

THE STATE**Versus****PHILANI MAPHOSA**

IN THE HIGH COURT OF ZIMBABWE

BERE J with assessors Mr P. M. Damba and Mr E.R.M. Nyoni

BULAWAYO 4 & 5 FEBRUARY 2016

Criminal Trial*Miss N. Ngwenya & Miss S. Ndlovu* for the state
B. Sengweni for the accused

BERE J: On the 24th of August 2012 and at Jethro Ndlovu's homestead in Mahosangwe Village, Matobo the deceased, Ncedisani Sibanda lost her life as a result of assault by the accused person. Exhibit 3, the post mortem report gave the deceased's cause of death as Subarchnoid Haemorrhage and skull fractures as a result of a violent attack on the deceased.

It is not in dispute that the attack on the deceased was orchestrated by Philani Maphosa who stands as the accused in this case.

It is also common cause that on the day in question the deceased and the accused had a misunderstanding whilst at the deceased's place of residence. As a result of that misunderstanding the accused armed himself with a hoe (which turned out to be the murder weapon) and used it to severely assault the deceased leading to her untimely death.

The background to the state case is that on the 21st of August 2012 the accused picked up a love letter which the accused suspected the deceased's husband one Jethro Ndlovu had written to the accused's wife Siboniso Dube. After making abortive attempts to set up a meeting in the village to deal with this matter the accused ended up taking the letter to the deceased's homestead intending to discuss the issue with Jethro. On one such visit Jethro's wife confirmed that the paper on which the letter was written had been removed from the family diary and that the handwriting on the letter resembled that of the deceased's husband.

On the fateful day the accused proceeded to the deceased's homestead intending to confront Jethro about his adulterous relationship with his wife but found Jethro absent. The accused had a misunderstanding with the deceased which led to the accused severely assaulting the deceased leading to her death. Before the fatal assault the accused was heard uttering words to the effect that he was going to leave Jethro without a wife since the latter had destroyed his marriage.

Whilst agreeing with the bulk of the state case, the accused's defence was to the effect that he attacked the deceased after she had insulted him by uttering words to the effect that the accused was supposed to "keep his wife under leash". The accused said the deceased uttered these words in Sindebele language by saying "ubobophelainja yakho" meaning "keep your dog leashed".

The accused said these utterances provoked him and led to the assault that claimed the deceased's life.

The enquiry in this case was limited to the court endeavouring to find out the exact circumstances leading to the deceased's death bearing in mind the defence of provocation raised by the accused person.

I propose to deal first with the evidence led and accepted by this court before proceeding with the defence of provocation which the accused sought to take refuge in.

The state case comprised of viva voce evidence from Brighton Dube who was a male juvenile at the time of the murder and who regarded the deceased as her sister-in-law. The second witness was Siboniso Dube the accused's wife and finally the state led from deceased's son Milton Ndlovu whose evidence had to be recorded in the victim friendly court given his vulnerable age.

The rest of the evidence was admitted into the court proceedings as recorded in the state summary and in terms of section 314 of the Criminal Procedure and Evidence Act¹.

The accused was the sole witness for the defence and his attempt to call his cousin as a witness was shot down by the court after assessing that his evidence was not going to assist in any way in clarifying the issues around the alleged murder of the deceased.

Brighton Dube took the court through what exactly happened from the time the accused arrived at the deceased's place to the time the deceased was savagely attacked by the accused leading to her demise.

It was the clear evidence of Brighton that when the accused arrived at the deceased's homestead he asked the whereabouts of Jethro Ndlovu and was advised that he was not at home. He further stated that when the accused turned to the deceased to discuss the issue concerning the deceased's husband's alleged adulterous relationship with his wife the deceased then suggested that they involve a neighbour Gipton Ndlovu to resolve the issue. It was his evidence that the deceased then suggested to him and Milton that they put on their shoes to accompany her to Gipton Ndlovu's place.

