

THE STATE
versus
JEFREY SITHOLE

HIGH COURT OF ZIMBABWE
MATHONSI J
GWERU 22 MAY 2018 AND 23 MAY 2018

Criminal Trial

M Shumba for the state
H Ndlovu for the accused

MATHONSI J: The night of 30 June 2015 must have been a very sad one for the community of Mkoba Village under Chief Bunina in Lower Gweru. On that night a 54 year old woman, Beauty Ncube, was first subjected to a hoe handle attack with the blows directed to her head instantly causing blood to flow freely from the injuries onto her body. As she ran to the homestead of a local businessman who had earlier given her and her boyfriend a lift from Lower Gweru business centre seeking refuge, the businessman would have none of it. Displaying a lamentable care-free attitude, the businessman sent her away into the night and the predatory hands of her assailant.

The deceased was then intercepted at a thicket and so violently sexually abused that the doctor who examined her body observed grooves on the thighs. At some stage during her ordeal she was struck on the mouth forcing out her two teeth as a result of a complete fracture of the mandible with multiple fragments. According to the pathologist, after the sexual attack she was then battered and smashed to death. So severe and senseless was the attack that there were multiple abrasions all over the body. At another stage, when she probably had long died, her body was dragged on the ground into a thicket presumably to conceal it.

Indeed the pathologist may have run out of space to describe the marks of violence evident on the body from multiple abrasions all over the body, to fractures of the mandible, big

lacerations on the head, marks of strangulation and all the way to a big fracture on the skull. The pathologist had to add other remarks to describe this abomination.

“The body fundamentally the face is covered with soil and herbs, branches, and abundant soil. All the clothes with soil and herbs and grooves on the thighs. The Police did not have the rape kits available but we took the specimens from the vagina (vaginal secretions) and put the specimen inside the sterile tube for posterior analysis.”

At some other stage the deceased was also subjected to strangulation. It is against that backdrop that the accused, then 59 years old and now 62, has been arraigned before this court charged with murder as defined in section 47 (1) of the Criminal Law [Codification and Reform] Act [Chapter 9:23]. He is accused of having perpetrated the heinous crime I have described above. He has not attempted to deny the allegations readily pleading guilty. A plea of not guilty was however entered as required by law.

In his defence outline the accused stated that he was in an intimate relationship with the deceased and that on the fateful day he commenced consuming opaque beer at the local business centre from 4pm and was later joined by the deceased. He was in possession of hoe and axe handles. At some stage Albert Moyo, the main state witness, took a handle from him which he did not immediately pay for forcing him to confront that witness for payment. Notwithstanding that alleged confrontation, himself and the deceased hiked a lift from Moyo on their way home but the two of them had a misunderstanding over his cellphone and beer which the deceased had taken from him.

The accused does not say how that initial misunderstanding panned out but says upon alighting from Moyo's motor vehicle he again picked up quarrel with Moyo over the hoe handle and with the deceased over his cellphone and beer. He suspected that the deceased was cheating on him with Moyo although he does not state the source of that suspicion. Pleading intoxication the accused says that in a state of rage and smitten by pangs of jealousy arising from his suspicion that the deceased had an affair with Albert Moyo, he attacked the deceased with a hoe handle. Significantly he does not explain further what transpired in the bush and how the deceased died.

Almost the entire evidence of the state, except for that of Albert Moyo who gave *viva voce* evidence in court, was admitted in terms of section 314 of the Criminal Procedure and

Evidence Act [Chapter 9:07] as it appears on the state summary. That is the evidence of Joshua Nyamande, the villager who wanted to relieve himself in the bush on 2 July 2015, when he discovered the body of the deceased. When he made that sordid discovery he observed that the body had wounds on the head and clotted blood on the mouth. Her skirt was lifted up exposing her buttocks while there was a visible spoor indicating that the body had been dragged to the point where it was found.

The admitted evidence also includes that of George Maburuse, a police officer based at Maboleni Police station. When he attended the scene he explored it and picked up two teeth which had dropped from the deceased's mouth, and observed a dragging spoor from the spot where the teeth were found to the position where the body was recovered. He also recovered the weapon used, a hoe handle, produced in court as exhibit 5. That exhibit was also identified by Albert Moyo as being the one which the accused had in his possession on the day in question. Maburuse also recorded a warned and cautioned statement from the accused in compliance with the procedure for admissibility which statement was later confirmed by a magistrate at Gweru on 17 July 2015. From the properly conducted indications of the accused he recovered the deceased's panties, wig, leggings and purse containing a cellphone and \$3-00 from the scene of crime.

The evidence of Dr Betancourt, a forensic pathologist at United Bulawayo Hospitals, which I have already alluded to above, was also admitted in terms of section 314 of the Act. The good doctor concluded that the cause of death was:

“endocranial hypertension

- Subdural haematoma, skull fracture
- Severe trauma due to beating injuries
- Strangulation manoeuvres
- Rape.”

