THE STATE

Versus

THOKOZANI SIBANDA

HIGH COURT OF ZIMBABWE
MOYO J with Assessors Mr P Dmba and Mr M Ndlovu
BULAWAYO 7 OCTOBER 2020

Criminal Trial

K Jaravaza, for the state
Ms V Chikomo, for the accused

MOYO J: The accused in this matter faces a charge of murder, it being alleged that on the 9th of May 2017 the accused struck the deceased Primrose Ndlovu with an axe on the neck. The accused pleaded not guilty.

The following were admitted into the court record as exhibits;-

- The state summary.
- The accused's defence outline.
- The 3 photos taken at the scene.
- The post mortem report.
- The axe that was allegedly used

They were all duly marked. The evidence of Sonyboy Sibanda, Thandiwe Siziba, David Dube and Zororai Marevesa was admitted into the court record as it appears in the state summary in accordance with section 314 of the Criminal Procedure and Evidence Act Chapter 9:07.

Beauty Sibanda, Doubt Mapfumo and Doctor S Pesanai gave *viva voce* evidence for the state. The accused person gave evidence for the defence. The facts of the matter are as follows:-

The deceased was aged 5 years at the time she met her death. Accused and deceased were related in that deceased was accused's niece. On the fateful day, Beauty Sibanda left 2 children, deceased and one Paul Moyo in accused's custody when she went to the fields. She

does not know what transpired but when she came back, she was informed by her neighbours that deceased had died and she must have been struck with an axe. Her body lay inside the bedroom hut with a blood stained axe next to it as shown in the photos. This witness did not see accused, who was nowhere to be found until he was arrested months later. When she went to the fields, she left accused working in the yard cutting poles constructing a granary. She said the granary that accused was supposedly left constructing had not been constructed. She said accused appeared to dislike the children but she would chide him and that he would sometimes harass the children but she would chide him still. She said Paul was a very small child and was not useful in being questioned about the deceased's whereabouts.

Next to testify was Doubt Mapfumo, who is employed by the ZRP and was the Investigating Officer in this case. He proceeded to the scene of crime after receiving a report. He went in the company of other police officers. He observed the deceased's body in a grass thatched bedroom hut. The deceased lay on a dusty floor with blood oozing from her neck. He inspected deceased's body and observed a deep cut on the deceased's neck. Besides the body there was an axe and it had some blood stains. He noticed some watery substance near her private parts. He took deceased's body to the hospital and also collected the axe as an exhibit since he suspected that it could have been the one used in the commission of the offence. He said that he examined the whole homestead, the entire yard and at the granary there were 2 poles that were still fresh. He said that the distance between the granary and the hut wherein deceased lay was about 15 m. He said that he did not see any blood stains between the granary and the bedroom hut. The witness confirmed that exhibit 4 was indeed the axe he had recovered at the scene. This witness then tendered the axe which was duly marked. Under cross-examination he said he knew where the accused was working as he was shown by the 1st state witness.

Next to testify was Doctor S Pesanai. He told the court that he is a qualified medical practitioner since 1995. He confirmed that he prepared the post mortem report in relation to this case. He told the court that the deceased's body was very pale as indicated in the post mortem report by a "pale + +" and that this meant that deceased had lost a lot of blood. He said the histology where they took vaginal smears to see if there was any semen or DNA they have not received any results due to lack of government resources in that area. During cross-examination he told the court that the generative organs showed no sign of sexual violation.

He also said that there were no bruises on the vagina, hymen was still intact showing that there was no penetration. Asked by the assessor to comment on the degree of force he said that the injuries were very deep and that the degree of force used was great and the person being cut must have been on a hard surface for the axe to chop deeply in that manner. Asked how deep the wound was he said it was 6cm x 4cm x 3cm deep. Asked by the court what the depth of the injuries was and what anatomy the axe had cut through, he said that the axe cut both major vessels in the neck, the trachea, the oesophagus, the spinal bone and the spinal code was also cut. Asked what the degree of force was *visa vis* the injuries he said the force was severe. That was the state case.

