

THE STATE
Versus
JUBILANT NDLOVU
And
PRIVILEGE NCUBE

IN THE HIGH COURT OF ZIMBABWE
TAKUVA J
BULAWAYO 8 DECEMBER 2014 & 15 MAY 2015

Criminal Trial

Miss S. Ndlovu for the state
F. Museta for accused 1
P. Mukono for accused 2

TAKUVA J: The alleged hooting of an owl calling out “Rejo Rejo” unfortunately led to the murder of an innocent 62 year old frail woman in the Mlomwe area in Plumtree. The two accused persons who are siblings were charged with murder. It being alleged that on the 1st day of March 2014 and at Thoko Ncube’s homestead, Mlomwe area Plumtree, the two accused persons or one or more of them did wrongfully, unlawfully and intentionally kill and murder Thoko Ncube a female adult in her lifetime therebeing.

Accused 1 admitted the facts by stating that; “I admit I committed the offence but it was not my intention to commit it.” The court then entered a plea of not guilty. Accused 2 in her plea said; “I admit that I know that grandmother died. I deny that I assisted or participated in killing her but grandmother died.”

The state outline was then read and produced as exhibit I. Briefly, the state allegations are that on the 1st day of March 2014 and at around 0600 hours and at Happy Mpala’s homestead, Mlomwe area, the accused persons hatched a plan to kill the now deceased on allegations that she was bewitching them. On the same date and at around 2000 hours accused persons in the company of Sikhangezile Mpala went to the said deceased’s homestead. On arrival, they found her in the company of her two year old grandchild one Mduduzi Ngwenya. While inside the hut, accused 1 jumped onto the now deceased and strangled her. Accused 2

then joined accused 1 by pressing the now deceased's legs and holding her hand. Accused 1 thereafter took a knobkerrie and struck the now deceased three times on the head. The deceased died from injuries sustained in this assault.

Accused 1 admitted these facts in his defence outline Exhibit 2. He, however, stated that he had smoked dagga shortly before the assault and that due to intoxication he became "highly susceptible to 2nd accused's commands as he genuinely believed the deceased was indeed bewitching them."

In her defence outline Exhibit 3, accused 2 while admitting being present at the scene at the time of the murder, denied participating in it. She said she went to the deceased's home alone in the evening to inquire on how she was feeling. Whilst there, accused 1 and Sikhangezile Mpala arrived shortly thereafter, accused jumped on to the now deceased and strangled her. Later, accused 1 took a knobkerrie and hit deceased with it on the head. They left deceased lying "lifeless" on the ground. She did not report the murder to anyone that night or the following day because she was still in "shock and fear of being labeled a sellout" by accused 1 and her relatives. She prayed to the court to find her not guilty of murder.

The state then produced Exhibits 4 and 5 being accused persons' confirmed warned and cautioned statements. In his statement, accused 1 while admitting the *actus reus* exonerated accused 2 and implicated Sikhangezile Mpala as his accomplice in the murder. On the other hand accused 2 denied assisting accused 1 to murder the deceased but admitted that she held deceased's hand and she saw accused 1 strike deceased three times on the head with a knobkerrie. She said when she asked accused 1 why he was "killing grandmother" he said he had smoked dagga and was not himself.

Exhibit 6 was the affidavit by Edson Chikunguru who identified the remains of the deceased to Dr S. Pesanayi who compiled a post mortem report Exhibit 7. Dr Pesanayi made the following observations. On marks of violence, he noted (1) Bruise on the neck 2cm right and left 1cm; (2) Vomitus from mouth. On the skull, he observed that there was a scalp haematoma

left temporal region, right temporal region and right occipital region. He also observed that there was subarchnoid haemorrhage in the brain and he listed the cause of death as;

- (i) Subarchnoid haemorrhage;
- (ii) Blunt force trauma;
- (iii) Assault

Exhibit 8 was as a hunting knobkerrie with the following dimensions;

- (a) Length – 49cm
- (b) Circumstance of the head – 28cm
- (c) Weight 0.545 grammes

Accused 1 admitted that this was the weapon he used to assault the deceased. It was also admitted that the deceased died from these injuries.