In his evidence Albert Moyo rebutted the accused's claims that he had an affair with the deceased or that he ever quarreled with the accused over payment for the hoe handle. In fact according to him he had been pressured by both the accused and the deceased to take the hoe handle when he found the two carousing at his friend Bethule's bottle store earlier in the day with the understanding he would pay for it when he found the money.

The witness also disputed that the accused and the deceased ever quarreled over a cellphone and beer during the time that he transported them from the business centre to the gate of his homestead where they alighted. According to him relations between him and the accused were so good that not only did he regularly give the accused piece jobs to work on his garden, himself and the deceased could afford to wait for the witness by his motor vehicle as he wound up his grinding mill business and he readily gave them a lift home.

The only slight dent in Moyo's testimony occurred when he conveniently did not witness the initial assault of the deceased by the accused even though it occurred about 5 metres from his car as he tried to unlock the gate. He still did not find the need to turn round and observe that assault even though he says he heard the deceased exclaiming why the accused was assaulting her. He however later met the deceased by the gate which he had returned to close. At that stage he observed blood flowing from a head injury and the deceased told him that the accused had assaulted her. By that time the latter was standing across the tarred road still clutching the hoe handle which he had used to strike the deceased.

Moyo said that when he tried to inquire from the accused why he was assaulting the deceased the accused threatened to kill him as well forcing him to rush to his car to pull out his own hoe handle he had obtained earlier from the accused. He used it to threaten the accused before sending the deceased out into the night and indeed into the hands of a murderer who had already exhibited signs of a desire to harm her.

The evidence led by the state clearly shows that it is the accused who caused the death of the deceased under extremely tragic circumstances. When the deceased left Moyo going into the night, the accused was still waiting for her at a distance of about 40 metres. The next thing her body was found in a thicket two days later, badly mutilated.

It remains for us to consider the defence proffered by the accused which boils down to intoxication. In his *viva voce* evidence the accused resorted to a touch and go approach. At one point he stated that what prompted him to resort to violence was the deceased having taken his two "scuds" of opaque beer and leaving the bottle store. He shifted to saying that it was because the deceased had taken his cellphone which to us does not make sense. The moment he realized that story would not fly, he shifted again to say that the assault was triggered by the deceased

wanting to remain with Albert Moyo. Significantly there is nothing in the evidence to suggest that the deceased wanted to remain with Moyo. Therefore there is no foundation for assaulting the deceased for a non-existent issue. The deceased had already alighted from the vehicle with him. She had accompanied him on the way home and had to run back to Moyo. From there she had left going home which is why the accused was able to waylay her. When everything had failed, the accused resorted to hiding behind drunkenness as if everything depended on it.

Consideration of that evidence would be incomplete without reference to his warned and cautioned statement which he gave to the police at ZRP Maboleni on 3 July 2015 when the events were still fresh in his mind. He said:

“I do admit to the charges being leveled against me that I assaulted Beauty Ncube and caused her death. I assaulted her because she had taken my cellphone and beer. I struck her thrice on the head and once on the mouth with a hoe handle. I then dragged her into a bush at an anthill and left her there dead. I do not admit to the charge of raping Beauty Ncube. I and Beauty had sexual intercourse after agreeing as were in love.”

The state has not pursued the rape charge it initially preferred against the accused. What is clear however is that at the time that the deceased left Moyo the assault has already commenced and she was by then already bleeding. What it means therefore is that if the sexual intercourse took place at the scene where the body was recovered, which is close to where her under garments were recovered, the accused must have had sexual intercourse with a woman who was bleeding profusely from head injuries sustained as a result of an assault perpetrated on her by the same person who was being intimate with her. She probably had by then lost two teeth which were picked from the scene and had a fractured mandible. Under those circumstances could sexual intercourse be consensual? Both the medical evidence and indeed the accused's own testimony confirm that the deceased was sexually abused before being killed. Sexual intercourse could not have been consensual when her under garments were hidden, when her buttocks were exposed and she had already been assaulted and was injured. We conclude that she was raped and killed to conceal the offence.

Let me return to the issue of intoxication. Section 219 of the Penal Code defines intoxication as intoxication resulting from the ingestion of any form of alcohol or drug. It defines voluntary intoxication as any intoxication which is voluntarily induced. It has not been

suggested that in this case the accused was involuntarily induced. In fact the evidence suggests he voluntarily partook in the exercise of alcohol consumption. It follows therefore that whatever intoxication he endured was voluntary.

As a defence to a specific intent crime intoxication is a very elusive proposition. This is because once it is established that an accused person formulated an intention to commit an offence, intoxication cannot possibly assist such an accused person. I say so because in terms of section 220 of the Code intoxication is only a complete defence where the person charged was involuntarily intoxicated when he or she committed the offence. In addition the defence of intoxication can only be a full defence where the person was so intoxicated to such an extent that he or she lacked the requisite intention, knowledge or realization. Otherwise even involuntary intoxication is only a complete defence in offences involving negligence.