The defence led evidence from the accused person. He was 22 years at the material time and that the deceased was his niece. He also told the court that on the fateful day he was at home fixing a granary. He told the court that there was a big V-shaped log which he had put on the one which he was chopping. He demonstrated that the V-shaped log was upright firm on the ground and that he would put the one he was cutting on the V in an angular fashion, its one end would be on the ground and the other end on the V. He would then cut near the V, with the other piece falling away. He said there were some offcuts that the deceased and the other child would pick and pretend that they were also building some granary while playing. He said that the children ended up playing next to where he was, about 3 feet away to be precise. The axe then started slipping and to get a firmer grip on the axe he spit into his palms and then held the axe firmly. He then applied force in a bid to cut the log but the axe slid from his hands, the niece (the deceased) then suddenly stood facing him and the axe then hit her on the neck. He then took her to the room, he first put a jersey on her neck and then took her into the house. He then placed her on the bed. The deceased then sprung up and later fell down. He said he then thought of how one day his grandfather had chided him for delaying to fix the goat pen and he said the accused must do chores in time or else if he delayed something big will happen as he did his chores.

He further told the court that some day prior to the fateful day he requested the deceased to give him water to drink and his mother then said accused liked sending the children and that amongst the children he was going to kill one of them. He said he fled after killing the deceased as he thought that people would harm him. He further said that he had no motive to kill the deceased. Under cross-examination he demonstrated how he was

cutting the firewood with the axe. Under cross-examination he said that if deceased had not stood up when she saw the other child moving away she would not have been struck. He was asked why there was no blood at the scene and he said that it was because he had taken deceased to the bedroom. He said after he struck the deceased with an axe, deceased fell down facing upwards. He was asked where he had collected the jersey from he said it was on the granary. He was further asked if deceased did not bleed from the time she was struck, fell, and he went to collect the jersey until when he came back. He then said that blood had started to ooze out. He said deceased was about 5 paces away when she was struck. He said he fled from May 2017 until his arrest in December 2017 as he wanted to go and find a person who would apologise on his behalf. He said that he would not have killed his sister's daughter.

He was questioned about the photograph tendered as an Exhibit and marked B, that is, whether he left the deceased in that room to which he admitted. He further said he took the child into the house and then went back and took the axe and placed it next to the child. He was questioned as to why he did that and he said that he wanted the people to see that it was that axe that been used to strike the deceased. It was put to him that deceased was struck inside the hut because

1) There were no blood stains outside.

2) the axe was left inside the house.

3) the Doctor said from the nature of the injuries the deceased had been struck while she lay on a hard surface.

He then responded by saying he could not answer questions as he was pained by this and that he had no further utterances to make before the court. It was put to him that Sonnyboy Sibanda found deceased on the bed and she pulled the deceased who then fell and therefore did not find deceased on the floor. Accused maintained that he left deceased on the floor. He said he had realised that deceased had died when he put her on the bed. He was asked why he fled if it was a genuine mistake and he said that he was scared of law enforcement agents. He confirmed that deceased and the other child had been left in his custody. Asked by the assessor, he confirmed that the axe did not come off the handle. He said the axe fell off from both his hands. He said the axe flew straight to the deceased and

that it did not spin. Asked by the court what happened when the axe slid and struck the deceased he said the axe got stuck on the neck. He then removed the axe from the neck and that is when deceased started to bleed. He said he removed the axe placed it on the side and then took deceased to the hut and then came back for the axe. He said he then left for his hut and then dressed up and left. He was asked where he then went to and he kept on telling the court where he intended to go, that is to his grandfather's place. Asked if he went there he said no. He seemed to have difficulty telling the court where he then went. After the question was repeated about 3 times with an explanation that the court sought to know where he went to and not where he intended to go to, he then told the court that he only went to join illegal gold panners at Hopefountain since he was used to them. He was later arrested in Bulawayo after 8 months of staying with illegal gold panners. He then decided to go to his grandfather in Bulawayo and when he got there, his grandfather asked him if he knew of the incident where deceased had died and he professed ignorance of same. He said he was arrested after his grandfather alerted the police about his presence. Asked why he did not tell his grandfather about the incident he then said that he did not think properly. He was asked if he had said before he put the jersey blood oozed out and he replied by saying it did but that it was not much.

