

THE STATE

Versus

NKOSIYABO NDZOMBANE

IN THE HIGH COURT OF ZIMBABWE
KAMOCHA J
HWANGE HIGH COURT CIRCUIT 5 JULY 2012

W. Mabhaudi state counsel
Mrs Mhlanga Simango defence counsel

Criminal Trial

KAMOCHA J: The accused who is now 28 years was charged with murdering his brother Thethelani Ndzombane on 26 April 2011 at Village 7 Battlefields, Mbembesi. When the charge sheet was read to him he admitted killing his brother but with no intention to kill and murder him. The accused was 27 years old and the deceased was 31 years when he met his death.

The state outline was read and produced as exhibit one and I do not propose to read it again. I shall, however, reproduce the accused's defence outline which was produced as exhibit 2 and reads thus:

"Accused pleads not guilty to the charge of murder preferred against him, and will state as follows in his defence:

1. That on the fateful day the accused and the deceased were home in the morning and they had an argument over groundnuts and deceased assaulted the accused and the accused was angered by the deceased's action.
2. The accused was provoked by the deceased's conduct and he later retaliated by assaulting the deceased.
3. That accused did not intend to kill his brother but he was provoked and could not restrain himself.

Wherefore he prays that the honourable court find him not guilty of the charge of murder."

On 4 May 2011 the accused made an extra curial statement which was confirmed by a magistrate at Bulawayo Magistrates' Court. The statement was marked as exhibit 3 and reads as follows:

"I admit the allegations that I chopped Thethelani Ndzombane with an axe. What happened is that on the 26th April 2011, I arrived from herding cattle. Thethelani sent me to go and fetch water from the river, I refused and he fetched a switch and assaulted me. After he had finished, we retired to bed. I woke up during the night, picked an axe and axed him on the head once and I then axed him several times on the neck. When I realized that I had chopped off the head, I removed him from inside the house and dragged him out using a tarpaulin/sail sheet and placed him by the edge of the yard. I went back into the house and slept. I woke up in the morning, at the morning star that marks dawn, I dragged him with the tarpaulin/sail sheet and placed him in the bush and I took the tarpaulin/sail sheet back and placed it in the house. On the following day I washed off the blood stained clothes. I dug and buried the blanket, trousers and belt in the bush. I stayed without telling anyone. I washed the axe."

The 4th exhibit was an affidavit by Constable Nicholas Sibanda who identified the body of the deceased to Dr A.R. Casteiinos who carried out the post mortem of the deceased's remains and compiled exhibit 5 the post mortem report. The doctor opined that the cause of death was due to (a) traumatic decapitation (b) cut on the neck (by axe) following (c) assault. Exhibit 6 was the axe the accused admitted to have used in attacking his brother in decapitating his head. Its details are these - length of blade from the base to the sharp edge 23 cm, width of blade 13 cm, length of handle 72 cm; weight of whole unit 2.18 kg.

Exhibit 7 was the last exhibit which consisted of a black tarpaulin 2 x 2m, 1 striped shirt, 2 blankets and a pair of trousers.

The defence counsel consented to the production of the following witnesses' evidence as it appears in the state outline in terms of the provisions of section 314 of the Criminal Procedure and Evidence Act [Chapter 9:07] Canaan Mhlopela, Dumisani Khumalo, Constable Gift Magwaza and the affidavit of Constable Nowell Shoko and doctor Casteiinos in terms of section 278 of the Act. The defence counsel also admitted on behalf of the accused that the axe exhibit 6 was the murder weapon and that the clothing in exhibit 7 belongs to the deceased. The tarpaulin was used to carry the deceased's body from the homestead to the bushy area where it was discovered six days later in a decomposing state.

Viva voce evidence was led from Nobantu Mabhena the accused's aunt who had good relations with both deceased and accused. They had a homestead close to her. She last saw the deceased when he went to her asking for pliers to use when fencing his home.

