

THE STATE
versus
HLONIPHANI NGULUBE

HIGH COURT OF ZIMBABWE
MATHONSI J
BULAWAYO 9 MARCH 2017

Criminal Trial

K Ndlovu for the state
V J Mpofo for the accused person

MATHONSI J: The accused person, a gold panner residing at his own homestead at Altyre Farm, Fort Rixon, was 35 years old at the material time when the 73 year old Moses Maduma met his painful death on 18 May 2016 while he was at his own homestead in the same area of Fort Rixon, the victim of a savage machete attack with blows directed mainly to the head.

The accused person has now appeared before us charged with the deceased's murder in contravention of s47 (1) of the Penal Code [Chapter 9:23] and kidnapping in contravention of s93 (1)(a) of the same code. He has pleaded not guilty to both charges.

The state alleges that the accused was pursuing one Petronella Mapema Ndlovu, a former girlfriend of his, who had terminated their relationship and was finding her way to her sister's place when she decided to enter the deceased's homestead asking for water to drink. It was while Petronella was drinking water which had been offered to her by the deceased that the accused arrived wielding an axe, a log and carrying a piece of barbed wire. As he tried to attack Petronella, the elderly deceased tried to restrain the accused by standing in between them.

It was then that the accused vented his anger on him fatally striking him with an axe. He allegedly tied Petronella's hands with the piece of barbed wire and, leaving the deceased for dead lying prostrate on the ground, he frog marched Petronella to another part of the village where he detained her until she was able to escape at night.

In his defence outline the accused stated that Petronella was his wife but he suspected that she was cheating on him. When he returned home from his gold panning activities he found his wife away from home although she later returned. The following day he left home in the company of his wife Petronella, who was a willing companion. They both proceeded to the plots in search of temporary employment. After spending the whole day together, his wife “absconded at night” fleeing away from the interrogation he had subjected her to on the rumours of her infidelity.

Considering that he had observed blood stains on her attire he suspects that it is Petronella who was involved in the killing of the deceased. He himself had nothing to do with it and moved for his acquittal on the murder charge. As he never kidnapped Petronella he should also be found not guilty in respect of the second charge.

The postmortem report compiled by Dr Roberto Trecu, a pathologist at United Bulawayo Hospitals, who conducted the autopsy was produced in terms of s278 (2) of the Criminal Procedure and Evidence Act [Chapter 9:07]. The doctor observed the following marks of violence on the body of the deceased:

“Small lacerations on the fingers of both hands

- Abrasion on the chest, face and frontal area
- Laceration on the right parietal zone (3cm x 1cm)
- Laceration on the right frontal zone (2,5cm x 1cm)
- Laceration and abrasion on the right side of the nose
- Small abrasion on the legs.”

In respect of the skull and brain, he noted a depressed circular fracture with multiple bones fragments on the right parietal bone, with severe cerebral damage and cerebral compression. The doctor concluded that the cause of death was severe brain damage as a result of depressed skull fracture due to a beating injury.

The stones, exhibits 6 and 7, as well as the axe, exhibits 8, allegedly used in killing the deceased were also produced. Although exhibit 6 has a circumference of 40, 86cm, weights 1,440kgs and exhibit 8 is a formidable weapon with a 37cm handle, a blade 14cm in length whose width is 7cm and weighs 1,715kgs, the eye witness who saw the bludgeoning of the

deceased from very close range disowned those weapons saying that the ones that were used were much bigger than these exhibits.

The evidence of Petronella Sibanda who was lined up to corroborate that of the first state witness Monica Mubata; Norman Sibanda who was to corroborate that of Petronella Ndlovu; Smart Murire the attending detail who observed two deep cuts on the head and a small wound on the nose, Constable Hando who recorded the warned and cautioned statement of the accused; Constable Mahachi who witnesses the recording and that of Dr Roberto Trecu who performed the autopsy, was admitted in terms of s314 of the Criminal Procedure and Evidence Act as it appears on the state outline.

The state also led *viva voce* evidence from two more witness namely Monica Mubata and Petronella Ndlovu. Mubata was a gold panning colleague of the accused who worked with him at the panning sites. She stated that on about three occasions prior to the death of the deceased, the accused person had confided in her and others during panning operations that his girlfriend Petronell Ndlovu had left him for an old man, the deceased. He had repeatedly vowed that he was going to kill either Petronella or the deceased. All efforts to calm him down and make him realize the folly of his intentions had come to naught as the accused was of the firm view that all men like the deceased deserved a big log and nothing else. She later learnt of the deceased's death on a day when the accused had absented himself from work after making the vow to kill him.

Petronella Ndlovu stated that she used to have an affair with the accused and they had kind of co-habited in Claremount compounds. The relationship was an abusive one because the accused used to incessantly assault her and ill-treat her. She then decided to end the relationship and told the accused of her decision. He did not say anything. She then moved to Sibongile Ngwenya's place where she stayed for three days.

Following a visit to the local apostolic church where she received treatment, she returned to Sibongile's home and packed her belongings going back to her communal home. On the way, she was passing by the deceased's homestead when she decided to go in and ask for water to drink. The deceased gladly gave her a cup of water and she drank the water. After returning the cup to the deceased she turned round to behold the accused lifting an axe about to strike her on

the head with it. He held it with both hands over the head and was about to land a blow. She did not see how the accused had gotten there but by then he was already in the yard.

The accused uttered the words to the effect that no woman of his was allowed to reject him and get away without being given a beating. The deceased advised him to accept it if the woman was no longer interested in him. Unperturbed the accused advanced at the witness intending to axe her forcing her to retreat. It was then that the deceased stepped in front of her to protect her and then took the first blow from the accused with an axe.