State counsel applied for the admission of the evidence of the following witnesses in terms of section 314 of the Criminal Procedure and Evidence Act Chapter 9:07; Tsepiso Dube, Munyaradzi Paul Mpofu and Dr Sanganai Pesanayi. There was no objection from counsel for the defence and the application was duly granted.

Viva voce evidence was adduced from Sikhangezile Mpala (Sikhangezile) a 15 year old juvenile. After she had been sworn in but before she testified, the state counsel applied that she be warned as she was an accomplice. The court administered the accomplice warning in terms of section 267 of the Code. She knew the deceased as her paternal grandmother and accused 2 as her step mother. She knows accused 1 as her “maternal uncle” in the sense that he is accused 2’s brother. They were living at the same homestead at the time the deceased was murdered.

The witness testified that on 1 March 2014 accused 2 went to a funeral in the morning and returned around 1600 hours. Upon arrival, she asked the witness if she heard a hooting owl calling out “Rejoice, Rejoice” i.e. the second accused’s daughter. The witness denied hearing such hooting and accused 2 left to visit a neighbour. Later, accused 1 returned from herding

cattle. He was now in accused 2's company. Accused 2 then told the witness that they should kill the deceased because she was a witch. Also accused 2 said the witness must be roped in so that she did not report the murder. The witness was strongly warned of dire consequences if she dared disclose what was to happen. Specifically the witness was told that if she told anyone, they "all would die in prison". Further accused 2 threatened to poison the witness' food and tell people that she was trying to abort.

Accused 2 ordered the witness to quickly prepare supper so that they find the deceased still awake. Accused 1 and 2 then left for accused 1's room. Upon their return, the witness detected a strong smell of dagga from accused 1 who was now carrying a knobkerrie. After locking all the children in a room, they proceeded to deceased's home where they greeted her. Deceased started rekindling the fire and asked accused 1 to "blow the fire", instead, accused 1 jumped and grabbed deceased's throat. Frightened the witness leapt out of the room but quickly returned due to fear of being poisoned by accused 2 as per her threats. She met accused 2 at the door and accused 2 re-entered the hut. Accused 2 sat on deceased's legs while pressing down deceased's hand. The witness held the 2 year old Mduduzi after it fell down.

When accused 1 and 2 realised that deceased was weak and unconscious, accused 2 felt the body and announced that the lower part was cold while the upper part was warm. She then instructed the witness to strike the deceased with the knobkerrie and the witness refused. Accused 2 was angered by this and she clapped the witness and pulled her hair before covering deceased's face.

At that point accused 1 struck deceased twice on the head with the knobkerrie. Accused 2 instructed accused 1 to deliver another blow to "finish her off." Accused 1 obliged by hitting deceased on the centre of the head with the knobkerrie. Accused 2 repeated the death threats to the witness, insisting that it is a good thing that deceased had died as she was a witch who caused the death of the witness' mother and siblings as well as being responsible for the miscarriage by the witness' late mother. Accused 1 concurred with accused 2 adding that deceased was a witch whose vision he had seen in his dreams. Before leaving, accused 2 placed Mduduzi beside

deceased's body as she uttered the words "*Inja ifile* – The dog has died." Asked about her relationship with both accused persons, the witness said accused 2 was moody while accused 1 was generally nice with her. Further, she said accused 2 pretended to like deceased while in reality she told the witness that deceased was an evil person. According to her both accused persons did not like the deceased at all.

