

THE STATE

Versus

MXOLISI NKOMO

IN THE HIGH COURT OF ZIMBABWE

MAKONESE J with Assessors Mr J. Sobantu & Mr Mashingayidze
BULAWAYO 14 & 15 AND 21 SEPTEMBER 2021

Criminal Trial

K. Ndlovu for the state
M. Mpofu for 1st accused

MAKONESE J: The accused is facing one count of murder in aggravating circumstances as defined in section 47 (1) (a) of the Criminal Law (Codification and Reform) Act (Chapter 9:23). It is alleged that on 9th October 2019 at Polite Nkomo's homestead, Madlambuzi, the accused acting in common purpose with two other accomplices caused the death of Maina Moyo an 82 year old female adult. The accused denied the charge. On the second count accused is facing a charge of robbery in contravention of section 126 (1) of the Criminal Code. The allegation being that on the same day and at the same homestead the accused used violence and threats of violence and stole various items of clothing, cash and property of the complainants. The accused made a concession that he stole the property but denied the charge of robbery.

Factual background

The facts in this case are largely common cause and beyond dispute. A state outline tendered by the state sets out the events leading to the demise of the deceased. On the day in question and at around 1730 hours, Ashely Nkomo, the deceased's nephew left home to visit a friend. The deceased was at the homestead. This was the last time the deceased was seen alive. Upon his return, Ashely proceeded to his room and slept. The following morning Ashely woke up around 0540 hours. He proceeded to the kitchen to make a fire and prepare to go to school. He could not find match sticks to light the fire. He decided to go and request for match sticks from the deceased. When he got

there he found that the door was partially open. He entered the bedroom and found deceased lying on the floor, dead. Ashely reported the matter to neighbours. Villagers organized a manhunt and tracked the suspects by following the shoe prints that were observed at deceased's residence.

Accused and his associates were later apprehended. Accused was caught wearing clothes belonging to Ashely Nkomo. Accused's accomplices managed to escape before they were handed over to the police. They were later to be re-arrested. At the commencement of the trial a separation of trials was ordered as accused's accomplices were not in attendance at court.

In his defence outline, the accused admits that he went to deceased's homestead with an intention to steal an undisclosed amount of money. He had been informed by Life Ncube, one of his accomplices that the deceased kept some money in her bedroom. Accused denies that he had any intention to cause the death of the deceased. Accused states that his negligent conduct during the act might have led to the demise of the deceased. On the second count of robbery accused tenders a plea of guilty with respect to the charge of unlawful entry and theft.

The State Case

The state tendered by consent a post mortem report compiled by Dr Juan Rodriguez Gregori. The report was prepared following an examination of the remains of the deceased. The cause of death is listed as:

1. Mechanic asphyxia
2. Neck constriction
3. Strangulation by hands.

On internal examination, the pathologist observed haemorrhagic infiltrate of the neck side muscles and fracture of the hyoids. The hyoid bone is a small U-shaped bone, situated in the middle of the neck anteriorly at the base of the mandible and posteriorly at the fourth cervical vertebra.

The evidence of the following witnesses as it appears in the outline of the state case was admitted into the record by way of formal admissions in terms of section 314 of the Criminal Procedure and Evidence Act (Chapter 9:07), namely:

- (a) Cassamia Prince Sibindi
- (b) Tichaona Sibindi
- (c) Chrispen Muganhu

(d) Dr Juan Rodriguez Gregori

The clothes recovered from the accused person at the time of his arrest were also tendered as exhibits. The defence made a formal concession that these clothes belonged to Ashely Nkomo.

Xolani Moyo – was called as the first state witness. He knew the accused as a fellow villager. The witness knew the deceased during her lifetime as a neighbor. He testified that he was summoned to the deceased's homestead. He was informed that the deceased had been murdered. The witness observed some shoe prints at deceased's homestead. He tracked these shoe prints. The prints led him to the accused. He located him in the Gonde area. The witness confronted the accused and managed to effect a citizen's arrest. Accused's other accomplices fled and escaped from the scene. This witness conceded that he did not witness the murder. His role in this case was limited to his arrest of the accused. His evidence was clear and credible in all material respects. We accept the evidence of this witness as his clear recollection of the events.

