

NORMAN SIBANDA v THE STATE

**SUPREME COURT OF ZIMBABWE
MALABA DCJ, GOWORA JA & GUVAVA JA
BULAWAYO, MAY 5 & 8, 2014**

M Donga, for the appellant

A Munyeriwa, for the respondent

MALABA DCJ: On 7 July 2011 the High Court found the appellant guilty of the murder of Zenzo Maphosa with actual intent to kill him. It sentenced him to death after finding no extenuating circumstances. The appeal against conviction and sentence is by operation of the law automatic. Mr *Donga* for the appellant indicated that he had no meaningful submissions to make on both conviction and sentence. The decision by Mr *Donga* that the court *a quo* did not misdirect itself in returning the verdict of guilty of murder with actual intent to kill and imposing the death sentence on the appellant is supported by the facts.

It was common cause before the court *a quo* that on 7 June 2003 at 1830 hours the appellant struck the deceased with a log on the part of the head between the right occipital and temporal regions. The blow felled the deceased but the appellant went on to deliver two more blows on the head and a further two on the body with the log. The deceased lay motionless as

the appellant assaulted him. The appellant stopped beating the deceased when he saw Ephraim Khabo approaching him. He fled from the scene leaving the deceased lying on the ground bleeding from the injuries on the head.

The deceased was later that evening admitted to the intensive care unit at Mpilo Hospital in Bulawayo. He died in the intensive care unit on 7 July 2003. The post mortem examination revealed that the blows the appellant delivered on the deceased's head with the log caused fractures of the skull in the frontal, right occipital and temporal regions of the head. The longest fracture was 5 cm. The fractures caused depression of the brain. There was subdural haematoma of the parietal, frontal and temporal brain. The cause of death was the subdural haematoma from the skull fractures.

The appellant said he assaulted the deceased in self-defence. The issue before the court *a quo* was whether the deceased was the aggressor. The evidence on which the court *a quo* found the facts on which it rejected the appellant's defence was to the effect that the deceased was struck by the appellant from behind whilst running away.

The evidence was to the effect that at about 6pm on 7 June the deceased left a local bottle store and joined his cousin Never Khabo going home. The two met Langton Mpofo and Mloyiswa Sweswe who were going in the opposite direction. They all resided in Kennilworth Village 5 in Inyathi and are related. When the four stopped to greet each other, Mloyiswa who is a son-in-law to Never, stood aside and held a conversation with the deceased. Langton and Never stood a few metres away talking to each other.

It so happened that the appellant had been walking about 20 metres in front of Langton and Mloyiswa before they met Never and the deceased. The appellant was a stranger in the village visiting Violet Tshuma. Never, Langton, Mloyiswa and deceased met on the road near Violet Tshuma's homestead.

The appellant went into Violet Tshuma's homestead. A few minutes later he approached the deceased and asked for a cigarette. The deceased told the appellant that he had no cigarette. The appellant said to the deceased: "You Santana MDC member, I am a ZANU(PF) member – I will kill you today."

"Santana" was the deceased's nickname. MDC and ZANU(PF) are different political parties.

Soon after uttering the words the appellant picked bricks intending to throw them at the deceased. Mloyiswa remonstrated with the appellant telling him to be ashamed of threatening to assault an old man. The deceased was aged 44 years. The appellant was aged 20 years. He took heed of what Mloyiswa said and dropped the bricks. The appellant went to the deceased and snatched his hat. He struck the deceased on the face with the hat once before leaving the scene. He returned to Violet Tshuma's homestead. The deceased did not react to the abuse he received from the appellant. He was drunk.

After the appellant left the scene, Langton and Mloyiswa bade Never and the deceased farewell and went their way. Never and the deceased walked towards Never's homestead. Little did they know that the appellant was watching their separation from Langton and Mloyiswa. When Never and the deceased had walked about 50 metres the appellant pulled a log from a plate rake at Violet Tshuma's homestead. He ran after the two armed with the log.

Rebecca Mkandla was at her homestead next to that of Violet Tshuma. She saw the appellant running towards Never and the deceased armed with the log. Rebecca called out to the two warning them of the impending danger. Never ran to her maternal uncle's homestead. The deceased ran towards Rebecca's homestead with the appellant in hot pursuit. When the deceased got to the homestead, the appellant struck him with the log on the right occipital region of the head. He fell down. The appellant delivered two more blows on the head rendering the deceased motionless.

As the appellant assaulted the deceased with the log, Rebecca was screaming. Her screams attracted the attention of Ephraim who was in a homestead nearby. He ran to the scene of the crime and found the appellant striking the deceased on the head with the log. Ephraim is a member of the special constabulary based at Kennilworth Police Base.

Upon seeing Ephraim approach, the appellant stopped the assault on the deceased and ran away. He went through a space between strands of barbed wire fence separating Rebecca and Violet's homesteads. Ephraim gave chase until he caught hold of the appellant. A

struggle ensued until Ephraim dispossessed the appellant of the log. The appellant managed to make good his escape. The log was 113cm long, 16.5cm thick and weighed 985grams.

