

THE STATE
versus
CHRISPEN CHIPURURA

HIGH COURT OF ZIMBABWE
MUSAKWA J WITH MESSRS
GONZO AND SHENJE AS ASSESSORS
HARARE, 15, 16, 17, 19 AND 24 MARCH 2010

Criminal Trial

D. Chesa for the state
O. Zimbodza, for accused

MUSAKWA J: Although accused pleaded guilty to contravening section 47 (1) (a) of the Criminal Law (Codification and Reform) Act [*Cap 9:23*] the court entered a plea of not guilty in keeping with the provisions of s 271 (1) of the Criminal Procedure and Evidence Act [*Cap 9:07*].

The accused who is a qualified teacher who was based at Nyamapanda Primary School was in love with Abigail George. Abigail George was the mother of the three year old Nigel Josi. She had parted ways with the father of the child although the latter was seeking to reconcile with her. At the time of commission of the present offence Abigail George was pregnant with deceased's child.

On 27 October 2008 accused visited Abigail George who from her testimony was no longer interested in the affair. Later in the evening of the same day Abigail George left for the home of her friend Brenda Chaparira. According to her she told accused that she was going to fetch water. Accused is said to have suggested that she lock the door from outside. She said she told accused that she was not returning to put up for the night. On the other hand accused told the court that when he realized that he had been locked inside he questioned Abigail who told her she was doing so in case her former husband came and found him there.

Whatever could have been the more plausible explanation, accused spent the night locked in Abigail's house. Early in the morning on the following day Abigail returned home. According to her she left deceased behind because he was asleep. On the other hand accused said she

returned carrying deceased on her back. Brenda Chaparira said when she told Abigail that it was time to wake up she returned shortly afterwards when deceased started to cry. She does not know whether Abigail then took the deceased with her as she was then asleep. However, it was Brenda's evidence that when she eventually woke up deceased was not in the room. It was also Abigail's evidence under cross-examination that on the previous day she had carried deceased on her back as he was not feeling well. She was also asked if she had checked on deceased's health before she left for her place. She simply stated that she left deceased whilst he was asleep. There was no mention that he had cried and that she had returned to attend to him.

When Abigail unlocked the door to her house she went in and greeted accused. Accused returned her greeting and she went out to brush her teeth. After she returned from brushing her teeth accused told Abigail that he was going to his residence at the school. That is when Abigail said she told him never to return again. This upset accused as he then demanded his clothes he had brought for laundry. In addition accused demanded what he had given to Abigail during the good old days, including cash he claimed to have loaned to her. Abigail retorted that she had never placed her hand in accused's pockets for the money that he was now demanding.

At this stage the sequence of events diverges. According to Abigail when accused demanded his things he packed them in his bag and went outside. She in turn followed in order to see him off and locked the door behind her. As the two faced each other accused was now holding an axe and told her that he could damage her for being arrogant. The next instant she only saw darkness. When people later came she told them that she had been injured by accused but was unable to talk much. She was admitted at Kotwa Hospital until 23 November 2008.

Although Abigail was adamant that she had not brought deceased with her, she could not explain exactly how she was attacked or how deceased was killed. She suggested that deceased could have followed her home on his own as he used to go to Brenda's home to play with her child. The axe that was used by accused belonged to Brenda and had been lying outside near the entrance. Abigail had a visible scar covering the left eye and part of the left part of the head. In fact she lost her left eye as a result of the assault. She told the court that she sustained two other injuries to her head.

On the other hand accused's version is that when he demanded his things including the cash he then took Abigail's jacket and sneakers. He told Abigail that he would return the items when she paid back his money. As he walked away Abigail tried to snatch the jacket and sneakers and ended biting him on his left thumb. In a bid to extricate himself he stumbled on the axe and used his right hand to strike Abigail. Abigail knelt down as a result of the blow. As he aimed another blow she dodged and he struck deceased on the head. The deceased died soon thereafter. Realizing the gravity of the situation accused slashed his neck with a knife he took from Abigail's house in an attempt to kill himself. He then threw the knife and axe on the roof of the house.

Accused claims he sought help from Abigail's neighbor but to no avail. He then attempted to carry Abigail to her aunt's place but he failed as he was getting weak from the self-inflicted wound. He then went away to his residence. Upon being questioned by workmates he told them that he had been attacked by Fungai Josi, Abigail's former husband. However, he later came out clean when Police recorded a warned and cautioned statement from him. The warned and cautioned statement that was produced as exhibit three is in tandem with the defence outline and accused's testimony save one aspect. In the warned and cautioned statement accused did not state that Abigail bit him on the left thumb.

