

THE STATE
versus
JEREMAYA SIBANDA

HIGH COURT OF ZIMBABWE
MOYO J
BULAWAYO 15 MAY 2018

Criminal Trial

Miss Ngwenya for the state
B Sengweni for the accused person

MOYO J: The accused person in this matter faces a charge of murder, it being alleged that on 21 June 2015 he assaulted the deceased Forgiveness Sibanda resulting in his death.

The accused person pleaded not guilty. Documentary evidence was produced in the form of the state summary, the defence outline, the affidavit of the police officer who identified the deceased's body to the pathologist, the post mortem report, the accused's confirmed warned and cautioned statement as well as the psychiatrist report on accused's mental condition. They were all duly marked. Accurate Nyoni gave *viva voce* evidence for the state. The evidence of Lucia Nyoni, Pasca Nyoni, Perish Makube, Gilbert Sigauke, Mehluli Sibanda and Dr Roberto Trecu was admitted into the court record as it appears in the state summary in terms of section 314 of the Criminal Procedure and Evidence Act [Chapter 9:07].

The accused person gave evidence for the defence. The facts of the matter are largely common cause. The accused was the father to the deceased, a 3 year old boy with a physical disability that affected his ability to walk and talk. He was therefore lame and dumb.

The accused and the mother of the deceased who is his wife tried to seek help from various quarters in a bid to heal their son. The prophets that they consulted told them that the child was bewitched by the mother's family. The accused was also told by some of these faith healers that the child was a goblin and that he lived in a granary. On the fateful day, the mother

to the deceased left the deceased with the accused person who is the father to the deceased to go and do her laundry at some nearby place. The accused then followed her after about an hour to say the deceased had died. She wanted to alert other people but accused stopped her. The deceased had some bruises on the face and the back of the head and he was bleeding from the mouth and nose. Accused later dug a shallow pit behind the house and buried deceased there. He then sent his wife packing to her rural home in Binga in order to conceal the murder. The offence came to light when his wife got to her home and was asked about the whereabouts of the child wherein she told her mother that the accused person had killed their child and buried him in a shallow grave. The accused person does not dispute the facts as alleged by the state, in fact he says he cannot recall what transpired when he killed his child, buried him in a shallow grave and sent his wife packing to Binga.

The postmortem report gives the cause of death as:

- 1) Subarchnoid haemorrhage
- 2) Skull base fracture
- 3) Severe head trauma due to beating injury.

The first issue for determination in this court is whether the accused's conduct is wrongful since accused's defence counsel has submitted that he should be acquitted because he believed that he was assaulting a goblin as opposed to a human being.

On this submission the court takes into account the following:

- 1) That the accused person was found to be mentally fit and consequently can be held liable for his actions.
- 2) That the psychiatrist's report and the accused's wife support the aspect of his belief in witchcraft and goblins.
- 3) That in his confirmed warned and cautioned statement he admits to the offence and says some evil spirit had taken control of him.
- 4) That in his previous defence outline he said that the child had fallen and died due to epileptic fits.
- 5) In court the accused person says he had made frantic efforts to have the child healed because he did not believe that the child was a goblin.

Clearly from these facts, it cannot be found that the accused killed the child because he thought it was a goblin. I find so for the following reasons.

- 1) He himself tells the court that he did not believe that.
- 2) In his confirmed warned and cautioned statement which was recorded when his mind was still fresh on the events leading to deceased's death, he does not say that he killed a goblin.
- 3) His differing versions on that the child died as a result of epileptic fits and that he slapped the deceased causing his death, show that the accused is a man who knew what he was doing but decided to come up with different versions to escape culpability. In essence this means that the version about the child being a goblin is also another that he is now throwing in as a man who is fighting to save himself from blame.
- 4) The child was then 3 years old and the doctor had told the accused and his wife that the child had a medical condition that affected his leg muscles.
- 5) If indeed, the accused believed that the child was a goblin, his conduct after killing the deceased would have been consistent with that belief. He need not conceal the death of a goblin. He was going to let his wife tell the people that he had killed the child and if the people came he would tell them that there was nothing wrong with his actions of killing a goblin. Burying the child in a shallow grave and sending his wife packing so that no one ever knows of the deceased's whereabouts show a consciousness to the fact that the deceased was indeed a human being whose death had to be concealed. It is therefore not true that accused thought that the deceased was a goblin in my view. The accused's conduct was therefore wrongful on the date in question. The accused clearly believed in witchcraft and made efforts in that area to have the child healed, but he did not think the child was a goblin from his own words in court and conduct after killing the deceased.

