

THE STATE
versus
ELIAS MAKONDO

HIGH COURT OF ZIMBABWE
MWAYERA J
MUTARE, 18 May 2021, 2 June 2021 and 14 September 2021

Criminal Trial

ASSESORS: 1. Dr Sana
2. Mr Mudzinge

C Chibaya, for the State
Mrs J Matsikidze, for the accused

MWAYERA J: The accused pleaded not guilty to two counts of murder in aggravatory circumstances as defined in s 47(1)(a) or (b) of the Criminal Law (Codification and Reform) Act, [*Chapter 9:23*]. It is alleged by the state that the accused person killed two elderly people who were husband and wife by striking each one of them with an axe on the head. After fatally striking the couple the accused ransacked the couple's bedroom and stole US233 and about \$30ZWL. The accused denied having unlawfully and intentionally caused the death of the deceased persons. He also denied having any realisation that there was a real risk or possibility that his conduct might cause death and continued to engage in that conduct despite the risk or possibility resulting in injuries from which Faina Mberi and Elson Mberi died.

In his defence the accused denied the allegations and pointed out that he struck both deceased persons over a dispute involving his demand for US\$100 for the work he had performed (cutting down maize stalks) at the couple's homestead. He denied having the requisite intention actual or legal to cause the death of the deceased persons. He further advanced in his defence that he could not be held criminally liable since he was intoxicated at the time of commission of the alleged offence. The accused further admitted to having been negligent on the day in question and pointed out he regretted his conduct on the day in question but insisted he had no intention to kill the two deceased persons.

Evidence

The state with the consent of the defence adduced in evidence the following exhibits. An axe with a wooden handle exh 1 and a certificate of weight showing the axe handle and blade weight of 1,650kg exh 1 (a).

Further tendered in evidence was the post mortem report exh 2. The report was compiled by Dr Nyafesu who examined the remains of Faina Mberi and concluded that cause of death was severe head injury secondary to excessive trauma. Worth noting is severe injuries observed by the doctor which among others included a deep laceration on the right parietal occipital area measuring 12cm x 6cm and a depth of 4cm with fractured, and depressed skull.

A post mortem report exh 3 compiled by Dr Matsalaza was also produced by consent. Again worth noting are the numerous severe injuries on the deceased which included among others a cut about 13cm long, a fractured and depressed skull.

Accused's confirmed warned and cautioned statements in respect of count 1 and 2 were tendered in evidence and marked as exh 4 and 5 respectively. The accused in summary admitted striking the deceased Faina Mberi with an axe 3 times on the head, so as to get money to use. After striking the deceased Faina Mberi he proceeded to the kitchen where Elson Mberi was and struck him once with an axe on the head following which he took the deceased Elson Mberi's phone. In his warned and cautioned statement exh 5 it is worth noting that the accused admitted having concealed the axe under his bed prior to the attack on the deceased. He retrieved the axe and proceeded to strike Elson Mberi. After the attack the accused then took the deceased's cellphone, proceeded to strike 3 times on the head of Faina Mberi who was sleeping. Thereafter the accused searched for money and got away with US\$233 and \$30 RTGS. Also tendered in evidence is a photo album exh 6 with pictures of the deceased Faina Mberi and the general scene of crime as indicated by the accused.

The state adduced evidence from 13 witnesses. 12 of whom had evidence formerly admitted in terms of s 314 of the Criminal Procedure and Evidence Act [*Chapter 9:07*] as it was on common cause issues. Only one witness Feresi Tazviona Mudyanadzo gave oral evidence. The witness narrated how the accused arrived at the late couple's homestead on 21 May 2019. The witness who was also employed by the late couple would work on specified days and go to her home. On 21 May 2019 the accused was engaged as a domestic worker by the couple. When she knocked off she actually left the accused doing some domestic chores. The witness's evidence was that when she reported for duty on 24 May 2019 she found the deceased Faina Mberi lying motionless facing down and she also found the seriously injured

Elson Mberi sitting helplessly in a chair. She called out for help and together with other witnesses helped ferry Elson Mberi to Rusape Hospital. His wife Faina Mberi was already dead after having been fatally wounded on the head. The witness's evidence remained intact even after cross-examination. We found nothing to criticise about the manner the witness testified. She was a truthful witness.

All the other villagers who came upon hearing the alarm confirmed observing that the couple had been fatally struck on the head. The investigating officer and team also confirmed the common cause aspects. It is common cause that the accused was employed as a domestic worker by the couple. It is also common cause the accused worked for about 3-4 days at the couple's homestead. Further it is not in contention that the accused had been accommodated by the elderly couple as a child they were willing to stay with to carry out domestic chores for a remuneration. Also not in dispute is the fact that the accused was allocated his own bedroom. Considering the accused's version in his confirmed warned and cautioned statements and his evidence in chief in court it is apparent the accused struck the couple with an axe, one after the other. That the accused approached the unsuspecting Elson Mberi and struck him on the head leaving him helpless is not in dispute. Further it is not in dispute the accused approached Faina Mberi who was sleeping and accused actually went and fetched light so as to see where his blows landed. He then struck her 3 times in the head leaving her dead.

