

THE STATE
versus
KUDAKWASHE FIRISIYANO

HIGH COURT OF ZIMBABWE
MUSAKWA J
HARARE, 22 September and 14 October 2014

Criminal Trial

Assessors: 1. Mrs Shava 2. Mr Tutani

M. Manhamo, for the State
G. Zimbizi, for accused

MUSAKWA J: The accused is charged with contravening s 47 of the Criminal Law (Codification and Reform) Act [*Cap 9:23*]. The state should always be specific in its citation as s 47 comprises subs(s) 1, para(s) (a) and (b). Of course no prejudice was occasioned to the accused as he was able to plead to the indictment.

In brief, the deceased was a thirty four year old mother of two. She resided in Shackleton whereas the accused resides in Murereka, Lions Den.

On 29 June 2013 the deceased attended a musical show in Murereka in the company of a friend. At some stage of the night the deceased had an encounter with the accused. Her naked body was found on the following day near the local Catholic Church. The cause of death was established as cervical spinal injury.

The accused's defence was to the effect that he had been having an affair with the deceased prior to her death. On the fateful day they planned to attend a musical show. The deceased was the first to attend whilst the accused attended to their brick moulding business with his brother. Ironically the accused had told the deceased to wear the clothes he had bought for her.

Upon following to the music venue the accused proceeded to the back of the bar. He was shocked to find the deceased being intimate with another man. The deceased then advised the man that her husband had come and the man bolted.

The accused confronted the deceased who shouted at him and told him he had no right to challenge her as they were not married. They proceeded outside the wall to the premises whereupon the deceased told the accused she no longer loved him. This prompted the accused to demand the items which he had given to the deceased. These comprised a tracksuit, skin tights, black boots and a cell phone.

The deceased suggested that they go to a friend's place near the Catholic Church where she would get alternative clothes. Whilst on the way the deceased changed her mind and refused to surrender the clothes. The accused then grabbed the deceased by the neck and ordered her to remove the clothes. He then left and does not know what happened to the deceased.

With the stage having been set the state sought into admission the evidence of all state witnesses as summarised in annexure "A" save for that of the doctor who conducted the post-mortem examination. This approach was shot down and I will revert to it in detail later.

From the evidence the state eventually led the court heard that the deceased cohabited with one William. This William had been away to Kariba for two weeks prior to the tragic event.

One other sordid aspect of this matter is that the deceased and her friend Queen Nhamo were women of easy virtue. Despite Queen Nhamo claiming to be a fruit vendor it emerged from her testimony that they did not mind supplementing their income by peddling sexual favours. This is why on the day in question Queen Nhamo got a Police Officer to purchase for her beer and food. She was later to retire for the night with the same officer.

Queen Nhamo claimed not to know the accused person. She lived within the same neighbourhood with the deceased. The deceased frequently visited her in the company of William. Surprisingly, Queen never visited the deceased's residence, attributing this one way relationship to the fact that the deceased was "married" whereas she was not.

One remarkable aspect which could not have emerged without *viva voce* evidence is that on the fateful day the deceased informed Queen that the clothes she was wearing had been purchased by William. William had not finished paying for the items. The deceased had had a dual sim card Nokia D200 for about a month. Surprisingly Queen made the court believe that she was not curious to know where the deceased had obtained the phone. This is

particularly so as an opportunity had presented itself by the deceased volunteering information regarding her attire. Queen had not seen this attire previously.

With cohabitation appearing to be the order of the day and being accorded the status of marriage, the court heard that the accused had moved in to stay with his lover, Chipo Bokosha three days before the incident. The two had been in love for three months. Chipo had left the Ministry of Transport quarters within Lions Den upon termination of employment. She knew that the accused and his brother were engaged in brick moulding. She also joined the venture.

According to Chipo on the fateful day the accused left home to attend a musical show. Later at night after she had retired to bed the accused returned and offered her some clothes. She simply placed the items aside. On the following day she discovered that apart from being used the clothes had blackjacks sticking on them. She found this objectionable and took up the issue with the accused's brother and parents.

Whilst returning home Chipo heard about the discovery of a naked body at the Catholic Church. With a description of the clothes that the deceased was last seen wearing matching what she had been given by the accused, she visited the Police Station. It was suggested that when the accused returned home she should lock up the accused and alert the Police Officers. This is what she did when the accused subsequently turned up. The accused was arrested by some uniformed officers who handed over the case to Criminal Investigations Department.

Although Constable Trymore Bobo said he did not notice anything unusual at the crime scene no specimen were taken from the deceased to establish whether she had had sexual intercourse. Such basic investigative techniques seem to be regularly circumvented. With a naked corpse, it should be routine to establish whether there was sexual violation.

The post-mortem report in respect of the deceased noted the following-

“Cervical spine injury

Bruise to face

Lacerated left ear

Deformed cervical spine.”

Doctor Madzura who conducted the autopsy testified that he has been in practice since 2011. He made an external examination of the body. The body was placed in its anatomical position, that is supine on its back with the hands on its sides. It was then turned and palpated to note any abnormalities.

The doctor noted that the head was not lying in its normal position. Hence the finding of cervical deformity at the C3-C4 level of the neck. This is the area that supplies impulses to the diaphragm. With such an injury death would have been swift.

He also noted laceration of the left ear. A laceration being a cut, he noted that it had a pattern of a human bite.

Concerning the spinal injury he was of the view that it was in the nature of a dislocation. Such an injury may be caused by a force that displaces bones from their confinement and result in pressure to the spinal cord. Even bare hands, if exerted with force may cause such injury.

