

**THE STATE****Versus****CERTAIN MOYO**

IN THE HIGH COURT OF ZIMBABWE

MAKONESE J with Assessors Mr F. Damba and Mrs S. M. Hadebe

BULAWAYO 13 &amp; 14 SEPTEMBER 2016

**Criminal Trial***Miss N. Ngwenya with Miss S. Ndlovu* for the state*Mrs J. Magosvongwe* for the accused

**MAKONESE J:** The 3<sup>rd</sup> of August 2014 started as a normal day for the 77 year old Johnson Siphoko Moyo (now deceased). In the early hours of this Sunday morning the late Johnson Siphoko Moyo assigned his son (the accused) to dip his cattle as he wanted to leave them at Tshawulwa Grazing Farm on his way to Bulawayo. After dipping the cattle the accused returned home and penned the cattle. Andrics Moyo (accused's 3 year old son) who was playing outside the yard followed accused who was heading towards the cattle pens. At around 0900 hours on the same day the deceased left his homestead on his way to Bulawayo. He unpenned the cattle intending to leave them at the grazing area some distance from his homestead in the Nyabane area of Plumtree. This was the last time the deceased was to be seen alive. He went missing. His remains were recovered from a well on 17<sup>th</sup> January 2016. The deceased was positively identified through his national identity card, drivers' licence and the clothes he was last seen wearing. Investigations carried out by the police led to the arrest of the accused.

The accused who was aged 26 years at the time of the disappearance of the deceased denies the allegation of murder being levelled against him. Accused is deceased's son. At the relevant time he resided at his father's homestead at Malisikwana Village, Nyabane area, Plumtree with his father. Accused's defence is a complete denial of the allegations.

The state tendered into the record of proceedings an outline of the state case (exhibit 1). The defence outline was tendered as exhibit 2. The accused's confirmed warned and cautioned

statement was admitted into evidence as exhibit 3. The affidavit of Constable Edson Chikunguru who was on duty at United Bulawayo Hospitals and who identified the remains of the deceased was marked exhibit 4. The post mortem report number 78/77/2016, prepared by Dr Sanganayi Pesanai was filed as exhibit 5. The report indicates that the cause of death was:

- (a) Severe head injuries
- (b) Multiple skull fractures
- (c) Assault

### **The State Case**

#### **Andrics Moyo**

The state opened its case by leading evidence from Andrics Moyo. He is a minor child aged 5 years. He gave his testimony via video link at the Victim Friendly Court. The accused is his father. The deceased was his grandfather. At the material time he resided with his parents at deceased's homestead. This witness gave an eye-witness account of the events that led to the death of the deceased. He confirmed that his grandfather passed away. He testified that the deceased was murdered by the accused. He narrated that accused struck the deceased with an axe on the back of his neck and all over the body.

The witness indicated that when the deceased was axed by the accused one Japhet and his son were also present. The witness further testified that Japhet and his son were merely present when the crime was being committed and looking on. The witness stated that after the deceased had been axed his body was placed in a wheelbarrow by the accused. The body was then hidden in a cave. The witness stated that he observed that the wheelbarrow had blood. The accused washed away the blood after placing the body in the cave. The witness observed that the cave had been covered with stones.

Accused's defence counsel had very few questions for this witness. Andrics was quizzed as to why he had not told anyone about what he had witnessed. The witness' response was that

he had informed the police what he had witnessed. The witness pointed out that the police subsequently recovered the remains of the deceased from a well. It is my view that the evidence of the minor child was given in a clear detailed manner. The young witness gave a graphic and precise account regarding the commission of the gruesome murder. He was not contradicted in any manner under cross-examination. I find no reason to suggest that the evidence of the minor child was tainted by malice. The evidence was given with such clarity that the events of the fateful day seem to have remained attached in the mind of the youthful witness. I am satisfied that the evidence of the youthful witness was credible in all material respects.