The accused in denying unlawfully and intentionally causing the death of the 2 deceased persons pointed out that he struck the deceased because his demands for US\$100 were not being met. The accused stated out in evidence that his full time employment was rescinded by Mrs Faina Mberi and replaced by an agreement for a piece job at an agreed fee that was payable upon completion of the task. He narrated that he completed the task and payment was not made so in his drunken state he ended up striking the couple. The accused was exposed as a dishonest witness during cross examination. His version that he was intoxicated when he savagely struck the two was scattered by the fact that in his narration he made it clear that he had before going for a beer drink stalked the axe in his room for purposes of striking the deceased persons. Further in a clear indication that he was in full appreciation of what he was doing the accused struck the husband Elson Mberi once on the head as he did not have much issues with him. Going by the accused's own narration the wife Faina Mberi is the one who had caused him not to be permanently employed. He had qualms or issues with Faina Mberi hence he actually proceeded to the room in which she was sleeping with an intention to strike her. On realising it was dark he went back and took a cellphone with a torch from Elson Mberi. He lit where the

now deceased Faina Mberi was Lying and struck the latter 3 times on the head using an axe. Such conduct of preplanning and ability to apportion blameworthiness is certainly not consistent with being intoxicated to the extent of not knowing what he was doing. It was revealed during cross examination that the question of being intoxicated was merely raised in a bid to minimise the grave attack on the deceased persons. The accused had partaken beer the previous afternoon thus diminishing any levels of intoxication the following early morning hours. The accused as a witness did not fair well as even the issue of being owed money was discredited. It was clear he had just worked for 3 days and the domestic work done was not commensurate to his suggested demand for US\$100. In fact this assertion of not being paid for work done was exposed as a fallacy raised to minimise the accused's moral blameworthiness. Even if it was true that the accused worked to be paid his dues there was no satisfactory explanation tendered for demanding money at 0400hours on 24 May. In fact the accused after fatally striking the deceased stole a torch, cellphone and US\$233 and \$30 ZWL. This was way beyond what he suggested he was claiming. It was apparent from the manner the accused testified that the issue of intoxication and demand for dues owed was just raised to minimise his involvement in causing the death of the diseased persons. Generally we did not hold the accused as a candid witness. For him to secure employment he misled the elderly couple to hire him as he posed as a member of the same Christian church with them. He claimed he was a member of the Seventh Day Adventist which was not true. It is also worth noting that even if he was owed any money that is not a defence warranting striking a couple on the head. Also even if it were to be accepted he was drunk, in the early morning, his voluntary intoxication is not a defence. Section 221 of Criminal Law (Codification and Reform) Act is instructive

“Intoxication no defence to crimes committed with requisite state of mind

- (1) If a person charged with a crime requiring proof of intention, knowledge or the realisation 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.”

The Law

The accused is facing 2 counts of murder. Murder consists of both the *actus reas* and *mens rea*. It is settled that for a court to convict an accused of murder it must be satisfied that either the accused desired to bring about the death of the victim and he proceeded to kill or that he reasonably foresaw that as a result of his conduct death was substantially certain and

persisted with the conduct none the-less. See *S v Mungoza* HMT 1/18, *S v Sweswe* HB 184/18 and see also *S v Mugwanda* SC 19/2002. It is settled that where it is proved beyond reasonable doubt that the accused set out with an aim or desire to cause death of the deceased then murder with actual intention should be sustained. Equally when an accused proceeds with conduct where it is foreseeable that actions so taken would cause death or death is substantially certain then murder with actual intention ascribes. For both murder with actual or legal intention it is clear from the essential elements of murder that there has to be both the *mens rea* and *actus reas* for a conviction of murder to be sustained. See also *S v Milos Moyo* HB 85/2010 and *S v Chaitezvi and Ors* HH 63/10.

Analysis Evidence and Application of the Law

Upon considering the totality of the evidence the following observations are worth noting. The accused struck the unsuspecting deceased Elson Mberi while the latter was in the process of building a fire. The accused then proceeded to the bedroom where Faina Mberi was sleeping. It was apparent from the accused's version that he went to the bedroom armed with an axe to deal with Faina Mberi whom he accused of having caused him not to be paid US\$ 100. The accused on realising it was dark went out to get a torch so as to actually see his victim. With the aid of light from a torch he hacked Faina Mberi's head 3 times. There is no evidence that either of deceased offered any form of resistance to the attack by accused person. The accused armed himself with an axe and struck both deceased with it on the head. Such an attack with a lethal weapon on the head speaks volumes to intention. The intention in this case was to kill so as to steal money and make good escape without any fear of detection. Clearly if the accused had a matter to discuss with Faina Mberi he could have woken her up and engaged. The conduct of the accused on the morning in question was clearly that of a man on a mission to kill and steal from the deceased.

