THE STATE

Versus

SINDISO NDLOVU

IN THE HIGH COURT OF ZIMBABWE
MOYO J with Assessors Mr J. Sobantu & Mr O. Dewa
BULAWAYO 7 MAY 2024

Criminal Trial

K. Shava for the state
T. Tashaya for the accused

MOYO J: The accused faces a charge of murder, it being alleged that on 19th of October 2019 and at stand number 154 Maphisa the accused person set Busani Ncube ablaze intending to kill him or realizing that there is a real risk or possibility that her conduct may cause death but continued nonetheless. Accused denies the charge.

The following were tendered into the court record; state summary, accused's defence outline, accused's confirmed warned and cautioned statement, post mortem report and a plastic container as well as a blanket. The post mortem report gives the cause of death as bilateral pneumonia, 40% burns.

The facts of this matter are largely common cause. The evidence of Candice Ndlovu, Ndabezinhle Sibanda and Dr S. Pesanai was admitted into the court record as it appears in the state summary. Charles Malaba and Mbonambi Wiseman gave evidence before the court. The evidence of Mudye Munyanyiwa was expunged from the court record. The accused and Raynos Zulu gave evidence for the defence. As I have already said, the facts of this matter are largely common cause. The accused and deceased were wife and husband respectively. On the 18th of October 2019, while they slept accused received a message from a girlfriend and this prompted a misunderstanding between the 2 of them. Deceased apologised and the issue was seemingly resolved. The following day, on the night of the 19th of October, accused and deceased were in their bedroom hut where per accused's version deceased just decided to douse himself with some flammable liquid and lit himself. This happened after deceased had previously gotten into the way of a car and accused dragged him. When they got home, accused went outside to the toilet. He did not return so she followed him and found him standing.

When they got into the house she went straight to sleep and she noticed that deceased was wet by the trousers. He said it was urine upon being questioned. There was no electricity so she lit a torch. Deceased then lit a match, accused does not know if he wanted to light a candle. He then ran towards accused, she then tried the door and saw the keys on the floor. She shouted for help. She later took a blanket and covered deceased with it to extinguish the flames. The rest of the witnesses came in after the fact. However all confirm that when they came in deceased was on the bed in some smoke and no longer in flames. Charles Malaba and Ndabezinhle Sibanda state that deceased upon querying told them that he had been burnt by accused. Raynos Zulu on the other hand says he never heard deceased say anything but that he could neither deny nor confirm if he said what he is alleged to have said.

The only issue for determination is what caused the burning of the deceased? Is it himself as accused says, or is it accused who burnt him.

We have the following issues to use in discerning what could have transpired.

1. It is common cause that accused and deceased had an altercation the previous night wherein deceased had a phone call from a girlfriend.

2. Deceased however apologised and the matter seemingly rested.

3. The following day nothing of any significance happened between the parties or to deceased which disturbed their lives.

4. Charles Malaba and Ndabezinhle Sibanda said the deceased told them accused burn him.

5. Accused upon arrest, in her confirmed warned and cautioned statement, responded to the allegations being made against her by saying;

   "I do not admit to the charges." (full stop)

This was after she had been told that that was an opportunity to mention her defence or else an adverse inference would be drawn from her failure to do so. This is recorded in the statement itself. Given the fact that accused was being charged with serious allegations of murder, and given that her defence in court is that deceased doused himself, it was a material fact of her defence to say I do not admit to the charge as deceased doused himself or that I do

not know exactly what transpired but I just saw the deceased in flames. To say I do not admit to the allegations full stop, creates a problem for the accused.

Refer to section 257 (c) of the Criminal Procedure & Evidence Act which stipulates that where in any proceedings against a person, evidence is given that the accused on being (b) charged by a police officer with an offence, failed to mention any fact relevant to his or her defence in those proceedings, being a fact which, in circumstances existing at the time he or she could reasonably have been expected to have mentioned when so questioned, charged or informed, as the case may be, the court, in determining whether there is any evidence that he or she may be convicted on that charge, may draw such inferences from the failure as appear proper and the failure may, on the basis of such inferences, be treated as evidence corroborating any other evidence against the accused."

We then proceed to analyse the evidence before the court.

The evidence that we have is not direct at all. It is circumstantial. In circumstantial evidence I am guided by the *locus classicus* case of *R* v *Blom* 1939 AD 188 which sets out the cardinal rules of logic that have to be satisfied when dealing with inferential reasoning.

