

THE STATE

Versus

TAPIWANASHE CHIVENDE

IN THE HIGH COURT OF ZIMBABWE

MOYO J with Assessors Mr A.B Mpofu and Mr W.T Matemba

GWERU 18 MAY 2022

Criminal Trial

M. Shumba, for the state

Ms T Masaka, for the accused

MOYO J: The accused person faces a charge of murder, it being alleged that on the 23rd of June 2020 at house No. 1418 Light Industry Gokwe, the accused caused the death of the deceased Anywhere Tshuma by assaulting her and strangling her. The accused denies the charge.

The following were tendered into the court record:-

- the state summary
- the defence outline
- the accused's confirmed, warned and cautioned statement
- the post mortem report

They were all duly marked.

The evidence of following witnesses was admitted into the court record as it appears in the state summary:-

- (1) Fortune Shava
- (2) Forgiven Zimunya
- (3) Jimmy Nkomo
- (4) Polite Kabunza
- (5) Tafara Sibanda
- (6) Charity Ncube
- (7) William Zulu
- (8) Kokerai Mandava
- (9) Welcome Dube
- (10) Dr Juana Rodriguez Gregori

The state led *viva voce* evidence from Eva Bvimbi. He did not witness the incident being the subject matter of these proceedings but he saw accused and deceased prior to the incident and he later saw deceased's body the following morning in her bedroom. The accused person gave evidence for the defence. The crux of his evidence is that deceased was a former girlfriend of his. When they met on that date they rekindled the relationship. He then slept at deceased's place. He states that both himself and deceased and their friends drank beer on the night in question. He told the court that later in the night deceased asked him to leave as her boyfriend was coming. Deceased insulted him telling him that he was not man enough and that he could not satisfy her sexually. He then became angry slapped deceased and then strangled her. She was on the bed. When he realized that she was not fine he then put her on the floor, for her to receive sufficient air. The deceased's child cried and he attended to comfort the child then he left. He left deceased lying on the floor facing upwards. In his confirmed warned and cautioned statement, which is also detailed, accused states that deceased told him

to leave later saying her usual boyfriend was about to come. He then told deceased that she was now taking him for granted and assaulted her on the breast with his knee and open hands. He then strangled her to death. In his evidence in chief accused stated that he was too drunk to be in control of his senses. He also stated that deceased provoked her by saying he was not man enough and had failed to satisfy her sexually. In essence accused's defence is that he acted out of anger and also that he was drunk and therefore could not appreciate the consequences of his actions.

The version by the accused person is that he assaulted deceased and strangled her. This is in his confirmed warned and cautioned statement. The confirmed warned and cautioned statement is admissible as evidence in the absence of any challenges. Accused in his defence outline never challenged the confirmed warned and cautioned statement meaning it is a true version of what transpired. In terms of our law the burden is on the accused person to challenge a confirmed warned and cautioned statement which he never did until cross examination which was too late. In his defence outline the accused person emphasizes anger as a result of provocation as his defence. In his evidence in chief and cross examination however accused also brought in the aspect of drunkenness. This court will adopt the version in his confirmed warned and cautioned statement as it is the version that he gave when events of this case were still fresh in his mind. It is thus the correct version. Accused tried to tell the court that the police harassed and threatened him but the nature of the detail he gave in the statement could not have been imposed on him by the police. The statement is elaborate and therefore could only be his version. It is thus not accepted that the statement was not given freely and voluntarily, especially considering that it was confirmed by a Magistrate and even to his defence counsel he never protested the warned and confirmed statement as it was never raised in these proceedings.

Even if accused had been drinking beer on the day in question, his appreciation and vivid narrative of the events of that day strip him of any incapacity to comprehend them. He may have been drunk but the vivid account given by him shows that he was in control of his senses. Again, on the issue of anger, the accused and deceased had long separated, the deceased had told accused that she was now a lady of the night. In his evidence in chief he gave the impression that the deceased and him rekindled their love affair but clearly that is not as per his confirmed warned and cautioned statement as in his warned and cautioned statement he asked deceased if she was going to charge him for sexual favours since he was her former boyfriend and deceased charged him \$50-00. He said he did not have \$50-00 and they settled at \$35-00. It therefore is not true that accused and deceased rekindled their relationship and that another man was to come later in the night and therefore provoking and angering accused. There was absolutely no provocation as deceased had told him that she was now a lady of the night and that he also had to pay for that service. This also strips accused of the defence that he lost his sense of control in the face of provocation as clearly from his own confirmed warned and cautioned statement there was no provocation. Deceased had told her she was in the business of being a lady of the night and when she asked him to leave so that the next client comes, that could not have been offending to the extent of losing self control.

We then assess what the accused is guilty of.

The accused person acted unlawfully in the circumstances and his confirmed warned and cautioned statement is admissible evidence in this regard. It is also corroborated by the post mortem report that confirms that deceased died of strangulation in line with accused's account that he strangled her.

The state submitted that the accused had the requisite legal intention to commit the crime of murder but defence counsel submitted that the legal intention is not there and that instead accused was negligent. At page 96 of the *Guide to Criminal Law in Zimbabwe 2005 Edition* Professor Feltore gives the distinction between murder and culpable homicide as follows:-

“Where it is alleged that x had legal intention to kill, x will usually deny that he foresaw that his actions would result in death. The question then is whether, as a matter of inference, he did have such foresight despite his denial. He can only be convicted of murder if the only reasonable inference that can be drawn from the facts is that he had legal intention to kill. If the court draws this inference, the court decides that he must have and did foresee the possibility of death. (In effect a finding that he is lying that he did not see the possibility of death.”

From the facts of this matter, clearly, the accused must have foreseen the possibility of death from strangulation as no other result would be expected from strangulation. It deprives the victim of oxygen and therefore will reasonably cause death. It is for these reasons that the court rejects accused’s assertions that he did not foresee death, as his foresight can be drawn as a matter of inference from his actions. He certainly cannot stand here and tell us that he strangled deceased but did not foresee death as a reasonable result from that action.

It is for these reasons that the accused person is convicted of murder with constructive intent.

Sentence

The accused person is convicted of murder, he is a first offender, is a youth. He is a breadwinner for his 2 minor children. The accused has spent almost 2

years in pre-trial incarceration since June 2020. The defence counsel submitted that accused showed contrition and remorse, we hold a different view, for a contrite mind volunteers the truth and is ready to be at the mercy of the court, facing the truth. In this case the different versions given by the accused person strip him of any contrition. A contrite mind is consistently honest which was not the case with this accused. An innocent life was lost under the most unfortunate circumstances.

Accused was selfish and unreasonable when he attacked the deceased for telling him to leave as another man was coming. He should have just left. The only point in his favour is immaturity since he could have acted immaturely in resisting to leave. Our society is under siege, people are dying at the hands of others with the flimsiest of misunderstandings. These courts frown at the loss of life through violence. There are now some members of our communities especially those in the gold panning trade who find violence fashionable. These courts can only tame such behavior through passing deterrent sentences. Considering his youthfulness the accused person would ordinarily be sentenced to 15 years imprisonment, but because he has already spent almost 2 years in remand prison, the 2 years will be discounted.

It is for these reasons that accused will be sentenced to 13 years imprisonment.

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