

THE STATE
versus
DANIEL SARAPO

HIGH NCOURT OF ZIMBABWE
MUZENDA J
MUTARE, 19 and 21 October 2021

Criminal Trial (Murder)

ASSESORS: 1. Mr Mudzinge
2. Mr Chipere

Mrs J Matsikidze, for the State
Ms S Muzandaka, for the accused

MUZENDA J: Accused is charged of Murder as defined in s 47(1)(a) or (b) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] it being alleged by the state that on 22 September 2020 at Toto Village, Chief Makoni, Rusape, accused unlawfully caused the death of Divine Sarapo by striking him multiple times on the head and body with a broken leg of a table and his hands with intent to kill him or realising that there was a real risk or possibility that his conduct might cause death and continued to engage in that conduct despite the risk or possibility resulting in injuries from which Divine Sarapo died.

Accused pleaded not guilty. He denied assaulting the now deceased. On the day in question he recalls warming water to bath deceased. During bathing deceased, the latter started convulsing and to accused such convulsions were caused by witchcraft. Accused called out his wife Gloria Nyaude and his mother Diana Sarapo to the scene, Diana Sarapo confirmed to accused that deceased had passed on. Accused hurriedly made arrangements to bury deceased in Toto Village and due to Covid 19 regulations only a handful of people attended the funeral. Accused strongly believes that deceased died from unnatural means.

Facts

Accused is the biological father of deceased who was aged 10 years at the time of his death. Accused had had an affair with deceased's mother not knowing that she was a fellow Johanne Marange Masowe Church member. Having discovered that he collected the deceased

at a tender age and the mother re-joined her husband. The husband later died but deceased's mother did not return to accused, she decided to sojourn to South Africa for greener pastures. Meanwhile accused who was not well took deceased who was equally not healthy to the mother Diana Sarapo. Diana Sarapo compassionately took care of deceased from the age of two years. Accused disappeared into the world and did not contact his mother nor took care of deceased. Hence deceased became a product of a broken up family who largely depended on his paternal grandmother for a period of eight years. Sometime in August - September 2020 accused invited the mother to visit him in Toto Village. The mother who was by then aged 81 years grabbed an opportunity to go and show accused his son. Unfortunately deceased had developed epilepsy whilst staying with the grandmother who happens to belong to Johanne Marange Apostolic Faith Church and did not take deceased for medication.

When accused received his mother and the deceased, he became aware that the grandmother had brought deceased to accused and leave him there. It appeared this idea was not warmly received by accused. He had gone to consult spiritual faith healers from his church and they had prayed for deceased. According to accused's wife for the two weeks deceased had stayed with them he had been attacked three times and to accused, his wife was not happy that deceased, whom he had met for the first time would stay with them at Toto Village. On 22 September 2020 the grandmother was scheduled to return to her home and she woke up early in the morning, set up fire to warm water for her bath. Her daughter had promised to send her bus fare. She later learnt that the money had not been sent so the departure was rescheduled for another day.

Accused poured water into a dish, took some of which the faith healer had prayed for and mixed it with hot water. He ordered deceased to get into the dish, deceased tested the water and felt that it was unbearably hot, he refused to go into the dish. The grandmother also tested the water in the dish and confirmed that it was not for one to be subjected to its heat. Accused thought that deceased was deliberately feigning epilepsy, collected a broken leg of a table and started assaulting deceased on the buttocks as well as the back below the shoulder blades. The accused's mother and his wife made several attempts to restrain and remonstrate accused but he spurned both of them. Accused later ordered both wife and mother out of the kitchen and remained with deceased. From where the grandmother was she could hear deceased crying. Accused stated that deceased was crying maybe because he needed the grandmother's company. At a later stage the wife returned to the kitchen and observed deceased trying to leave the dish but at all times he could not. Deceased then collapsed and it was only at that stage that

accused took him out of the dish and placed him on a sack on the floor. Accused observed that deceased was powerless and the wife saw deceased violently stretching out his legs and thought that he was convulsing, he had not been attacked by epilepsy at that stage. She decided to call out the grandmother. She heeded, went where deceased was, felt his stomach and declared that the now decease had passed on. The grandmother and accused's wife wanted to wail, but accused ordered them not to giving an excuse that he was just but a tenant at the place and was not allowed to wail. Accused ferried deceased to the grandmother's room where he was dressed up.