In terms of section 221 (1) of the Code:

“If a person charged with a crime requiring proof of intention, knowledge or the realization of a real risk or possibility—

- (a) was voluntarily or involuntarily intoxicated when he or she did or omitted to do anything which is an essential element of the crime; but
- (b) the effect of the intoxication was not such that he or she lacked the requisite intention, knowledge or realization;
such intoxication shall not be a defence to the crime, but the court may regard it as mitigatory when assessing the sentence to be imposed.”

In any event, even if the circumstances in which intoxication were a complete defence existed, that would be cold comfort really for a voluntarily intoxicated accused person because section 222 requires that a person charged with a crime requiring proof of intention, knowledge or the realization of a real risk or possibility as is the case with murder defined in section 47 (1) of the Code, who is proved to have been voluntarily intoxicated and the effect was such that the person lacked the requisite intention, knowledge or realization, be found guilty of voluntary intoxication leading to unlawful conduct instead of the crime originally charged. However when it comes to punishment, it is the same as if he or she had been found guilty of the crime originally charged.

Therefore intoxication would be of no help to the accused at all. In light of the fact that I am not satisfied that intoxication negated intention in the accused’s case, I consider it

unnecessary to be detained by such legal niceties. This is an accused person who was demonstrably in control of all his mental faculties. He had the presence of mind to sell his wares to Albert Moyo and aggressively market a hoe handle; the presence of mind to realise Moyo was about to close his grinding mill and drive home and he therefore hiked a lift. When he decided to physically attack the deceased he had the presence of mind to be lustful and demand sexual favours from her and to perform the act. After the heinous crime he still remembered to drag the body to an anthill and a thicket to conceal the crime. In light of all that I conclude that he indeed was capable of formulating an intention, knowledge or realization. Therefore intoxication is not available to him in whatever form as a defence. It is accordingly rejected.

I therefore come to the inescapable conclusion that the accused knowingly killed the deceased. Considering the circumstances of how he went about it, the weapon used and the ruthlessness with which he executed it as attested to by the pathologist, which shows that violent and excessive force was used directed to the vulnerable parts of the body, the only logical conclusion is that the accused intended to bring about the outcome of the death of the deceased. He achieved it and having achieved it he concealed the evidence. He therefore had actual intention.

Accordingly the accused is hereby found guilty of murder with actual intent.

Reasons for sentence

The accused was 59 years old when he committed the offence. He is now 62, a fairly advanced age. He had consumed alcohol on the day in question and must have been intoxicated. He is a first offender who pleaded guilty to the offence and therefore curtailed proceedings.

The accused has been in custody since his arrest in July 2015. He co-operated with the police and the court. He had lived a blameless life for a long time before he strayed at the age of 59. He has offered to compensate the deceased's family with two cows.

Unfortunately nothing really can atone for the loss of life under circumstances obtaining in this case. Aggravation completely obliterates all the mitigating factors. What aggravates the offence is that the accused targeted a defenceless woman and killed her like a wild animal because even a domesticated animal is not killed the way he killed the deceased. There was

absolutely no justification for what he did. The killing itself was senseless but he also took time to sexually indulge himself and thereafter tried to obliterate the evidence not just by terminating the deceased's life but by concealing the body.

In terms of section 47 (2) of the Code in determining an appropriate sentence to be imposed upon a conviction of murder, a court shall regard it as an aggravating circumstance that the murder was committed by the accused in the course of rape or other sexual assault to the victim. I have already said that the deceased was sexually abused before being killed. In fact there is a strong possibility that she was killed and her under garments hidden in order to conceal the crime.

In terms of section 47 (4) of the Code;

“A person convicted of murder shall be liable –

- (a) subject to sections 337 and 338 of the Criminal Procedure and Evidence Act [Chapter 9:07], to death, imprisonment for life or imprisonment for any definite period of not less than twenty years, if the crime was committed in aggravating circumstances as provided for in subsection (2) or (3); or
- (b) in any other case to imprisonment for any definite period.”

Although in a case of murder committed in aggravating circumstances the court may impose the penalty of death, it still has the discretion not to impose it but its hands are tied to imposing a sentence of not less than 20 years. In our view considering the age of the accused who is already in the afternoon of his life, we are disinclined to impose capital punishment. His age has served him from the gallows. However this was an extremely bad case of the abuse of a woman which this court frowns upon. We cannot have a situation where men use their strength to victimize women sexually and physically and then kill them in such a callous manner. This court will be failing in its duty as the arbiter of fairness and justice if it were to release such a person back to society. The accused deserves to be permanently removed from society, if for no other reason but to protect society from his predatory instincts.

Accordingly the accused is sentenced to life imprisonment.

National Prosecuting Authority, state's legal practitioners
Chitere Chidawanyika and Partners, accused's legal practitioners