HB 26-18
HC (CRB) 21/18
XREF GOKWE 21/8/17

THE STATE
versus
DINGILIZWE DUBE

HIGH COURT OF ZIMBABWE
MOYO J
GWERU 6, 7 AND 8 FEBRUARY 2018

Criminal Trial

S Pedzisayi for the state
P Mabukwa for the accused

MOYO J: The accused person faces a charge of murder. It being alleged that on 17 August 2017 he set alight a bedroom hut at Amson Dlomo's homestead, resulting in the four deceased persons namely Progress Dlomo, Preference Dlomo, Presence Dlomo and Peculiar Dlomo dying in the inferno. He pleaded not guilty to murder but pleaded guilty to culpable homicide, a lesser charge.

Documentary exhibits were tendered in the following manner, the state summary, the defence outline, the accused's confirmed warned and cautioned statement, the four post mortem reports relating to all the deceased.

Also tendered were to by 5litres containers, a green woolen hat, a box of matches, a red T-shirt, a red miner's torch and a machete. All the exhibits were duly marked.

The evidence of Arrance Sibanda, Eliza Tsuro, Perceive Dlomo, Ernest Sibanda, Autilia Moyo, Phineas Chikwingo, Malvern Muzivi, Cornelius Dale, David Tizauone and Dr S. Pesanai was admitted into the court record as it appears in the state summary in terms of section 314 of the Criminal Procedure and Evidence Act [Chapter 9:07].

Privilege Dlomo gave *viva voce* evidence on behalf of the state. The material aspects of her evidence are similar to that of the defence, save for the fact that while she insisted accused was a violent person, accused denied this. For the defence, accused and his first wife Keresencia Munechi gave evidence.

The only factual conflict between the state case and the defence case is that the accused says he never assaulted Privilege in the duration of their marriage, that he loved her and that the only problem was the father in law who would continually call her back to his homestead so as to extort money from him. This was however resolved by the evidence of Keresenzia Munechi, accused's defence witness as she corroborated Privilege's account on that aspect. The extortion by the father in law was however not specifically challenged as he was never called to testify but nonetheless, this court finds that the accused gave the version of extortion by the father in law as the source of conflict between himself and his in laws and that he never assaulted Privilege yet clearly from the evidence of his two wives he was indeed a violent man who assaulted both his wives occasionally. This means that the real problem was his violence that caused his wife to flee back to her parents and nothing else. Even his narration on the lobola charges is not clear, it is not clear as to how much he was precisely charged, how much he paid and what was outstanding. It would also appear that by August 2017, he had paid all the initial amounts that were due and at some stage he even said that he had overpaid lobola. On the other hand he said he paid the introductory/acceptance charges only. His version on this lobola issue was manifestly unreliable and the only conclusion that can be made is that accused was being untruthful on this account. He merely assaulted his wife, was a violent husband and wanted his in laws to stay out of it. Having resolved the only factual issue the facts of this matter are thus common cause.

The Factual Background

The accused was married to Privilege Dlomo. The relationship was violent accused would occasionally assault her and she would flee to her parents' home. She was the accused's second wife. Accused denied ever assaulting her but as already resolved herein accused did assault her occasionally, causing her to flee the matrimonial home. On 17 August 2017, Privilege had again fled her matrimonial home due to threats of violence by the accused person. She decided to go to her uncle in Fort Rixon and did not go to her parent's homestead. The accused then went to the Dlomo's homestead according to him, with an intention to destroy Dlomo's property as he was bitter about Dlomo's unwarranted extortion and demands over lobola. He then planned to

torch Dlomo's bedroom hut and chop his cattle in a bid to hurt Dlomo or revenge and force him (Dlomo) to resolve the issues of accused's wife fleeing for no apparent reason. We already know however, that Privilege fled violence from accused as this was corroborated by accused's first wife whom he called as a second defence witness. He then set upon this evil mission and on the way in Bulawayo he bought 2 x 5litres gallons, and some matches. When he got to Gwelutshena, so he says, he then bought petrol and walked for about 5km to the Dlomo homestead. He got there when it was already dark. This homestead is used by people who reside therein, it was not an abandoned homestead and accused acknowledges that. He says Dlomo had told him that himself, Dlomo and his wife were in the Republic of South Africa, so he expected that his wife's siblings were sleeping in the other bedroom hut belonging to the girls. He says he targeted the bedroom belonging to their parents who were not around but were in the Republic of South Africa.

