

THE STATE

VERSUS

BENJAMIN DZIKA

IN THE HIGH COURT OF ZIMBABWE
MATHONSI J
GWERU 13 SEPTEMBER 2011

Mrs T. R. Takuva for the state
Ms. C. Mugabe for the accused

Criminal Trial

MATHONSI J: The accused faces two counts of murder and 1 count of attempted murder in breach of section 47 of the Criminal Law Code, [Chapter 9:23].

The allegations against the accused are that on 3 July 2009 he went to the residential premises of Evans Vaughan Robert Henry who was 76 years old (hereinafter referred to as “the deceased 1”), namely No. 7 Simpson Road Gweru East at about 2200 hours where he gained entry through the main entrance which was not locked.

Once inside the accused is alleged to have hidden in the spare bedroom when he realised that the deceased 1 was awake. When the deceased 1 left his bedroom the accused is alleged to have taken advantage to enter the bedroom where he hid himself inside a fitted wardrobe. Upon the deceased’s return the accused is alleged to have attacked him with an unknown object striking him on the head thereby inflicting the fatal injuries.

The state alleges that after accounting for the deceased 1, Evans, the accused then went for his wife Valerie who was sleeping in a different bedroom and struck her on the head with an unknown object rendering her unconscious. The accused is alleged to have ransacked the house stealing property which included 1 black supersonic radio, brass charcoal iron, a candle holder, an FN pistol, a pair of binoculars, R100 and some groceries. He then made good his escape.

It is further alleged that some twelve (12) days later on 15 July 2009 the accused proceeded to the residential premises of Raymond Peter Rensburg (hereinafter referred to as ("the deceased 2")), namely Plot 9 Umsungwe Road, Harben Park Gweru, where upon arrival he cut the fence in order to gain entry.

Once inside the yard, the accused is alleged to have broken the kitchen window to gain entry into the house.

It is alleged that the accused then proceeded to the bedroom where the deceased 2; then aged 67, was sleeping and attacked him striking him on the head with an unknown object resulting in his death. Having killed the deceased 2, the accused is alleged to have ransacked the house before making off unnoticed with US\$1000, R3000, a gold necklace, a nokia 1202 cellphone handset, one pair of male black shoes, one blue monarch suitcase and some groceries.

It was not until September 2009 that the accused was arrested after his wife Irene Moyo had let the cat out upon making a report of domestic violence to the police. When the police raided his home in broad daylight at about 1500 hours they found the accused sleeping. Upon his arrest, the police recovered an FN pistol in between the mattress and base of the bed on which the accused was sleeping. A pair of binoculars was recovered in a push tray in the same room. These two items had been stolen from the premises of the deceased 1 after he was killed.

More property, including a Nokia cellphone and a black supersonic radio, was recovered. These had been stolen from the premises of the deceased 2 and the deceased 1 respectively and were recovered following indications made by the accused person.

This is a case in which there is no direct evidence of the commission of the crime as no body witnessed the killings and the attempt. It is therefore a matter that has to be decided on circumstantial evidence.

The law relating to circumstantial evidence can be found in Hoffman and Zeffertt, The South African Law of Evidence, 4th ed, at pages 589-590 where the learned authors stated:

"In *R v Blom* 1939 AD 288 at 202, 203 WATERMEYER JA referred to 'two cardinal rules of logic' which governed the use of circumstantial evidence in a criminal trial:

- (1) The inference sought to be drawn must be consistent with all the proved facts. If it is not, then the inference cannot be drawn.
- (2) The proved facts should be such that they exclude every reasonable inference from them save the one to be drawn. If they do not exclude other reasonable inferences, then there must be a doubt whether the inference sought to be drawn is correct.”

The question which then arises is whether it can be said that the only inference to be drawn from the proved facts is that the accused did commit the offences in counts 1, 2, and 3?