As regards the role she played in the murder of the deceased, the witness denied holding deceased's legs as suggested by accused 1. It was the witness' testimony that deceased was living alone at her homestead and accused 2 would not allow her to assist deceased with domestic chores. Under cross-examination, she said accused 1 "appeared excited" while assaulting the deceased. After the murder, they exited the hut and went behind some huts through the back of the homestead. They avoided the proper gate. When they arrived back home, accused 2 ordered them to pray and she (accused 2) prayed as follows; "Father we pray you receive her spirit and it should not return." On the 3rd day of March 2014 at approximately 1300 hours, the witness reported the murder to Tsepiso Dube her aunt who had visited her.

In assessing this witness' credibility, the court will take into account the following factors;

- (i) That she is a 15 year old who witnessed a shocking and horrific event.
- (ii) That she was assaulted and threatened with death by accused 2
- (iii) That she was dependent on accused 2
- (iv) That she freely and voluntarily reported the murder to Tsepiso Dube leading to the arrest of the accused persons
- (v) That there is need to be cautious.

In our view, Sikhangezile gave her evidence in a clear and straight forward manner. Her demeanor in the witness stand was impressive and she was not shaken under cross-examination. In fact the bulk of her evidence was common cause and therefore not challenged. Further, her evidence was corroborated in material respects by both accused persons' testimony. Also, it is corroborated by Venencia Definite Dube's evidence that plainly demonstrates accused 2's

complicity in the murder. The probabilities favour Sikhangezile's version and her entire narration sits in accord with that of accused 1 and 2, with the only divergence being accused 2's role in the murder.

Sikhangezile, in our view, is a credible witness who did not embellish or exaggerate her story. Despite the immaturity, she gave a coherent and logical story whose complexion never changed throughout the trial. For these reasons we entertain no doubt whatsoever in our minds that her version represents the truth of what transpired that fateful night. We therefore find no reason to disbelieve her wherever her evidence conflicts with that of the accused persons.

The next state witness was Venencia Definite Dube. She came to know accused 1 when he was brought to her uncle's home by accused 2. Accused 2 is married to her maternal uncle and deceased was related to her grandmother.

On 2 March 2014 approximately 1300 hours she was coming from a nearby well in the company of accused 2. When they got to deceased's homestead, they saw a baby outside with mud all over him. The baby was crying and accused 2 picked it up and asked where its grandmother was. Accused 2 felt the baby's stomach and said the baby was hungry. She told Sikhangezile to bring a clean trousers for him after which she entered deceased's bedroom calling out "Good afternoon mother" x 2. The witness entered the kitchen hut whose door was slightly open and saw deceased lying on firewood facing upwards. She quickly went out and accused 2 asked her what it was. She told the 2nd accused to enter the hut and see for herself. Accused 2 entered the hut calling out "mother, mother". She then came out crying and said the kraal head must be notified. Under cross-examination by Mr *Mukono* for accused 2, the witness said she saw accused 1 drinking tea at accused 2's homestead. She also told the court that prior to this incident, she had known accused 2 for approximately five months and that accused 2 used to spend most of her time in South Africa.

This witness' testimony was wholly unchallenged on material respects although accused 2 tried to feebly suggest that Mduduzi (the 2 year old boy) was not trudging forlornly in the mud outside deceased's kitchen hut. The witness impressed the court as a truthful witness. She

answered questions in a straight forward manner and she did not exhibit any hatred for the accused persons despite the fact that they were accused of the murder. We find her to be a credible witness whose evidence we accept *in toto*.

What we find significant about her evidence is that it exposes accused 2's personality as a cunning hypocrite and a plausible liar. She deviously pretended that deceased was alive and well by calling out to her when she knew deceased was murdered the previous night. She pretended not to know the culprits even after the matter was reported to the police. Quite clearly, such conduct is indicative of a guilt mind.

