THE STATE

Versus

DANIEL ZULU

IN THE HIGH COURT OF ZIMBABWE
KABASA J with Assessors Mr G Maphosa and Mr J Ndubiwa
HWANGE 4 AND 5 JULY 2023

Criminal Trial

Mrs M Cheda, for the state
Ms L Mthombeni, for the accused

KABASA J: The accused pleaded not guilty to a charge of murder as defined in section 47 of the Criminal Law (Codification and Reform) Act, Chapter 9:23. He instead pleaded guilty to the lesser offence of culpable homicide but the plea was rejected by the state.

The state allegations are that on 10 September 2022 the deceased's husband left the farm where they resided at Plot 3 Kennelys Nyamandlovu. On 11 September 2022 the accused who was employed at the deceased's farm made a report to the neighbours that they had been attacked by robbers. The neighbours rushed to the deceased's home and discovered the deceased's body lying lifeless on the floor in a pool of blood.

In his defence the accused did not dispute assaulting the deceased using a knobkerrie. He also did not deny lying to the neighbours about a robbery. He however explained that he assaulted the deceased with the knobkerrie in a fit of rage after she had told him she was seeing some other man and that that man was going to visit her on that very night. The accused was incensed because he was having an illicit relationship with the deceased and her nonchalant attitude did not sit well with him. Besides the assault he did not take anything from the house nor did he disrobe the deceased.

The accused's defence was one of provocation. In determining the accused's guilt the issue hinges on whether the provocation defence is available to him.

The evidence led by the state was largely common cause. The accused's confirmed warned and cautioned statement which was produced and marked exhibit 1 raised no issue as to who caused the deceased's death and the weapon used to inflict the injuries which took her life.

The post-mortem report which was produced and marked exhibit 2 described the injuries sustained by the deceased. The doctor observed:-

> Multiple contused wounds in the right side of the head with fracture of the subgerling structure, excoriations and inflammation in the left side of the face, cheek and left shoulder and contused wound in the left occipital region.

The scalp had haemorrhagic infiltrate and multiple laceration in the left side. The skull had multiple fracture in occipital region and the brain had encephalic dislaceration.

The cause of death was:-

Encephalic dislaceration

Cranial trauma

Assault

The knobkerrie used to inflict the injuries broke into 2 pieces and the knobkerrie's head had a circumference of 22.2 cm and a weight of 0,325 kg. The 2 pieces were marked exhibit 3.

A blood stained pant which was torn into two was produced and marked exhibit 4.

The evidence of Mthandazo and Nothando was largely not disputed. This evidence confirmed the fact that the accused went to the neighbours and pretended that he and the deceased had been victims of a robbery. The witnesses went to the deceased's house and observed that she was lying on the floor in a pool of blood and was covered with cushions.

Efforts were made to try and trace the footprints of the intruders who were said to have been there but that was in vain.

Both witnesses were known to the deceased as a neighbour and the accused as an employee who had been so employed for about 2 weeks before the fateful day. None of the

witnesses was aware of the illicit relationship accused claimed was between him and the deceased.

The deceased's husband was away at the time of the incident and only returned after news of the deceased's death was communicated to him by the second witness, Nothando. It was this witness's evidence that he had employed the accused on 23 August 2022 and so he had been in his employ for about 2 weeks when the incident occurred.

When he left home he had given the deceased US$250. They used to run a canteen and a tuck shop at their plot and on his return home he saw his wife's empty purse on the floor and a US$5 note. He did not see the US$250.

The robbery story was repeated to him but after the deceased's burial he recovered the knobkerrie which had been thrown into a septic tank. It had blood and he identified it as the one the accused used to carry with him when herding cattle.

The accused was subsequently re-arrested as he had been released after the initial arrest due to lack of evidence. Although the witness could not positively comment on the claim by the accused that he was in a relationship with the witness's wife, he however wondered at the truth of such claim given that the accused had only been at the plot for 2 weeks.

The last witness was the investigating officer. Nothing much turned on his evidence. The police did not send the torn pant for forensic tests and the issue of the missing US$250 was hardly investigated.

The accused testified in his defence. We must say his story was so incoherent we were left in no doubt that he was making up a story and failed to knit it together.