What then is the accused is guilty of. The accused harmed the deceased in some way which is unknown to all of us but to himself. In court he acted like he could not remember how he harmed the deceased but what is common cause is that he is the one who caused the deceased harm which resulted in deceased's death. That is common cause. The postmortem says the deceased died from brain haemorrhage and a skull fracture that was from severe head trauma due to beating injury. The pathologist found that the injury on deceased's head was from severe head

trauma due to beating. It then follows that the only reasonable conclusion to make on the basis of the postmortem report is that the deceased was beaten severely on the head causing his death. This court does not know the circumstances of the deceased's beating but from the nature of the injury, its being termed "severe" by the pathologist, this court can infer that the accused severely assaulted the deceased on the head causing his death. We then proceed to assess what the accused is guilty of. The accused person gives various versions and reasons for his actions, but his wife tells us that he did mention to her that the child was a goblin and that he did not want a goblin at his home and that he would not touch the deceased ever since the disability manifested itself. Clearly, the accused person harboured ill feelings towards the deceased, he did not like the deceased, he did not want the deceased because of the disability. The mother says she left deceased with accused for the first time on that day, he must have seen it as the best opportunity to harm the deceased. He himself admits to harming the deceased. The postmortem report confirms a severe beating on the head.

A safer conclusion would thus be based on the findings of the pathologist that deceased was severely beaten on the head.

It can thus be informed from the facts of this case that accused wanted to eliminate the deceased through death, not because he was a goblin as he himself confirmed in court, but because of his disability and their failure as parents to have him healed. He must have been frustrated by their failure to have him healed and in the circumstances it can be safely concluded that he assaulted the deceased in a bid to get rid of him, which is why he was even prepared to bury him in a shallow grave. The accused is accordingly found guilty of murder with actual intent.

Sentence

The accused person is convicted of murder, he is 32 years old, he is a first offender. The accused person committed an abominable act. He killed his own son due to the fact that he had an incurable disability. The murder was committed in aggravating circumstances as provided for in the General Laws Amendment Act No 3 of 2016 section 8 thereof in that he killed a minor who was also disabled.

The accused person was the father of the deceased, he clearly disliked the fact that the deceased was disabled but he however made frantic efforts through faith healers to try and have the deceased healed. He was told that the deceased was bewitched. The circumstances of this case show a frustrated man, who resorted to crime because he was faced with a situation that he could not contain, faith healers did not help the situation either. What they told him should have pushed him into desperation as he clearly believed in witchcraft. Whilst this cannot be an excuse for killing one's disabled child, this court considers the effect his belief in witchcraft had on his actions and that certainly cannot be ignored.

Section 3 of the General Laws Amendment Act No 3 of 16 provides that "a court may also, in the absence of other circumstances of a mitigating nature" regard as aggravating that the victim was a minor or disabled. (Emphasis mine) This means in essence that the court should balance both aggravating circumstances and mitigatory features if any. Section 4(a) of the same amendment provides that:

"A person convicted of murder shall be liable to death, imprisonment for life, or imprisonment for any definite period of not less than 20 years, if the crime was committed in aggravating circumstances."

This in essence means that even where the crime was committed in aggravating circumstances the death sentence is not the only prescribed punishment in cases such as this one where there is an element of mitigation that reduces the moral blameworthiness of the accused person. It is for these reasons that capital punishment will be excluded in this case.

These courts have bemoaned the loss of lives through violent means, the accused should have sought assistance from the medical profession, found ways to enhance the deceased's life in the condition that he was in rather than resorting to kill him. His conduct is frowned upon by this court.

A lengthy custodial sentence given the circumstances of this case where a life was unnecessarily lost is warranted. A strong message must be sent out there that this court does not take lightly the loss of life through violence. The accused person is accordingly sentenced to 25 years imprisonment.

National Prosecuting Authority, the state's legal practitioners
Sengweni Legal Practice, accused's legal practitioners