The proved facts are as follows:

Counts One and two

- (1) On 3 July 2009 at 2200 hours someone broke into the premises of the deceased 1 and battered him on the head causing his death.
- (2) At the sametime, the same perpetrator or someone working in league with him or her proceeded to where the deceased 1’s wife, Valerie aged 80, was sleeping in a separate bedroom and battered her head, no doubt intending to cause her death. Fortunately she did not die but was rendered unconscious. She did not live long as she died of heart failure on 8 August 2010, bearly a year later.
- (3) After the two attacks, the perpetrator ransacked the house stealing property including an FN Pistol, a pair of binoculars and a black supersonic radio.
- (4) These three items of property were recovered following the arrest of the accused with the FN Pistol found hidden under the accused’s mattress and the binoculars displayed in his push tray at the accused’s residence. The supersonic radio was recovered from Harrison Moyo who had purchased it for US\$15-00 in July 2009, soon after the killing, from the accused.
- (5) Clearly, the person who attacked deceased 1 and his wife intended to incapacitate them in order to facilitate a robbery. The killing was in the course of a robbery and so was the attack on Valerie.
- (6) The accused’s wife also reported a case that accused was spending nights away from home coming home in the morning with stolen property. Indeed when he was raided during the day he was found fast asleep.

Can it be said that there is another inference to be drawn from these facts other than that the accused is the one who killed the deceased 1, attacked Valerie and stole their property?

I do not think so. This is particularly so because the accused's own testimony was a tissue of lies and nothing whatsoever can be gained from it. So hopeless was he as a witness that at the end nothing was left of his defence which is rejected in its entirety.

In my view the only inference to be drawn from the proved facts is that the accused was the perpetrator of the robbery, the killing and the attempt in Counts 1 and 2.

Count 3

In count 3, the proven facts are the following:

- (1) On 15 July 2009 at 2200hours some one broke into the premises of the deceased 2, who was 67 years old, and battered him on the head as he slept causing his death.
- (2) After the attack the perpetrator ransacked the house and stole property which included a nokia cellphone belonging to his wife Marina.
- (3) The said nokia cellphone was sold by the accused to Jetro Moyo for \$30-00 in August 2009 a few weeks after the killing. It was recovered on 21 September 2009 following indications made by the accused person.
- (4) In this case, therefore, the person who attacked the deceased 2 intended to incapacitate him in order to facilitate a robbery. The killing was therefore in the course of a robbery.

Again the question whether there is another inference to be drawn from the proved facts other than the fact that it is the accused who perpetrated the killing can only be answered in the negative.

There is a striking similarity between the killing of the deceased 1 and the deceased 2.

- In both cases the modus operandi was to strike at 2200 hours at night.
- Once inside the house the perpetrator would go on to attack his/her victims on the head to cause their death.
- when that was accomplished the perpetrator would ransack the house making off with property.

- In both situations, the victims were elderly white people.

I now have to consider whether these were cases of murder with actual or constructive intent or any other competent verdict.

Count 1

According to the doctor who examined the deceased, the following observations were made;

“Head- (1) forehead round wound with rough edges with a 4cm diameter.

(2) cut wound 5cm long

(3) Bruise on the right upper eye.

(4) Bleeding from the nostril

(5) Face covered with blood.

Severe brain damage as a result of a blow from a heavy blunt object.

Severe bleeding also contributed to the death of the victim”

The doctor also observed a lot of skull fragments of bones and the forehead had a broken base etc.

It was stated in *S v Mugwanda* 2002 (1) ZLR 574 (S) at 581 D-E 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.”

Where a person meticulously plans a raid on a defenceless elderly couple in the dead of the night and proceeds to attack them the way he did at a time when that person was not at risk or under threat, they can only desire bringing about the death of the victim.

Accordingly the accused is found guilty of murder with actual intent in count 1.

Count 2

The accused had already accounted for the victims’ husband. The victim was a frail 80 year old woman who was defenceless at the time and was sleeping.