### **Priscilla Moyo**

The state called as its second witness Priscilla Moyo. She resides at Siphoko Johnson Moyo's homestead, Nyabane area, Plumtree. She knows accused person as her maternal uncle and deceased as her grandfather. She testified that on the 3<sup>rd</sup> of August 2014 around 1000 hours the deceased left his homestead wearing a khakhi trousers, a blue work suit jacket, brown "farmer" shoes and was carrying a black bag. The deceased was headed for Bulawayo where he intended to consult prophets and faith healers regarding his missing cattle. The witness testified that deceased intended to unpen his cattle and drive them to a farm for grazing before embarking on his trip to Bulawayo. This was the last time the witness saw the deceased alive. The witness indicated that before this day the relations between accused and deceased had soured over the deceased's missing cattle. Deceased fingered accused and one Japhet in the loss of his cattle. The witness indicated that a missing person's report was made when it became apparent that deceased had not arrived at Bulawayo. The remains of the deceased were discovered in January 2016. The witness assisted in the identification of the body of the deceased. Under cross-examination, this witness maintained that relations between the deceased and accused had deteriorated as deceased was convinced that accused was responsible for his missing cattle. The witness informed the court that deceased had indicated that if he were to die, he would have been killed by accused and his (deceased's) wife.

The evidence of this witness was not controverted under cross-examination. She gave a concise account of what she knew. She did not exaggerate her testimony. Her version is credible and the court has no hesitation in accepting her testimony as a true reflection of what happened.

### **Thambo Ncube**

The third witness for the state was Thambo Ncube. He resides at Malisakwana Village, Nyabane area, Plumtree. He knew the deceased during his lifetime as a close friend and neighbour. He knew accused as deceased's son. The witness illuminated the proceedings by his candid testimony and somewhat ambient character. He testified that during the first week of August 2014 around 0900 hours he visited the deceased at his homestead. The deceased revealed to him that he had missed four beasts at the grazing lands and that he suspected that his son and one Japhet were responsible for the disappearance of his cattle. The deceased ominously told the witness that should he be found dead, the accused and his wife, Mamina Moyo would be responsible. The witness further indicated that after the disappearance of the deceased he had to engage senior Police Officers at Plumtree but investigations yielded no clues regarding the whereabouts of the deceased. The witness indicated that sometime in January 2016 he was informed that the remains of the deceased had been discovered in a well at Tshankwa Farm.

The evidence of this witness remained largely unchallenged under cross-examination. The witness corroborated the assertion by Priscilla Moyo that prior to the disappearance of the deceased the relationship between the deceased and accused had been strained over the missing cattle.

The testimony of this witness was clear and credible. It is an accurate reflection of what the witness knew in connection with the case. There was no exaggeration on his part. He had no motivation to lie or mislead the court.

The state then applied for the admission of the evidence of the rest of the state witnesses by way of formal admissions in terms of the provisions of section 314 of the Criminal Procedure

and Evidence Act (Chapter 9:07). The evidence of the following witnesses was accordingly tendered into the record.

- (a) Kenneth Maphosa
- (b) Annie Sibanda
- (c) Angeline Mhlanga
- (d) Detective Sergeant Xolani Sibanda
- (e) Handson Moyo
- (f) Constable Emmanuel Chimhoswa
- (g) Constable McIrvine Langa
- (h) Xolisani Ability Ngwenya
- (i) Detective Constable Stanley Tugwete
- (j) Detective Constable Garikayi Mavhurama
- (k) Doctor Sanganayi Pesanai

### **Defence Case**

The accused elected to testify under oath. He is now 28 years old. He was 26 years old at the relevant time. The accused denied that he murdered his father. He gave a lengthy account of his movements on the day his father disappeared. He professed ignorance regarding the allegation that he had murdered his father. He mentioned names of various people he came into contact with on the day in question. He did not however call any single witness to confirm his movements. He failed to proffer any reason why his son Andries would lie against him. When pressed to explain why the minor child would falsely implicate him, the accused ventured to suggest that the child might have been influenced by one Ntombizodwa Ngwenya. The accused surmised that the minor child may have heard rumours circulating in the village that he had killed his father. The accused's suggestion was not only far-fetched but without foundation. As correctly noted by Ms Ngwenya, appearing for the state, the accused did not raise this issue with the police when the warned and cautioned statement was recorded. Secondly, the accused did not raise the issue in his defence outline. Thirdly, the accused did not raise the issue in his