Firstly, the inference sought to be drawn must be consistent with all the proved facts. If it is not, it cannot be drawn and;

Secondly, the proved facts shall be such that they exclude every reasonable inference from them save the one sought to be drawn. If they do not exclude the other inferences then there must be doubt whether the inference sought to be drawn is correct. We have the following proven facts;

1. The altercation of the night before the fateful event of the burning of the deceased.

2. That nothing of any significance occurred between accused and deceased, or deceased and any other person between the previous night of the altercation and the night of the fire.

3. That deceased got burnt while in the bedroom with the accused person with the door locked from inside.

4. That when the other people came into the house they found deceased no longer in flames but with smoke.

5. That accused upon being confronted with the charges gave a bare denial and did not tell the police that she denies the charges because deceased burnt himself.

Section 257 of the Criminal Procedure & Evidence Act provides that an adverse inference may be drawn in such an instance to corroborate the evidence that is already there.

6. Then there is the evidence of Charles Malaba and Ndabezinhle Sibanda as well as Mbonambi Wiseman the police officer who visied deceased at the hospital about a week later. However, before the court can assess the probative value of such evidence, this court must make a finding on whether deceased made the utterances or not. Since Raynos Zulu told the court that he did not hear deceased say anything. Charles Malaba says he found accused standing and deceased lying on the bed. He then asked deceased what had happened and deceased said accused poured fuel on him and then lit him. The evidence of Ndabezinhle Sibanda was admitted as it appears in the state summary, and it is to the effect that on the way to hospital the deceased mentioned that the accused had splashed some petrol on his body and set him on fire.

Raynos Zulu says he did not hear deceased speak. Charles Malaba says he asked deceased about the fire and deceased responded by telling him that accused poured fuel on him and burnt him. Raynos Zulu says he did not talk to deceased and did not hear if anyone spoke to the deceased. Looking at his evidence Zulu does not say that deceased never said the utterances as alleged by Charles Malaba and Ndabezinhle Sibanda as a question was put to him;

"Can you deny that deceased told Charles Malaba and Ndabezinhle Sibanda that accused doused him with petrol then lit him?

His answer was;

A - I cannot agree I cannot deny."

In essence he is saying he did not hear that but neither can he say it was not said. He does not know.

This court believes the evidence of Charles Malaba, for the simple reason that it was an expected and natural human behavior for him to ask a burning person what had happened. Such a question would be a natural consequence to any person attending to the event that Charles Malaba was attending. This court does not hold the view that Charles Malaba is not telling the truth in that surely any normal human being would have enquired from the deceased as to why he was burning. This court thus makes a factual finding that Charles Malaba did enquire from the deceased what had happened as that is indeed consistent with normal human behavior. I will not deal with whether deceased told Ndabezinhle Sibanda and Wiseman Mbonambi the same information due to the fact that there was a considerable amount of time between the event and the utterances allegedly made to them. That is logical and in synch with attending to an emergency that a person naturally enquires as to what happened.

I say so because, guided by the case of *S* v *Mutsure*, SC-62-21 wherein the Supreme Court confirmed the conviction of a person under similar circumstances. In that case the Supreme Court quoted with approval the case of R v *Andreous* 1987 ALL ER 513 wherein it was held that;

> "Hearsay evidence of a statement made to a witness by the victim of an attack describing how he had received his injuries was admissible in evidence as part of *res gestae,* at the trial of the attacker if the statement was made in conditions which were sufficiently spontaneous and sufficiently contemporaneous with the event to preclude the possibility of concoction or distortion. That in order for the victim's statement to be sufficiently spontaneous, to be admissible, it had to be so closely associated with the event which excited the statement that the witness' mind was still dominated by the event".

