

REPORTABLE (50)

Judgment No. SC 58/03
Crim. Appeal No. 185/01

MICHAEL SIBANDA v THE STATE

SUPREME COURT OF ZIMBABWE
CHIDYAUSIKU CJ, CHEDA JA & CHIWESHE AJA
BULAWAYO, DECEMBER 1, 2003 & MARCH 2, 2004

J Tshuma, for the appellant

S M Ushewokunze, for the respondent

CHEDA JA: The appellant lived with his wife at house no. 308 Emakhandeni in Bulawayo, where they rented two rooms. The appellant left for his communal home on 17 April 1998 and returned on 19 April 1998. On that day, 19 April 1998, his wife was found lying in a pool of blood. She was dead.

The appellant was charged with her murder in the High Court. He was convicted of murder with actual intent. The trial court found no extenuating circumstances and sentenced him to death. This appeal is against both conviction and sentence. The notice of appeal is not in the file but the Court was advised that the appeal was against both conviction and sentence.

The State alleged that the appellant, who was then twenty-four years old, murdered his wife aged thirty years.

The evidence led from one Khulumani Mhlanga (“Mhlanga”), the owner of the house, was that on 17 April 1998 the deceased and the appellant were both seen at the house at about 7.30 hours. The deceased emerged from the direction of the toilet and proceeded to her room. That was the last time he saw her alive. The witness left home to meet his wife at Entumbane bus terminus, leaving the appellant in the house with his wife. On arriving back at the house at about 11.30 am, he saw the appellant coming from the direction of the toilet and they exchanged greetings. Later he heard their door being closed and locked. Thereafter he heard no sound or movement from the appellant’s room.

Later in the day the appellant’s mother visited the house and knocked at the door of the appellant’s room. She found no-one and left a carrier bag containing groceries with the witness. The witness did not see the deceased or the appellant. There was no light, movement or sound from their rooms between 17 and 19 April 1998. He next saw the deceased when she was dead.

Later under cross-examination Mhlanga said he last saw the deceased on the morning of 16 April and he last saw the appellant on the morning of 17 April. He said when the body was found he observed dry blood and there was blood oozing from somewhere. He said the keys he used had been stolen with his briefcase.

Detective Assistant Inspector Abraham Malunjwa (“Malunjwa”) also gave evidence. He knew the appellant only in connection with this case. On 19 April 1998 he was called to attend to the case at Emakhandeni. He found some police details and other people there. The deceased’s body was in a box in the police

vehicle. The box was opened and he saw the deceased who had a wound on her throat. The throat had been slit open. He noticed a wound near the right ear of the deceased. He entered the house to see what had happened. He saw remnants of a stone which he thought could have been used to strike the deceased below the ear.

When asked, the appellant said he had left his wife in the room and when he returned the room was locked and he used his key to open the door. He checked and saw that the windows were closed and the curtains were drawn. He was advised that the deceased also had keys. He searched for the keys and found them in a small handbag which contained two Bibles.

Whilst searching for a knife, Malunjwa saw two cups that had been used but not washed. He suspected that the appellant had killed his wife and he arrested the appellant.

Doctor Jehenya examined the body of the deceased the following day and also went to the scene. There was an electrical cord on the floor connected to a plug in the dining-room. The other tips of the cord were naked. He said he examined the remains of the deceased on 20 April 1998. He said he saw some burn marks on her and there was a pressing iron in the room which could have been used to inflict the burns. He observed that the neck was cut above the voice-box. The spinal column was completely severed.

Anastasia Nhliziyo said she was the mother of the deceased. In December 1997 she had been invited to the house of the deceased and the appellant to

discuss their problems, as the appellant was no longer employed. In February 1998 they had come to her, asking for money for rent and food. She went to their house and found that there was no food, so she gave them \$200. She learned that the deceased wanted to work but the appellant did not want her to do so. This was said in the presence of the appellant. The appellant said to his mother-in-law, in the presence of the deceased, "If I allow her to go and work other people are going to take her away from me". The deceased had been promised a job in the Ministry of Education, and she had told her mother to expect her on 19 or 20 April 1998. She later telephoned to say she had got a job at Naran's. She had been a temporary teacher for six years but the appellant had asked her to stop working soon after their marriage.

Sergeant Timothy Chinyoka gave evidence. He said on 19 April 1998 at about 12.55 he was on duty at Entumbane Police Station. Following a report received, he went to house no 308 Emakhandeni and found the appellant and another man on the veranda. He spoke to them and then asked to see the body. He found the deceased lying on her back and there was blood on the floor near the body. The deceased's neck was slit open. He checked but could not see any struggle marks. The property in the house was in normal condition. He learnt that the appellant was the one who locked the two doors on Friday 17 April 1998 when he left for Filabusi and that he had left his wife in the room.

Enos Maphosa said he is related to the deceased, who was his cousin. He also knew the appellant as they grew up together and are distant relatives. The deceased approached him, asking him to assist her to get a job and told him that her

husband was not working. He spoke to his employer, a Mr Naran, and it was arranged that the deceased should come to meet the prospective employer on Friday. She did not come. Arrangements were then made for her to come on Monday. On Monday he learnt that she was dead.