When he got to the homestead he did not check where the children were sleeping. He says he knocked on the door of the bedroom hut and challenged Dlomo and his wife to come out. He then sprinkled petrol at the door and windows and set the hut alight. The four deceased person who were sleeping in the hut were burnt to death. Before setting the hut on fire he had first passed by the kraal axing about nine beasts. He then fled. It is not in dispute that accused acted unlawfully and wrongfully on the date in question. There is also nothing to resolve on the facts as they are simple and straightforward. What has to be resolved is the legal issue of what accused is guilt of.

The state counsel prayed for a verdict of murder with constructive intent. While the defence prayed for a verdict of culpable or alternatively murder with constructive intent.

In murder with constructive intent an accused must have legal intention to commit murder even if he does not have actual intention. Legal intention, known also as *dolus eventualis* is defined in many respects as:

Professor Feltoe in the *Guide to Criminal Law in Zimbabwe* 2005 Edition at page 96 explains legal intention as:

> "Accused does not mean to bring about death but he engages in an activity after he foresees that there is a real risk that the activity will result in the death of a person."

Professor Feltoe goes further to state that:

> "Where it is alleged that accused had legal intention to kill accused 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 the article, the concept of *dolus eventualis* in *South African Law* by Shannon Hoctor, a Professor of Law at the University of KwaZulu Natal, *Dolus eventualis* is circumscribed in the following manner.

> "It, *mens rea* is a less and mediate degree found in those cases in which an offender, without specific malice or intention directed to the crime charged, consciously sets forth upon a wrongful or unlawful design, and in the execution of it reaches a criminal result greater than, or short of, or otherwise different from that proposed, but which he should reasonably have contemplated as a possible consequence of his conduct."

In the case of *S* v *Humphreys* 2015 (1) SA 491 (SCA) at paragraph 13 the court reasoned as follows per BRAND JA

> "Like any other fact, subjective foresight can be proved by inference. Moreover, common sense dictates that the process of inferential reasoning may start out from the premise that, in accordance with common human experience, the possibility of the consequences that ensued would have been obvious to any person of normal intelligence. The next logical step would then be to ask whether, in the light of all the facts and circumstances of this case, there is any reason to think that the appellant would not have shared this foresight, derived from common human experience --."

Legal intention can therefore be drawn as a matter of inference. The following facts are proven, from which an inference on accused's intention may be drawn:

- Accused planned to torch his father in law's bedroom hut.
- He did all the pre-planning
- He set upon a journey from Inyathi to Gokwe.
- He bought fuel containers in Bulawayo
- He also bought some matches.
- He bought fuel in Gwelutshena which he filled in the containers that he already had.
- He proceeded to walk 5km to the Dlomo homestead, at night.

- He got to the Dlomo homestead,
- He found Dlomo's cattle penned in his kraal a clear indication that there were people at the homestead as the cattle had been duly penned.
- He chopped the cattle as planned
- He then proceeded to the homestead.
- He did not announce his presence as he entered the homestead
- He went straight to his father in law's bedroom hut.
- He did not establish where the people in that home were
- He says he knocked on the bedroom hut door and challenged Dlomo and his wife to come out
- He does not say that he announced his presence politely, he challenged whoever was inside to come out
- Nobody responded or came out
- It being at night people were obviously sleeping
- He then sprinkled fuel on the windows and the door and set the hut alight.
- That nobody reacted to his challenge would certainly not mean that there was nobody inside the hut.
- There were many possibilities either the people inside would not have heard his knock and his challenge
- Or they heard it and decided to stay indoors as it would be safer.
- He does not say that he announced that he was torching the hut for the benefit of the people inside to appreciate the danger and come out.
- He did not open the door and go inside to burn the property so that he would see that definitely there was no one in there.
- He decided to sprinkle petrol on the doors and the windows and set those ablaze and yet those could be the only means of escape by anyone who could be inside
- He confirmed that this was not an abandoned homestead, he knew there was life in this homestead.

- It being a bedroom hut and it being at night a possibility that someone could be using that bedroom was real
- The accused person must have foreseen this real possibility
- It cannot be true that he was oblivious of this reality. If a person burns a bedroom hut at night at a homestead where there is life surely the real possibility that life may be lost as a consequence of such an action is unavoidable.

