

Judgment No. SC 17/03
Crim. Appeal No. 214/01

Bemba Ndlovu V The State

SUPREME COURT OF ZIMBABWE
SANDURA JA, CHEDA JA & ZIYAMBI JA
HARARE, JUNE 10, 2003

J B Colegrave, for the appellant

N J Mushangwe, for the respondent

SANDURA JA: The appellant was charged with murder, the allegation being that on 19 November, 1997 he unlawfully and intentionally killed a seven-day old male infant at Khumalo's homestead in Lupane district. He pleaded guilty and was convicted of murder with actual intent. No extenuating circumstances were found and he was sentenced to death. He subsequently appealed against the conviction and sentence.

At the hearing of the appeal, the following order was issued with the consent of both counsel:

"It is ordered that the conviction and sentence be and are hereby set aside and that the following be substituted:

1. In terms of s 28(1) of the Mental Health Act [*Chapter 15:06*] the accused, Bemba Ndlovu, is guilty of the murder of Sicolani, an infant, but was mentally disordered or defective at the time when he killed the deceased.
2. It is ordered that the accused be returned to prison for transfer to Parirenyatwa Psychiatric Unit for examination".

We indicated at the time we issued the order that our reasons would be given in due course. I now set them out.

The background facts in the matter are as follows. The appellant and the deceased's mother lived as husband and wife in terms of a customary law

union from 1990 to June 1995 when they separated. The deceased, who was born in November 1997, was not the appellant's child.

On 19 November 1997, the appellant proceeded to the village where his former wife and the deceased were. He arrived there at about 10 p.m. and knocked on the window of the hut in which the deceased and his mother were sleeping. As he threatened to force his entry into the hut, he was struck on the forehead with an iron bar by the deceased's mother who thereafter escaped from the hut leaving the deceased asleep.

The appellant then entered the hut and took the deceased away. The matter was subsequently reported to the police, but the deceased was never found.

When the appellant was arrested, he freely and voluntarily made the following warned and cautioned statement:

"I admit the charge of killing the baby on the 19th November. I arrived at Jethro Thebe's homestead, took the baby away and undid fibre from a tree, tied the baby to a stone and threw it in water (pool), because the baby in question was not mine. The child was obtained through prostitution by Makhumalo, my wife. she did prostitution when I was in prison. I was therefore angered by this. That is why I killed the baby. I admit that I killed the baby and threw it in a pool. That is all".

That statement was subsequently confirmed by the resident Magistrate at Lupane. The pool mentioned in the statement was searched by the police, but the deceased's body was not found.

As already mentioned, the appellant was found guilty of murder with actual intent and sentenced to death.

When the appeal came up for hearing on 15 November, 2001, Mr *Colegrave*, who appeared for the appellant, sought a postponement to enable the

appellant to undergo a psychiatric examination for the purpose of determining the appellant's mental state at the time of the commission of the offence. He submitted that having regard to the nature of the killing and the appellant's own evidence at the trial, there was a possibility that the appellant was mentally disordered at the relevant time. The postponement was granted and the appellant was subsequently examined by a psychiatrist who has submitted an affidavit in which he has set out his observations and conclusions.

The affidavit, in relevant part, reads as follows:

"During my examination I found that:

- (a) Bemba's grandfather suffered from mental illness.
- (b) Bemba once walked from Bulawayo to Lupane, for no good reason since he had bus fare. His first wife noticed that he was not mentally well and took him to a traditional healer for treatment.
- (c) He used to hear voices and talk to himself.
- (d) He burnt his brother's house for no reason.
- (e) Although his claim to be a traditional healer cannot be disputed, some of the elements of his powers and capabilities are almost delusional.
 - (i) Claim to have passed lightening to burn father-in-law's house.
 - (ii) That by burying a child at the hospital it reduced his traditional healing powers,
 - (iii) Being possessed by evil spirit during disappearance of the child, and when he walked from Bulawayo.
- (f) Morbid refusal to be rejected from 1995 to 2003.
- (g) Evidence of thoughts disorder...during my examination...

In my opinion, at the time of the alleged offence B. Ndlovu was mentally disordered. He suffers from a Paranoid Psychosis."

In the circumstances, this Court was satisfied that at the time of the commission of the offence the appellant was mentally disordered.

Accordingly, an order was issued in terms of s 28(1) of the Mental Health Act [Chapter 15:06], the Act in force at the relevant time, but which was repealed by s 127(1) of the Mental Health Act 1996, with effect from 1 January, 2000.

CHEDA JA: I agree.

ZIYAMBI JA: I agree.

Pro Deo