

THE STATE

VERSUS

HANDSOME SIBANDA

IN THE HIGH COURT OF ZIMBABWE

CHEDA J

BULAWAYO 4 & 5 JUNE 2013 AND 12 JUNE 2013

Mr *N. Siphuma* for the accused

Mr *Mhlanga* for the state

Criminal Trial

CHEDA J: The accused is facing a charge of murder to which charge he pleaded not guilty.

It is the State case that on or about the 19th February 2012 near Shangani Business Centre, Fort Rixon in the Matabeleland South Province, he wrongfully, unlawfully and intentional killed Zamani Nkomo.

The State opened its case by calling one Witness Jele (hereinafter referred as Jele). His evidence was that he is related to the accused as he is his uncle. On the day in question in the evening he was sitting around a fire at Shangani Business Centre when he was attracted by a noise of people fighting. He rose to check and noticed that it was accused who was holding the deceased by the collar and delivering blows. The deceased was remonstrating with accused and was calling out “nduku, what are you doing” Nduku is accused’s nickname. He indentified the accused by his face and that he was putting on a white

T-Shirt. The person who was being assaulted was putting on a yellow T-shirt. He clearly saw what was happening through a 6-7cm hole in the wall and visibility was good as there was a bulb illuminating the area. He was standing at a distance of about 20m from the scene. He retreated to the fire place. After this he saw accused crossing the main road leaving the scene. He later heard that there was a man who had been killed at a spot where accused was. Upon checking he discovered that it was the same person who was being assaulted by the accused.

This witness was initially arrested by the police, but after investigations he was cleared of the allegations and subsequently released.

Fikelephi Hlabangana (hereinafter referred to as Fikelephi) was the next State witness. Her evidence is that she had a love relationship with the accused which lasted a month. On the day in question she was in the company of three other people at the Business Centre when she saw a youngman who came to where they were. This youngman was drunk and offered to buy them beer and non-alcoholic beverages but they declined. Soon after that, the accused passed them without saying a word and he appeared angry. It was in the afternoon of the 19th February 2012. She again saw him in the evening. It was now dark. Accused invited her to a dark spot. When she asked him why he wanted her to come to a dark spot, his response was that he did not want to come where she was as there was light as he did not want to be seen by the police. She eventually went to where accused was as she wanted to retrieve her mobile phone which had been taken by accused. When she got to the accused she noticed that the accused had now changed his clothes from what he was putting on earlier when she first saw him late in the afternoon. She later learnt that the person she had seen earlier in a drunken state was infact the

deceased. It was further her evidence that when she saw accused for the first time, she heard him telling Bekezela Siziba that they, (herself included) were going to see Shangani for the last time and that blood would be shed that day.

Bekezela Siziba (hereinafter referred to as Bekezela) was the next witness to give evidence. Her evidence is largely corroborative of that of Fikelephi with regards to the threats to the effect that they were seeing Shangani for the last time and that accused called Fikelephi to a dark spot as he said he had not heard there was someone who had died in the area.

These two witnesses gave their evidence very well and corroborated each other in all material respects. We have no hesitation in accepting their evidence as a true reflection of the events of this fateful day.

Constable Leeroy Mahuye is a member of the Zimbabwe Republic Police who was based at Shangani Police base at the relevant period. He was charged with carrying out investigations which led to the arrest of the accused. During his wide investigations he also arrested Jele and others on suspicion of his offence, but, subsequently released them as he found no evidence implicating them.

Priscilla Mpofu (hereinafter referred to as "Priscilla") was the last witness for the State. Her evidence was that she knows the accused as he was also a vendor at a Flea Market at Shangani Business Centre where she also plied her trade. On the day in question accused arrived and asked the whereabouts of Fikelephi and he further advised her to remain monitoring the situation while he went away.