The state closed its case and accused 1 gave evidence in his defence. Accused 1 gave three different versions in his defence. Firstly, in his confirmed warned and cautioned statement he admitted all the allegations but blamed it all on intoxication and that Sikhangezile had told him that deceased was a witch who had caused the death of her mother and her siblings. He also stated that according to Sikhangezile, he was next on the death list. Surprisingly in his defence outline (Exhibit 2) apart from admitting the details of how the murder was committed incriminated accused 2 as the one who instructed him to kill the deceased because she was "responsible for deaths of relatives through witchcraft."

Thirdly, in his evidence in chief, he changed again and exonerated accused 2. He denied planning the murder saying they visited the deceased in order to "rebuke her" but when he got there he did things to her that he could not remember due to intoxication from two twists of dagga. However, under cross-examination he seemed to agree that accused 2 instructed him to kill the deceased. He specifically said accused 2 ordered Sikhangezile to strike the deceased with a knobkerrie and when she refused he took the knobkerrie and hit deceased "three times on the head".

In the witness box, the witness had a shifty demeanour and was long-winded in his responses to questions put to him in cross-examination. At times he would admit that his answers were nonsensical, incoherent and outright improbable. We are of the view that there is

more to his concealment of the facts than meets the eye. For these reasons we disbelieve the 1st accused and we shall only rely on his testimony where other reliable evidence corroborates it.

As regards intoxication, it is common cause that accused 1 smoked the dagga well after the plan to murder deceased had been hatched. In other words accused 1 did so to gain Dutch Courage. See *S v Nyathi & Ors* S-52-95. Voluntary intoxication is at most a partial defence and will only operate as a partial defence. On a murder charge, if the accused lacked the intention to kill, he will be found guilty of culpable homicide. The onus is on the state at all stages to prove intent to kill, but there must be some basis for holding that accused was so drunk that he did not know what he was doing – see *S v Tavakonza* A – 24-71 and *S v Dzaro* 1996 (2) ZLR 541 (H) where it was stated that drunkenness is not a defence in itself but it may render the accused incapable of forming the special intent which is necessary to constitute a particular crime – see also *S v Johnson* 1961 (1) SA 2011 (A); *S v Chamunorwa & Ors* S-137-86. *S v Dube* 1997 (1) ZLR 229 (H)

In Johnson's case it was held that;

“To determine what the position in the criminal law ought to be as regards an accused who commits an act or an omission under the influence of liquor, it is desirable, I think to start with the degree of intoxication, and in so doing, I deal with normal voluntary intoxication.” The law can be formulated thus; It is only when a person, who commits a consequence crime, is so intoxicated that he does not realise that he is acting unlawfully, or that his inhibitions have substantially disintegrated that he can be regarded as lacking criminal capacity. Where there is a reasonable doubt, the accused should be given the benefit thereof. However, a court will only come to the conclusion, or entertain the reasonable doubt, that when someone has committed an act or an omission which is an offence, he was intoxicated to such a degree that he lacked criminal capacity on the basis of evidence justifying such a conclusion. In other words, all the relevant facts should be carefully considered and a court must undertake this investigation as it is the court's task to determine whether the accused had criminal capacity or not.”

In casu, there is ample evidence from Sikhangezile that the murder was planned before accused 1 smoked dagga. Therefore, accused 1 smoked the dagga to give himself “Dutch Courage”. Consequently, his liability for the murder is based upon his intention that he formed before he became drunk. As G. Feltoe puts it, “... in practical terms it is highly improbably that

a person will form an intention to kill and, having become drunk, implement his earlier intention without the requisite intention. In other words, evidence of the intention formed before the person drinks to bolster his courage to do the evil deed will usually simply assist in establishing that when he proceeded to carry out the murder, he still knew what he was doing and carried out the deed with the necessary intention.”