The accused person appreciated the real risk as he says he knocked and called out challenging his in laws to come out. He himself by virtue of his own conduct appreciated the risk that the hut could be occupied but nonetheless torched it.

The correct verdict in this matter is clearly that of murder with constructive intent. I will not assess defence counsel's submission on the aspect of a mistake of fact, as there is no mistake of fact in these facts. The accused person was not mistaken about anything, he hatched a plan to torch his in law's bedroom hut and he proceeded to do just that realizing that there was a real possibility that a person could be in there but he continued to torch the hut nonetheless.

The defence of intoxication

Such defence does not avail to the accused person as from his own account he appreciated everything that he did. He designed a plan and executed it meticulously until the end, therefore to then claim that he was clouded by intoxication is not true as his mind was clearly alive to the execution of his whole plan. He also says he got himself drunk deliberately after planning this so that he would have courage to execute the plan. The accused person drack beer for Dutch courage on the day in question.

The relevance of Section 220 (a) of the Criminal Law Codification and Reform Act [Chapter 9:23]

It is the finding of this court that the section which provides for involuntary intoxication as a complete defence to murder is inapplicable to the facts of this case, as clearly accused freely and voluntary got himself drunk and he even says he did so, so that he could get courage to execute

his sinister plan. Involuntary intoxication therefore does not exist in these facts and consequently the provisions of section 220 of the code are inapplicable.

As reasoned here, the only appropriate verdict in these circumstances is that of murder with constructive intent.

The accused person is accordingly found guilty of murder with constructive intent.

Sentence

The accused person is convicted of murder. He is a first offender, he is a family man and was the sole bread winner. The murder was committed in aggravating circumstances for the following reasons: in that it involved unlawful entry as the murder was committed by the accused after he entered the Dlomo homestead unlawfully on the day in question. It also involved malicious damage to property as he maliciously damaged a dwelling house through the use of fire. Three of the victims of the murder were minors. It also involved the death of two or more persons as four people died. These are all aggravating circumstances as per amendment number 3 of 2016. The accused set upon an evil plan to burn a bedroom hut which clearly could be occupied at the given time. He did not care about this, but, he set upon this evil mission recklessly and with no due regard for life at all. Four innocent young lives were lost in the process. The court finds that loss of life in circumstances as in this case is an abomination in our society. Accused was violent, he continually beat the woman he claimed to love, he did not want to reform but instead he wanted to silence his father in-law so that he leaves him alone whilst he physically abused his daughter. Domestic violence is a cancer in our society that requires all of us, the courts and other societal structures, to work hard in discouraging it, as the courts, there is no other way of doing this except through the passage of appropriate sentences. The accused person committed murder in aggravating circumstances, the only mitigating aspect that will serve him from the death sentence is that he is convicted of murder with constructive intent. He did not set upon a mission to kill on that day in question but he conducted himself in manner that was clearly bound to cause loss of life and did not care about the consequences.

He indeed caused the loss of four lives in the process. The arson was pre-planned and was meticulously carried out. In the case of *S* v *Vilakazi* 2009 (1) SACR 552 SCA at paragraph 58, the South African Supreme Court held that

> "In cases of serious crime, the personal circumstances of the offender, by themselves, will necessarily recede into the background."

In the case of *S* v *RO and another* 2010 (2) SACR 248 (SCA) at paragraph 20 the court stated thus:

> "to elevate the appellant's personal circumstances above that of society in general would not serve the well-established aims of sentencing including deterrence and retribution."

In the case of *S* v *Swart* 2004 (2) SACR 370 (SCA) at paragraph 12 the court stated thus:

> "Serious crimes will usually require that retribution and deterrence should come to the fore and that the rehabilitation of the offender will consequently play a relatively smaller role."

I am persuaded by these authorities in so far as the circumstances of this case are concerned. The accused person committed murder in aggravating circumstances, after pre-planning the whole sinister mission, he caused the death of four sisters. Society must have reacted with shock and grief at this event and the courts should likewise express their disapproval of such actions through appropriate punishment. Punishment that will cause the society and the aggrieved to have confidence in the justice system. Leniency in such circumstances or our over-emphasis of accused's being a first offender, would neglect the core foundational principles on sentencing in such serious cases. People, who behave like the accused person, should be removed from society, as they are dangerous and reckless. It is for these reasons that in terms of section 8 (4) (a) of the Criminal Law Codification and Reform Act [Chapter 9:23] the accused person is sentenced to life imprisonment.

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