The medical report produced as exhibit 3 reveals serious wounds on the head one wound was revealing the skull bone. Although the skull was not fractured the injuries disoriented the victim leaving possible disability.

Clearly the intent to kill was there.

Accordingly, the accused is found guilty of attempted murder.

Count 3

I have already stated that there are similarities in the way the killings in counts 1 and 3 were perpetrated. I have also cited the law on intent.

The medical evidence shows that the attack on the deceased 2's head caused serious wounds with a wound on the left upper part of left eye with rough edges; deep wound on left occipital area. There was severe bleeding associated with brain damage. A heavy blunt object was used.

I can only conclude that the accused desired to bring about the death of the deceased.

Accordingly the accused is found guilty of murder with actual intent in count 3.

Extenuation:

Count 2: Mitigation by Defence Counsel

Accused was aged 29 years

He is married with two minor children

He is the sole bread winner for his family

His actions show that he is an uneducated and unsophisticated person.

The majority of property stolen from the complainants' house is of very little value.

The accused by virtue of his age – he was 29 at the time - his actions show immaturity.

Extenuation:

Count 1: Defence Counsel

In respect of his age, the accused acted immaturely.

I reiterate that the property that was stolen is of limited material value.

Accused did not benefit from the offence, the majority of the stolen property was recovered. There are no reasonable prospects of extenuation in count 1.

Count 3

As has already been indicated I will not burden the court by repeating his age, immaturity, lack of sophistication and the fact that property stolen was recovered.

State Counsel

I submit that there are no extenuating circumstances in this case- those facts which reduce the moral blameworthiness of the accused.

He preplanned his mission very well, picked his victims very well focussing on old people and, he knew very well that there would be no meaningful resistance.

Considering his stature and condition of his victims he could have stolen from them without killing them. He still went ahead and attacked them viciously.

In Count 3, the victim was elderly (67). He attacked the deceased while he was lying in bed. He could have stolen from him without having to kill him.

At 29 he cannot be described as an immature person. I urge the court to find that there are no extenuating circumstances.

Count 2

Accused should be sentenced to a prison term of not less than 3 years.

By the court: Reasons for sentence in count 2

In considering an appropriate sentence we have taken into account the following factors stated in mitigation.

- the accused was aged 29 years at the time. He is married with two minor children and is the sole bread winner for his family. His actions show that he is an uneducated and unsophisticated.
- Some of the property was recovered.

Against that should be considered the fact that he preyed upon a defenceless, frail 80 year old woman and attacked her ruthlessly directing his blows to the head.

He had already killed her husband and for that reason she was exposed. The attack on her was not only senseless but callous in the extreme.

That a human being would find it in him to do to another human being what he did to this old woman is difficult to fathom.

It was only fortuitous that she survived.

Accordingly, the accused is sentenced to 8 years imprisonment in count 2.

Count 1

This was a murder in the course of a robbery where what was driving the accused was only greed and inherent evil and nothing else.

There can be no justification whatsoever for such conduct.

Accordingly we are unable to find extenuating circumstances in count one.

Preamble

Accused Speaks

I request the court to be lenient on passing sentence. I have two very young children and my parents are very old now. I am also looking after my nieces and nephews; I only have my elderly mother.

I request that you be lenient.

Sentence

The accused shall be returned to custody where the sentence of death shall be executed according to law.

Count 3

No distinction exists between the murder in count 1 and the one in Count 3. This was also a murder in the course of a robbery where the accused was driven by greed and outright brutality and nothing else.

Regrettably therefore we are unable to find extenuating circumstances in count 3.

Preamble

Accused speaks

I request that the court passes on me a sentence other than death so that I would be out of prison and take care of my family.

Sentence

The accused shall be returned to custody where the sentence of death shall be executed according to law.

*Criminal Division, Attorney General's Office, the state's legal practitioners
Makonese and Partners, accused's legal practitioners*