The State then sought and obtained the admission of the evidence of the following witnesses:

(1) Ian Pike

- (2) Sengurai Herbert
- (3) Dr S. Pesanai
- (4) Dr T. B Munemo
- (5) Mr Pascal Max Ndlovu

The State also produced a post-mortem report for the deceased as Exhibit 4. The Doctor who carried out the post-mortem found that there was a laceration right on the frontal region (2x2)cm. A laceration of the right lower lip (1x1)cm. A fractured frontal bone, Both maxillar bone and nasal bones were fractured, all incisor teeth were fractured and there was a depressed skull. In conclusion he was of the opinion that the cause of death was (i) brain damage,(ii) skull fracture (iii) blunt force trauma and (iv) homicide.

The State then closed its case.

The accused gave evidence and maintained what is contained in his defence outline which is marked as exhibit 2.

He stated that on the day in question he arrived from Insiza where he had spent a night on the 18th February 2012. He only arrived at Shangani Business Centre on the 19th February 2012 at around 6pm. Upon arrival, he proceeded to where Priscilla was and collected his money from her as he had given her airtime cards commonly referred to as "Juice cards" to sell. After collecting the money, he went straight to his living quarters where he took a bath. Later that evening he heard that a person had been killed at the shops. He vehemently denied his involvement in the said murder.

We find that the state proved that indeed deceased was killed. According to Jele, the deceased was killed by accused whom he saw assaulting deceased while deceased was remonstrating with him. He was emphatic that it was the accused, as he is related to him and therefore he could not have been mistaken about his identity. When asked why he did not immediately report the accused to the police, his response was that accused has the notoriety of being feared in the community in general and in particular that during that period he was reporting at the police station for a similar case, that is, murder or some such related matter where someone had lost a life. He also told the court that even at the time of his temporary incarceration where he was detained with accused, accused continued to issue threats of violence against him designed to silence him about his knowledge of this case.

Therefore, in our view this witness's reluctance to make a voluntary and full disclosure about the accused involvement is excusable. We find that the witness told the court the truth and his evidence is accepted.

Accused's assertion is that he only arrived at 6pm at Shangani Business Centre. This, however, was contradicted by the evidence of Fikelephi and Bekezela. Their evidence is that accused arrived in the afternoon and they again saw him in the evening and immediately after that, this incident was discovered.

The question is whether or not it is accused who committed this offence. In order to ascertain this fact, the court is constrained to look at the evidence presented by the State. Jele's evidence was very clear that he saw the accused assaulting the deceased with an object which he could not identify. The blow was being directed to the deceased's face. Indeed the post-mortem report confirms injuries sustained on the particular part of deceased's body that is the face. This is consistent with what Jele saw.

The accused was positively identified by Jele whom he knows and is related to. He has no reason to have falsely implicate the him. Therefore, there is no room for entertaining any doubt as to the assailant's identity. As if that is not enough, accused was also seen by Jele leaving the scene of crime.

In addition thereto, Fikelephi and Bekezela saw him in the evening. He did not want to come to where there was light as he stated that he did not want to be seen by the police. Prior to this, he had threatened that they would never see Shangani again. He also asked Priscilla to observe any unusual movements around that area.

All this behaviour is unusual and points to a man whose mind was unsettled. While in the absence of something fishy he could have been forgiven for his behaviour, but, in view of this incident all indications point to his association with this murder. The problem with his conduct is that when taken in totality with other evidence led by the State, which evidence is in our view credible, one is left with only one irresistible conclusion, that accused is the one who fatally assaulted the deceased.

Accused's explanation of his movement on this fateful date cannot be believed and is accordingly rejected.

Having so concluded, the question which remains is whether accused committed the murder with actual or legal intent.

Accused was seen assaulting deceased, but, it is not clear why he did so. In light of this it has not been proved beyond reasonable doubt that accused actually intended to kill his victim.

What is, however, clear in our view, is that his assault on the deceased using whatever weapon on that vital part of the body he must have foreseen the consequences of his actions, that is, that death would occur. However, despite this foreseeability he opted to continue irrespective of the consequences.

In view of this, the court finds that accused should be found guilty of murder with constructive intent.

Verdict: Guilty of murder with constructive intent.

Criminal Division, Attorney General's office, state's legal practitioners

Sansole and Senda, accused's legal practitioners