

THE STATE
versus
DANIEL MASIKINYE

HIGH COURT OF ZIMBABWE

BHUNU J

HARARE, 14 October 2014, 15 October 2014, 16 October 2014, 17 October 2014 and 17
June 2014

Assessors: 1. Mrs. Shava. 2. Mr. Barwa.

Ms Zachariah, for the State
Ms Mangidza, for the Defence

BHUNU J: The accused is charged with the murder of his cousin sister the now deceased Favourite Masuka in terms of s 47 of the Criminal Law (Codification and Reform) Act [*Cap* 9:23]. She was only a toddler of 4 years of age when she met her untimely death at the hands of the accused. He is alleged to have raped her first before killing her to cover up the rape.

Most of the facts pertaining to the charge are common cause as the bulk of the State's evidence was admitted by consent of the defence team in terms of s 314 of the Criminal Procedure and Evidence Act [*Cap* 9:07]. The section provides that:

“314 Admissions of fact

- (1) In any criminal proceedings the accused or his legal representative or the prosecutor may admit any fact relevant to the issue and any such admission shall be sufficient evidence of that fact.
- (2) If he considers it desirable for the purpose of clarifying the facts in issue or for obviating the adduction of evidence on facts which do not appear to be in dispute, the judge or magistrate may, during the course of a trial and on application by the prosecutor, the accused or his legal representative ask the accused or his legal representative or the prosecutor, as the case may be, whether any fact relevant to the issue is admitted in terms of this section.”

The evidence of the following witnesses as appears in the summary of the state case was admitted by the defence in terms of the above section:

1. Rebecca Tinago.
2. Togara Mavhunga.
3. Isaac Zawu.
4. Doctor T Masamha.

The accused consistently admitted having killed the deceased as alleged by the State. In his confirmed warned and cautioned statement he admitted raping the deceased before killing her. In Court he however admitted killing the deceased but denied raping her at all. In his confirmed warned and cautioned statement he had this to say:

“I admit the offence. When I killed Favourite Masuka, I first lifted her, carried (her) on my back, thereafter placed her on the ground and raped her. After raping her, I throttled her and stamped on her neck. I carried her to behind an anthill. When I got there, I held her legs and lifted her up and started hitting her head against a tree. I then let go her off and left her under the tree, bleeding from the nose and head.”

In Court his version had slightly changed. His sworn testimony was as follows:

“I know why I am in Court today. I have come for my trial in this case. I do not know the case.

It was in the afternoon when I indicated to my grandmother that I wanted to go and fetch firewood. I then carried the child on my back and went to fetch the firewood. It was my first time to go with her to fetch firewood. She did not dispute it when I told her.

I then placed the child on the ground and fetched firewood. After fetching firewood I then throttled her and then I broke her arm.

Q. Why were you doing that to your sister?

A. Nothing.

Q. In your warned and cautioned statement you said you first raped her, throttled her and then hit her against a tree.

A. Yes.

Q. Are you changing what you are saying now?

A. After I had kicked the child on the head I then lifted her by the legs and then hit her head against a tree.

Q. What then?

A. I left the child at the scene, carried my firewood home. My grant mother asked me and I said I did not know where the child was.”

The accused maintained his stance throughout that he killed the child in the manner alleged for no apparent reason. He then sought to hide behind the defence of insanity. His graphic accurate narration of the events which culminated in the deceased’s death establishes that he was conscious and cognitive of his conduct throughout the whole episode. He admitted as much under cross-examination which went something like this:

“Q. Why did you kill your sister?

A. I just killed her for no reason.

Q. Did you understand what you were doing?

A. Yes I appreciated what I was doing.

Q. So you knew that you were killing your sister for no reason.

A. Yes

Q. After the deceased person was found what then happened.

A. Mrs. Madaka advised me to go to the nearest school and that she would pass through and take me to her place of residence.

Mrs. Madaka then came and took me to her place of residence. She then ordered me to go to the garden to fetch water. As I was at the garden I was filling some drums of water. She sent one of her children to call me to her house. When I arrived there she advised me that uncle Naison was present. She advised me to tell the truth to uncle Naison, but I am not related to uncle Naison in any way.

I explained to them what had happened. He intended to remove my clothes and wanted to assault me. He further asked me why I had not come to his house.”

The accused's admission in his confirmed warned and cautioned statement that he first raped the deceased before killing her is amply corroborated by the post-mortem report which states that;

“Fracture of skull on left temporo parietal region. Evidence of penetration of vagina with about 1 cm opening.”