Janethi Mhlanga said she is the wife of Khulumani Mhlanga. She corroborated her husband about her coming from home on 17 April 1998 and seeing the appellant coming from the toilet. She did not see the deceased.

The appellant gave evidence in his defence. He said the deceased had been his wife for one year and four months. He was not employed in April 1998. He believed he stopped working in November or December 1997 when they closed at Monarch. His wife was not employed. They lived at no. 308 Emakhandeni as tenants. He said this was a semi-detached house, divided by a wall only, and one could hear what was going on at the neighbour's house.

On 16 April 1998 the appellant spent the day at the house. His wife visited her brother, Enos Maphosa. She was back at about two in the afternoon. He spent the night with his wife. The following morning he left at 10 am and parted with his wife. He saw Mrs Mhlanga on the morning of 17 April and spoke to her as he was leaving. He had been on the veranda with his wife. He was leaving, carrying a bag and bidding farewell to his wife. His wife did not accompany him as she was busy cleaning.

The appellant said he spent 18 April 1998 at Filabusi at the Seventh Day Adventist Church from 8 o'clock to 4 o'clock. He returned on Sunday 19 April and arrived at about 12 o'clock. At the house he went to the first door, which is the sitting-room door on the veranda. He unlocked this door and proceeded to the bedroom door. He found it locked. He unlocked it. He was shocked because he saw his wife lying on the floor facing upwards. She was on the floor between the bed and the wardrobe. Her throat had been cut off. He screamed and got out of the room. He went to look for the landlord and ran to the neighbour's house to call them. He telephoned the police from a neighbour's telephone. He said the police were worried and they searched for the keys and found them. They went and tried the keys at the communal home and found that the keys were for the communal home. They said they would put him under arrest. They assaulted him. They damaged his ear. He said it was not true that his wife's keys were found in the house. He denied that when he left he locked the house as stated by Mhlanga. He said on 17 April Mhlanga did not leave the house as he could hear Mhlanga's movements in his room.

The appellant denied under cross-examination that he told his mother-in-law that he did not want his wife to work as other people would take her away from him.

With this evidence before him the trial judge convicted the appellant.

It has been argued by Mr *Tshuma*, for the appellant, that he should not have been convicted because the evidence relied on was mainly circumstantial and

nothing positive or factual was established to link the appellant with the murder of his wife.

To begin with, the following facts are common cause -

- (a) The deceased and the appellant were husband and wife. They lived together as lodgers in the room where the deceased was found dead;
- (b) The two were not working at the time, had financial problems and were short of money for food;
- (c) The deceased was last seen by the landlord alive before the appellant went away;
- (d) Once the appellant left, the deceased was never seen by anybody alive;
- (e) The room that the deceased and the appellant occupied remained dark for the entire period that the appellant was away;
- (f) For the whole period that the appellant was away, no sound or movement was ever heard from their room; and
- (g) The appellant had taken his keys for the room with him. The deceased had her own spare keys that were found in the room where she was lying dead.

The above points set up a picture that needs careful examination.

In addition to the above, there are other points given in evidence which have to be examined together with these points. They are –

A. THE DECEASED'S EMPLOYMENT

The deceased had previously worked as a temporary schoolteacher. Soon after their marriage the evidence given is that she left employment because the appellant did not want her to work.

The appellant also lost his job, and this led to financial difficulties. The evidence led was to the effect that even the deceased's mother used to help them with money for food.

When the deceased's mother visited them at one stage she was told by the appellant that if he allowed the deceased to go out and work the appellant feared that other men would take her away from him.

Immediately before her death, the deceased had two chances of getting employment. Firstly, she was promised a temporary teaching position in Tsholotsho. The appellant was aware of this. Secondly, her cousin had arranged for her to be interviewed for a job at Naran's business. The appellant says he was not aware of this possible job.

The deceased did not attend the interview at Naran's as arranged. She was already dead. If she had been still alive, she would have attended the interview

on a Friday. This seems to be the same Friday that the appellant left for his communal home.

B. THE KEYS TO THE HOUSE

The appellant had his own keys to the rooms they occupied. The deceased had hers. The appellant says he parted with the deceased at 10 am. He said the deceased was cleaning the house in the morning because she was going to leave at 3 pm.

The appellant went away on 17 April to catch a bus to the communal area. He returned on 19 April. He said he unlocked the doors to their rooms. This means he had his own keys with him. Later, when a search was carried out, the deceased's keys were found in the house. This shows that the person who locked the house did not use the deceased's keys as they were in a bag in the same room where she was found dead.

The appellant said he had told the police that the person who killed the deceased had also locked her inside the room using her keys. He denied that the keys were found in the deceased's bag.

The appellant denied that when he left the room he locked the house, but Mhlanga said he heard the appellant locking the door when he was leaving.

