

THE STATE

Versus

CAMEN SIBANDA

IN THE HIGH COURT OF ZIMBABWE
KAMOCHA J
HWANGE HIGH COURT CIRCUIT 13, 14 & 15 NOVEMBER 2012

T. Ndlovu state counsel
T. Nkala defence counsel

Criminal Trial

KAMOCHA J: The 49 year old accused was charged with the crime of murder. It being alleged that on 4 March 2012 and at a bushy area in Sigilikithi Village in the Mdengelele Area of Nkayi he did wrongfully, unlawfully and intentionally kill and murder Simanga Dlodlo a male adult in his lifetime therebeing.

When the charge was put to him he said he understood it but he was just intervening to stop the fight and did not fight anyone. The court then entered a plea of not guilty in the light of what the accused had said.

The state outline was read and produced as exhibit one. Exhibit two was the defence outline which was also read for the record. I do not propose to reproduce the above two exhibits due to their lengths. The third exhibit was the accused's unconfirmed extra curial statement which recites as follows:

"I deny the allegations being leveled against me that I assaulted Simanga Dlodlo with a metal stool once on his head with the intention to kill him in the company of Cideon Sibanda and Costa Sibanda. I was holding one of his hand (sic) being assisted by Maxwell Vundla so that he would not be assaulted by Costa Sibanda and Cideon Sibanda. Costa Sibanda was assaulting him with a hammer several times on his head while Cideon Sibanda was assaulting him with a screw driver handle and fists all over the body. Cideon Sibanda then pressed hard the hand cuffs to tighten them deeply. Simanga Dlodlo was already bleeding profusely from his head and nose."

Defence counsel pointed out some anomalies relating to the statement. The statement could not have been made on 3 march 201 before the commission of the offence on 4 march 2012 and before the deceased died on 10 march 2012. Further, the statement was not recorded at Gwelutshena but was recorded at Nkayi Prison. The correct position was that the

statement was recorded on 27 March 2012 at Nkayi Prison. The corrections were accepted by the state counsel. With that correction the evidence of the recording officer was admitted by consent in terms of the provisions of section 314 of the Criminal Procedure and Evidence Act [Chapter 9:07].

The next exhibit was exhibit 4 which was an affidavit by Constable Nicholas Sibanda who identified the body of the deceased at United Bulawayo Hospitals to Doctor Pesanai who examined the remains of the deceased and compiled the post mortem report exhibit 5. The doctor was told that the deceased had been assaulted by villagers and sustained head injuries. The marks of violence were (1) laceration on the scalp 3 cm long sutured; (2) circular bruises on the hands suggestive that his hands were tied. Internal examination revealed subarchnoid haemorrhage in the brain. Under other remarks he stated that the post mortem was consistent with bleeding in the brain caused by a blunt object.

He concluded that death was due to subarchnoid haemorrhage caused by blunt force trauma during the assault.

After leading evidence from two witnesses the public prosecutor applied for the admission of the evidence of the following witnesses as it appears in the state outline in terms of section 314 of the Criminal procedure and Evidence Act [Chapter 9:07]. Sergeant Maratha and Constable M. Nyoni after the date and place of recording of the statement were amended, Constable Nicholas Sibanda and Dr S. Pesanai. The state also applied and was granted an application to have the evidence of Brighton Gunda expunged from the record.

Viva voce evidence was adduced from Maxwell Vundla and Jefias Mkhwananzi. Maxell Vundla – Maxwell said he has been a member of the Neighbourhood Watch Committee since 2001 and lives at his own homestead at Sigilikithi Village in the Mdengelele area of Nkayi. He knew the accused since his youth as they grew up in the same area. He said Costa Sibanda and Cideon Sibanda were accused's blood young brothers and he knew them from their childhood as they were younger than him.

On the fateful day he went to attend a meeting at Jefias Mkhwananzi's homestead chaired by Jefias Mkhwananzi – Jefias was the kraal head of the area. He also had been given a letter by the police which authorized him to arrest the deceased and take him to the police.

After the meeting he showed Jefias the note from the police. Thereafter he requested to talk to the deceased who agreed to go with him to the police. He had even agreed to show him the property for which the police wanted him brought to the police base.

The witness and deceased then left to go the police. After they had walked for some distance the deceased changed his mind and told the witness that he was no longer willing to go to the police and with that he turned and began to walk back despite the witness'

persuasions. The witness began to follow the deceased as he walked back. The witness was afraid of arresting him as he had in possession a hammer , an axe, a chisel and a catapult.