Accused went out for sometime and returned with a car, fetched him and in the company of the grandmother and wife drove out to inter the deceased. There was no burial order nor police report for a sudden death case. The matter was revealed only in November 2020 after the grandmother brought it to the attention of accused's brother. Exhumation was done but deceased's body was in a state of hopeless decomposition. Hence no post-mortem report is available.

Analysis of the Matter and Facts.

Most facts are common cause and from the background above as well as evidence led by the state the following is not controverted:

- (a) Accused is the biological father of deceased.
- (b) Deceased was of ill health.
- (c) Deceased's only closest relative who reared him is the paternal grandmother who knew the extent of deceased's epilepsy.
- (d) The maternal aunt of deceased is of advanced age and wanted accused to take over deceased's responsibility and welfare and accused was not comfortable with the arrangement.
- (e) Accused initiated the idea of placing deceased in a dish of water which had been mixed with the one prayed for by Apostolic faith healers. He forced deceased to sit in that water. When deceased refused, accused, assaulted him.
- (f) Deceased cried out in pain.
- (g) Deceased could not manage to leave the dish, however at the age of ten, he was lifted by accused.
- (h) The two state witnesses Diana Sarapo and Gloria Nyaude are close relatives of the accused, Diana is accused's mother and Gloria is his current wife.

- (i) Both Diana Sarapo and Gloria Nyaude saw accused assaulting deceased on the buttocks and vulnerable upper part of the body, an area around the shoulders, and the number of blows were too many to count.
- (j) Both witnesses tried to restrain accused to desist from assaulting deceased but accused warned them off.
- (k) Both witnesses noticed water oozing from deceased's nose and mouth, they also noticed lacerations at the deceased's body and deceased's toes had a fresh wound.
- (l) Deceased died on the spot and was buried within hours of his death.

What is in dispute is whether accused authored the death of his son and of so whether he had an intention to cause death of the now deceased?

It was submitted on behalf of the accused that the state did not discharge onus reposed on it by law to prove the guilt of accused person beyond reasonable doubt, more particularly as far as the true cause of the death of the victim is concerned. It was further submitted by the defence that the requisite essential elements of murder were not proved. The defence went on to criticise the evidence of both Gloria Nyaude and Diana Sarapo and urged the court to make a finding that both witnesses' evidence did not assist the court.

Accused was with deceased on the day in question. He forced him to go into the dish. He was with him when he saw deceased, aged 10 years being unable to leave the dish. He did not meaningfully challenge the evidence of assault adduced by the state from Diana Sarapo and Gloria Nyaude which evidence gave a graphic description of the assault and the places where deceased was assaulted. Corroboration was added when police recovered a broken piece of wood and weighed it, this is the weapon which was used by the accused to assault deceased. Deceased died in the hands of accused, and death is not in dispute. Deceased's health deteriorated step by step from the time accused assaulted him to the time he passed on. There was no break of chain of events. In our view deceased was fatally assaulted by accused to such an extent that he could not stand on his own and leave the dish where he was forced to sit. Gloria Nyaude did not witness any epileptic convulsions, she saw the deceased's last kicks and she immediately alerted accused's mother. Accused was heard repeatedly asking now deceased's spirit not to come back and haunt him. This behaviour is not consistent with someone who died from epileptic convulsions but to one who had been unlawfully killed. This aspect of utterances by the accused was never challenged by the defence in court. We take it as common cause.

