

**THE STATE**

**Versus**

**RELIANCE SIBANDA**

IN THE HIGH COURT OF ZIMBABWE

MAKONESE J with Assessors Mr T E Ndlovu and Mr J Sobantu

HWANGE 5 & 8 JULY 2019

**Criminal Trial**

*M Munsaka* for the state

*J Change* for the accused

**MAKONESE J:** On the 14<sup>th</sup> of January 2019, during the evening hours the deceased and the accused were part of a group of villagers who were gathered for a beer drink at Nhlanhla Sibanda's homestead after assisting him fence his fields. It is a long held tradition in the country side for neighbours to assist each other in undertaking specific tasks in the fields. Once the task at hand is completed villagers retreat for a beer drink. Food is normally served as well at such events.

The accused who was aged 24 years at the time of the commission of this offence has been arraigned before this court on a charge of murder. The allegations by the state are that in the early hours of 14<sup>th</sup> January 2019 and at Nhlanhla Sibanda's homestead, Makuni village, Lupane the accused unlawfully and intentionally struck **MTUNZI MOYO** with a log on the head once thereby causing his death. The accused denies the charge and tenders a plea of guilty with respect of the lesser charge of culpable homicide.

The state did not accept the limited plea to the lesser charge and the matter had to proceed to trial.

In brief, the allegations against the accused person are that after fencing **NHLANHLA'S SIBANDA'S** homestead all the members of the working party proceeded to his homestead. All the participants were treated to some food and traditional brew. Everyone consumed large quantities of alcohol except for **NHLANHLA SIBANDA** who eventually retired to bed early. Sometime in the late hours of the day the accused approached the deceased carrying a log and without uttering a word delivered one fatal blow upon the

deceased's head. The deceased fell to the ground facing down and bled to death from the injuries inflicted by the accused. The accused further assaulted **NKOSILATHI THEBE** once in the chest. **NKOSILATHI** fearing for his own safety left the scene and went to his homestead. The police attended to the scene and recovered pieces of the log that had been used in the assault. The body of the deceased was conveyed to hospital for a post mortem examination.

The state produced an outline of the state case which now forms part of the record. The accused tendered his defence outline which reads in part:

- “2. Accused was outside the hut with the deceased when deceased all of a sudden insulted accused with his mother's private parts, saying in vernacular “*msunu kanyoko.*”
3. Accused then asked deceased why he was insulting him. Deceased then picked up an axe intending to assault the accused.
4. The accused person then ran inside the hut then came out and went behind the hut so that he could access the small gate. Upon arriving at the small gate he found it closed with some sticks.
5. At this point deceased had followed the accused. When deceased caught up with the accused, he then picked a log then assaulted the deceased once. After striking the deceased the accused person ran away using the other exit .....

The state tendered accused's confirmed warned and cautioned statement recorded from the accused at ZRP Lupane on 19<sup>th</sup> January 2019. The English translation of the Ndebele version is in the following terms:

“I admit the charge of killing **MTHUNZI MOYO** which is leveled against me. The deceased person and myself went to Nhlanhla Sibanda's homestead where we drank beer together. At the time the now deceased person had taken one too many, he began to hurl abusive terms in relation to my mother's clitoris for no apparent reason. As he shouted such obscenities, he reached out for an axe intending to chop me with it, but I jumped off into a hut. He followed inside the hut where he again intended to chop me, instead I managed to avoid by switching off the light and bolted out of the room. While I was still running away from him, I picked a dry log and struck him with it, but did not see which part of the body I hit him. That is when I got a chance to run away because he was apparently older than myself.”

A post mortem report compiled by Dr Roberto Lara Diaz after an examination of the remains of the deceased reflects that the cause of death was:

- (a) subdural hemorrhage
- (b) multiple skull fracture
- (c) head trauma

The post mortem report was filed under report number 57/56/2019 and now forms part of the record. The state produced pieces of the log used in the assault. The combined weight of the log is 1,715kg. The log appears to be of the hard wood type of tree.