On the other hand the accused testified in his defence. He maintained that he had had an affair with the deceased for three months. He was hurt to see her being intimate with another man. He was further angered when the deceased told her she was no longer interested in him. That is what prompted him to demand the clothing. Despite having stated in his evidence in-chief that the deceased was the first to attack him, he conceded under cross-examination that he was the first to grab the deceased by the neck. The deceased then retaliated by grabbing him by the neck and they struggled. He then forcefully pushed her and she fell down within the bed of sweet potatoes. The place had grass, remnants of sweet potato plants and stones.

The accused denied that he meant to kill the deceased or that he realised that death might occur. He even denied foreseeing death resulting from his conduct. There is a contradiction between the defence outline and his testimony regarding how he got the deceased's clothes. Nonetheless he confirmed that he undressed the deceased whom he left lying down and crying.

Both the state and the defence submitted that a verdict of culpable homicide should be returned. As remarked earlier, the case was marred by the absence of forensic evidence on whether the deceased had had sexual intercourse. This is despite the State having alleged in its summary that the accused raped the deceased twice.

Taking into account the brief summaries of the witnesses' evidence it was surprising that the State had initially sought to proceed entirely by way of admissions. Whilst it is encouraged to curtail proceedings by way of admissions where the evidence is not contentious this should not have been the case in the present trial where some aspects were not clear. As is apparent what the state sought to be admitted was too banal such that had the matter proceeded thus it was clear a charge of murder would not have been sustained. In shooting down this approach I was fortified by the remarks of McNally JA in *S v Dehwe* 1987 (2) ZLR 231 in which at 242 the learned Judge of Appeal had this to say:-

“A murder trial differs from other trials, not only in the sense that it involves a possible death sentence, but also in that it involves a consideration of extenuating circumstances at a separate and distinct stage of the trial. Because murder, more than other crimes, involves human passions whose operation may often give rise to circumstances of extenuation, it is vitally important, before a decision on extenuation is made, that the court has some impression of the motives and relationships which have led to the killing. How can it gain a meaningful insight into these vital matters simply by reading a summary of the evidence prepared by someone wholly remote from the realities? There is no opportunity to assess the character of the witnesses, to absorb the atmosphere of the time, to gain some impression of the relationships between the accused and his fellow workers, between the deceased and the accused or indeed between the deceased and the other witnesses.”

One other point of criticism is that the state case summary is pitched to allege murder in the course of rape and theft or robbery. No such evidence was ever led. It is unacceptable to make such damning allegations which the state knows it is never going to prove. In this respect see *S v Bhaiwa* 1988 (1) ZLR 412 (SC).

It is possible that the accused may have had an affair with the deceased. What is incredible is the accused's claim that he intended to marry her. This is so considering his assertion that she was of loose morals. It is unconvincing that he believed she would reform with marriage. In any event the accused was already cohabiting with Chipso. Considering that he knew the deceased to be of loose morals he could not have been incensed by seeing her being intimate with another man.

Nonetheless the accused must have had a disagreement with the deceased, the nature of which cannot be conclusively established. The accused then grabbed the deceased by the neck. He must also have bitten her on the left ear.

According to the accused, he was upset to see the deceased being intimate with another man. Perhaps it is an aspect of selfishness and jealousy that drove the accused to detest being double-crossed. That the deceased may have been up to some mischief cannot be

discounted. When Queen sought to invite her for a meal she failed to locate her. She had no idea where the deceased had gone to and eventually left without seeing her.

Can it be inferred that the accused deliberately killed the deceased. If so, what was the motive? There being no direct evidence we refrain from inferring such intention to kill. The absence of forensic evidence militates against making such a finding of intention to kill.

As for whether the accused realised the real risk or possibility of death, there is the issue of the manner of assault to be considered. Doctor Madzura testified that he did not see any indentations on the deceased's throat. He further stated that cervical spinal injury can be caused by bare hands or a hard object (blunt force). Nonetheless, in either case severe force would have been required. What was not clear was whether manipulating the neck with bare hands caused the injury.

The other explanation by the doctor was that this type of injury can also depend on the nature of the object that caused it. In the present case it can be the nature of the fall and the surface where the deceased fell. What is required is the force that displaces the bones. If the cervical spine was exposed during the fall, it may have led to the deformity.

What we have before us is a borderline situation. Having been angered the accused grabbed the deceased by the neck. He must also have bitten her on the left ear. He then forcefully pushed or shoved her and she fell down in a bed of sweet potatoes. The state did not lead evidence on the layout of the scene of crime. The accused then stripped the deceased and left her lying down and crying. Either force was applied to the neck with bare hands or the deceased was violently thrown to the ground. The probability seems to be the latter act which led to the injury.

According to s 11 of the Code, a person shall not be held criminally liable unless his or her conduct caused or substantially contributed to the consequence. A person's conduct is deemed to have caused or substantially contributed to a consequence if it is the factual cause of the consequence. What it means is that but for the conduct the consequence would not have occurred. The conduct should also be the legal cause of the consequence in that it must be a reasonably foreseeable consequence of such conduct or was brought about by a new cause after the conduct, which cause was itself a reasonably foreseeable consequence of the conduct.

There is no doubt that the accused's conduct led to the deceased's death. But for assaulting the deceased in the manner he did, the deceased would not have died. It is immaterial that the accused left the deceased alive. He left the deceased in a helpless state,

which means she was mortally injured. It was also reasonably foreseeable that in grabbing the deceased forcefully by the neck and then pushing her with force she might be seriously injured.

In view of the possibility that the deceased might have sustained the fatal injury from a fall it cannot be said that the accused harboured some intention by way of realisation of the real risk or possibility of death. This is buttressed by the State's failure to lead forensic evidence which might have supported sexual assault. It is therefore unsafe to return a verdict of contravening s 47 (1) (a) or (b) of the Code.

Nonetheless a reasonable person would not have conducted himself in the manner the accused did. He is therefore found guilty of culpable homicide.

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