

THE STATE
versus
TONY JAX NCUBE

HIGH COURT OF ZIMBABWE
PHIRI J
HARARE, 30 October 2017

Criminal Trial

ASSESSORS: 1. Mr Barwe
 2. Mr Gweme

N. Mazvimbakupa, for the applicant
T Nyahuma, for the accused

PHIRI J: The accused was arraigned before this court facing a charge of murder in terms of s 47 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. It being alleged that on the 4th October 2016 at 84 Chipundura Park, Bindura, the accused person unlawfully and with intent to kill or realising that there was a real risk or possibility that death might result assaulted and throttled Faith Arimandi thereby causing injuries from which Faith Amandi died.

The State Case

The State led its evidence by first tendering, by consent, the warned and cautioned statement made by the accused person and marked as Exhibit number 1. The State then applied for formal admission of the evidence outlined in the summary of its evidence, marked as annexure “A” of the following witnesses.

Albert Katobo
John Tivawone
Rumano Simukai
Jephath Gurupira
Memory Nyaruwembu
Anic EIndani Ncube
Brendon Dickson and
Washington Zidenga

Of these witnesses the evidence was accepted by the court.

In his warned and cautioned statement the accused stated the following;

“I have understood the caution of the charge. I do admit to the allegations levelled against me. It was on October 4, 2016 around midnight when I met a lady named Faith at Chipadze shops, Bindura this lady was into prostitution so we agreed to put up for the night at my residence being intimate. She told me that she wanted a payment of US\$20.00. We were ferried by a taxi which dropped us at my residence which is number 84 Chipindura Park, Bindura. I paid US\$3.00 to the taxi driver for the hire. On the same day in the morning Faith said she wanted to leave that is when I checked my wallet and I noticed that my money amounting to US\$60.00 was missing. I then asked her to give me money since we were just two. She said I do not have your money, I was angered and throttled her with two hands whilst she was standing and she fell down, defecating and passed urine. She started breathing heavily until she was breathless. I then realised she was dead. I locked the door to that room, approached my uncle named Washington Zidenga and asked him for his car, saying I wanted to ferry some things urgently and he gave me. I drove the car alone and went to my place of residence where I had left the corpse. I arrived home and parked the car under the verandah of the house close to the entrance door. I found Josphat Gurupira my co-tenant sleeping under the verandah of the house. I lied to him that I had seen the person who owed him at a certain house in our neighbourhood. I did this for him to move away from this house so that I could get a chance to carry Faith’s body, put it in the car. Josphat Gurupira then left. I then put the corpse in two sacks, one on the upper body, the other on the legs. I then ferried the corpse with the car and dropped it along a road at Nyamakura farm, Bindura.”

The evidence of the aforementioned state witnesses was common cause, and it essentially corroborated what the accused stated in his warned and cautioned statement. Albert Katobo testified that on 4th October, 2016 at around 0030 hours he ferried the deceased and the accused using a Toyota Raum from Chipadze shopping centre, Bindura to number 84 Chipindura Park, Bindura.

John Tivawone testified that he observed the deceased’s body at a dust road at Nyamakura Farm, Bindura covered with two empty 50kg sacks.

Alick Lindani Ncube, a sister to the accused stated that accused requested her to accompany him to his place of residence and clean some faeces and put them in a plastic bag she was subsequently instructed to burn.

Harrison Lunga gave evidence in court. He testified that he is employed in the Criminal Investigations Department and that he attended the scene of the murder of Nyamakura Farm. He made certain observations on the deceased’s body part of which included blood clots on the deceased’s nostrils. He also noticed faeces coming from the deceased’s pants.

He caused various pictures to be taken on the deceased’s body lying in different positions and these were admitted as evidence.

He testified that when he took the body of the deceased to Hospital, a post mortem could not be conducted as the body was in a state of decomposition. The external post mortem

examination affidavit produced by Dr Mauricio Gonzale S stated that the cause of death was unascertained due to decomposition.

There is however sufficient evidence that the unlawful conduct of the accused was the cause of death.

This Witness, Harrison Lunga, also testified that accused made certain indications to him and, also indicated that he had taken deceased's mobile phone, a Samsung GTF phone and had exchanged it with his brother in law.

That marked the close of the state case.

Defence Case

In his defence, accused pleaded not guilty to a charge of murder, and submitted that he throttled the deceased with only the intention of inducing her to give him back the sum of \$60.00 that he suspected her of having stolen from his wallet.

He averred that he had no intention whatsoever to bring about the death of the deceased but that in throttling her in the manner he did, this resulted in her death.

He testified that he had spent the fateful day drinking alcohol between 12 midnight and 1am. He indicated that deceased woke up around 5am and wanted to leave. It is at the time that he looked at his wallet and alleges he couldn't find \$60.00 which he had. He testified that he was angry and enraged and he held deceased by her throat. He let go of her when she "was now breathing heavily." He stated that deceased passed away. He was gripped with fear and became confused.

He subsequently asked for a motor vehicle from one Washington Zindega, covered deceased's body with 2 sacks and proceeded to dump the body at Nyamakura farm.

He later proceeded home, and asked his sister to clean the car and house as deceased had soiled herself when he had held deceased by the throat.

Under cross examination the accused testified that before he strangled the deceased he had asked her to give him his money. He admitted that he could see he was hurting deceased and that she was in pain.

On being asked what would happen if someone is strangled accused admitted that a person would die.

Analysis of the Evidence

It was submitted, on behalf of the State that the accused should be found guilty of murder with constructive intent.