The state sought and obtained formal admissions in terms of section 314 of the Criminal Procedure and Evidence Act (Chapter 9:07). The evidence of the underlisted witnesses was admitted into the record as it appears in the state outline namely:-

- (1) Essential Mathonisa
- (2) Thulani Hove
- (3) Dr Lara Diaz
- (4) Collet Ncube
- (5) Comrade Sibanda
- (6) Dingilizwe Moyo

The state led *viva voce* evidence from two crucial witnesses. The first to testify was **NKOSILATHI THEBE**. He was the only eye witness who observed the events that led to the demise of the deceased as they unfolded. The witness confirmed that he was seated with the deceased and the accused. They were seated in close proximity. The witness was hardly a metre away from the accused and the deceased. He could hear what was being said by the parties as they drank beer. The witness conceded that the deceased and the accused had consumed considerable quantities of alcohol. They were both drunk. Their level of intoxication was between moderate and excessively drunk. **NHLANHLA SIKOSANA** and **DANISA SIBANDA** were asleep at the time the accused struck the deceased with a log. **MVELO MPALA** had left the scene. **DINGILIZWE** had also just left the homestead. The

witness was well known to both accused and the deceased prior to this incident. The witness confirmed that they were consuming the traditional brew known as “*seven days*”, in reference to the time it takes to prepare the alcoholic drink. This witness did not hear any insulting words as alleged by the accused. He did not observe the deceased attempting to strike the accused with an axe. According to this witness there was no misunderstanding between the accused and the deceased. If such words had been uttered the witness was close enough to have picked up that exchange of words. This fact was confirmed by the accused himself who says no one heard these insulting words. According to this witness’ testimony accused left the homestead and came back 3 hours later when he attacked the deceased without any explanation. We found the evidence of this witness to be credible in all material respects. He had no motivation to falsely implicate the accused. The accused himself did not suggest a reason why the witness would concoct a false story. We accept the evidence of this witness as an accurate reflection of what transpired on the day in question.

The second state witness **NHLANHLA SIBANDA** gave his evidence well. He stated that the he was actually regarded as a grandfather by the accused. He depended on the accused for assistance with various types of piece jobs, including ploughing the fields. He had a good relationship with both accused and the deceased. On the relevant day and after a hard day’s work the working party was at his homestead drinking beer. Food was also served. He retired early to bed around 9 pm. He was fast asleep when was woken up by **MVELO MPALA** who reported to him that the accused had struck the deceased with a log. He got outside his bedroom hut and observed that MVELO had rendered first aid by wrapping a cloth around the deceased’s head in an attempt to stop the bleeding. After some time the accused who had left soon after the assault came back and told the witness that he had struck the deceased with a log and that he was no longer breathing. The witness enquired why the accused had attacked the deceased and he did not get an answer. The accused indicated to the witness that he did not know why he had done so. The witness persuaded the accused to remain at the homestead while the matter was being reported to the neighbourhood watch special constabulary. This advice fell on deaf ears. Accused left the scene. He was later arrested in Bulawayo on allegations of murder. The witness indicated that if accused had been threatened or assaulted by the accused he would have received such a complaint from the accused. The witness further stressed that all axes were collected from those that

were at the fields. He confirmed that accused had withdrawn his axe prior to the attack on deceased. It is common cause, however, that accused was not in possession of the axe at the time of the fatal attack on the deceased.