Ndlovu said that the accused delivered a blow with the sharp end of the axe chopping the deceased on the left parietal region of the head bringing the deceased tumbling to the ground. While the deceased was on the ground the accused delivered the second blow axing him on the right side of the head again above the ear. The accused had brought a big stone with him which he had put down. He picked it up and used it to strike the deceased on the nose as he lay helpless on the ground. He turned the axe and using the blunt side of it, he struck the deceased on the knees.

The accused jumped over the deceased and used a piece of barbed wire to tie the witness's hands. He also tied her around the waist and forcemarched her back to Dlamini Mine Compound in Claremount. They left the deceased's homestead at around 1800 hours and arrived at 2000 hours. Whereupon the accused locked her in the house and only unlocked the door at 0400 hours the following morning. He again shepherded her to Msudu area some further distance way.

They went to Norman Sibanda's home but found him and his wife away. They waited until the wife arrived. The accused told her that he was looking for employment. It was while the accused and Norman's brother had gone away to look for employment that she got a chance to report to Norman's wife that the accused had killed a person at Altyre Farm. That night she managed to sneak out of the room which she shared with the accused as he soundly slept and made good her escape. Arriving at Msudu Centre she made a report to the police leading to the accused's arrest. The witness denied having an affair with the deceased saying that she regarded him as her grandfather. She denied that at the time of the attack on the deceased she was in a relationship with the accused maintaining that she had already terminated it.

The accused also took to the witness stand. The moment he did so, he immediately recanted the contents of his defence outline insisting that Ndlovu was his wife who had lived with him at his compound. She had left him on 10 May 2016 going to her communal home but did not go there. Although he expected her to return to him on 22 May 2016, Ndlovu returned early on 20 May 2016 having killed the deceased.

The following morning the two of them who did not have any differences and were in a happy relationship, decided to voluntarily go and look for employment. Before they left Ndlovu insisted on taking with her all the property in the house including a solar panel and speakers. He prevented her from doing that. It is then that Ndlovu got angry and decided to fix him by incriminating him in the murder of the deceased.

The story does not make sense because if one goes by it, Ndlovu killed the deceased in order to fix the accused because she was angry after being refused permission to uplift property. But then the deceased was already dead by then having died at a time when Ndlovu would have no reason to kill him. To make matters worse the accused admitted that he did not witness Ndlovu attack the deceased. What he is saying is mere conjecture which does not make sense, a heap of lies by an incorrigible individual unable to raise any answer to direct evidence of him having been seen bludgeoning an innocent person to death.

Other than that the accused did not even begin to challenge any of the evidence presented on behalf of the state all of which points to the fact that he took some time preparing to attack. His avowed intention was to kill either Ndlovu for rejecting him or the deceased whom he suspected of having whisked her away from him. The evidence of the vow is unchallenged.

When the time came he attempted to axe Ndlovu and when the deceased stepped in he turned his anger on him because he did not care who between them he killed. In fact to show that the attack on the deceased was not a deflected blow, he continued attacking him as he lay on the ground directing the subsequent blows to the head. He also made sure he incapacitated him by striking the knees with the blunt side of the axe.

Looking at the post mortem findings which speak of multiple bones fragments on the skull and depressed skull fractures, there can be no doubt that severe force was used to reduce the deceased's head to pulp. We have said that his avowed intention was to kill. He set about

arming himself with a vicious weapon, the axe, and a big stone to finish off the victim. He then attacked directing his fury at the head and even after realizing the fruit of his industry, the deceased lying on the ground dying, he captured the woman and escaped. It did not occur to him to render any assistance because he never had a change of heart. The intention to end life was always there. Thereafter he held Ndlovu hostage including tying her with wire and locking her in a room.

Accordingly the accused is hereby found guilty of one count of murder with actual intent and one count of kidnapping.

Reasons for sentence

In assessing sentence we are mindful of the fact that the accused was aged 35 at the time of the offence. In a way this is a crime of passion and that in his mind the accused felt very short changed. He suffered from swirls of passion and pangs of jealousy which must have incapacitated his thought process. While failure to accept rejection by a woman can never be justified, we cannot ignore the fact that this was a gold panner smitten by love in a lost cause which we regard as cushioning the aggravating circumstances that exist. We will therefore refrain from imposing capital punishment.

Having said that, nothing really should atone for the savage killing of a 73 year old man who was minding his own business at his home thinking that he was safe. What we have here is a man who was rejected by a woman because of his abusive tendencies. He simply could not accept rejection because he harboured this obtuse and indeed warped mentality that a woman is an object of appropriation by a man, a piece of chattel which he could own. In his warped way of thinking if he did not have Petronella no one else could. He would kill either Petronella or he who dated take her away from him. He did not even bother to verify his suspicion and ended up bludgeoning an innocent person to death using the most grotesque of weapons, a huge axe.

It is our duty to remind sexual perverts who target defenceless and vulnerable women and would kill whoever comes close to them, that this court, as the arbiter of justice and fairness will not tolerate that kind of behaviour. At the moment this country is confronted by a new phenomenon, the spectre of violent killings being perpetrated at mine compounds. Those who

work and live at mine compounds who have suddenly taken it upon themselves to kill and maim with reckless abandon must know that if they arrogate to themselves the power of God of taking life because life means nothing to them, this court, as the last bastion in the defence of the sanctity of human life, will not hesitate to send them away. There is a pressing need to protect society.

The accused is a serious danger to society. He simply has to be taken away.

In the result, the accused is sentenced as follows:

1. In respect of the one count of murder with actual intent, life imprisonment.
2. In respect of one count of kidnapping – 5 years imprisonment.

*National Prosecuting Authority, state's legal practitioners
V J Mpofo and Associates, accused's legal practitioners*