As they walked past the tree where the meeting was held outside the kraal head's homestead the witness say Costa Sibanda and Cideon Sibanda – Costa and Cideon walking in front at a distance walking ahead. As he and deceased continued walking past the kraal head's homestead he noticed the accused coming from the kraal head's home where stools and chairs which were used at the meeting were supposed to be left. The accused, however, emerged holding a metal stool.

The deceased was still walking in front of the witness. Costa and Cideon then turned. Cideon then said, "Here is that person he has come back". The accused who was still behind the witness then began to walk fast and went past the witness. He was armed with a metal stool and advanced towards the deceased. As accused was asking the witness how the deceased had returned without going to the police, Cideon said, "Let us beat him up" but Cideon himself and Costa were scared of the deceased, the accused then ran towards the deceased with a stool. The deceased was saying they were not going to do anything to him. The three of them surrounded him feigning to hit him. The accused then hit him with the metal stool on the top of the head. The blow knocked the deceased to the ground. The accused delivered an overhead blow with the metal stool.

The metal stool was produced as exhibit six. It is a heavy stool weighing 6kg. It is a tripod. The 3 legs are made of re-enforcing steel with three other pieces of re-enforcing steel to hold the three legs together. The seat is metal.

When the accused's blow knocked deceased to the ground the items he had in his possession fell off him. The witness then head one of the Sibanda brothers saying, "Catch, hit! Kill!" The witness ran to the scene to try and stop the assault. He found Costa having taken the deceased's hammer and was hitting the deceased on the shoulders and hip with it. The hammer was produced as exhibit 7 and weighs 620 grams and is 30cm long. It is a small hammer which was joined to a conduit pipe. He did not count the blows with the hammer but went between the Sibanda brothers and deceased to try and restrain them in vain because each time he took away one of them the other two remained assaulting him. Fortunately Jefias arrived after about 3 to 4 minutes and the two managed to restrain them. Unfortunately the deceased had already been injured at that time.

Cideon and Costa went away after they were restrained but the accused remained assisting them in washing the blood from the deceased who was bleeding profusely from the head injury.

His evidence about when he handcuffed the deceased and how the deceased was carried to the police and hospital is confused. He seemed to be hiding something as regards

the handcuffing of the deceased. There are three different stories about when the deceased was handcuffed.

The witness said he was handcuffed at the time he was being loaded into the scotch cart while Jefias said he was only handcuffed when he was already in the scotch cart. The accused said he was handcuffed at the scene and one of the Sibanda brothers in fact tightened the handcuffs at the scene. There does not seem to be any reason why Maxwell would have handcuffed the deceased at the scene when he had been injured and was bleeding profusely. The deceased was not handcuffed when he was being washed by the accused at Jefias' homestead. It seems he was handcuffed either when he was refusing to be loaded into the scotch cart or when he was trying to jump from the cart as it was moving.

For some reason when the deceased was handed over to the police the full story was not given to the police. The full story was only divulged after 3 days when the police went to record statements from witnesses. That is when he told the police that the deceased had been assaulted by accused who delivered the first blow, Costa and Cideon. The witness said he had no reason to fabricate a story against the accused. He said he had never had a misunderstanding with the accused. He denied the allegation that he had been caught red handed sleeping with accused's wife Ethel Ncube and accused ended up divorcing her in 1992.

That suggestion is baseless when regard is had to the fact that the allegation is now 20 years old and accused was the one allegedly wronged. He had divorced her, any way and she died sometime ago.

The witness said he knew that there was animosity between deceased and Cideon. The deceased had at one stage set Cideon's hut on fire wanting to burn him inside. The hatred between Cideon and deceased was because Cideon had an affair with the woman the deceased was living with.

Apart from the criticism mentioned elsewhere in this judgment about Maxwell, his evidence was generally acceptable. His evidence on the accused striking the deceased with the heavy metal stool once on top of the head was given very clearly. This court accepts it.

The kraal head Jefias Mkhwananzi arrived at the scene at the end of the assault. His evidence was that he was the kraal head of that area. The deceased, accused and his two young brothers Costa and Cideon fell within his area of jurisdiction.

On 3 March 2012 Cideon who was in the company of his nephew approached him and reported that deceased who had previously burnt his hut was about to do it again. He had gone to Cideon's homestead wanting to do so again but was prevented by Cideon's vicious dogs. He, however, uprooted Cideon's dagga plant. Jefias told them not to worry anymore as

deceased was already wanted by the police in respect of a theft charge. The witness also told them that he had no jurisdiction to deal with dagga matters. They left.