If there was a special feature, e.g malice, giving rise to the possibility of concoction or distortion, the trial judge had to be satisfied that the circumstances were such that there was no possibility of concoction or distortion. That, however, the error in the facts narrated by the victim went to the weight to be attached to the statement by the jury and not to admissibility. That since the witness statement to the police was made by a seemingly injured man in circumstances which were spontaneous and contemporaneous with the attack there was no possibility of any concoction or fabrication of identification, the statement had been rightly admitted. The Supreme Court also quoted with approval words of Lord President Normand in

the case of *O'Hara* v *Central Smit Co* 1941 SC 363 where he said at 381; "the words should be at least *de recenti* and not after an interval would allow time for reflection and concocting a story, the Supreme Court also referred to Choo in Evidence 2012 292 as follows;

"Evidence of facts may be admissible as part of the res gestae if these facts are so closely connected in time, place and circumstances with some transaction which is at issue that they can be said to form part of that transaction. The Supreme Court further referred to and quoted the case of *S* v *Tuge* 1966 (4) SA 565 where the court stated thus;

"The court held that the following conditions needed to exist for a *res gestae* statement to be admitted to evidence:-

(a) the original speaker must be shown to be unavailable as a witness – in this case deceased is not available.

(b) there must have been an occurrence which produced a stress of nervous excitement. Obviously in this case the event of burning produced stress of nervous excitement.

(c) the statement must have been made whilst the stress was still "so operative on the speaker that his reflective powers may be assumed to have been in abeyance (in this case deceased still had smoke, his t-shirt still exhibited burning signs although with no flames per Charles Malaba's testimony).

(d) the statement must not be a reconstruction of a past event (the statement to Charles Malaba was about an event that was still in place even if the flames had just been put out there was still some smoke)

Using the guidelines in the *Mutsure* case, I am satisfied that the utterances made by deceased to Charles Malaba are admissible and do have probative value.

The next issue to look at and analyse are the events leading to the night of the 19th of October 2019, in a bid to establish a logical assessment of what transpired. Tracking the events between accused and deceased from the 18th of October 2019, it is clear that accused would be the only person with a motive to harm deceased. It is common cause that accused and deceased had an altercation about deceased's girlfriend the night before. Nothing ever happened between the 2 of any significance vis-à-vis what later transpired. We are told that from

nowhere, deceased just poured fuel on himself and lit himself. Apparently for no reason whatsoever. This defies logic and is highly improbable. Of course standing alone it may not be sufficient to establish anything but if one looks at the other pieces of evidence already accepted, juxtaposing them, the court should be able to see what the issue of deceased's burning come from. It adds weight to the evidence of Charles Malaba and deceased's utterances and it is corroborated by accused's failure to mention in her defence that in fact deceased burnt himself. Accused knew that deceased burnt himself from the time she perceived it happening, so an adverse inference will be drawn by this court in terms of section 257 of the Criminal Procedure & Evidence Act as already quoted herein, that she failed to mention a crucial fact not only relevant to her defence but in fact central to it. A fact that she was obviously aware of at the time the charges were laid against her. What that means is that this is an after-thought. Accused, gave a bare denial of the allegations and did not mention her defence which was available at the time, so that she had time to construct it. This court accordingly draws an adverse inference on accused's failure to mention the backbone of her defence. Looking at the totality of the evidence before me as assessed herewith I am satisfied that the State has indeed proved its case beyond a reasonable doubt against the accused person.

The accused person is accordingly found guilty as charged.

Sentence

The accused is convicted of murder. She is a 1st female offender with young children. She was to an extent provoked by deceased's conduct of infidelity. She has waited for 5 years for justice. It would appear from the facts that she did try to assist the deceased by putting out the flames and seeking assistance. This court was not persuaded that there is an element of torture in the manner that deceased was assaulted. Torture means, subjecting a victim to physical and emotional stress prior to killing them but in this instance whilst the manner of inflicting injuries is a painful one by nature, it cannot be held that the intention was to torture the victim but rather to inflict harm. This is a sad story of a domestic dispute gone too far with fatal consequences.

These courts frown at the use of violence in any manner, especially in the home. However, a sentence that meets the justice of the case is the one that considers the personal circumstances of the offender, the circumstances of the commission of the offence and the interests of society at large. There is weighty mitigation in accused's personal circumstances,

a female 1st offender with young children, the delay of 5 years, the element of some provocation and passion.

In the circumstances of the commission of the offence there is mitigation in that she seemingly tried to assist but it was too late and the harm had already been done.

Looking at the interests of society it is a henious crime to set your spouse alight in a bid to settle a domestic issue. It must be discharged by the courts

I hold the view that a sentence in the region of 10 years imprisonment will sufficiently cater for the different categories of interest in sentencing of offenders in this matter.

It is for these reasons that accused shall be sentenced to 10 years imprisonment.

The National Prosecuting Authority, State's legal practitioners
Sengweni Legal Practice accused's legal practitioners