Going by this evidence, it means that the appellant locked the door when he left. No-one was seen or heard unlocking or opening their door until the appellant returned and found the door still locked.

There is no evidence to suggest that beside those who resided at this house any other person had the keys. Even if Mhlanga's keys had been lost and possibly found by someone else, it is difficult to see how that person would have known that a particular key was for the room or rooms used by the deceased and her husband.

C. THE KILLING OF THE DECEASED

Several questions were raised about the date and time the deceased was killed after the doctor had assumed the date given by the police to be the date she could have been killed. It is clear that the doctor did not base this date on his own scientific observations and experience. He was given a date by the police and simply adopted that date.

However, clotted blood was observed by the doctor and some of it was then dry and peeling off. This suggests that quite some time had passed since the bleeding took place. It was certainly not recent. The evidence also shows that this was about mid-April and it was not hot then.

D. WHO KILLED THE DECEASED

Although it is clear that there is no direct evidence, everything seems to point to the appellant as being responsible for the murder. He was with his wife on the morning of Friday before he left for his communal home.

When Mhlanga returned to the house after meeting his wife at the bus terminus, he saw only the appellant. He did not see the deceased. Mhlanga heard the appellant closing and locking the door of their room as he was leaving. There was no sign of the deceased.

The deceased was neither seen nor heard of from then on until the appellant returned from his communal home. The deceased had been expected at Naran's that Friday afternoon. She did not turn up for the interview. If she had been still alive that afternoon, she would have attended the interview. This brings about the conclusion that she must have died between the time she was seen by Mhlanga with her husband that morning and the time she should have attended the interview that afternoon.

It is also noteworthy that once Mhlanga and his wife arrived at their house there was neither noise nor movement from the rooms occupied by the deceased and her husband. Even the lights in their rooms were never switched on during the nights when the appellant was away.

No other person was seen to come and enter the house except the appellant's mother, who found the door locked and went away without entering the rooms or seeing any one of them.

Mr Mhlanga says he left about 9.30 am and returned at about 11.30 am. He had left the deceased there with her husband. In the absence of any noise or movement heard after their return, this suggests she must have been killed while Mhlanga was away. No other person is known to have come into contact with the deceased during that time.

A further point to note is that there were electric cables which were naked at the one end while the other end was connected to a plug. Signs of burning were observed on the deceased's body. It is possible that some electric shock could have been applied on her which could have stunned her, depending on the level of the electric power, in which case she would not have been able to shout or call for help.

It was argued, and rightly so, that all this is circumstantial evidence, and that there is a need for a critical analysis by the Court before making a finding.

E. CIRCUMSTANTIAL EVIDENCE

Mr *Tshuma*, for the appellant, submitted that the inference that the appellant killed his wife was not the only one that could be drawn from the evidence. However, the trial court dealt with this point and was satisfied that it was. The evidence led in the trial supports that finding.

The appellant could not tell the court where exactly his wife was when he left. There would have been no reason for him to lock the doors on leaving if his wife was in the house and alive. There is nothing to support his suggestion that she

could have been killed outside the house and then brought into the room dead. If he had left her alive, she would have attended the interview at Naran's. The suggestion that someone could have come and killed her and then locked the house is also far-fetched, in that her keys were still inside the room. The bunch of keys that were lost or stolen did not have the keys to the appellant's bedroom on it. There was no trace of blood outside the house. The appellant had a motive for killing the deceased. See p 940 of *South African Criminal Law and Procedure* Vol V.

I am satisfied that the trial court made a careful assessment of the evidence and came to the correct conclusion. It was safe to draw the inference that the appellant killed the deceased as he feared that if she went to work other men would take her away from him.

It was suggested by the appellant's counsel that the appellant should be referred for examination in terms of the Mental Health Act [*Chapter 15:6*]. This issue was never raised at the trial. There is nothing in the evidence to support the suggestion that there could be anything wrong with the appellant's mentality. There is no history of mental illness or any strange behaviour by the appellant. Nothing emerged from the trial to raise any suspicion. The appellant gave evidence and was cross-examined. Both the court and the defence counsel did not observe anything that attracted attention or raised questions regarding the appellant's mentality. Otherwise they would have raised the issue of mental examination at the trial.

Accordingly, the appeal against conviction cannot succeed and it is dismissed.

As against sentence, there is nothing in the appellant's favour. He was obviously a jealous man. He clearly told his mother-in-law his fears. The deceased suffered under his control. Despite their poor financial position he did not want her to work. He must have discovered, before leaving, that she was planning to take up employment somewhere. He killed her to stop her from taking up employment. She was subjected to electric shocks and then brutally murdered. Doctor Jehenya said her neck was almost completely severed. After killing her, he locked her body in the room and left so as to give the impression that she was killed while he was away.

In the circumstances, the trial court rightly found that there were no extenuating circumstances. I see no fault with that finding.

In the result, the appeal against both conviction and sentence fails and it is hereby dismissed.

CHIDYAUSIKU CJ: I agree.

CHIWESHE AJA: I agree.

Webb, Low & Barry, appellant's legal practitioners