At the end of the trial, the state counsel submitted that the state had managed to prove beyond a reasonable doubt murder with actual intent. This, the state counsel submitted was from the pieces of evidence that did not tally with accused's version.

The defence counsel submitted that no motive had been shown and that an accident indeed happened and that therefore accused should be acquitted on the murder charge and convicted of culpable homicide.

We thus analyse the facts as follows:-

Nothing much can be made of the life accused and his family lived prior to the incident. It is not clear as to what transpired on the fateful day but it is common cause that deceased was struck in the neck by the accused with an axe. What this court has to determine is whether from the facts deceased was struck accidentally as alleged by accused or deceased was struck intentionally by the accused.

The accused person is the only witness to what transpired when deceased was struck. It is the accused's version that the court has to rely on and either accept entirely or dismiss as being unreasonable, improbable and untrue. I will then proceed to point out the problems that this court finds with accused's version.

1) Accused says deceased was struck accidentally outside the bedroom hut in the yard as he chopped poles for constructing a granary. Doubt Mapfumo the Investigating Officer inspected the yard but found no blood stains. Accused initially said deceased had not bled whilst outside and then later said that blood had oozed out but was not much. That deceased did not bleed much while outside is inconsistent with the Doctor's evidence that in fact both the major vessels of the neck were cut. This court takes judicial notice of the common fact that a minor cut, even on a finger results in immediate bleeding what about a cut in the nature as described by Doctor S Pesanai in the post mortem report wherein the axe cut through 2 major vessels. The axe itself had blood stains meaning that blood did exit at the site of the injury.

2) The axe was found next to the deceased in the bedroom hut by the first state witness Beauty Sibanda. Accused says he put the blood stained axe next to the deceased inside the hut so that people could see that it is the axe he had used. Even if the axe had remained by the granary, since it had blood stains, they were still going to see that it had been used. In any event if accused really cared about his family knowing what had happened to the deceased he would not be placing the axe near the deceased for them to see, he would tell them himself what had transpired. The explanation for putting the axe in the hut near the deceased is therefore improbable, unreasonable and simply untrue. This court rejects it and in its stead makes a finding that deceased was struck in the bedroom hut where she was found and not outside by the granary, which is the explanation for the axe being next to the deceased inside the bedroom hut. This finding is complimented by the Doctor's assertion that from the depth of the injuries into the neck, deceased could not have been struck whilst standing but in fact should have been struck while she lay on a hard surface.

This finding is also complimented by the aspect that there were no blood stains anywhere in the yard either at the granary itself or between the granary and the bedroom hut wherein the deceased was found.

3) Again, if accused's version was true, he would not injure his five year old niece by accident whilst cutting poles for the granary and not report the accident either to his own family or relatives or even neighbours or the police. His failure to do so on the strength that his grandfather had said something big will happen if he delayed to attend to his chores and that law enforcement agents are harsh, is clearly unreasonable, improbable and untrue. This finding that there was no accident is further complimented by the fact that accused fled from his home soon after he struck the deceased, that was in May 2017, went gold panning for almost 8 months until December 2017, a conduct that is clearly consistent with guilt rather than innocence. Further, even after going to his grandfather in Cowdray Park in December 2017, he still pretended that he did not know of deceased's demise, even after the grandfather had questioned him giving him an opportunity to own up. His conscience clearly did not care about what had happened to the deceased for if it had been an accident his conscience would have forced him to own up about the accident. For 8 months he left his niece's death to be a mystery to his relatives and the neighbourhood and yet he had all the answers that would relieve his relatives of the anxiety. His grandfather had to alert the police of his presence and the police pounced without him being ready to surrender himself to the police.

