

THE STATE  
versus  
POWER MPASO

HIGH COURT OF ZIMBABWE  
TSANGA J  
HARARE 9 & 10 October & 18 November & 2 December 2019

*Assessors: Mr Mhandu  
Mr Barwa*

### **Criminal Trial**

*H.V Huni, for the state  
O Mawadze, for the accused*

TSANGA J: The accused was charged with the murder of 54 year old Spiwe Masadza being his uncle's wife. The accused was therefore the deceased's nephew and customarily she was considered his grandmother. He had been working for her for about three months.

They were certain admitted facts in terms of s 314 which were not in dispute as to the events of the day the alleged murder occurred on the 10<sup>th</sup> of November 2018. The accused admitted to killing the deceased on the day in question He was in the company of the deceased and a young boy one Stallon Jacob when he tripped the deceased as they were coming from the garden in Mhokore extension, Chief Bushu area, in Shamva. He had then struck her several times with a stone on the head and she had sustained head injuries from which she bled profusely. Stallon had rushed to advise villagers about what was happening, in particular Aleck Zuze and Washington Masadza. Aleck Zuze who had come to the scene had found the now deceased unconscious in a pool of blood. Together with other villagers they had rushed her to Shamva hospital in an ox drawn cart where she had later died as a result of the head injuries sustained following the attack.

It was also common cause that he had made indications of the assault at the crime scene to the Investigation Officer, Sergeant Rhoda Chirimumimba of Shamva Police Station. It was further common cause that the accused had made a confirmed warned and cautioned

statement to the police in which he admitted to having struck the deceased six times with a stone on the head. It had been confirmed by the magistrate.

Whilst the accused admitted that he killed the deceased in the context of the above facts, nonetheless put forward a defence to the effect that he did not know what got into him as the incident had happened when he was driving their herd of cattle whilst coming from the garden in the company of the now deceased and ten year old Stallon. His defence was that the stone he used which was targeted at the cattle had misdirected and hit the deceased.

The evidence of Stallon Jacob, Alec Zuze, Washington Masadza, Rhoda Chirimumimba and Dr S Matshalaga as contained in the summary of the state case was also admitted in terms of s 314 of the Criminal Procedure and Evidence Act. Stallon was with the accused at the time they were coming from the garden. Washington Sadza and Aleck Zuze received Stallon's report about the assault whilst Rhodha Chirimumimba attended the scene. Dr Matshalaga prepared the post mortem report.

The post-mortem report done on the 13<sup>th</sup> of November 2018 was admitted by consent in terms of s 278(A) of the Criminal Procedure & Evidence Act as Exhibit 1. Among other details it captured that she had a swollen forehead and had blood coming from the nostrils. She also had surface injuries which included a 2.5cm injury on the right temple. She also had a 3x 3cm wound on the left temple and a haematoma on the left forehead. Also described was a haematoma on the right temporal scalp. In addition was recorded a fracture to the frontal skull. In other words, she had suffered detailed injuries as captured in the post mortem report. The cause of death was recorded a left subdural haematoma, blunt force head trauma and assault.

The warned and cautioned statement captured that the accused had freely and voluntarily made. It was admitted in terms of s 256(2) of the CP&E Act as exhibit 3. It captured the accused's admission as follows:

"I do admit to the allegations being levelled against me. I tripped her and she fell down. I struck her with a stone six times on the head and she later died at the hospital."

The state closed its case.

The accused took to the witness stand in his own defence to further expound on his defence as he had indicated in the statement of facts. He attributed his actions to possession by a spirit at the time. He also claimed to have only assaulted her once despite the admitted facts that he struck her six times as also captured in his warned and cautioned statement. He further attributed his signing of the warned and cautioned statement to fear that the police

would assault him at the time. It is not unusual for accused person to try and distance themselves from their warned and cautioned statements during trial as a tactical move.

In cross examination, in explaining why he had signed the warned and cautioned statement he said that he had feared the police because they were carrying a baton stick. However, he admitted that he was never at any time threatened by the police but was just afraid of the facts as he put it. He insisted that he had only struck her once on the temple even against the backdrop of the admitted facts and the warned and cautioned statement which he made at the time of his arrest that he had struck her at least six times. He further insisted that his intention, when he hit her, had been to strike cattle, although again he admitted that he had no explanation for the wounds she sustained as narrated in the post-mortem report and conceded that the doctor would have no reason to lie. He further admitted to realising that his actions were wrong but attributed his actions to an evil spirit that had possessed him at the time. Asked why he had initially said he wanted to hit sheep then moved to goats and then cattle he attributed the nomenclature to be applicable to cattle.

### **Factual and legal Analysis**

Significantly the file from the magistrate's court contained a mental health report from Dr Kajawo and psychiatric nurse Bridget Bande which stated that he was mentally fit and was not suffering from any mental illness. Malingering is uncommon among prisoners if they think that they can get away with it. See for example *S v Nyamukondiwa* HH541 /18 The attempt at acting confused about the difference between sheep, goats and cattle, mere deliberate acts at game playing as was the denial that he had struck her multiple times.

There was no proof by the accused that the statement was not made freely and voluntarily by him. Furthermore, it had been confirmed voluntarily and no threats had been recorded. We therefore find that the statement that he made therein that he had tripped the deceased and struck her six times was freely and voluntarily made. It has a significant bearing on what was his intention at the time.

