THE STATE

Versus

RODNEY KAWOME

IN THE HIGH COURT OF ZIMBABWE
KABASA J with Assessors Mr Sobantu and Mr Damba
BULAWAYO 12 AND 22 JULY 2024

Criminal trial

K. M. *Nyoni,* for the state
N. Mpofu, for the accused

KABASA J: - The accused appeared before us on a charge of murder as defined in section 47(1) of the Criminal Law (Codification and Reform) Act [Chapter 9:23]. He pleaded not guilty.

The state's case is that on 20 August 2023 the now deceased arrived home swollen and bleeding, following behind her was the accused who was her boyfriend. The accused was unhappy with the fact that the deceased had been drinking at a shebeen. He ordered her into their bedroom where he assaulted her and would not relent despite pleas from a tenant to stop the assault. The following morning the now deceased was unresponsive to attempts to wake her up. She was eventually removed from the bedroom lifeless and her body was conveyed to United Bulawayo Hospitals for postmortem examination.

In his rather long winded defence the accused explained the events of that day and attributed the injuries observed on the deceased's eye and face to the fact that she kept falling as they walked home from the shebeen where he had fetched her from. She provoked him as she relentlessly shouted at him objecting to the fact that he had taken her away from the shebeen. The insults turned to physical abuse and he reacted. He slapped her twice and held her tight by the neck in an effort to calm her down. He did not intend to kill her and prayed that he be found guilty of culpable homicide.

The state led evidence from two witnesses. The two are husband and wife and were renting at the accused's house at the relevant time. Their evidence was more or less the same.

The deceased arrived home crying and her face and eye were swollen. She was bleeding from the nose and mouth. The accused arrived about 2 minutes later, ordered her to go into their bedroom where sounds of assault could be heard with the deceased crying out and pleading with the accused. Attempts to stop the assault by the tenant only succeeded at the third attempt. The following day the deceased was unresponsive, a report was made to the police and her lifeless body was removed from the couple's bedroom.

If there is anything to criticize about these two witnesses it would only be the fact that they wanted to say everything they could recall, including detail that was not necessary or relevant. Apart from that they gave their evidence well and demonstrated that they vividly recalled the events of that night. They were credible witnesses whose evidence could be safely relied on.

Their observations of the deceased's condition was confirmed by Doctor Pesanai who conducted the postmortem. He noted that the deceased had periorbital edema on the right eye, blood from the nose, blood stained froth from the mouth and multiple excoriations on both cheeks.

The cause of death was asphyxia, manual strangulation and assault. The deceased's hyoid bone was fractured and the subconjunctival haemorrhage in the right eye was consistent with manual strangulation.

There was therefore no doubt that the deceased met her death at accused's hands. It was evident he was trying to downplay the extent of the assault and the strangulation but his efforts were in vain. We say so because he initially sought to explain the injuries observed on the deceased as having been caused by her falling due to drunkenness. His conscience must have gotten the better of him as he eventually accepted that the injuries observed were not from falling. He assaulted her, not just twice but many times. He also sought to suggest that he merely held her neck so as to push her away but eventually accepted that he strangled her.

The only issue is whether he was provoked, snapped and acted in the heat of the moment so as to reduce the charge of murder to culpable homicide. He also appeared to suggest that he was intoxicated. Is voluntary intoxication a defence available to him?

Section 221 of the Criminal Law Code provides that:-

"221 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 realisation:

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."

Both witnesses testified to the effect that the accused appeared normal/sober the night in question. The following day however they both said he was drunk and understandably so as he started drinking early that morning but this was after the demise of the deceased. The point is the accused was not intoxicated, a fact borne out by his clear recollection of the events of that night. If one is so drunk as to fail to appreciate their actions they cannot possibly be selectively so. By this we mean they cannot on one hand give a detailed account of what it is they seek to portray as the events which led to the deceased's death and at the same time plead intoxication as a way of escaping liability for the actions which led to such death.