We came to this conclusion because of the following reasons:-

In his confirmed warned and cautioned statement he said he struck the deceased with a knobkerrie after she had told him he was not going to sleep in her home that night because there was someone who was going to come. This angered him and that was why he hit her with the knobkerrie.

In his evidence he said the deceased uttered these words at around 6 pm and he only knocked off from work at 2030 hours. He went to the deceased's home and the talk of this

other man was not repeated. She actually prepared sadza and they ate as was the norm. They proceeded to behave as usual as people in a relationship.

If this is what happened what angered him then as the 6 pm talk had been all but forgotten?

Asked what led to deceased's death he said they fought and she tried to attack him with the knobkerrie. He disarmed her and used it to assault her.

He had already forgotten this version because he was again asked where he took the knobkerrie he used to assault the deceased and his response was that he took it from underneath the sofa.

How could he have taken it from underneath the sofa if the deceased was the one who had tried to assault him with it and he disarmed her? He would have taken it from the deceased then and not from underneath the sofa.

Under cross-examination he again had forgotten that the deceased's torn pant was said to have been torn during the fight as he was just pulling at anything he could pull at. In response to a question from state counsel he said everything of the deceased was intact.

As for the reason he assaulted the deceased he had a different reason. His response now was that he thought she had infected him with a sexually transmitted disease because she would not agree to him using protection. He had visited the hospital and he was told the test showed "immunity" which meant it was in between a positive and a negative result.

Asked again why he used a knobkerrie when he could have easily used his hands he had another explanation. His response was this was because there was a knife under the sofa and he thought the deceased would take it and injure him with it.

We could not help but conclude that the accused was thinking on his feet but was unable to do so coherently. It was as if he had decided to say anything that came to mind, it mattered not whether it was making sense.

It became clear that he was bent on misleading the court. He realised that in the 2 weeks that he had been employed, the story he was weaving of an illicit affair which flourished each time deceased's husband was away from home was improbable. That realisation had him claim that he had been employed for 6 months. Surely why would the neighbours talk about 2 weeks

if he had been at this plot for 6 months? The first witness even said he knew the accused from before as he used to see him at his home area when the witness was constructing buildings as he is a builder. This witness used to plough the deceased's husband's fields and so he came to know when the accused was employed. This is not a detail that a witness would fabricate and why fabricate anyway? He was just a neighbour who in return for ploughing the deceased's husband's plot got a piece of land which he utilised for his horticulture. This meant he would be at his neighbour's plot often and so would know the employees thereat.

Nothando was also a neighbour who was a friend to deceased and they attended the same church. Granted she would not have known if the deceased chose to have an illicit relationship with her cattle herder but she would know when the accused secured employment at this plot.

The accused's explanation that these witnesses were out to get him to go to prison was just a lame explanation.

From the foregoing the defence of provocation was not supported by the evidence, including the accused's own version.

Section 239 of the Criminal Law Code provides that where a person is provoked and as a result of such provocation he or she does not have the intention or realisation referred to in section forty-seven or he completely loses self-control, the provocation being sufficient to make a reasonable person in his position and circumstances lose his or her self-control, such person shall not be guilty of murder but culpable homicide.

We have already shown that the accused could not even state what it is that provoked him. If a person is provoked and such provocation leads them to do something that they would not have done but for the provocation, it is easy to clearly articulate the cause of such provocation. The accused's jumbled up and incoherent story is evidence of the fact that there was no such provocation.

It was not lost on us that as the trial progressed he appeared to clutch on self-defence. The requirements for self-defence are provided in section 253 of the Criminal Law Code. The very fact that the accused prevaricated on how he came to use the knobkerrie and where he got it from shows that there was no self-defence to talk about. If as he said in one of his various versions, he took the knobkerrie from underneath the sofa and the one blow he delivered to the

deceased's head felled her to the ground, what was he defending himself from when he continued to bludgeon her head with the knobkerrie? The knife story was but a figment of his not so fertile imagination and it was meant to bolster a non-existent self-defence story.

This defence belatedly thrown into the fray is also not available to him.

He was not done with these manufactured defences as he also claimed he was intoxicated. His account of what he would have us believe happened showed that he was not so intoxicated as to fail to know what he was doing or what was happening.