It was the evidence of Brighton that he then heard the accused saying to the deceased the following, "Today I want to leave Jethro Ndlovu with no wife as I also no longer have a wife". The witness said the deceased pleaded with the accused to have Gipton involved but her pleas fell on deaf ears.

The next thing this witness saw was the deceased running back into the hut and trying to secure the door by standing behind it. The accused succeeded in overpowering the deceased by pushing the door open and immediately attacked the deceased with a hoe.

1. Criminal Procedure and Evidence Act [Chapter 9:07]

According to this witness the first blow on the deceased landed on the right side of the deceased's head just below the ear and that blow literally rendered the deceased motionless. Even when she was down and defenceless the accused continued to attack her concentrating the blows that followed on the deceased's head. That this was so is confirmed by the post mortem report which noted multiple skull fractures.

That there were these kinds of assaults was confirmed by both the accused himself and to a lesser extent by Milton who because of his tender age at the material time was unable to give graphic details of the assault itself.

We are satisfied with the evidence of Brighton as that evidence was well given. There was no indication that his evidence was in anyway tainted by the natural anger which he admitted he had as a result of having the misfortune of witnessing the tragic assault on his sister in law, the deceased.

The credibility of the state case found support from an unlikely source, the accused himself. The accused's own version supported the deceased's assault as given by Brighton but sought to differ on the number of blows he delivered. To us, the disparity in the number of blows on the deceased is not the issue but the impact of those blows on the deceased. Whatever number of blows were delivered, the blows had the effect of causing the immediate death of the deceased.

The accused's explanation was that he acted in the manner he did because he had been provoked by the utterances of the deceased when she allegedly told him to "keep your dog leashed".

Our view is that if indeed these words had been uttered by the deceased resulting in the accused reacting to these words by assaulting the deceased, these utterances would have been made an integral part of the exhibit 1, the accused's warned and cautioned statement which was recorded from him barely four days after the deceased's assault. Instead, these very serious utterances are conspicuously missing from exhibit I.

In addition, the accused's flawed evidence in court that he, at one time had found his wife and Jethro Ndlovu having sexual intercourse and literally did nothing to his wife did not project him in good light. We know as a court that the accused was incensed by exhibit 4 to the extent that he savagely assaulted his wife leading to her unceremonious departure from the parties' matrimonial home. It clearly defeats common sense and logic that if indeed the accused had caught his wife and Jethro red handed having sexual intercourse he would have done nothing to his wife, let alone not bring that issue to either the deceased or the village head.

To compound his situation this alleged sexual intercourse between his wife and Jethro was never made part of his defence outline, warned and cautioned statement, let alone put to his wife in cross-examination.

In court the accused openly admitted that he had lied to the recording detail about having seen Jethro handing a letter to his wife.

By giving contradictory evidence in court concerning the number of letters he recovered concerning the adulterous relationship between Jethro and his wife, the accused soiled his own credibility. The accused's situation gets worse when one accepts that when his wife Siboniso appeared in court to give evidence as a state witness, the accused through his counsel did not even make an attempt through cross-examination to rebut her specific averment that her alleged confession to adultery was as a result of duress brought about by her savage assault by the accused coupled with a threat to end her life by axing.

One further finds it extremely unbelievable that the accused would have forgotten to instruct her counsel to ask his wife about where exhibit four was recovered from, let alone her being caught red-handed in a sexual act with Jethro or even to question her as regards one of his three children whose paternity he was now putting in issue in court.

It will be recalled that even though the accused and the deceased had briefly got out of the kitchen hut before the assault, the deceased was still conversing with Brighton and Milton who were inside. It is evident that the reason why the deceased sought to involve her neighbour was

because she was fearful of the accused. It is highly improbable in our view that given her state of fear at that time she would have gathered courage to utter the words belatedly attributed to her by the accused.