evidence in chief, neither was the issue raised under cross-examination. The inescapable conclusion is that the assertion by the accused that Andrics may have been influenced by villagers to create the damaging allegations against him are an after-thought. The nature of the detailed evidence provided by the minor child is in logical sequence. There is sufficient corroboration to the minor child's testimony. Priscilla Moyo spoke of a bad relationship between deceased and accused prior to his mysterious disappearance. Kenneth Maphosa was hunting with his dog when he passed close to a small mountain when he noticed a human body lying helplessly on the ground facing sideways and covered with tree branches. This incident was witnessed around 3<sup>rd</sup> August to 31 August 2014. Kenneth Maphosa had been dissuaded from reporting the matter to the police by his grandmother. Kenneth Maphosa was told by the grandmother that he would get into trouble with the police if he reported the matter. After the discovery of the remains of the deceased Kenneth Maphosa made indications to the police and gave a statement outlining what he had witnessed on 3 August 2014.

### **Analysis of the evidence**

The state relied to a large extent on the eye-witness account of Andrics Moyo. That evidence is credible and consistent. The court has been urged to treat the evidence of Andrics with caution. It is been contended by Mrs Magosvongwe appearing for the accused that the minor child never narrated his story to any of the state witnesses for a period of 2 years. Further, it was argued that evidence of minors should be treated with caution as witnesses of this age are suggestible and can fantasize events. In support of her argument, counsel for the defence relied on the case of *S v Sibanda* 1994 (1) ZLR 394. I shall deal with the case later in this judgment.

For the state to secure a conviction in this case, the court must be satisfied that the case against the accused has been proved beyond reasonable doubt. It is my view that the evidence adduced by the state was not challenged nor controverted in any material respect. The evidence of Andrics is consistent with the results of the post mortem report. It is critical to note that, the Pathologist Dr Sanganayi Pesanai made the following observations on the remains of the deceased:

- (a) Lineal Skull Fracture from the right parietal to the left parietal bone
- (b) Lineal Fracture Frontal Bone
- (c) Fractured and missing right frontal bone including the orbit
- (d) Fractured right parietal bone missing piece
- (e) Fractured right temporal bone missing part

On other remarks the pathologist noted

- (f) Fractured right anterior fossae bones
- (g) Fractured right medial fossae bones

The nature of the injuries as reflected in the post mortem report are consistent with the observations made by the minor child who witnessed the accused axing the deceased behind the neck, on the head and all over the body. It is inconceivable that given the age of the minor child he would have fabricated his evidence to such a degree that results of the post mortem would, in all material respects fit into the puzzle of how the deceased met his death. The question of suggestibility does not in this event arise at all. The evidence of the minor child was not fanciful. The court notes that the minor child gave evidence in a relaxed and purely innocent manner. His version of events is accepted by this court. No reasonable or logical explanation has been placed before this court to indicate that the child was motivated to lie against his father.

### **Analysis of the law**

In the case of *S v Sibanda (supra)* referred to by defence counsel, the court laid down certain guidelines regarding the approach in dealing with evidence led from minors. The court in that matter stated, (per head-note) as follows:

“In our law, unlike English law, corroboration is not required. In our law the approach is that it is advisable to require corroboration of children because their youth indicates immaturity which may cause them to give ill-conceived or misleading evidence. Because our courts are not obliged to require corroboration, the courts must be cognizant of potential objection to the evidence of children which may or may not be valid according to the facts and circumstances of each case.”

In the case of *S v Ncube* 2014 (2) ZLR 297 (H), this court had occasion to deal with the approach in dealing with evidence given by minor children in sexual cases. This court concluded that:

“While the evidence of the child witness must be approached with caution, such caution must be creative or proactive caution where a judicial officer uses knowledge of psychology or other relevant disciplines in order to maximize the value of such testimony. Psychological research has established that young children do not fantasize about being raped and other unusual horrific occurrences, but their fantasies and play are characterised by their ordinary daily experiences. It is highly unlikely for very young complainants to make serious allegations without any basis at all ...”

In the case of *Thomas Madeyi v The State* HH-34-13 the court cited with approval the Indian case of *Uttah Pradesh v Krishna Master & Ors* AIR 2010 SC 3071 where the Indian Supreme Court held that there is no principle of law that it is inconceivable that a child of tender age would not be able to recapitulate the facts in his memory. A child is always receptive to abnormal events which take place in his life and would never forget those events for the rest of his life. See also *S v Machowe* S-14-99 and *S v Madzombe* 1999 (2) ZLR 214 (H).