In any event voluntary intoxication is no defence and even if it had been shown that he was so intoxicated as to be incapable of having the requisite intention or realisation, the law says he would still be guilty of voluntary intoxication leading to unlawful conduct and be liable to the same punishment as he would have been liable to for a conviction of the originally charged offence. (s222 of the Criminal Law Code).

We were however left in no doubt that the intoxication was being thrown in for good measure. All these defences, provocation, self-defence and intoxication are not supported by the facts and are accordingly not available to the accused.

That said, the fact that a knobkerrie was used to bludgeon the 47 year old woman not once but several times and with such force as to fracture her skull speaks volumes as to the accused's intention or realisation that there was a real risk or possibility that his conduct may cause death but continued nonetheless.

It appears that the state was seeking to show that the accused raped the deceased. The evidence was however not conclusive. It is suspicious but suspicion no matter how strong cannot amount to evidence. The state conceded this point and did not seek to pursue the issue of rape in its closing submissions.

Could it be that the accused sought to force himself on the deceased and bashed her when he failed and was afraid of the repercussions and then decided to stage a robbery scene by throwing things all over the floor as was witnessed by the witnesses? Or could it be that he robbed the deceased and then sought to destroy evidence by getting rid of the witness?

We pose these questions because the evidence was not conclusive. It appears not much was done by way of investigations with the police probably being content with pursuing the murder charge.

We are unable to say the killing was perpetrated in the course of a robbery or that it was perpetrated to conceal a rape. The state conceded as much as in closing submissions state counsel did not pursue these issues.

The accused said he had had sexual intercourse with the deceased earlier on. Even if this was to be taken as some confession that sexual intercourse occurred, there was no evidence *aliunde* to show that indeed sexual intercourse occurred.

The circumstantial evidence in the form of the torn pant and skirt did not, in our view, meet the threshold of the 2 cardinal rules of logic enunciated by WATERMEYER JA in *R* v *Blom* 1939 AD 188. The proved facts were not such that they exclude every reasonable inference from them save the one sought to be drawn and the inference sought to be drawn was not consistent with all the proved facts.

In *State* v *Freddy Ndlovu and Another* SC 135-04 GWAUNZA JA (as she then was) referred to the case of *State* v *Tsorayi* 1985 (1) ZLR 138 (HC) wherein the court quoted with approval from *R* v *Sylees* (193) 8 CR App R on the correct approach to adopt when dealing with confessions.

> "The first question you ask when examining the confession of a man is, is there anything outside it to show it was true? Is it corroborated. Are the statements made in fact true? Is it consistent with other facts which have been ascertained and which, in the case, (are) proved before us."

As already alluded, the deceased's position and the torn pant is suggestive of a possible violation of a sexual nature but we cannot say so with any degree of certainty.

Whatever it is that the accused sought to conceal by bludgeoning the deceased, the inescapable conclusion is that he intended to kill her when he delivered these vicious blows to her head. The real reason behind the killing is known by him as the deceased did not live to tell her story.

The state has therefore proved its case beyond a reasonable doubt and the accused is accordingly found guilty of murder as defined in section 47 of the Criminal Law (Codification and Reform) Act, Chapter 9:23.

Sentence

The accused is 28 and was 28 at the time the offence was committed. He is a first offender and has a 3 year old son who stays with his brother.

He will live with the stigma of the "murderer" label for the rest of his life.

The taking of a life is not anything that can be taken lightly and this death is likely to haunt him for the rest of his life.

In aggravation is the fact that a life was unnecessarily lost. Life is precious and people must respect the sanctity of life.

The accused sought to malign the 47 year old deceased's character in a bid to downplay his conduct. The deceased's husband must have re-lived the events of September 2022 when he was made to listen to the accused's spurious allegations against his deceased wife.

The deceased, a 47 year old woman was bludgeoned to death by an employee who had not even spent a month under her employ.

The husband must have trusted him for him to have left the deceased alone with this "2 week-old" employee. The accused's conduct was such a betrayal of trust and hurtful to the deceased's husband and loved ones.

No one should lose their life at the hands of another, especially in the manner the deceased lost her life.

The accused showed no respect for her in taking her life and even in her death, he left her body half naked for all and sundry to see before she was removed from the scene.

This was a callous murder which ought to be suitably punished.

For these reasons accused is sentenced to:-

25 years imprisonment

National Prosecuting Authority, state's legal practitioners
Dube, Nkala & Company, accused's legal practitioners