The state then led evidence from its second witness **ASHLEY NKOMO**. The witness is 19 years old. He resided with the deceased at her homestead. The deceased was his great grandmother. The witness narrated that at the time of the commission of the offence he was attending school and doing Form 4. On the 9th of October 2019 and at around 1930 hours after the evening meal, he left the deceased bathing while he went to visit a friend. When he returned home he went straight to bed. The following morning he woke up around 0540 hours. He proceeded to the kitchen to prepare for school. The witness realized that there was no matches to light the fire. He decided to request some match sticks from the deceased. When he got to her room he noticed that the door was not closed. He entered the room only to find clothes strewn all over the house. After checking around the deceased's bedroom he could not locate the deceased. The witness drew the curtains and then observed that there was blood on the floor. The witness discovered the lifeless body of the deceased under the bed. The witness left the homestead to make a report to neighbours. Villagers embarked on a search for the assailants by tracking their shoe prints. The matter was reported to the police. Later in the afternoon, the witness found the accused at the homestead. Accused had been apprehended in connection with the murder of the deceased. The witness realized that accused was wearing his T-shirt inscribed "adidas". The police also showed him clothes recovered upon the accused's arrest. He positively identified the clothes as his in the presence of the accused.

This witness gave his evidence well. He was not contradicted under cross-examination. His version is an accurate reflection of what he perceived in connection with this matter. The witness is worthy of belief.

The state closed its case without leading further evidence.

The defence case

The accused elected to testify under oath. Accused stuck to his defence outline. He mentioned that he went to the deceased's homestead in the company of his two accomplices Trymore Nkomo (aged 15) and Life Ncube aged (14). His intention was to steal money from the deceased. When they arrived at the deceased's homestead it was dark and they went directly to the deceased's bedroom. The accused used a kitchen knife to open the door. At that stage the accused realized that the deceased was awake and standing in the doorway. She lit a match stick. Accused's accomplice flashed his cellphone light in the direction of the deceased. Accused grabbed the deceased by the neck. He firmly held the deceased who struggled in a bid to free herself. The deceased eventually fell to the ground with the accused still holding her neck tightly. The deceased gasped for her breath. In the meanwhile accused instructed his accomplices to search the house for the money. Accused requested Life Ncube to grab the deceased by the neck whilst he searched for the money which they were failing to find. After ransacking the house and collecting some clothes the accused and his associates left the deceased lying helplessly on the floor. The accused narrated that he did not realize that the deceased might die as a result of the strangulation. Accused's avowed intention was to rob the deceased of her cash and other property. He did not intend to cause her death.

Accused's version does not make sense. On the one hand he stated that he did not firmly hold the deceased on the neck. He however conceded that the deceased was gasping for fresh air. It is common logic that when one fails to breathe it means that their airway is being blocked. The accused intentionally strangled the deceased with the sole purpose of carrying out the robbery. In his evidence accused gave the impression that by holding her around the neck he did not want the deceased to alert the neighbours. The court is satisfied that the accused and his associates planned the robbery. They were prepared to use violence to steal the money and other property. The accused caused the death of the deceased.

Whether the accused should be convicted of murder with actual intent

It is common cause that the deceased died at the hands of the accused and his associates. The sole issue for determination is whether or not the accused intended to cause the death of the victim or negligently brought about her death.

Mr K. Ndlovu appearing for the state argued that the results of the post mortem report clearly indicate that severe force was used causing death by strangulation. A critical aspect of the post mortem report is that it reveals that the pathologist observed the following; “haemorrhagic infiltrate of the neck side muscles and fracture of the hyoids”

As observed earlier in this judgment the hyoid bone is a U-shaped bone situated in the middle of the neck. A fracture of this bone proves beyond any doubt that severe force was used in constricting the neck. The accused continued holding the deceased by the neck until she fell to the ground. She was gasping for air. She was strangled to death. The accused must have felt that the deceased was weak as she was collapsing to the ground. The court takes note of the fact that the deceased who was aged 82 years old was no match against the three young assailants. As regards the question of whether death was intentionally caused by the accused the case of *S v Mugwanda* 2002 (1) ZLR 574 (S) is relevant. At page 581D-E the learned judge held as follows:

“On the basis of the above authorities, it follows that for a trial court to return a verdict of murder with actual intent it must be satisfied beyond reasonable doubt that:

- (a) Either the accused desired to bring about the death of his victim and succeeded in completing his purpose; or
- (b) While pursuing another objective foresees the death of his victim as a substantially certain result of that activity and proceeds regardless”.