Even if it had been shown that he was voluntarily intoxicated to an extent that he lacked the requisite intention, knowledge or realisation the law says he still is guilty of voluntary intoxication leading to unlawful conduct and liable to the same punishment as if he had been found guilty of the crime originally charged.

This indicates the need for people to drink responsibly and where they fail to do so and become senselessly inebriated, they cannot escape liability for no one would have plied them with intoxicating liquor and so they are held accountable for their actions.

This is however not the case *in casu.* The accused was not intoxicated. He knew and appreciated what he was doing and had a sound recollection of what he sought to portray as the events of that night. Intoxication, if such had been proved to have been the case, can only be mitigatory.

What of provocation? Is this defence available to him?

Section 239 of the Criminal Law Code provides that:-

"239(1) If, after being provoked, a person does or omits to do anything resulting in the death of a person which would be an essential element of the crime of murder if done or omitted, as the case may be, with the intention or realisation referred to in section forty-seven, the person shall be guilty of culpable homicide if, as a result of the provocation –

(a) he or she does not have the intention or realisation referred to in section forty-seven, or

(b) he or she has the intention or realisation referred to in section forty-seven but has completely lost his or her self-control, the provocation being sufficient to make a reasonable person in his or her position and circumstances lose his or her self-control."

This two fold approach was enunciated by MATHONSI J (as he then was) in *S* v *Ndlovu* HB 293-17 where the court said:-

> "Our law applies a twofold approach to provocation. The first stage is to apply the normal subjective test to decide whether there was an intention to kill. If there was intention the court should proceed to the second stage formulated in *S* v *Nangani* 1982 (1) ZLR 150 (S) as, was the provocation such as would be reasonably be regarded as sufficient ground for loss of self-control that made the accused act against the deceased the way he did? If the answer to that question is in the affirmative then the accused must be found guilty of culpable homicide."

In *Attorney-General* v *Tobaiwa and Ors* 1980 ZLR 192 BARON JA stated that the spontaneity of the reaction is vital for the defence of provocation to succeed.

> "It is the essence of a defence of provocation that has the effect of reducing the crime from … or murder to culpable homicide that the reaction to the provocation must be sudden, in the sense that the person provoked acts on the spur of the moment and in circumstances where he has temporarily lost his power of self-control and does not appreciate what he is doing." (*S* v *Tsiga* AD 77-76)

Turning to the facts *in casu*, the accused said he got home to find that his girlfriend of 8 years was not there. He called repeatedly and when she finally picked up he could tell she was drunk. He followed her to the shebeen and found her drinking alcohol in the company of men. He took her from there and was assaulting her along the way. On arrival home she sought refuge from their tenant but he ordered her into their bedroom where the assault continued.

The tenant tried to stop him not once, not twice but three times and all that time the deceased was pleading with him, apologising and professing her love for him. He would stop each time the tenant tried to dissuade him and continue after getting rid of the tenant.

Was he acting on the spur of the moment? Did he snap and lost self-control such that he did not appreciate what he was doing? Certainly not.

We say so because at that shebeen the deceased was not found in some compromising position with a man. She was drinking alcohol in the company of men not one man. The accused walked with her back home assaulting her and continued with the assault long after they arrived home. He did not end with just the assault but strangled her applying enough pressure to fracture the hyoid bone.

The *Merriam-Webster (2016) Medical Dictionary* provides the definition of the hyoid bone as:

> "A u-shaped bone or complex of bones that is situated between the base of the tongue and larynx and that supports the tongue, the larynx and their muscles."

Manual strangulation is a deliberate and purposeful action, throttling someone and depriving them of air. Such is not achieved by a mere push or a fleeting grabbing of the neck.

In that bedroom the deceased could be heard crying, a cry of pain as described by the first witness. She was pleading and trying to "cajole" the accused by professing her love for him to no avail. The evidence showed that it was the deceased who was on the receiving end and not the accused.