It then goes on to give the cause of death as Head Injury Secondary to Assault. The evidence before this court clearly establishes that the accused was conscious of his wrong doing throughout the whole episode. His conduct in trying to conceal his evil deeds by denying knowledge of the whereabouts of the deceased after he had killed her and trying to minimise the gravity of the offence by denying rape cannot be the conduct of an insane person.

Both doctor Masamha and the psychiatrist Farai Gwasira who examined the accused after the commission of the offence could find no evidence of mental illness. Their evidence was admitted in terms of s 314 of the Criminal Procedure and Evidence Act [*Cap* 9:07]. It therefore constitutes evidence of the fact that the accused was not suffering from any mental defect at the material time.

Mrs. Florence Madaka is a member of the Neighbourhood Watch Committee in the locality residing at Plot 47 Blackfontain Farm testified that she has known the accused since he was a child. She participated in the search for the deceased when she was reported missing. Her testimony was to the effect that when questioned the accused admitted having raped the child first before killing her. When she attended the scene of crime she observed that the deceased's head was severely damaged and her panties were blood stained.

She also stated that the accused participated in the search but did not disclose that he knew where the deceased's body was. Under cross-examination this witness told the court that she has known the accused since 2003. She was of the view that the accused was subnormal as he was at times not mentally stable although at times he appeared normal. She came to that conclusion because the accused had stopped going to school. She would however at times observe him standing next to school children not saying anything. As a result she concluded that he suffered from temporary insanity.

The accused has tendered the defence of insanity. That defence has its roots in common law. At common law a person who commits an act or omission that constitutes a crime while labouring under a disease of the mind to such an extent as to be incapable of

appreciating the nature and quality of his conduct is absolved of any guilt. The defence has since been codified under s 227 of the Criminal Law (Codification and Reform) Act [Cap 9:23] which provides that:

“227 Mental disorder at time of commission of crime

- (1) The fact that a person charged with a crime was suffering from a mental disorder or defect when the person did or omitted to do anything which is an essential element of the crime charged shall be a complete defence to the charge if the mental disorder or defect made him or her;
 - (a) incapable of appreciating the nature of his or her conduct, or that his or her conduct was unlawful, or both; or
 - (b) incapable, notwithstanding that he or she appreciated the nature of his or her conduct, or that his or her conduct was unlawful, or both, of acting in accordance with such an appreciation.
- (2) For the purposes of subsection (1), the cause and duration of the mental disorder or defect shall be immaterial.
- (3) Subsection (1) shall not apply to a mental disorder or defect which is neither permanent nor long-lasting, suffered by a person as a result of voluntary intoxication as defined in section *two hundred and nineteen*.”

The term mental disorder or defect is defined under s 226 as:

226 Interpretation in Part V of Chapter XIV

In this Part;

“Mental disorder or defect” means mental illness, arrested or incomplete development of mind, psychopathic disorder or any other disorder or disability of the mind.

Despite the codification of the defence of insanity, the common law test for determining whether the accused was insane at the time of commission or omission constituting criminal conduct as provided in the M’Naghten rules is still useful. The test as articulated by Professor G Feltoe in the *Guide to Criminal Law* at p 11 is as follows:

- “1. Was the accused unaware of physical nature and quality of act because of a disease of mind?

- 2 Even if he was aware of the physical nature and quality of his act, was he unaware that the act was wrong because of a decrease of the mind?
3. Even if he was aware of both the nature and quality of his act, and that it was wrong was he unable to resist the impulse to commit the crime because of a decrease of the mind?"

The evidence before us clearly establishes that the accused fully appreciated the nature and quality of his conduct. He consciously lured the deceased to a secluded forest area away from the prying eyes of the public for the purpose of raping her. After raping her he fully appreciated that what he had done was wrong and would get him into trouble should she report the rape.

To avert the trouble and criminal liability he decided to kill her in order to silence her for good. When it was discovered that the deceased was missing, he deliberately concealed her whereabouts by lying that he had ordered the child to go back home. Although he knew where the body of the deceased was, he sought to mislead the searching party by embarking on a fake search away from where he knew the child he had killed lay stone dead.

The accused's conduct betrays the behaviour of a rational person who was fully conscious of the nature and quality of his conduct and was fully aware of the unpleasant consequences of his criminal conduct. That being the case, the court comes to the unanimous decision that the accused was mentally sound and did not suffer from any mental defect, disorder or illness rendering him incapable of appreciating that raping and killing the deceased was wrongful and unlawful. The accused intentionally killed the deceased after raping her in order to conceal the rape he had perpetrated on her. His conduct in this respect was wilful and deliberate.

The accused is accordingly found guilty of murder with actual intent.

The National Prosecuting authority, the State's legal practitioners.

TK Hove & Partners, the defence's legal practitioners.