The deceased had been living with a certain woman. When the two parted ways the deceased was alleged to have taken the woman's property. It so happened that part of the property the deceased had taken did not belong to her but belonged to one Penina Nkomo. When the deceased was approached by the woman he used to live with and Penina Nkomo about the property the deceased shouted at them and told them that he was not going to give them the property which comprised of a radio, battery, shoes and a torch. They reported the matter to the kraal head who also told them that that was a police matter – he referred them to the police. Later he received a message to the effect that the police would come for the deceased.

On the morning of 4 March 2012 the deceased approached him wanting to return part of the property he was alleged to have stolen. The witness told him that he would not accept part of the property and told him to return it to the owner. The deceased left.

Latter the witness held a meeting with the locals. Meetings at his homestead are held under a big shady tree outside the homestead. After the meeting people started taking the chairs and stools to the homestead.

Maxwell Vundla approached him and showed him a letter from the police authorizing him to arrest the deceased for the theft allegations. He called the deceased and informed him about the police note and told him to go with Vundla to the police. He agreed. The two then left

The witness went to his homestead to write a report about the meeting that he had. 30 minutes after the deceased and Vundla had left he heard some noise. What he could hear distinctly were the words "Catch!, hit!, kill!". He got out of his homestead and went to investigate. He proceeded to the scene which was 50m from his homestead where he found Vundla, the deceased and the 3 Sibanda brothers and separated them. On his arrival Cideon and Costa were assaulting the deceased. Costa was using the hammer exhibit 7. Cideon assaulted the deceased with the axe exhibit 8. He had it in his right hand and had the screw driver in the left hand. The axe weighs 480 grams, the length of the wooden handle was 45cm, the blade was 6cm, its width at its widest point is 5cm.

The witness said the accused joined him and Vundla to restrain Costa and Cideon. The witness disputes a suggestion that Costa and Cideon were assisting Vundla to effect an arrest on the deceased by assaulting him. The suggestion surprised the witness who replied that they should have done so earlier if that had been the case.

What comes out of the evidence of this witness was that the stool that accused had been sitting on during the meeting was at the scene when he got there when it should have been at his homestead.

He noticed a visible injury on top of the deceased's head which was about 4cm long.

His evidence became confused when it came to the report he made to the police. He also appeared to be hiding something. Instead of relating the full story of what he had seen he chose to just tell them that the deceased had been assaulted by villagers,. In fact he wanted this court to believe that he told the police what he had been told by accused. That cannot be correct. Apart from that criticism his evidence was generally acceptable.

The accused had no witness to call but gave viva voce evidence himself. He sought to persuade this court that all he had done was to restrain his two brothers who were assaulting the deceased. His story is clearly false. There was clear evidence by Vundla that when Cideon said "Let us hit him". He hurriedly went to where his two brothers were with the deceased and they surrounding him and all feigned to him first. The accused then struck the first blow with the metal stool exhibit 6 causing a laceration on top of his head from which he profusely bled. The doctor who performed the post mortem observed a 3cm sutured laceration on top of the head of the deceased. This court finds that the accused in fact delivered the first blow which knocked the deceased to the ground thereby incapacitating him. The brothers continued with the assault when the deceased was on the ground.

They only stopped after they were restrained by Vundla who was joined by Jefias. The three brothers formed the common purpose when one of them said "Let us hit him." The accused only thought of assisting in restraining his brothers after he had already delivered the important blow which incapacitated the deceased. His attempt to withdraw from the common purpose was too late. It was like closing the stable after the horse had bolted.

The accused appreciated that by using such a heavy stool on the head of the deceased there was a possibility that death would result but he continued with the assault with a reckless disregard whether death ensued or not.

He is guilty of murder with constructive intent.

Sentence

This is a gang assault by three brothers who were assisting one of the brothers – Cideon whose hut was allegedly torched by the deceased. The three brothers suspected that the deceased was about to repeat that. Things came to a head when they heard that the deceased had taken Riyah Nkomo's property. Riyah Nkomo was alleged to be having an affair with

Cideon when she in fact was the deceased's girlfriend. The deceased once torched Cideon's hut because of the said woman.

The attack on the deceased was a brutal one. Dangerous weapons were used to attack the deceased. The accused used a metal stool weighing 6kg. His brothers had no weapons.

The deceased may have been perceived as a problem by the accused and his brothers but they had no right to take the law into their hands. That is lawlessness. This court does not countenance that. A life was needlessly lost.

Adequate sentences must be meted against people who commit such crimes. In this case Cideon and Costa were scared of the deceased. They had to rely on the accused. Aggravating features in this matter far outweigh the mitigating ones.

The accused and his young brothers were the aggressors. The deceased was resisting arrest but that had nothing to do with accused and his brothers.

In the result the justice of this case will be met by a sentence of:-

Eighteen years imprisonment.