

THE STATE**Versus****STRUCTOR KHUMALO**

IN THE HIGH COURT OF ZIMBABWE

TAKUVA J with Assessors Mrs A. Moyo & Mr T.E. Ndlovu

BULAWAYO 9 MARCH & 10 OCTOBER 2017

Criminal Trial*Ms N. Ngwasha*, for the state*N. Ndlovu*, for the accused

TAKUVA J: The accused was charged with murder. He pleaded not guilty and the matter proceeded by way of trial. The allegations are that on 25 December 2016 at Masuku Store Lupote, Siganda the accused unlawfully and intentionally kill and murder Sicelo Moyo a minor in her lifetime therebeing. It was further alleged that on the fateful day, accused met the deceased who was in the company of Mercy Madedele (Mercy) and Progress Madedele her cousin sister and cousin brother respectively. The accused proposed love to Mercy and the deceased but neither of them responded. At that time, the accused grabbed an umbrella from Mercy and tore it using a sharp instrument. Mercy managed to escape by running away from the scene. The accused remained behind with the deceased most likely because she was barred from escaping by him. After sprinting for approximately 5 metres, she looked back but could not see neither the accused nor the deceased. She decided to return to investigate the deceased's whereabouts. On her way she was escorted by two men to where she had left deceased and accused. Upon arrival, she observed the deceased lying down bleeding from the left side of her chest. She was dead.

The accused was arrested on the 26th of December 2016 by Learnmore Nkomo. He denied these allegations and filed a defence outline in which he claimed to have been wrongly identified as the person who caused deceased's death since he had behaved violently on the day in question by having a "fall out" with "Mkhululeko". He denied meeting deceased, Mercy and

one Progress Madedele on the day in question. He prayed that he be acquitted of the charge of murder.

State Counsel then produced the post mortem report compiled by Dr Roberto Trecu as exhibit 3. According to the pathologist, the cause of death was:

1. Cardiac block
2. Pericardial and cardiac damage, haemopericardium
3. Stabbing injury

In that report, he also listed a number of wounds that he observed on the deceased's body and heart.

Exhibit 4 was an axe with the given dimensions. It is a very sharp axe with a small handle. The forensic DNA test certificate was produced as exhibit 5. The Research fellow who carried out the analysis concluded *inter alia* that:

“There must have been a mix-up in the chain of custody from sampling to the laboratory in Harare and subsequently to AGTC. The blood sample from the deceased was not stored properly as a result, DNA extract from it was degraded and thus gave us an incomplete profile of a male individual. Due to the mixed nature of the okapi knife DNA profile, we cannot link the profile of the deceased to the alleged murder weapon.”

Exhibit 6 was an okapi knife with the following measurements;

- (i) Length of the blade is 10cm
- (ii) Length of the whole knife is 23,5cm
- (iii) Weight is 0,05kg

The issue to be determined is the identity of the murderer. In order to answer this question the state led *viva voce* evidence from five witnesses and sought the formal admission of the evidence of two witnesses.

The first witness to testify was Mercy, the deceased's cousin. She stated that on 25 December 2016 at approximately 7pm she together with deceased, Progress were outside Masuku's store where she was washing mud from her shoes when accused approached them. Accused invited Progress, the witness' young brother for a beer drink but the latter turned down the offer and entered the shop leaving the deceased, accused and Mercy outside. The accused had an axe which prompted deceased to ask whether accused would not injure patrons with the axe. The accused then said "Stilah, the son of Machakade does not walk without a knife – boys from Machakade do not move without knives – we carry them for defence purposes and we do not attack girls but boys who are stubborn."

Accused then proposed love to the 2 girls by saying "girls I want one of you" and the two did not respond. Accused who was undeterred moved closer to the witness and pressed her against the wall. Deceased moved away carrying the witness' umbrella. The witness requested to be given her umbrella and deceased handed it over. At that stage, the accused grabbed the umbrella and cut it with a "sharp" object. He also broke it and the witness ran away holding a piece of the umbrella. However, she only ran for 5 paces and one of her shoes got stuck in the mud and she looked back only to discover that deceased was not following her. She returned and found deceased lying down in a pool of blood – dead. She was lying about 2 paces from where she had left her and accused standing.

