

THE STATE
versus
BEKITHEMBA SIBANDA

HIGH COURT OF ZIMBABWE
MOYOJ
HWANGE 7 NOVEMBER 2018

Criminal Trial

Mrs *C Gorerino* for the state
N Ndlovu for the accused person

MOYO J: The accused person faces a charge of murder. It being alleged that on the 23rd of December 2017 the accused assaulted the deceased twice on the head with the back of an axe resulting in deceased dying later at Nkayi hospital from the injuries sustained in that assault.

The following were tendered into the court record.

- The state summary
- the defence outline
- the post mortem report
- it gives the cause of death as severe brain damage, compound skull fracture, assault.
- and the axe handle with an iron ring.

They were all duly marked.

The evidence of Sihle Moyo, Kheyi Ncube, Sergeant Tarisai Kurauone, Sergeant Fungai Mandikwaza and Dr S Pesanai was admitted into the court record as it appears in the state summary. Philimon Sibanda and Bhekimpilo Sibanda gave *viva voce* evidence for the state. The accused person gave evidence for the defence.

The facts of this matter are that accused and deceased lived together being two at deceased's homestead.

Accused was deceased's son. It appears the two had a misunderstanding on the morning of the 23rd of December 2017, resulting in accused striking the deceased with an axe handle that had an iron ring at the tip. There were no eyewitness's accounts thus the state relies on peripheral issues that point towards the accused person as the culprit. It is also alleged that the deceased made a dying declaration in the presence of both state witnesses to the effect that she was assaulted by the accused. It is alleged that from the time the deceased was assaulted, that is, on the morning of the 23rd of December, to the morning of the 24th of December when people converged at the deceased's homestead upon hearing about her demise, the accused was nowhere to be found. Even when he came back, finding people converged at his mother's homestead, he went straight into his bedroom hut and did not seem to care or worry about why people had converged there. The accused person also come carrying exhibit 4, the weapon that was allegedly used in the assault. The two state witnesses said that this weapon was blood stained. When asked why he went away on the morning of the 23rd until the morning of the 24th he said that he had come back in the evening of the 23rd, ate his food, that he assumed his mother had prepared went to sleep, woke up again the following morning at 4am and went away. He said he did not check on the deceased as he assumed that she was sleeping. Asked who had prepared the food since it is common cause that deceased had been injured and taken to hospital the previous morning, he said he does not know but there was food and he assumed it was prepared by the deceased.

The evidence of Kheyi Ncube, which is admitted as it appears in the state summary corroborates the evidence of the two state witnesses that gave *viva voce* evidence in court. Kheyi Ncube's evidence is to the effect that he interviewed the accused person who stated that he had assaulted the deceased twice on the head with an axe handle after the two had a misunderstanding. The accused person disputes the version as given by the state witnesses, he says he never assaulted deceased, that he went away to a beer drink with no incident, come back

at night and went again on the following morning. He did not know about deceased's whereabouts, injuries or demise.

When he come back, he was carrying the alleged weapon and a plastic bag. That's when people pounced on him forced him to admit to the offence. The state case hinges on circumstantial evidence. It is trite that for the court to rely on circumstantial evidence, it should pass the following test.

- 1) firstly the inference sought to be drawn must be consistent with the proven facts. Secondly, the inference sought to be drawn must exclude even other reasonable possibility except the one sought to be drawn, otherwise if there are many possibilities the court is not allowed to pick and choose only one of the possibilities. That would be a misdirection.

Before us, we have the following proven facts.

- 1) Accused and deceased lived being only two at deceased's homestead.
- 2) Accused was deceased's son, naturally he would be concerned about deceased's well-being and whereabouts.
- 3) Accused went away soon after deceased had been assaulted.
- 4) Accused did not return to be seen by anybody until the following morning.
- 5) Accused never heard of deceased's assault when he was also in the neighbourhood
- 6) Accused saw people as he returned the following day converged at his mother's homestead, did not confront them to confirm the reason for their presence but instead went straight to his bedroom hut.
- 7) Accused was carrying the alleged weapon
- 8) Witnesses observed blood on the alleged weapon.
- 9) Accused told the witnesses together with Kheyi Ncube whose evidence was admitted that he assaulted deceased with an axe handle after a misunderstanding.

These proved facts are sufficient for this court to confidently draw a conclusion that the accused person is culpable, however, before we do so, we have to analyse the accused person's defence that he is being falsely implicated by people who do not like him. Bhekimpilo Sibanda

had issues with him relating to cattle that were an inheritance from their late father. Hence Bhekimpilo Sibanda had an incentive to lie against him. However this defence crumbled in court as he failed to prove that there was an inheritance shared or to share between them since the cattle owned by their father become his mother's at his father's death. He himself gave evidence to the effect that he suggested that Bhekimpilo since he had young boys, take the cattle and look after them. He said occasionally Bhekimpilo and his mother sold cattle and he did not show how Bhekimpilo would then be bitter towards the accused person since Bhekimpilo had been put in control of the cattle and his mother managed the cattle through him to the exclusion of the accused person. If there could be any bitter person from these facts, it must be the accused who feels left out from the control of the cattle and not the other way round.

Again, he said that Philimon Sibanda was given a field by his late father. Philimon Sibanda would as a result have an incentive to lie against the accused. This does not make sense either in that Philimon was given a field by accused's father, the field hence lay in the control of accused's mother had died, Philimon thus would have no issues with the accused over the field. Accused himself said Philimon produces in grain abundance from this field and that he had since extended it so why would Philimon a happy farmer have issues with accused who has no control over the field? Again from the facts the only person who can be bitter from that set up is the accused person because he even said he has been telling Philimon to find his own field not to extent. It does not appear that Philimon has heeded accused's interference he has kept the field and is even extending it, this shows that Philimon cannot be held to have any incentive to fabricate against the accused. When asked what issues Kheyi Ncube had with accused he said Kheyi Ncube is Bhekimpilo's father-in-law. We have already shown that there is no incentive for Bhekimpilo to falsely incriminate the accused person, and it follows that Kheyi Ncube has no reason either.

There is absolutely no danger of false incrimination from the facts before us. We have already found that from the facts before us, a safe conclusion can be made that the cumulative effect of the proven facts, is that the accused person is the perpetrator.

We then proceed to establish what he is guilty of. The accused person struck deceased twice on the head with a handle that had a metal ring, being the remnant of an axe. The injuries described by Bhekimpilo Sibanda and Philimon Sibanda are serious as they allege that deceased's scalp moved forward and overlapped her eyes. The post mortem report shows that deceased suffered a fractured skull. Accused must have used excessive force in the circumstances. It is our view that the accused person used, to the injuries suffered and from the degree of force applied, he must have foreseen the death of the deceased as a real possibility. It is for these reasons that accused is found guilty of murder with constructive intent.

Sentence

The accused person is convicted of murder. He is a first offender. He had taken alcohol at the material time. He however committed an abominable act against his own biological mother. He also is not contrite at all. He killed a person over the age of 70 years which is in itself an aggravating feature. He is a very bad example in our society, he is hardheartedness boggles one's mind. How can a person murder his own parent and have no feeling of contrition at all. Denying until the end shows that the accused person has no conscience at all. The accused person deserves a lengthy custodial sentence as there is no single weighty mitigatory feature, that would cause the court to depart from the usual sentence. It is for these reasons that the accused person is sentenced to 20 years imprisonment.

National Prosecuting Authority, state's legal practitioners
Ndove and Associates, accused's legal practitioners