On the facts and the evidence there is no other conclusion that can be reached by this court except that accused foresaw the death of the victim as a substantially possible outcome.

Mr M. Mpofu, appearing for the accused found it extremely difficult to advance any meaningful argument or behalf of the accused. He argued that accused acted in the heat of the moment and that he panicked. He opined that accused did not know how to react when he saw the deceased standing in the door way. Accused and his accomplices were determined to complete their

mission. They strangled the deceased and left her dead on the floor. They took an amount of R300 and some clothes. The reality is that accused foresaw death as a possibility and continued holding the deceased tightly around the neck. She failed to breath. She collapsed and died at the hands of the accused and his associates.

Our law is settled that a person may be convicted of murder with actual intent even in circumstances where he does not set out to kill his victim. The threshold of proof required in our law is that an accused foresees that by engaging in some activity, he proceeds with that activity regardless as to whether death ensues or not. See *Guide to Zimbabwean Criminal Law* by G. Feltoe at page 108.

Disposition

On these facts, we are satisfied that the only reasonable inference to be drawn is that the accused did foresee the death of the deceased as a substantially certain consequence of his activity. It has not escaped the court's notice that accused appears to have been the one directing the robbery. He is the one who opened the door using a knife. He is the one who disabled the deceased by holding her firmly in the neck, strangling her. At some point when the deceased was already lying on the ground, he instructed Life Ncube to maintain a hold on the neck. The intention was to ensure that deceased was permanently disabled. In the result, the court is satisfied that the state has proved beyond reasonable doubt that the accused is guilty of murder with actual intent.

It is the finding of the court that the accused is found guilty of murder in aggravating circumstances as defined in s47(2) and (3) of the Criminal Code on the first count.

On the second count, by his own admission the accused and his colleagues set out to steal money and other valuables from the deceased. The accused and his accomplices used violence to rob the deceased. They had no lawful right to act in the manner they did. Accused is accordingly found guilty of robbery as charged.

Sentence

In assessing an appropriate sentence the court shall take into account the mitigating factors of the case and weigh them against the factors in aggravation. The accused has been convicted of murder with actual intent in aggravating

circumstances. The aggravating circumstances as provided for in section 47 (2) and (3) of the Criminal Code are that:

- (a) the murder was committed in the course of a robbery.
- (b) the murder was preceded of physical torture and violence against the victim.
- (c) the murder involved a person over the age 70 years.

The court notes that the accused is a youthful offender who was aged 20 years at the time of the offence. His accomplices were aged 15 years and 14 years respectively. Accused acted in haste and displayed a high degree of immaturity and thoughtlessness. The deceased was a frail old woman aged 82 years. The deceased posed no real danger to the accused. The deceased did not deserve to die. The accused and his associates used a high degree of force in the strangulation of the deceased. The deceased failed to breathe because the wind pipe was blocked. The accused is credited for having tendered a partial plea of guilty with respect to the lesser offence of culpable homicide. The court takes into account the fact that accused has spent close to 2 years in remand prison pending trial. This means that accused has already served a portion of his sentence. The accused is at the prime of his life. The sentence this court shall impose must not condemn him but give him the chance to reform. The sentence must therefore be rehabilitative.

The law provides in section 47 (4) (a) of the Criminal Code that where an accused is convicted of murder in aggravating circumstances the court shall impose a sentence of not less than twenty years. The court may in such circumstances, impose capital punishment or life imprisonment. In view of the weighty mitigating circumstances in this case and the youthfulness of the accused the court must carefully balance the personal circumstances of the accused and the interests of justice. A fair and just sentence is one that strikes a balance between societal expectations and the needs of the accused. The sentence imposed must serve the interests of justice.

I must indicate that this court is disturbed by the upsurge in cases of violent crimes, particularly robbery and murder. In this case human life was needlessly lost. The 82 year old lady died for a mere R300 and a few items of clothing. The court needs to protect the sanctity of human life by imposing appropriate sentences in each individual and peculiar case.

In the result, the following sentence is deemed appropriate.

“Accused is sentenced to 20 years imprisonment”

National Prosecuting Authority state’s legal practitioners
Samp Mladzi accused’s legal practitioners