

THE STATE
versus
GLADYS SIBANDA

HIGH COURT OF ZIMBABWE
MOYO J
BULAWAYO 7 AND 8 JUNE 2018

Criminal Trial

Ms N Ndlovu for the state
Miss P Vangiranai with *R Muchada* for the accused person

MOYO J: The accused person faces a charge of murder, it being alleged that during the period between September and November 2016, she repeatedly assaulted the deceased Thandeka Moyo resulting in her death from the injuries she sustained in that assault. The accused person pleaded not guilty and prayed for her acquittal.

The following evidence was tendered into the court record and was duly marked.

- 1) The state summary
- 2) Defence outline
- 3) Affidavit of the police officer who identified deceased's body to the pathologist
- 4) Post mortem report
- 5) The DNA report

The state called Cinile Khumalo the mother to the deceased and Lubelinhle Khumalo the daughter to the accused to give *viva voce* evidence. The evidence of Mercy Ncube, Sydney Tapfuma, Bukhosi M Ncube, Dr S Pesanai and Zephaniah Dlamini 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 this matter are fairly straight forward but very painful. In September 2016 the accused who was an aunt to the deceased embarked on a journey to Binga her rural home and

requested for the deceased so that the deceased would come and be a playmate to her child. She was ordinarily resident in Bulawayo. The mother to the deceased agreed and accused was to return deceased in about two weeks. The accused left with deceased who was aged about 3 years. She never brought the deceased back as agreed and frantic efforts by the mother to communicate with her to bring the child back proved futile.

In the meantime, once in Bulawayo, accused would repeatedly assault the deceased for soiling herself. She would use a switch from a peach tree as well as shoes. She would indiscriminately assault deceased all over the body. The assaults were frequent and repeatedly for as long as deceased soiled herself when accused was present. In other words, deceased escaped the assaults only in the absence of the accused. The deceased then became unwell from the repeated assaults and even had visible scars. It does not appear from the evidence that accused then stopped assaulting deceased at that stage since the deceased was repeatedly assaulted over a period of three months. The deceased fell sick, she would fall, she appeared dizzy to Lubelihle Khumalo (accused's daughter). At a later stage deceased could neither eat, nor talk nor walk. Deceased was nonetheless never taken to the clinic for medical attention. In other words accused watched deceased suffer from the pain she endured from these brutal assaults but she continued the assaults unabated. She did not care about the pain the deceased was enduring, neither did she find it in her conscience to stop the assaults.

The deceased eventually gave in to the injuries and pain. She died sometime in November 2016. Accused concealed the death and buried the deceased in a shallow grave. She then left for Botswana and was away for period of 5 months from December 2016 to April 2017. She later came back, still unrepentant, as she concocted a story about the deceased's demise. As always it is rare that evil triumphs over good, the truth eventually came out leading to accused's arrest.

I have not used the accused's version of events in those areas where accused differs with state witnesses because accused is an unrepentant liar. She gave instructions to her defence counsel and manufactured facts to the effect that deceased had epileptic fits and that she bought some paracetamol to treat deceased, facts that her own daughter disputed in court. Her defence

outline differs materially from her evidence in chief especially where she says after discovering that deceased had died, she then went to Binga to inform the relatives and yet in court she agreed with the state witnesses that she tried without success to conceal deceased's death and later concocted a story on deceased's demise. Accused's version cannot be believed because she has lied on material issues.

The post mortem report gives the cause of death as multiple fractures, severe assault. This court notes with shock that the deceased had seven fractures. The deceased even had a healing old fracture, meaning at some stage she was assaulted and suffered a fracture and was at a later stage also assaulted (whilst already injured) and got further fractures. The deceased must have suffered at the hands of the accused person. Considering she was a defenceless 3 year old who could not even appreciate her whole predicament. The accused person acted in a cruel manner in these circumstances. She was reckless, she did not care at all about the consequences of her actions. The seven fractures show that the accused must have foreseen the possibility of death as a reality. A 3 year old with fractures on the scalp, limbs, ribs, without medical attention would be at a real risk of dying. Legal intention can be inferred from the facts despite what the accused says was her intention. In these circumstances, that is the repeated severe assaults, the lack of medical care, and the nature of the injuries sustained by the deceased, the only reasonable inference that can be drawn is that the accused did foresee death as a real possibility but nonetheless never cared and never took any steps to forestall the real danger the deceased's life was then in. The accused is accordingly convicted of murder with constructive intent.

Reasons for sentence

The accused is convicted of murder. She is a first offender, a family woman and a mother of four, she is the breadwinner in her family.

Aggravating is that she caused the death of a minor, a 3 year old. She also caused the death through a very brutal, and reckless as well as painful way. For three months the deceased endured torture at the merciless hands of the accused who is also a mother and motherly instincts are expected to have dissuaded her from such conduct. It is surprising how a mother would act

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in such a manner. She was also unrepentant and lacked remorse throughout the three months deceased was in her care, she continually assaulted deceased to the point of death. She did not see the need to seek medical attention, neither did she see the need to send the child back to her parents. She further concealed the death and later concocted a story. She was not remorseful at all. These courts have repeatedly mourned the loss of life through violence.

An innocent 3 year old toddler died a painful death at the hands of the accused. She need not live with the deceased if she did not want to, so why take a minor into her care when there is even no reason for that only to turn the innocent and defenseless child into punching bag? The accused has no meaningful mitigation and yet aggravating factors in favour of a stiff sentence are abundant in these facts. Accused is accordingly sentenced to 20 years imprisonment.

*National Prosecuting Authority, state's legal practitioners
Liberty, Mcijo and Partners, accused's legal practitioners*