The accused pre-planned the murder when he sought employment with a desire to steal from the elderly couple. On the fateful day he hid the axe in his room beforehand. He then armed himself with the axe struck and disabled the husband Elson Mberi and then proceeded with a torch to severely strike a sleeping Faina Mberi. The accused's conduct after fatally striking his victims is a clear indication of actual intention. He proceeded to ransack the house and steal money after which he packed all his belongings and went away. The accused only mistakenly left his identification card in the bedroom. The accused in this case cannot motivate provocation as he clearly was not provoked by the elderly couple for him to lose self-control

and act spontaneously to the provocation. Elson Mberi was busy making a fire while Faina Mberi was sleeping when the accused approached her already armed. The accused had ample time to formulate his intention as he kept the axe in his room waiting for the opportune time to attack his victims. The accused was aware the couple had some foreign currency at home and this lured him to seek employment so as to rob the couple. He admitted in his confirmed warned and cautioned statements that his intention was to take money from the deceased without resistance and that he wanted to use the money. In his evidence accused actually narrated how he used the money to buy beer and food and only surrendered himself to the police after he had squandered his loot and had part of it stolen in a bar.

From the foregoing it is, clear the accused attacked the couple intentionally with a view to steal money from them. Even though the accused sought to minimise his role in the death of the two deceased by citing intoxication and provocation such was an exercise in futility. There is glaring evidence that the accused set out to secure employment with a clear plan to murder the elderly couple so as to steal the foreign currency the couple received from their children and kept at home. The accused thus set about the plan to kill the deceased. He took the axe and severely and fatally struck the deceased thereby causing injuries from which the deceased passed on. This is a case in which as observed by both state and defence counsel in closing submissions the common cause aspects and evidence speak volumes to the accused setting out with an aim to bring about the death of his victims and proceeds to achieve such a goal.

The state has in the present case proved that the accused unlawfully and with actual intention caused the death of both Elson Mberi and Faina Mberi.

Accordingly the accused is found guilty of 2 counts of murder with actual intent as defined in s 47 (1)(a) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*].

Sentence

In passing sentence we are alive to the honoured sentencing principle of seeking to strike a balance between the offence and offender while at the same time ensuring that the societal interest of justice is met. We have considered all mitigatory and aggravatory factors submitted by counsel.

In mitigation as highlighted by Mr *Mukwena* the fact that accused is a first offender is mitigatory. He is a family man with responsibilities. Further the accused has been in custody for slightly above 2 years awaiting the finalisation of the murder allegations. The anxiety that goes with the period of suspense cannot be understated. Also in accused's favour is the fact

that when haunted by the grave offence he surrendered himself to the police. That is all that can be said about the accused in mitigation.

As correctly observed by the state counsel Mrs *Matsikidze*, the accused stands convicted of a heinous and prevalent offence. He is a first offender who chose to engage in the unlawful criminal enterprise at the deep end. What aggravates the offence is the fact that an elderly couple above 70 were not only robbed of their money but precious God given life, which is constitutionally guaranteed. The unsuspecting couple were tortured and killed for their humane gesture of accommodating the accused as their own child. The fact that accused carried out homework to get details that the deceased couple had foreign currency at their homestead increases accused's moral blameworthiness. The home work included even finding out the couple's religious standing. The accused then duped the elderly couple into believing he belonged to the same Christian denomination, the Seventh Day Adventist hence they welcomed him in. The fact that the accused disguised himself so as to prey on the elderly couple displays clear premeditation and determination to achieve the unlawful enterprise. The accused waited for the opportune time to pounce on the elderly and unsuspecting couple. He savagely attacked the couple one after the other using an axe. The attack was callous and brutal considering the couple did not offer any resistance. Mr Mberi was making a fire while his ailing wife Mrs Faina Mberi was sleeping. The accused exhibited a high degree of cruelty when he after fatally striking the couple ransacked the couple's bedroom and got away with US\$233 and \$30ZWL. Considering the couple's age the accused could have used other means to steal as opposed to fatally striking the couple with a lethal weapon an axe on the head a vulnerable part of the body. The manner in which the accused carried on the attack displays lack of respect of human life. Society abhors use of violence on another and courts have to weigh in and express displeasure by passing appropriate sentences. In this case the pre-planned violent attack was perpetrated with an aim to rob the unsuspecting couple. Life was lost because of greed and desire to acquire material possession. The accused has not shown any remorse for the offence. Even the morally right gesture of customarily compensating has not been done. Although it does not bring back the lost life such a gesture is a sign of regretting.

Considering the circumstances of this matter the premeditated attack culminating in robbery and death of the elderly couple is a serious infraction on humanity. The murder is certainly murder committed in aggravatory circumstances. It calls for removal of the accused from the society for good. Capital punishment is appropriate in the circumstances of this case. However, in due recognition of the age of the accused at the time of commission of the offence

(27) youthful offender, his removal from society can still be attained by imposition of life imprisonment.

Count 1: Life imprisonment

Count 2: Life imprisonment

National Prosecuting Authority, state's legal practitioners
Chibaya & Partners, accused's legal practitioners