4) Even if he were to be given the benefit of the doubt for leaving immediately after the incident as he said that he was scared, it certainly does not make sense that for 8 months, when he now had slept over the incident so many nights and had had the opportunity to discuss it with other people, and had had time to get his nerves calm down on the experience that befell his niece, he still decided to keep quiet, 8 months on. That can only be consistent with a person who had something to hide. The destination that he reached after the incident, that is, the illegal gold panning site, where he stayed for almost 8 months is not consistent with a person who had killed a minor child by accident and was remorseful about such an unfortunate turn of events. He went to make money after the unfortunate incident. Even when he was asked

where he headed after the fateful day, he kept on saying he wanted to go to his grandfather's place and report the incident. Asked if he did go to his grandfather's place he said no he did not but on being questioned further as to where he went he would say he intended to go to his grandfather's place. He eventually stated that he went to the illegal gold panning site. His demeanor in answering this question showed that even himself had the realization that killing a child accidentally then leaving for a gold panning site was unreasonable. That is why he kept on telling the court that he intended to go to his grandfather to report the incident instead of telling the court where he went. Clearly, if he intended to go and visit his grandfather, and report the accident nothing stopped him from doing so since he was now further from the community that he alleges he feared. This court accordingly finds accused's version as a result of the aforestated analysis, to be unreasonable, improbable, and in fact untrue looking at the totality of the facts before this court. This court finds that in fact accused struck the deceased with an axe on the neck having directly aimed thereat.

This court says so from the conclusion it has made of the scene of crime, the Doctor's findings and the accused's conduct that ensued. There was thus no accident as accused would want this court to believe. The motive remains unknown, it is only him who knows why he acted in the manner he did on the date in question and this court need not establish the motive for it to reject his account as being improbable, unreasonable and in fact untrue.

Defence Counsel submitted that since no motive was shown by the state, accused's accident version must be accepted. However, accused's accident version cannot succeed only on the basis of lack of motive, for even if it remains unknown it does not necessarily follow that there was no motive. This court is allowed, whether the motive is known or not, to assess the facts relating to the scene of crime, the accused's version and the accused's conduct following the incident in order to find, if indeed deceased died in an accident or if she was murdered in cold blood, for whatever reason. In fact it is not a requirement in our law that a court finding that the accused acted intentionally must first establish the motive. The motive is inconsequential for as long as the facts on the evidence of the scene of crime, the injuries sustained by the deceased, as detailed in the post mortem report, the weapon used, the anatomy of the body where the blow landed, the court is at large to make a finding using

that information on the mental status of the accused person. Striking a 5 year old with an axe in the size of Exhibit 4 in the neck as if one is slaughtering an animal, and thrusting it deep into the throat so much so that it almost hacked the head off as per the injuries described by Doctor S Pesanai, certainly cannot lead this court to come to any other conclusion other than that accused was aiming at deceased's death. For what else could have befallen the deceased when she was struck in the manner as proven using the axe that was tendered in this court? Only death could result Whether accused's intention is known or not is not a matter for consideration when establishing whether he acted intentionally or not.

I have already found that there was no accident, it follows that it is our view that accused acted wrongfully and unlawfully on the date in question.

What Then Is Accused Guilty Of?

I have already found that accused deliberately struck deceased on the neck with severe force as described by the Doctor and the nature of the injuries showed that the axe cut through the child's throat until it cut the spinal cord and the bones. The Doctor also asserted that deceased must have lay on a hard surface. A thrust of an axe in the manner I have just alluded to could not have been for any other reason except to kill the deceased. Accused must have aimed at deceased's death and nothing else.

It is for these reasons that accused is found guilty of murder with actual intent

Sentence

Accused is convicted of murder, he is a youthful first offender. He killed his own niece for unknown reasons like an animal. He put his family through the agony and anxiety of not knowing what had happened to the deceased while he went gold panning. He committed the crime in aggravating circumstances in that he killed a minor. The accused's conduct is abominable and an affront to the rights of innocent young children who must be protected and nurtured by their custodians rather than killed in brutality. The accused has his age to thank for the non imposition of the death sentence. He was still 21, the age that the court gives as a cut off for the death sentence. Even if he was beyond the age of 21, he stands to benefit from his youthful age as there is a fineline in maturity between a 20 year old and a

21 year old. One could easily classify the accused and those immediately below his age to belong to the same immature age- group.

It is for these reasons that the accused person will be sentenced to 25 years imprisonment.

National Prosecuting Authority, state's legal practitioners
V Chikomo Law Chambers, accused's legal practitioners