It was her evidence that on Saturday morning when she was at the homestead the deceased told the accused not to waste groundnuts. Although accused made no response he appeared not to like what the deceased had said. She could see that from his face. Deceased remonstrated with him around 09:30 hours.

The witness did not know when the crime was committed. When she could no longer see the deceased at the homestead she asked accused where the deceased was but the accused said he had no idea. She asked him on three occasions but he still professed ignorance of his whereabouts and explained that he found him gone when he returned from herding cattle.

The witness told the court that the deceased was only discovered after 6 days. The body was in an advanced state of decomposition.

She told the court that deceased did not assault the accused the morning he remonstrated with him over groundnuts. It was her evidence that deceased loved the accused and was not aware that he used to assault him.

The witness said she and accused went to school together and he was a person of good character. She was therefore surprised that he had killed his brother. The two never used to fight. But when it was put to her that what accused had done was not in his nature she opined that he may have done it because he had come from Johannesburg.

The witness gave her evidence well and is worth to be believed. The accused made a full confession in his evidence. His evidence was that his brother had assaulted him on the morning of 26 April 2011 over groundnuts. He went to herd cattle after the assault. He returned and stayed for a while before the deceased came. When he arrived they sat together before the deceased retired to bed. When he had fallen asleep he sharpened the axe exhibit 6. He then chopped the deceased on the head and neck. The rest of his evidence is substantially the same as what is contained in his extra curial statement with some variation on the reason he was allegedly assaulted by his brother. In his statement he gave the reason why he was assaulted as that he had refused to go and fetch water from the river. Yet in evidence and defence outline he said he was assaulted over groundnuts. The accused said he was assaulted over the issue of groundnuts on 23 April 2011 and he had told the deceased that he did not like what he had done. It was his evidence that he was still angry and furious about what had been done to him 3 days before. When he chopped his head off on 26 April 2011 he was still angry. He regrets his actions.

Under cross examination the accused denied ever having gone to South Africa. He was just being untruthful on that point. His mother says he was in South Africa for quite some time.

It was his evidence under cross examination that the deceased used to assault him on many occasions but he thought the deceased was chastising him as a young brother. He never told anybody about the assaults.

The court referred the accused to be examined by a psychiatrist to ascertain his mental state in the light of bizarre manner in which the murder was committed. Dr Elena

Poskotchinova's report was produced as exhibit 8. The psychiatrist concluded that there was no evidence of mental illness or mental retardation at present on accused. The accused was mentally stable at the time of the crime and responsible for his action. He is fit to stand trial.

The accused waited for deceased to fall asleep. He sharpened the axe and then struck deceased firstly on the head followed by several blows on the neck to the extent of chopping the head off to ensure that he was dead.

The accused is therefore guilty of murder with actual intent.

Extenuation

Defence Counsel

There is nothing much to say on behalf of accused to say that it was out of the ordinary that deceased would chastise a man like accused.

May the court find extenuating circumstances.

State Counsel

Circumstances which may have reduced accused's blameworthiness in extenuation had to do with what happened at the time. Accused may have been assaulted which might have led to the attack. The assaults came well before the commission of the murder.

The chopping is not contemporaneous. Had the chopping happened just before the assault it would have been a different story. The assault was not sustained causing serious injuries on accused. He himself dismissed it as a big brother chastising his wayward young brother. Accused was acting way out of provocation. It does not avail him.

That is all.

By court

The accused may have been assaulted by his brother either 3 days prior to the commission of the offence over groundnuts or that day for refusing to go and fetch some water whichever way one looks at it the attack was done after some time. The assault does not seem to have been sustained that is why it was not even worth his while to report it to anyone. Their aunt who lives in a homestead next to that of the deceased never saw accused being assaulted. The assault was clearly not sustained. In the result provocation does not avail the accused.

Consequently, this court is unable to find any extenuating circumstances in this matter.

Ruling

No extenuating circumstance have been found.

Accused - I have nothing to say.

Sentence

Sentenced to death.