Earlier in the afternoon the witness had been attracted to the accused by the insults he was shouting at officials and players at a soccer match. The witness said although she did not see accused stab deceased, she strongly suspected him because he suddenly became violent when the deceased and herself snubbed his advances. Secondly, the accused had weapons namely a knife and an axe which he could have easily used to kill the deceased. Thirdly, when she ran away deceased was very close to the accused and upon her return she found deceased's body lying quite close to where she had left them. What surprised her was that the accused was nowhere to be found. She was adamant that accused had told her his name was Stillah and the police told her Stillah was Structor Khumalo. This happened at the scene when

police officers asked them. She said it took her approximately 7 – 8 minutes to run away and return to the scene.

This witness gave her evidence very well in our view. She is a well cultured young lady who remained respectful to the accused despite her suspicion that he murdered her cousin. Her evidence reads well and was corroborated in material respects by the accused and Progress Madedele. Despite undergoing an incisive cross-examination, she remained resolute and steadfast that the person who harassed them identified himself as “Stillah son of Mashakade”. If the witness wanted to embellish her evidence she could have said the accused identified himself as Structor Khumalo. Also she could have simply claimed to have witnessed the stabbing of the deceased. This she did not do. For these reasons we find the witness to be credible. We embrace her evidence totally.

The next state witness was Progress Madedele (Progress) the deceased’s cousin. His testimony is similar to that of the last witness. He however, confirmed that the accused identified himself as “Stillah the son of Machakade” who always carried an axe and knife for self-defence. The accused was carrying an axe and he told them he had a knife in his possession when accused invited him behind the shop for a beer dink, he refused and entered the shop to watch patrons who were dancing. After approximately 5 minutes he came out to find deceased dead close to the place he had left her with Mercy and the accused.

Progress was a credible witness who did not try to mislead the court by exaggerating his evidence. He told the court he did not see the accused stab the deceased and that he never saw the accused holding a knife. He told the police who attended the scene that the accused had said his name was Stillah son of Machakade. The question becomes how would the witness have known accused’s nickname and his father’s name if accused had not mentioned it? The submission that the witnesses were coached by Mr Masuku or by the Ndlovu family is laughable to say the least. It would be illogical for the alleged coaches to tell the witnesses the accused’s nickname and not his real name which they knew very well. We therefore accept Progress’ evidence in toto.

Accused's neighbour, one Nqobile Ndlovu was the third state witness. He lives in the same village with accused i.e. Mbembeswane 2. He has lived in this village his entire life. He was 45 years old at the time he testified. On 25 December 2016 at approximately 19:50 hours he was drinking beer with Justin and Nhlanhla Ndlovu inside a back room at Masuku Bottle Store. The accused entered the room holding a small axe and knife shouting; "I heard that you were looking for me I am Stiva the one you are looking for. I am the child of the Machakade family. Lie down all of you, your mothers" clitoris all of you. I have spilt blood today I want to kill all of you."

According to this witness Stila was accused's nickname while his real name is Structor Khumalo. Machakade is accused's father. The witness was of the view that the accused believed there were police officers in the room. After threatening the witness and his brothers the accused escaped into the darkness. When the witness went outside, he became aware of the deceased's death from one boy while he was talking to members of the neighbourhood watch at the shop.

This witness gave evidence in a confident manner. His evidence was not seriously challenged under cross-examination. It was never put to the witness that the accused had injured his brother called Nkululeko that evening at Masuku Store. Further, it was never put to him that he coached the witnesses on the accused's identity and finally that they falsely incriminated the accused because they held a grudge against him. All this surfaced in the defence case well after the state witnesses had been excused. I must point out that a criminal trial is not about ambushing each other. It is therefore highly undesirable and a product of poor advocacy for defence counsels to withhold information from the scrutiny of state witnesses, hoping to foist that information down the court's throat during the defence case after the departure of state witnesses.

For these reasons we accept Nqobile's evidence wherever it conflicts with that of the accused.