Can it be said accused 1 did not know what he was doing when he murdered the deceased? The answer is clearly not in the affirmative. Accused 1 agreed with accused 2’s evil plan. He armed himself with a very dangerous weapon. He testified that he remembered what happened and what was said and by who before deceased was killed. More importantly he executed the plan, not haphazardly but methodically by strangling the deceased. He was able to notice that Sikhangezile left the room and was followed by accused 2. He also remembered that Sikhangezile took the baby while accused 2 held the “old lady’s hands”. Under cross-examination by Mr *Mukono* for the 2nd accused, accused 1 was asked;

Q - You claim that you did not know what you were doing when you killed the deceased

A - Yes

Q - How do you know accused 2 told Sikhangezile to hit deceased?

A - I heard them talking

Q - So you were conscious?

A - Yes

Accused 1 admitted that he consciously took the knobkerrie and hit deceased with it three times on the head. He did not just lash out involuntarily, he carefully aimed at deceased’s head in full compliance with accused 2’s instructions. Accused 1 had full memory of what happened during and after the murder. He remembered where he slept and for what reason. The fact that

accused 1 is able to recount what happened means that he knew what he was doing at the time. For these reasons, we find that despite intoxication, accused 1 had the requisite intention at the time.

As regards accused 2, the issue is whether or not she participated in the murder of the deceased. In her defence she took the witness stand and stood by her defence outline. She however admitted that she considered deceased to be a witch who casted some spell on her which disturbed her menstrual cycle. She also confirmed that she believed deceased did not like her.

What we find odd with accused 2's version is that she watched accused 1 and Sikhangezile brutally murder the deceased and just walked away and did not report to the headman, other villagers or the police. Her failure to firstly, prevent the murder and secondly to report it at the earliest opportunity persuaded us to believe that she was indeed part of the conspiracy. We say so for the simple reason that accused 1 is her young brother who from the evidence was brought to that homestead by accused 2 to herd cattle. He was in fact accused 2's employee. Accused 2 referred to him, in her evidence as a "child". There is no doubt in our minds that accused 2 manipulated accused 1. This manipulation made accused 1 state in his warned and cautioned statement that Sikhangezile a 15 year old girl instructed him to kill the deceased.

However, he denied this version when he had an opportunity to talk to his lawyer whom he gave instructions to draft his defence outline incriminating accused 2. The fact that accused 1 could not face his sister in court and confirm the contents of the defence outline is another example of the manipulation.

Further, we do not believe that the reasons given by accused 2 for her failure to report the murder are genuine. The real reason for accused 2's inaction is that she is a co-principal offender. Also we reject accused 2's explanation for labeling Sikhangezile an incredible witness. This so called hatred is non-existent in that if it were true, Sikhangezile and accused 1 would not have committed this murder in full view of accused 2. In a desperate bid to discredit

Sikhangezile and accused 1, accused 2 blamed the police, members of the neighbourhood watch committee, the headman, Tsepiso Dube and other deceased's relatives. They were all accused of harbouring grudges against her. As a witness, accused 2 was prone to exaggeration and would seek to add fresh evidence under cross-examination. Her responses to questions put to her were long winded. The totality of her evidence suggests that she is a plausible liar. One of the clear lies she told was that 2 year old Mduduzi was in the comfort of her home when the truth is that he was found wandering in the rain and covered with mud outside deceased's home.

Sikhangezile was a 15 year old minor in accused 2's custody at the relevant time. It baffles the mind therefore how accused 2 would permit Sikhangezile to kill accused 2's mother in law in cold blood and fail to report her. Surely accused 2 as the senior member of this family should have restrained Sikhangezile and accused 1 from carrying out their evil deed if at all she was not a willing participant.

For these reasons, we reject accused 2's evidence wherever it conflicts with that of Sikhangezile, accused 1 and Venencia Definite Dube. We accept the latter's evidence as the truth.