A person's unbridled anger which makes them seek to punish someone should not be excused as loss of self-control. There was no loss of self-control given the circumstances of this case. The accused did not snap and act in the heat of the moment. Sight should not be lost of the fact that when accused and the second witness went out to talk at the witness's third attempt to stop the assault the first witness could hear the deceased crying and talking although she could not hear what she was saying. This meant the deceased was still alive. She had not been strangled. The strangulation must have occurred later after the accused and the second witness had parted ways with each one going to their respective bedroom to sleep.

He chose to strangle the deceased to the point of fracturing the hyoid bone. Being deprived of air invariably attracts a reaction from the victim. The accused was relentless and in his defence outline he said he strangled her for about 5 minutes. Five minutes being manually strangled is a long time and the one strangling cannot possibly fail to appreciate that such deprivation of oxygen will most certainly lead to death as it did *in casu*. Why was he strangling her at a time he had spent time talking to the second witness outside the house?

The accused knew what he was doing and chose strangulation after subjecting the deceased to the assaults which the witnesses did not witness but whose loud sounds were unmistakable.

The accused had ample time to cool down from the time he called the deceased and learnt of her whereabouts up to the time he fetched her and took her home. His anger or resentment had no spontaneity to it and cannot avail him as a defence. It can, at most, be mitigatory.

He must have desired death when he strangled the deceased (*S* v *Mugwanda* 2002 (1) ZLR 547 (S), *S* v *Tomasi* HH 217-16).

Even if it can be said he did not set out to kill, he realised his conduct could cause death but continued nonetheless despite the risk or possibility.

In any event whether the murder was committed in terms of section 47(1) (a) or (b) is of no consequence. In *S* v *Mapfoche* SC 84-21 MAKARAU JA (as she then was) had this to say:-

> "Thus, under the section, it is not necessary, as was the position under the common law, to find the accused guilty of murder with either actual intent or with constructive intent. Put differently, it is not necessary under the Code to specify that the accused has been convicted

under s47 (1) (a) or (b). Killing or causing the death of another person with either of the two intentions is murder as defined by the section."

We posed two questions earlier on, whether provocation or intoxication were available to the accused as defences. The answer is in the negative.

We are therefore satisfied the state has proved its case beyond a reasonable doubt and accordingly find the accused guilty as charged.

Sentence

In assessing sentence we considered that you stand convicted of murder. On 20 August 2023 you followed your girlfriend, now deceased, to the shebeen where she was drinking beer. You took her from there and along the way you assaulted her until you got home. Once home the assault continued and attempts to stop you failed. You eventually strangled her resulting in her death.

You are a 37 year old first offender. You had tendered a limited plea to the lesser offence of culpable homicide. That was an indication of some measure of contrition.

You have 3 children, aged 7, 5 and 3. They are still young and dependent on you for sustenance.

In aggravation we considered that a life was unnecessarily lost. In 8 years you must have known that the deceased drank alcohol. You followed her to the shebeen and allowed your anger to fester. There was no provocation as you did not react in the heat of the moment. Three times your tenant tried to stop you from assaulting the deceased and you would stop just so you could get rid of your tenant before continuing with the assault.

Gender based violence is a scourge which is not abating. Women are dying at the hands of those who profess to love them.

Life is a gift to be treasured. Courts have time without number urged society to respect the sanctity of life. No one should lose their life at the hands of another.

The deceased died a painful death. Strangulation deprives the victim of air and you ignored her distress for distressed she must have been as she must have struggled to breathe but you were unrelenting.

Strangulation is a most cruel way of taking another's life.

The presumptive penalty for murder is 15 years where there are mitigatory factors as outlined in the sentencing guidelines. None of them are present in your case. 20 years is the presumptive penalty where the murder is committed in aggravating circumstances as outlined in the same guidelines. The manner in which you killed the deceased calls for a penalty greater than 15 years. You seem genuinely contrite and it is for that reason that we settled on 18 years imprisonment.

You are accordingly sentenced to 18 years imprisonment.

National Prosecuting Authority, state's legal practitioners
Cheda and Cheda Associates, accused's legal practitioners