The state argued in its submissions that he had actual intention to kill by virtue that he targeted a vital part of the body repeatedly against a defenceless victim.

### **13 Intention**

(1) Where intention is an element of any crime, the test is subjective and is whether or not the person whose conduct is in issue intended to engage in the conduct or produce the consequence he or she did.

The fact that he claimed to have been influenced by a spirit is not material. The mental report said he was mentally fit, suffered no delusions. There was no there evidence of diminished responsibility. Equally irrelevant is motive as garnered from the state summary that the deceased had been given an extra chore for the day as they were returning from the garden at which point the accused had attacked the deceased. Motive is not an intended consequence of an action but rather the reason for acting. Section 13 (2) of the Criminal law Codification and reform act is clear that motive is irrelevant unless expressly provided for in the code or an Act.

(2) Except as may be expressly provided in this Code or in the enactment concerned, the motive or underlying reason for a person's doing or omitting to do anything, or forming any intention, is immaterial to that person's criminal liability in terms of this Code or any other enactment.

The reason why motive is regarded as irrelevant is said to be because it is ultimately very difficult to determine a person's motive for a given act. Motive is further said to be unrelated to the degree a person has harmed society.<sup>1</sup> In other words, as long as there was an intention to commit a crime the reason for doing so is not directly relevant to criminal liability.

The intention to kill can be inferred from the repeated number of times that he struck the deceased and also the delicate and vital part of the body that he repeatedly targeted with the stone. Furthermore, the intention to kill is not one that must always be premeditated or deliberated over a lengthy period of time. It can be formed in that instance. The crucial test from the above provision is whether he intended to engage in the conduct or to produce the results that he did. His warned and cautioned statement is clear that he deliberately tripped her before carrying out his dangerous act of repeatedly bashing her head at least six times with a stone. Whilst it is hard to get into his subjective mind given that he was not willing to divulge his intention, preferring instead to proffer his unbelievable version of having intended to hit cattle once with the stone, it is the evidence in this case which speaks to his subjective mind. The substantial evidence of his intent in this instance is found in the essence in the character of the attack, the degree of harm, and the weapon used. All these give rise to an inference of intent to kill the deceased. It cannot be said from the facts that he was not desirous of bringing about the death of the now deceased or that he did not intend the

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<sup>1</sup> See the detailed discussion of the irrelevance of motive by Michael T. Rosenberg†**The continued relevance of the Irrelevance-of-motive maxim** *Duke Law Journal* [ 2008 vol. 57] pp1143 to 1177

consequence of death. Furthermore, there was no evidence of diminished capacity in this case. Under the factual circumstances placed before the court, his counsel's concession was proper that the evidence speaks to murder with actual intent.

We find that the accused intended to kill the deceased.

Verdict: Guilty of murder in terms of s 47(1) (a) of the Criminal law Codification and Reform Act [*Chapter 9:23*].

### **Sentencing considerations**

In mitigation it was argued that the accused is a young man of 25 and was a first offender. He dropped out of school in form one. He did not have a father and grew up without his mother. He only knew that his father lived in Marondera. The only relatives he knew were said to be his uncles. Furthermore he was said have largely admitted to the offence he had saved the court a lot of time. However, this court notes that the accused was not truthful with the court with regards to his intention, preferring to tell a story about wanting to hit goats, cattle or sheep. Persistent lies told by the accused were not consistent with remorseful behaviour nor with saving the court's time. See *S v Tiyavo* HH 293 /15.

The State on the other hand laid emphasis on the seriousness of his offence and the sanctity of life given that a life lost can never be salvaged. Moreover, as the state pointed out, he killed a 54 year old defenceless woman who had died a very painful death as evidenced by the post mortem report which spoke of fractures to the skull with pieces missing. Furthermore, he killed his grandmother who was looking after him and had given him a job making his moral blameworthiness high. He had not in way tried to help the deceased as it was the young child who had gone to seek help. Both the state and the defence lawyer were in agreement that a life sentence would meet the justice of the case.

Section 47 (2) of the criminal code lays out factors that are to be taken into account and that constitute aggravating circumstances in reaching at an appropriate sentence. In this instance those aggravating circumstances as outlined in the Criminal code which range from murders committed in circumstances of insurgency, rape, kidnapping and house breaking to serial murders or those accompanied by torture are not present herein. The section is, however, clear that the aggravating factors listed are not exhaustive.

Where there are aggravating circumstances as outlined in s 47(2) & (3) of the Criminal Code the court can impose either a death sentence, a life sentence or a sentence of imprisonment which must not be less than 20 years. In all other cases as per s 47 (4), the

court is free to impose a determinate period of imprisonment. It is my view that in the absence of the type of aggravating circumstances laid out in the Act, a life term imprisonment, albeit now interpreted in light of the constitutional decision in the case of *Makoni v Commissioner of Prisons and Anor CCZ 8/16* would not be appropriate herein. This is a case for a determinate sentence.

This court notes the aggravating circumstances pointed out by the state. Indeed a life was needlessly lost and intentionally so for reasons only known to the accused. As stated in *State v Shoriwa HH576/16*

“These courts are enjoined to uphold the sanctity of life. Therefore any crime which cheapens the value of human life and dignity of the person will invoke the full force of the law.”

The accused be and is hereby sentenced to 35 years imprisonment.

*National Prosecuting Authority, State’s Legal Practitioners  
Mawadze and Mujaya Legal Practitioners, Accused’s Legal Practitioners*