The accused was arrested on 26 December 2016 while lying in the bush by Learnmore Nkomo and one Mkhululi Gumbo. Learnmore Nkomo gave evidence of how they arrested the accused. After his arrest, the accused cunningly instructed Nkomo to remove an okapi knife from his pocket and throw it in the bush. Nkomo did not comply. Instead he handed the knife to the police. The same knife was then produced as exhibit 6. The accused admits being in possession of that knife.

Quite surprisingly, this witness' testimony about accused's attempts to destroy evidence by throwing away the knife was not challenged under cross-examination. In our view, Mr Nkomo was a truthful witness who simply narrated how they apprehended the accused. We therefore have no hesitation in accepting his evidence in its entirety.

The state's last witness was Sergeant Ngonidzashe Makombe a member of the ZRP stationed at Siganda Post, Inyathi. He attended the scene where, he observed that deceased was bleeding from a deep wound on the left side breast. The accused was brought to station by some villagers who also brought a axe and a knife. He took the axe together with a sample of deceased's blood to Forensic Science laboratory for analysis. He identified exhibit 4 and 6 as the weapons that were brought by the villagers who apprehended the accused. Again this witness' evidence was not challenged by the accused perhaps because of its formal nature.

The state closed its case and the accused gave evidence in his defence. The accused admitted being at the scene of the crime on the day in question. He called the place Mbembeswana 2 shops. According to the accused, all that he did was to fight with Nkululeko. He was surprised to be arrested for murder. He strongly denied meeting Mercy, deceased and Progress at the shopping centre. The accused admitted that his nickname was Stilah and that his father's name is Mashakade. He admitted carrying an axe and a knife on the day in question. The only point of divergence with the state witnesses is that he denied stabbing the deceased.

In our view, the accused did not fair well as a witness. He kept on adding new information as he went along. We do not accept his evidence when he denied having any

interaction with Mercy, Deceased and Progress. If this had happened, then these witnesses would not have known about “Stilah the son of Mashakade”.

Also we do not accept accused’s explanation of the scuffle between Nkululeko and himself for the simple reason that he did not challenge Nqobile Ndlovu’s evidence. We therefore find the accused to be an incredible witness whose evidence we reject in toto.

The law

In *Rex v Blom* 1939 AD 493 at 508-9 it was said that in reasoning by inference in a criminal case there are two cardinal rules of logic which cannot be ignored. The 1st rule is that the inference sought to be drawn must be consistent with all the proved facts: if it is not, the inference cannot be drawn. The second rule is that the proved facts should be such that they exclude every reasonable inference from them save the one sought to be drawn: if these proved facts do not exclude all other reasonable inferences, then there must be doubt whether the inference sought to be drawn is correct. See also *S v Vera* 2003 (1) ZLR 668 (H) and *S v Tambo* 2007 (2) ZLR 33 (H).

As regards intention, section 13 of the Criminal Law (Codification and Reform) Act Chapter 9:25 (the Code) states;

“(1) Where intention is an element of any crime the test is subjective and is whether or not the person whose conduct is in issue intended to engage in the conduct or produce the consequences he or she did.”

Section 18 of the Code deals with the degree and burden of proof in criminal cases. It states:

“18 (1) Subject to subsection (2) no person shall be held to be guilty of a crime in terms of this Code or any other enactment unless each essential element of the crime is proved beyond a reasonable doubt.”

Applying these principles to the facts *in casu* we find the following to be the proved facts;

