

THE STATE

Versus

SIBANGILIZWE MOYO

IN THE HIGH COURT OF ZIMBABWE

BERE J with Assessors Mr T.E. Ndlovu and Mrs E. Chazanga
HWANGE CIRCUIT COURT 10 & 11 NOVEMBER 2016

Criminal Trial

Miss N. Ngwenya for the state
K. Dingani for the accused

BERE J: The accused is charged with the crime of murder in contravention of section 47 (1) of the Criminal Law (Codification and Reform) Act [Chapter 9:23]. The accused pleaded not guilty.

The facts of this case are most unusual. On 7th of November 2012 at around 2100 hours the accused set out from Samasi Village for Zenka Area, in Nkayi using an ox-drawn scotch cart. The accused who was the eldest of the three was leading the oxen whilst his son Brian (17 years) and the accused's brother Mkhululi Moyo (aged 37 years) were seated in the scotch cart.

What has become common cause is that after they had covered quite some distance in the dark night of that November 2012, the accused who was leading the oxen saw some image on the verges of the road. As the accused was pondering what this image could have been he immediately saw some buckets of water right in the middle of the road and was immediately gripped with extreme fear and panic. In that panic stricken condition, the accused immediately made a "U" turn as he believed that their trip to Zenka had been cursed. The accused said at that moment he had decided to go back home and start the trip during day time. But alas! As the accused had made a 'U' turn and covered about 400 metres or so he saw another image similar to the one he had seen before on the side of the road but this time it was right in his path of travel. The accused made an abortive attempt to talk to this image but it did not respond. The accused then picked up some sand and threw at this image. The image's response was to immediately

attack the accused by attempting to strangle him by the neck. On witnessing this the two people in the scotch cart who claimed this same image had jumped into their scotch cart fled to a nearby road side village leaving the accused to deal with this strange image. The accused said using his home made axe which he was carrying he struck the strange object twice and it let loose its grip on him. The accused who was still in a state of panic called out to his brother and son that he had dealt effectively with the strange object and that they should come back. Because of fear the two could have none of this. They declined to go back to where they were called by the accused. The three eventually decided to seek accommodation at a homestead close by as they were convinced this was not a safe area to travel at night. The accused said when he struck this strange image he thought he was striking a goblin.

As the accused, his brother, son and the villagers from where the three had gone to seek shelter for the night were discussing the night's ordeal, they were then approached by a member of the neighbourhood Jackson Nyathi who had followed the tyre marks of the scotch cart to this homestead who advised them that a villager had been killed. On hearing this the accused was reported to have remarked "My God, why have you forsaken me?" The accused and his company eventually went back to the scene. It is these facts that have led to the accused's prosecution.

Both the accused and his brother testified in this case. Both said they were terribly frightened by this unusual image which appeared to have been wearing some white top with its bottom not clearly visible because of darkness. Both brothers were terrified by this creature to the extent that their fear was evident even as they were giving evidence in court. Both appeared to have fallen victim to this terrible belief in the existence of goblins, a belief system which even in this age is shared by many Zimbabweans or many Africans in general.

In his testimony the accused left the court in no doubt that when he was attacked and immediately sought to defend himself from this strange image, he genuinely believed he was under serious attack from a goblin.

The evidence of Jackson Nyathi did shed some light on the suspicious behaviour of the deceased whom he described as a mental person from the village whose mental stability was regulated by the consistent taking of mentally stabilizing pills. The witness confirmed that the deceased would behave strangely if she did not take her medication as prescribed. The witness was unable to tell the court if on this day the deceased had taken her pills or not.

In the court's view, taking into account the deceased's behaviour as projected by both the accused and those in his company at the time they met her, it is very likely that she behaved in the most unusual way, a behaviour that unfortunately cost her life.

I must now move to consider the legal position and the legal issues relevant to this case. The commission of the crime of murder has basically two components to it. There is the physical act (*actus reus*) which must be accompanied by the intention to commit this offence (*mens rea*). In order for someone to be found guilty of murder, both the *actus reus* and *mens rea* must exist at the same time. In other words an accused person must only be found guilty of the intention to kill a human being if at the time of the killing he had the intention to do so.

The defence raised by the accused in this case is one of mistake of fact which is a valid complete defence in our law. G. Feltoe in his book discusses this defence and gives a clear illustration of it when he states as follows:

“The test to determine whether the mistake was essential is to ask whether X would have committed the crime charged if the facts had been as X believed them to be. It would be an essential mistake if, when X kills a person, he thinks he is shooting an animal, or if when X takes away B's ox, he thinks that it is his (X's) ox ...

With crimes of intention the mistake does not have to be reasonable, although the unreasonableness of the mistake may be taken into account in deciding X did genuinely make that mistake. (But if the mistake was grossly unreasonable this may lead the court to conclude that the mistake was not genuine. However, if the court decides that although the mistake was grossly unreasonable, it was nonetheless a genuine mistake, it must acquit X).¹

1. *A Guide to the Criminal Law of Zimbabwe*, 2nd Edition, published by the Legal Resources Foundation, 1977 at pp 26-27

This position of our law was cemented by BEADLE CJ (as he then was) in the case of *S v Banet*.²

Further, and as correctly submitted by Ms *N. Ngwenya*, for the state section 233 of our Code³ recognises mistakes or ignorance of fact as a defence in cases similar to the instant case. For the avoidance of doubt the section is worded as follows:

- “233 When mistake or ignorance of fact a defence to subjective crimes
- (1) If a person does or omits to do anything which would be an essential element of a crime if done or omitted, as the case may be with any form of intention, knowledge or realization, the person shall have a complete defence to a charge committing that crime if, when he or she did or omitted to do the thing, he or she was genuinely mistaken or ignorant as to an essential fact of the crime concerned.
 - (2) Subject to this Code and any other enactment, mistake or ignorance of an essential fact may be a defence to a crime referred to in subsection (1) even if it is not reasonable.
Provided that reasonableness or unreasonableness of any mistake or ignorance may be taken into account in determining whether or not it is genuine.”

Applying these principles of law to the case before us we have not the slightest doubt in our minds that at the time the accused was involved in a vicious fight with the deceased, he bona fide believed he was dealing with a goblin or some strange object of the night which posed a serious threat to him.

Consequently, the accused’s killing of the deceased in such circumstances cannot attract criminal liability.

The concession made by the state was well made and we accept to the plea by Mr Dingani for the accused that the accused be found not guilty and acquitted.

2. 1973 (4) SA 430

3. Criminal Law (Codification and Reform) Act [Chapter 9:23]

The accused is accordingly found not guilty and acquitted.

The National Prosecuting Authority, state's legal practitioners
Mlweli Ndlovu & Associates, accused's legal practitioners