Accordingly, we make the following findings:

- (1) Both accused persons believe in witchcraft
- (2) On 1st March 2014 they conspired to murder the deceased whom they believe to have bewitched them
- (3) On the night of the same day, accused 1 and 2, in the company of Sikhangezile went to the deceased's homestead.
- (4) Sikhangezile was compelled through threats of violence and death by accused 2 in order to accompany them to deceased's home.
- (5) Before they left, but after the plan to murder deceased had been hatched and agreed on accused 1 smoked two twists of dagga
- (6) Accused 1, to accused 2's knowledge and approval armed himself with a knobkerrie

- (7) In furtherance of their common purpose, accused 1 strangled the deceased and later, on accused 2's instructions hit the deceased twice on the head with a knobkerrie. All along accused 2 was seated on deceased's legs and pressing her hands on the floor.
- (8) Accused 2 felt deceased's body and announced that she was still alive and that they finish her off.
- (9) Accused 1 then struck the deceased with the knobkerrie on the centre of the head and she died.
- (10) Accused 2 in a bid to satisfy herself that deceased had indeed died, felt the body and uttered the words "*Inja ifile*" which means the dog has died.
- (11) The three then left and upon arrival at home, accused 2 prayed not for forgiveness for her wicked deed, but to implore God not to allow deceased's spirit to return and hound her.
- (12) Both accused persons did not report the murder despite ample opportunity to do so.
- (13) Sikhangezile reported the murder to her paternal aunt one Tsepiso Dube
- (14) Although accused 1 had smoked dagga, he was not so intoxicated as not to know or be aware of what he was doing. He therefore participated with full knowledge of the unlawfulness of the act and the requisite intention to commit murder.
- (15) Accused 2 masterminded this crime. She is a co-principal offender whose *actus reus* was committed with the necessary *mens rea* for the crime of murder.

For these reasons we find that the state has proved its case beyond a reasonable doubt and both accused persons are found guilty of murder with actual intent.

In terms of section 48 (2) of the Constitution of Zimbabwe Amendment (No. 20) Act 2013, a law may permit the death penalty to be imposed only on a person convicted of murder committed in aggravating circumstances ..."

In casu, the murder was not committed in aggravating circumstances because what motivated the murder is the accused persons' belief in witchcraft. Also in respect of accused 1, intoxication weighed in.

Sentence

In assessing an appropriate sentence, the court considered what was submitted in mitigation. Particularly, the court noted in respect of accused 1 that he is a youthful first offender who was manipulated by his sister. The court also took into account the accused's belief in witchcraft and the fact that he had smoked dagga.

In respect of accused 2, the court considered that she is a 26 year old with young children. She also has a strong belief in witchcraft. These are the only mitigating factors the court could find.

On the other hand, it is aggravating that the accused persons committed a serious offence involving loss of life which is sacred. Indeed murder is a heinous crime in that it is morally reprehensible and deplorable. It has been said, time and again that the courts have a duty to protect the sanctity of human life.

In casu, the murder was premeditated in that the accused persons discussed their plan meticulously before executing it. The degree of cruelty and lack of respect for human life exhibited is shocking. The manner of execution was cold blooded, callous and cowardly. The public should be made aware of the fact that those who commit murder under the guise of a belief in witchcraft commit a very serious offence deserving a lengthy prison term. This is so because such beliefs are weird and held by irrational people. Trying to make sense out of their deeds is ignominious.

What is more disturbing *in casu* is that the accused persons killed a person who had done them no wrong. It appears the motive for the murder was premised on accused 1's episodes of hallucination after smoking dagga. The deceased was a 62 year old defenceless woman who was

assaulted over a long period of time with a murderous weapon. She must have suffered excruciating pain before she died.

For these reasons, the court finds that the accused persons' moral blameworthiness is of the highest order. Although it came out in evidence that accused 2 masterminded the murder, there is no legal justification to treat them differently when passing sentence.

Accordingly, each accused is sentenced to 30 years imprisonment.

Prosecutor General's Office state's legal practitioners
Messrs Ndove & Museta 1st accused's legal practitioners
Messrs Danziger & Partners 2nd accused's legal practitioners