The state closed its case without calling further oral evidence. The defence opened its case and the accused, **RELIANCE SIBANDA**, elected to give evidence under oath. Accused's defence was premised on the defence of self defence and to some degree provocation and intoxication. According to the accused there was a good relationship between himself and the deceased. There was no bad blood prior to this incident. The accused's evidence was that deceased insulted him by referring to his mother's private parts. This angered the accused. At some point the deceased picked up an axe and chased around the accused trying to assault him. The accused ran into a certain hut. He switched off the light before bolting out of the hut. The deceased pursued him and he ran towards one of the exits from the homestead. He discovered that the gate was locked and closed with sticks. He says he then picked a log from just outside the gate. He struck the deceased on the head once in self defence. According to the accused's testimony all the state witnesses did not hear the insult hurled at him by the deceased. Accused's version is simply a false story. There were no insults that is why all the state witnesses do not attest to that version. There was no axe lying around in the homestead as all axes had been taken away for safe-keeping. In fact, the second state witnesses observed that most of the axes were collected from his homestead much later after the burial of the deceased. The accused stated that he did not report the assault to **NHLANHLA SIBANDA** because he was in the state of shock. This simply does not make sense. Accused had all the reason to inform the person he regarded as a grandfather of any physical or verbal threats that would have been made against him. The accused testified that he was drunk but appreciated what was going on around him. He struck the deceased recklessly. He did not act as a reasonable person and directed his blows at the head with the full realization that death could ensue from his conduct. He must have delivered the single blow with excessive force. The post mortem indicates that the deceased suffered multiple skull fractures. The accused was a dishonest and untruthful witness. He lied that he had gone to see **NHLANHLA SIBANDA** after the assault. He was not candid with the court, and as observed by state counsel he lied on such trivial issues as to who was operating the radio that night. He suggested to this court that there was no one controlling the music

system because a memory card was being used. There was uncontroverted evidence that MVELO was operating the radio during that night.

In determining the guilt of the accused the court finds that the accused's defence of self defence does not comply with the requirements of section 253 of the Criminal Law Codification and Reform Act (Chapter 9:23).

G..Feltoe in his book *AGuide to the Criminal Law of Zimbabwe* ,at page 45, sets out the requirements for self defence as follows;

“The law provides that a person is entitled to take reasonable steps to defend himself against an unlawful attack. Harm, and even sometimes death, may be inflicted on the assailant in order to ward off the attack.”

On the evidence presented in this court, we have no doubt the defence of self defence was in fact an after-thought and was indeed false. The accused's version could not be true. His evidence rings hollow and is not reasonably possibly true.

The state succeeded in proving its case against the accused beyond reasonable doubt. The accused is found guilty of murder with constructive intent.

## **Sentence**

Far too many lives are being lost at beer drinks. Offenders who commit acts of murder must not seek to hide behind the effects of alcohol. Stiff sentences will be imposed in cases where there is unnecessary loss of human life. The court shall take into account all the mitigating features of this case. The court will consider that the accused is a fairly youthful first offender. He has the usual family responsibilities. He is a simple man surviving on subsistence agriculture. This court must, however, underscore the fact that a person's stature in society, whether rich or poor should not determine his moral blameworthiness. Taking away a human life will always be punished heavily by these courts. To the accused's credit, he did not dissociate himself completely from the offence.

He tendered a plea of guilty with respect to the lesser offence of culpable. What is disturbing is that in the face of overwhelming evidence that the accused was not subjected to insults, he persisted with his false defence of provocation and self defence. An accused who seeks to mislead the court, and is not candid with the court should expect to receive a custodial sentence which reflects his moral guilt. There was absolutely no reason for the accused to concoct a false defence when all the evidence indicated that he did not act under any provocation. In fact the evidence tends to suggest that accused mounted a surprise and opportunistic attack on the deceased person.

In the end, however, the court has to balance the interests of the accused against all the factors in aggravation. The court cannot ignore that accused is a young offender. It is appropriate that the sentence imposed be rehabilitative.

In the result, the accused is sentenced as follows:

“20 years imprisonment, of which 5 years is suspended for a period of 5 years on condition accused does not during that period commit an offence involving violence and for which he is sentenced to imprisonment without the option of a fine.”

**Effective sentence:-15 years**

*National Prosecuting Authority, state’s legal practitioners*  
*Mviringi and Associates, accused’s legal practitioners*