In any event if such words had been uttered our firm view is that Brighton would have heard such words. It makes sense to us that the attack on the deceased was unprovoked and informed by the accused's expressed desire to ensure that Jethro would not have a wife since according to the accused Jethro had destroyed his marriage by having an adulterous relationship with her. This then motivated the accused to savagely assault the deceased leading to her inevitable demise.

I wish to briefly deal with the defence of provocation which the accused has sought to feebly raise in this case.

Section 239 of our codified law² which the court brought to the attention of both counsel during court addresses provides that in a murder charge where provocation is successfully pleaded it provides a partial defence. The section reads in part as follows:

“239. When provocation a partial defence to murder

- (1) ...
- (2) for the avoidance of doubt it is declared that if a court finds that a person accused of murder was provoked but that –
 - (a) he or she did have the intention or realization referred to in section forty-seven; or
 - (b) the provocation was not sufficient to make a reasonable person in the accused's position and circumstances lose his or her self-control;the accused shall not be entitled to a partial defence in terms of subsection (1) but the court may regard the provocation as mitigatory as provided in section two hundred and thirty-eight.”

We have already dismissed the factual averments put forward by the accused persons as the basis for his alleged provocation in preference to his utterances as put forward by Brighton

that he made it clear before the assault that his avowed aim on that day was to end the deceased's life in order to fix Jethro.

Now if a man is heard making threats to end someone's life, proceeds to conduct himself in a manner that indeed fulfils that objective, the verdict can only be one, it has to be murder with actual intent.

We have considered the specific details about the murder weapon as provided by the state counsel, the delicate part of the deceased which was repeatedly attacked by the accused coupled with the accused's utterances before the assault.

We are more than satisfied that the accused made it his primary objective to end the deceased's life and proceeded to conduct himself in a manner that ensured that his objective was realised.

Consequently the accused is found to have murdered the deceased with actual intent.

Verdict - Guilty of murder with actual intent.

Sentence

In our endeavour to arrive at what we perceive to be an appropriate sentence we will take into account the following factors;

In mitigation we accept that the accused has a clean criminal record, a family man with the usual fairly heavy family responsibilities. The accused has been awaiting the outcome of this case for the past 4 years whilst in custody.

It was evident when the accused was giving evidence in this court that he genuinely believed that his wife was having an adulterous affair with the deceased's husband Jethro. To give weight to his conviction about this illicit relationship involving his wife was a confession made by his wife. Further confirmation was provided by the deceased when she gave an

indication that the letter in question had originated from a page of her family diary and that the handwriting on the letter was that of her husband.

We accept as correctly observed by accused's counsel that the court must not adopt an armchair approach when it comes to these crimes associated with passion. It is the pride of every man to feel that his wife is exclusive to himself and it brings about extreme humiliation for a man to have his wife taken from him by another man. It brings about a sense of great insecurity on the part of the victim. We have no doubt the accused must have felt this sense of insecurity.

In aggravation we are concerned that the accused directed his anger on the wrong person. The deceased was someone who must have been equally troubled just like the accused was.

We are concerned that the assault was recklessly carried out against an innocent woman who had a baby strapped on her back. The innocent baby could have easily lost its life. We do not believe the deceased had done anything to deserve the untimely termination of her life in the manner done by the accused.

This was a callous murder done right in front of the deceased's minor children who will probably live with trauma for life.

We have had the privilege to seeing the accused throughout these proceedings there was nothing to suggest he was remorseful for his conduct. Instead of telling the truth he compounded his situation by creating lies after lies making it extremely difficult for this court to treat him with deserving sympathy.

Those accused persons who appear before us must be their own liberators by endeavouring to be truthful and remorseful to their conduct.

The accused person has been protracted as a persistent terror to his wife who appeared extremely traumatized by the conduct of the accused.

The cumulative effect of the conduct of the accused demands that he be removed from society not for a limited time but for life.

Sentence - Accused is sentenced to life imprisonment.

Prosecutor General's Office, state's legal practitioners
Mcijo, Dube & Partners, accused's legal practitioners