It was also argued that in the circumstances death was foreseeable. Accused grabbed deceased by the throat and strangled her in trying to get his money back. It was argued that accused may have applied excessive force resulting in deceased bleeding.

It was also argued that accused conceded that a certain sound came from the mouth of the deceased, which meant that, deceased was no longer communicating with him. Further the State observed that the accused conceded that in strangling a person, a person loses his or her breath.

The State submitted that if those reasons i.e. in accused pursuing his objective of recovering his money, he did foresee death as “substantially a certain result” and yet he proceeded to strangle the deceased.

The State therefore argued that accused should be found guilty of murder with constructive intent.

The State disputed that there was negligence in the present case. It further argued that accused failed to safeguard the life of the deceased.

The State further argued that accused did not find the money he alleged was taken from him. Neither did he exhaust any other means to try to recover his money. He in fact, did not bother to recover his money.

The State submitted that accused did, in fact sleep for a considerable period, and hence, the effect of alcohol may have been diminished.

Accused could therefore not argue that he did not know what he was doing.

The State also argued that accused’s behaviour after the alleged offence, was committed rules out the issue of negligence and speaks to his “intention or state of mind.”

The accused’s defence counsel submitted that everything appears to have happened suddenly. Accused was unable to control his temper.

He submitted that he does not believe that the accused did have the direct intention to cause death of the deceased.

However he made the concession that the issue of *Dolus Eventualis* was established. More particularly in view of the accused’s conduct in grabbing the victim by the throat.

In the court’s view, this concession was properly made. The expression ‘intention to kill’ does not in law, necessarily require that the accused should have applied his will to compassing the death of the deceased. It is sufficient if the accused subjectively foresaw the

possibility of his act causing death and was reckless of such result. This form of intention is known as *dolus eventualis*, as distinct from *dolus directus*. The fact that objectively the accused ought to reasonably have foreseen such possibility is not sufficient. The distinction must be observed between what actually went on in the mind of a bonus paterfamilias in the position of the accused. In other words, the distinction between subjective foresight and objective foreseeability must not become blurred. The factum *probandum* is *dolus*, not *culpa*. These two different concepts never coincide. Subjective foresight, like any other factual issue, may be proved by inference. To constitute proof beyond reasonable doubt the inference must be the only one which can reasonably be drawn. It cannot be so drawn if there is a reasonable possibility that subjectively the accused did not foresee, even if he ought reasonably to have done so, and even if he probably did so. See *S v Malinga and Others* 1963 (1) SA 692 (AD) at p 694 G-H; and *S v Nkombani and Another* 1963 (4) SA 877 (AD) at pp 883 A-C, 890B, 895F.

It was this court's unanimous view that the accused's conduct clearly demonstrated that death was foreseeable.

He persisted in threatening the deceased and did not stop until the deceased stopped breathing.

The court also noted and agreed that excessive force was used to such an extent that accused defecated on herself and had blood coming out of her nostrils.

The court also took regard to accused's conduct in staying with the deceased's body for a long time and planning to carefully have some transport, covering up the body, dumping it at a farm and cleaning up the mess he had created.

All these factors support the arguments propounded, by the State, that accused committed this offence with constructive intent.

Sentence

In considering sentence this court has taken into account what has been submitted on accused's behalf in mitigation.

The accused is a first offender and was 21 years and at the time of the commission of this offence.

He is married and is blessed with one child. His wife left him to live with her parents after this unfortunate incident.

It was submitted that the accused is a youthful first offender. It was also submitted that accused's conduct after commission of the offence demonstrated some great immaturity on his part.

Accused testified in mitigation and was contrite. He apologised to everyone, the court, the deceased's family and his own family.

His father Siphosenkosi Ncube also testified, under oath, in mitigation, that accused's family made some token contribution at the funeral of the deceased. He submitted that his family shared the grief that deceased's family was undergoing.

It was also proposed, on behalf of the accused that the court should consider a rehabilitative sentence in view of the youthfulness and circumstances of the accused.

In aggravation it was submitted that the circumstances surrounding the present case are disturbing and unique.

The manner in which the offence was committed showed no mercy on the deceased. Accused conceded that no money was found on the deceased. In other words, it was conceded that the deceased died for nothing.

The accused was a married man but hired the services of the deceased whom he went on to murder. His conduct after the commission of the offence did not show that he was bothered by what he did.

It was submitted, on behalf of the State, that the present offence falls in the ambit of s 338 of the Criminal Procedure and Evidence Act [*Chapter 9:07*] which stipulates that this court is empowered to impose an appropriate sentence.

The State submitted that a lengthy custodial sentence is called for.

This court is of the view that regrettably offences such as the present one are on the rise. There appears to be a wanton disregard for the sanctity of life.

The right to life is protected by the Supreme Law of this country: The Constitution.

This court emphasises that the right to life is sacrosanct. Everybody, regardless of status, has a right to life.

This court has repeatedly reiterated that the loss of one life is the loss of one too many.

This court does not tolerate the use of violence to resolve whatever disputes. The deceased, in the present case, was a very vulnerable defenceless person who was invited to the accused's resident and lost life due to an allegation that was totally unfounded. She died for nothing.

Accordingly a deterrent sentence is accordingly called for to dissuade like-minded offenders from commission of this type of offence which sadly has been prevalent.

Accordingly the accused is hereby sentenced to fifteen years imprisonment.

National Prosecuting Authority, applicant's legal practitioners
Takawadiyi & Associates, accused's legal practitioners