- (1) Mercy Madedela, Progress Madedela and the deceased were at Masuku store at approximately 7pm on 25 December 2016.
- (2) The accused approached them and attempted to lure Progress away from the two girls but the latter refused.
- (3) The accused made advances to the two girls who ignored him leading to the accused assaulting Mercy by pressing her against a wall. She escaped and took her umbrella from the deceased but the accused would have none of it. He quickly tore the umbrella with a sharp object and broke it in the process.
- (4) Mercy then fled from the scene for about 5 -10 paces leaving the deceased and accused behind. She returned to the scene after approximately 8 minutes and found the deceased's body lying lifeless on the ground about 2 paces from where she had left her standing. The accused had disappeared into thin air.
- (5) The person who approached the group, proposed love to the girls and later assaulted Mercy and identified himself as "Stilah son of Matshakade. That person was armed with an axe and an okapi knife
- (6) That person is the same person who insulted and threatened to kill Nqobile Ndlovu and his brothers inside a backroom at Masuku's Store, in that he also identified himself as Stilah son of Matshakade to his frightened victims.
- (7) Stilah's real name is Structor Khumalo the accused in this case. The accused attempted to destroy evidence by throwing the knife away which conduct we find to be inconsistent with an innocent mind.
- (8) The proved facts exclude every reasonable inference from them save the inference that the accused is the one who stabbed the deceased to death. An inference that some other unknown person stabbed the deceased is inconsistent with all the proved facts especially if regard is had to the fact that the whole episode lasted a few minutes.
- (9) That the accused stabbed the deceased with actual intent to kill her. The medical report confirms that the knife entered the deceased's heart inflicting two wounds, resulting in severe and marked haemopericardium with abundant blood clot and compression of the heart (cardiac shock) 800ml. The accused must have used

excessive force to push the knife into the deceased's chest in that there was a total fracture of the 4th left costal arch (the 4th rib).

In the circumstances, we find the accused guilty of murder with actual intent.

We made a finding that the murder was not committed in aggravating circumstances after the state failed to establish the deceased's precise age.

Sentence

Justification for punishment in the realm of the criminal law resides in theories of punishment which include retribution, deterrence, rehabilitation and prevention or incapacitation. Punishment must fit the triad of the offender, the offence and the interests of justice which is represented by societal interests, expectations/legal values or the convictions of society. Consequently, punishments differ in their degree of severity depending primarily on the gravity of the crime.

Deterrence, prevention and reform look to the future in deciding what to do with the present, their common goal being crime prevention. According to one school of thought it is only the retributive theory that gives punishment its real meaning. Therefore, it sometimes so necessarily happens that the nature and gravity of a given crime, the *modus operandi* of its perpetration, the motive as well as the harmful effect (s) the crime causes to both the victim and the society, no other theory of punishment except retribution will meet the justice of the case. While it is accepted that modern trends in sentencing place emphasis on the rehabilitative theory of punishment, this should be the general rule which has exceptions.

Applying the above principles to the case at hand murder is a grave crime. The legislature deemed it fit to provide in section 47 (4) of the code that:

“4. A person convicted of murder shall be liable –

- (a) subject to sections 337 and 338 of the Criminal Procedure and Evidence Act [Chapter 9:07], to death, imprisonment for life or imprisonment for any definite period of not less than twenty years, if the crime was committed in aggravating circumstances as provided in subsection (2) or 3; or
- (b) in any other case to imprisonment for any definite period.”

Section 337 of the Criminal Procedure and Evidence Act states:

- “337 (1) Subject to section 338, the High Court may pass sentence of death upon an offender convicted by it of murder if it finds that the murder was committed in aggravating circumstances;
- (2) In cases where a person is convicted of murder without the presence of aggravating circumstances or the person is one referred to in section 338 (a), (b) or (c), the court may impose a sentence or imprisonment for life or any sentence other than the death sentence or imprisonment for life provided for by the law of the court considers such a sentence appropriate in all the circumstances of the case.”

In casu, we find the following factors to be mitigatory;

- (a) that the accused is a first offender;
- (b) that at the time of the commission of the offence the accused was intoxicated; and
- (c) that the accused is a youthful offender.

However, what is aggravatory is that murder is always regarded as a heinous crime. The accused brutally murdered a young and defenceless girl who had not wronged him in any way except exercise her freedom to choose who to love and who not to love. The accused’s brutal conduct led to the needless loss of a previous life. It is the duty of this court to uphold the sanctity of life.

It is clear from the provisions of section 337 that life imprisonment is a competent sentence in casu. However, having balanced the mitigating features against the aggravating circumstances, we are of the view that the following sentence is appropriate.

The accused is sentenced to 40 years imprisonment.

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