The state urged this court to find accused guilty of contravening section 47 (1) (a) of the code. Mr *Chesa* also submitted that it should be accepted that Abigail was not carrying deceased on her back. This is because no material with which she carried deceased on her back was found at the scene. Consequently, he further argued that it can only mean that accused killed deceased in order to suppress his attack on the mother. Accordingly it can only mean that accused deliberately killed deceased. In fact, Mr *Chesa* submitted that the murder was committed in cold blood.

On the other hand Mr *Zimbodza* submitted that the court must make a finding that deceased was killed whilst on his mother's back. In other words, he urged the court to accept accused's version of the events leading to the attack. Although conceding that the means used by accused to ward off the attack by Abigail was immoderate, Mr *Zimbodza* submitted that the court should return a verdict of contravening section 49 of the code (culpable homicide).

Having considered the evidence there are some aspects that remained unresolved. Although Abigail claims she left deceased at Brenda's house, the latter testified that she did not see deceased when she later woke up. It is difficult to conclude that deceased later followed his mother on his own. There are so many variables arising from this issue. The fact that deceased used to move between the two homesteads on his own does not mean he did so on the fateful day. This is primarily because no one saw him move out of Brenda's house in those early hours of the day. One could have wanted to know if he was tall enough to reach the door handle in Brenda's house in order to open it. Abigail did not see deceased arrive as she said she had already been injured.

On the other hand the first person to arrive at the scene, Nicholas Madzinga did not make detailed observations. Having noted deceased's body whose head was resting on a bag and Abigail who had serious injuries, his primary concern was to make a report to Police which he promptly proceeded to do. On the other hand Assistant Inspector Mupazi who attended the scene told the court that he found deceased and Abigail close to each other. Abigail was covered with a blanket. He did not see anything that could have been used to carry deceased on its mother's back. However, accused in his testimony told the court that deceased was strapped to its mother's back with a wrapping material which can be described as a small blanket. Considering that accused's warned and cautioned statement was recorded only a week after the incident attempts should have been made to clarify this aspect. If accused had attempted to carry Abigail away how far did he go from the scene? How did Abigail happen to be found close to the deceased? Who covered Abigail with the blanket and what happened to the blanket? All these are pertinent issues that have not been clarified. No evidence in the form of a sketch plan of the scene was presented to the court. It could have gone some way in outlining the scene and given some distances of the various points. Relying on witnesses' estimations from the courtroom without the accompanying plan is not very helpful.

Having concluded that it is not possible to hold that deceased walked alone to the scene and was killed in order to silence him, it means that we have to accept that he was on his mother's back. However, it is patently clear that whatever led accused to attack Abigail with an

axe, he harboured an intention to inflict grievous bodily harm which harm was indeed inflicted. He could have been charged with the attempted murder of Abigail.

We are here not concerned with the assault on Abigail which for some unknown reason was not prosecuted as attempted murder. By his own admission accused was aware that Abigail was carrying deceased on her back. Having first struck her on the left eye leading to Abigail going down, he further aimed another blow which found its mark on deceased. He must have realized that in aiming the axe at Abigail there was danger in causing death to deceased but persisted with such conduct despite the risk.

In the cases of *S v Mpala* 1986 (2) ZLR 93 (SC) and *S v Ncube* 1983 (2) ZLR 111 (SC) which involved the infliction of harm on an unintended victim it was held that since the *aberratio ictus* rule had been discarded in such cases as the present matter the court must look at accused's intention in relation to the unintended victim on the basis of foreseeability in order to determine whether he subjectively foresaw the possibility that the deceased might be killed.

In his Commentary on the Criminal Law (Codification and Reform) Act 2004, Professor G. Feltoe states that all crimes except those providing for strict liability require proof of some mental ingredient. The two main mental states are intention and negligence. Under the common law intention was subdivided into actual intention and legal intention. Thus legal intention has been modified to mean that a person has the necessary intention if he or she engages in conduct and realizes that there is a real risk or possibility (not merely a remote risk or possibility) that such conduct might cause the consequence and, having realized this, he or she continued to engage in the conduct reckless as to whether or not the consequence ensued.

We are therefore satisfied that the accused had the requisite intent *vis a vis* deceased when he aimed a blow at Abigail, missed and fatally struck the deceased. Accordingly, he is found guilty of contravening s 47 (1) (b) of the code (which for the avoidance of doubt is equivalent to murder with constructive intent).

Musunga & Associates, accused's legal practitioners