As clearly reiterated in the case of *R v Sibanda and Others* 1965 (4) SA 24 (RAB) where at p 246 BEADLE CJ dealing with circumstantial evidence, state as follows”

“The degree of certainty with which the individual facts must be proved in criminal cases must always depend on the probative value of the individual facts themselves. Generally speaking when a large number of facts taken together, point to the guilty of an accused, it is not necessary that each fact should be taken in isolation and its existence proved beyond reasonable doubt. It is sufficient if there are reasonable grounds for taking these facts into consideration and all the facts, taken together prove the guilty of an accused beyond a reasonable doubt”.

In the case of *S v Chabalala* 2003 (1) SACR 134 (SCA), para 15 states as follows:

“The correct approach is to weigh up all the elements which point towards the guilty of the accused against all those which are indicative of his innocence, taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and having done so, to decide whether the balance weighs so heavily in favour of the state as to exclude any reasonable doubt about the accused’s guilt. The result may prove that one scrap of evidence or one defect in the case for either party was decisive but that can only be an ex post facto determination and a trial court (and Counsel) should avoid the temptation to latch on to one (apparently) obvious aspect without assessing it within the context of the full picture presented in evidence, once that approach is applied to the evidence in the present matter, the solution becomes clear”.

Accused denies assaulting deceased in any way. The question is why would he pray that deceased’s spirit should not come back and haunt him? What had he done? Deceased died in circumstances where there are certain utterances which point to an inference that accused may well have had something to do with deceased’s death. Why did accused order both Gloria and Diana to leave him alone with deceased in the kitchen? Why would Gloria Nyaude and Diana Sarapo lie about the protracted assault? The chronology of events of 22 September 2020 shows that accused could not accept the burden of looking after an epileptic whose mother was not there and he decided to get rid of the deceased in one way or the other. He brutally assaulted him using a plank weighing 0.30kg and measuring 0.39m, he assaulted a naked ill boy of 10 years targeting the upper part of the body. We do not accept that deceased could have died of epilepsy, accused did not mention that in his warned and cautioned statement, nor did he mention that in his defence outline, to accused deceased died of witchcraft, details of which were not availed. The plausible probable cause of death is found in the evidence of accused’s wife and mother, that is deceased died as a result of protracted assault by the accused.

In order to avoid medical examination of the deceased’s body, accused deviously planned a hasty burial without informing relatives or the police. We were unable to establish any cogency reason why Diana and Gloria could lie against the accused and we found both of their evidence credible. Accused concealed truth from the court and scratched for reasons why

his wife and mother could lie against him. We reject his evidence as being improbable and imagined. Accused knew that deceased was of ill health, he assaulted him on a naked body and did so for some time which caused his wife and mother to restrain him. We are however constrained to find that accused intended to cause deceased's death but ought to have reasonably foreseen that by subjecting deceased to a protracted assault using 300g of a plank could have led to his death and regardless of that accused persisted in his conduct. We are satisfied that accused is guilty of Murder with constructive intent in contravention of s 47 (1)(b) of the Criminal Law (Codification and Reform) Act, [*Chapter 9:23*].

SENTENCE

In assessing an appropriate sentence the court will take into account both the mitigatory and aggravatory circumstances of the matter. Although you have been found guilty of Murder with constructive intent, the offence you committed is very serious.

You caused the death of your son whom your aged mother had laboured to raise and then you falsely implicate her as the one who implicate you in collusion with your elder brother Paul. That shows lack of contrition. Belief in witchcraft is mitigatory but not appropriate in this case because the victim of death was not a witch. You caused the death of an innocent child whom you had neglected for eight years and the manner he died is very pathetic and painful. Had it not been the humane and principle of your mother this death could have been concealed all in order to run away from your responsibility.

You are a first offender, who has family responsibility and have been in custody since the date of your arrest. The aggravatory features in this case far outweigh the mitigatory factors. A custodial sentence is called for.

Accordingly you are sentenced as follows:

15 years imprisonment.