In the instant case the child gave his testimony in a clear and logical sequence. There is no reason to suggest that his evidence is a result of fantasy or that he was influenced to implicate an innocent man. The demeanor of the youthful witness was that of an innocent child simply reciting and narrating what he had observed. The events were so clear in the mind of the child that he gave graphic details of the events. It is safe to rely on the evidence of the minor child. There is sufficient corroboration in the accounts of Priscilla Moyo, Kenneth Maphosa and Thambo Ncube. The established facts are that the accused sought to kill his father. He had the motive, the means and the opportunity to commit the heinous crime. He planned on how he would dispose of the body of the deceased. He managed to conceal the body. Only after a period of 2 years was the body of the deceased recovered from a well. The minor child Andrics placed the accused at the scene of the crime. The defence did not controvert the version placed on record by the minor child. We are satisfied that the state proved its case beyond a reasonable doubt. The accused intended to kill the deceased. He achieved his purpose. The accused is accordingly found guilty of murder with actual intent.

## Sentence

In assessing an appropriate sentence the court takes into account the fact that the accused has been convicted of murder with actual intent. The murder was committed in aggravating circumstances. The deceased was aged seventy seven years at the time he met his death. The murder was clearly premeditated. The court may therefore impose a death penalty as provided under section 48 (2) of the Constitution of Zimbabwe (No. 20) of 2013. The General Laws (No. 3) of 2016 has now set out what constitutes aggravating circumstances. In terms of section 8(3) it is provided that:

“A court may also, in the absence of other circumstances of a mitigating nature or together with other circumstances of an aggravating nature, regard any aggravating circumstances the fact that-

- (a) the murder was premeditated; or
- (b) the murder victim was a police officer or prison officer, a minor, or was pregnant, or was over the age of seventy years or was physically disabled”.

In terms of subsection 8 (4) of the General Laws Amendment it is further provided that:

“A person convicted of murder shall be liable –

- (a) subject to sections 337 and 338 of the Criminal Procedure and Evidence Act (Chapter 9:07), to death, imprisonment for life or imprisonment for any definite period, not less than twenty years, if the crime was committed in aggravating circumstances as provided in subsection (2) or (3) or
- (b) in any other case to imprisonment for any definite period.”

The state has not advocated for the imposition of the death penalty in view of what they perceive to be the background facts of the matter. They argue that the fact that the accused was being accused of stealing his father's cattle affected his mind and he acted irrationally. The emotional and psychological stress he may have suffered contributed to his irrational behaviour.

This court recognizes that the manner in which the accused committed this offence fits perfectly within the category of a murder committed in aggravating circumstances. This court however, does have a discretion to impose a death penalty or life imprisonment, or other appropriate sentence. In my view, even where a murder is committed in aggravating circumstances, the court still has a discretion whether to impose a death penalty or other appropriate sentence. This discretion must be exercised judiciously, taking into account all the relevant factors relating to the commission of the offence. The irrationality of the accused's behaviour, tends to reduce his moral blameworthiness. I have not lost sight of the fact that there was evidence placed before the court to indicate that the relationship between the deceased and the accused had soured prior to the commission of this offence. The deceased had threatened to consult prophets and traditional healers in Bulawayo to establish who was responsible for his missing cattle. The accused must have been rattled and disturbed by this threat, which possibly, would expose him as the person behind the missing cattle. For that reason I would be persuaded to give the benefit of the doubt to the accused person to the extent that accused was not solely motivated by an evil design to murder his father.

This is a murder that was evidently committed in a most brutal and callous manner. The accused not only set out to kill his father. After he achieved his purpose he succeeded in concealing the body. The remains of the deceased were only recovered after a period of 2 years. The court must therefore impose a sentence that shows that the courts do not condone the senseless killing of other human beings. The accused acted selfishly and showed no remorse up to the end. He chose to cover up his tracks in the hope that he would escape punishment for his evil deed.

In my view the following is an appropriate sentence.

**“Accused is sentenced to life imprisonment.”**

*The Prosecutor General's Office, state's legal practitioners  
Messrs Danziger & Associates, accused's legal practitioners*