.

Although we have refuted the story told by the accused person we accept that something between him and the deceased must have happened which prompted him to act in the manner he did. This court may never quite know what exactly prompted the accused to viciously assault the deceased.

From the evidence of Thembe it would appear that what the accused did in this case was out of character. The accused was known to be a quiet person.

We accept the remorse expressed by the accused person through his counsel.

In aggravation, the untimely death of the deceased at the hands of the accused has now put in jeopardy the lives of her 4 minor children, the eldest of whom is 15 years old. The welfare of those children has been heavily compromised. Like this court has always noted there is need for our people to move away from indulging in violence as a way of resolving disputes. People must learn to exercise restraint and be very slow to drift towards violence if there is a misunderstanding.

In this case a young life in its prime age had its life violently terminated in undeserving circumstances.

This court is particularly concerned by the manner in which the accused in this case conducted himself after the death of the deceased. He continued to torment and traumatise the deceased's relatives by pretending not to know the whereabouts of the deceased yet he knew he had ended her life.

Sentence - 22 years imprisonment

*Prosecutor General's Office, state's legal practitioners
Dube-Banda & Partners, accused's legal practitioners*