The evidence of the appellant was to the effect that when he found Never, Langton, Mloyiswa and the deceased standing on the road near Violet Tshuma's homestead, one of the young men invited him to a traditional beer drink. He said he told the young man he did not drink traditional beer. This angered the deceased who asked who he thought he was to say he did not drink traditional beer. The deceased pursued him as he moved away and hit him on the back with a stone. He said he took a log and struck the deceased five times on the head as he tried to pick more stones.

The appellant's defence outline contained allegations he made in the confirmed warned and cautioned statement. When he gave evidence-in-chief the appellant said that the deceased clapped him twice on the ear. He fell down before getting up and running towards Rebecca's homestead. The deceased chased after him until they got into the homestead. He took a log and struck the deceased on the head felling him. The appellant said out of anger he delivered two more blows on the deceased's head and another two on the body whilst the deceased was on the ground.

There were good reasons why the court *a quo* accepted the version of the events as narrated by the State witnesses. The appellant told the court *a quo* that he was a staunch supporter of ZANU(PF) and could not give up his membership of the political party for anything. The State witnesses would not have known that he was a member of ZANU(PF) if he had not

uttered the words attributed to him. The appellant was a stranger in Village 5. He had only been there for a week.

The young men who were in the company of the deceased at the time were Langton and Mloyiswa. Whilst the appellant alleged that one of them invited him to a traditional beer drink, they denied doing so. Mloyiswa remonstrated with the appellant when he threatened to strike the deceased with bricks.

On the appellant's version of events there was no time when Never separated from Langton and Mloyiswa. According to him, the events leading to the fatal blow on the occipital region of the deceased's head, started with the deceased asking him who he was to say he did not drink traditional beer. The facts show, however, that at the time the appellant and the deceased ran to Rebecca's homestead Langton and Mloyiswa had long left the scene.

The appellant did not mention in the warned and cautioned statement that the deceased clapped him twice on the ear felling him. Rebecca was clear in her evidence that it was the appellant who took the log from a plate rake at Violet Tshuma's homestead and ran after Never and the deceased. She was not involved in the conversation that took place between the appellant and the deceased. Her attention was first drawn to the appellant and the deceased running towards the homestead.

The evidence that the appellant was already armed with the log and was in hot pursuit of the deceased was corroborated by the appellant's admission that he struck the deceased

with the log on the occipital regional of the head. He could only be in a position to do so from behind the deceased.

The court *a quo* appreciated the law on murder with actual intent to kill and correctly applied it to the facts it found proved by the evidence presented by the State. *S v Mugwanda* 2002(1) ZLR 574(S).

On the question of sentence it had been suggested that the court should find the age of the appellant to be an extenuating circumstance. The court *a quo* was alive to the principle that youthfulness would ordinarily constitute an extenuating circumstance provided the actions of the offender are consistent with immaturity.

Miss *Munyeriwa* argued that the appellant's conduct cannot be imputed to youthfulness. She contended that the appellant's conduct could not be excused on grounds of immaturity. Mr *Donga* agreed that youthfulness could not save the appellant. He conceded that the appellant intended to kill a political opponent and went on to accomplish his purpose.

The appellant armed himself with a dangerous weapon and relentlessly pursued his victim until he struck him three times on the head with it. The assault was brutal.

The moral blameworthiness of the appellant was aggravated by the fact that he threatened to kill the deceased because he thought he belonged to another political party.

In *S v Muyambo* 1980 ZLR 411 it was held that cases that involve politically motivated violence must be dealt with severely. FIELSEND CJ said:

“Firstly the public must be protected from unlawful violence and they must feel that they are being given such protection.

Secondly the police who have a very difficult task must be shown that they have the support of the courts. ... for all these reasons sentences that will be effectively deterrent must be imposed.”

In *S v Ndlovu* S-122-94 it was held that political beliefs cannot be taken to be extenuation considering that people are free to hold different views.

The learned Judge was alive to these principles. In passing sentence he said:

“In a democracy people are free to belong to political parties of their choices. It would be wrong to punish them for choosing to go to parties of their choices. This type of behavior should not be tolerated in a democratic society. Killing someone because he or she holds different political beliefs cannot be an extenuating circumstance. Instead it would suffocate democracy if it were to be allowed.”

Violent offences committed against other citizens simply because they belong to a different political party should be viewed seriously by the courts. It follows that where a person is killed for his or her political affiliation the sentence imposed should reflect the inherent wickedness of the crime. The sentence should not be viewed by right thinking members of society as a licence for the infringement of the constitutionally guaranteed right of every citizen to belong to a political party of his or her own choice.

Accordingly, the appeal against conviction and sentence is dismissed.

GOWORA JA: I agree

GUVAVA JA: I agree

Messrs Lazarus & Sarif, appellant's legal practitioners

The National Prosecuting Authority, respondent's legal practitioners