

THE STATE

VERSUS

ZIBUSISO NDLOVU

IN THE HIGH COURT OF ZIMBABWE
MAKONESE J
HWANGE 16 MARCH 2012

Mr. K. Ndlovu for the state
Mr. T. Nkala for the respondent

Criminal Trial

MAKONESE J: The accused is facing a charge of murder. The allegation being that on the 27th August 2011 at John Green's homestead in the Mathole, Village, Sigaula area of Inyathi in the Matabeleland North Province the accused did wrongfully, unlawfully and intentionally kill and murder Catherine Impala a female adult aged 31 years by stabbing her with an okapi knife in the head.

The accused denied the charge and tendered a limited plea of guilty with respect to culpable homicide. The state did not accept the limited plea and a full murder trial was held.

The accused raised the defences of self defence and intoxication and sought to argue that the killing of the deceased was not intentional.

ISSUES THAT ARE COMMON CAUSE.

In this matter most of the issues are common cause and the State has ably summarised these issues as follows:

- (1) That the accused person and the deceased hail from the same locality and were known to each other before the commission of the offence.
- (2) That accused had purchased a radio and a motor cycle battery from the deceased, and did not immediately pay for these items. The debt in respect of the radio remained

outstanding for a long time despite demand up until the 27th August 2011, the fateful day.

- (3) The accused owed the deceased the sum of US\$20-00 and on this day accused had on his person more than US\$40-00.
- (4) On the 27th August 2011 the accused proceeded to deceased's home and offered to offset the debt he owed with three buckets of maize.
- (5) The deceased told her mother AGNES MPALA about the offer and left with the accused to go and collect the bags of maize from the accused's place.
- (6) On the way to accused's place the two passed through NOKUTHULA MOYO's homestead who was called as the first state witness. The deceased then requested NOKUTHULA MOYO to go along with her to accused's place and help her ferry the maize.
- (7) The deceased in response indicated that this was not necessary as he was going to help the deceased to transport the maize. The witness then remained at her home and did not accompany the deceased and the accused.
- (8) Upon arrival at the accused's home, the accused asked the second state witness HLONIPANI NKOMO to leave, and take a walk and come back after a while. He then invited the deceased to the main house on the pretext that he would show her the maize.
- (9) The deceased then asked AUSTIN MOYO who was also at the homestead in one of the huts to turn up the volume of his radio.
- (10) Once in the main house lounge accused, asked the deceased to have sexual intercourse with him but she refused. The accused person then forcibly made the deceased to lie down on the sofa and proceeded to cut her panties on both sides with an okapi knife. When the deceased continued resisting accused's sexual advances the accused threatened to tie her up with strips of cloth and the deceased gave in. The accused then had sexual intercourse with the deceased without her consent.
- (11) During the course of the sexual intercourse the deceased asked the accused to stop and dismount her. The accused refused. The accused said he had not yet been satisfied. The deceased then grabbed the accused by his testicles and told the accused that she

would not let go until accused dismounted her. The accused took an okapi knife which he had earlier on used to cut the deceased's panties and then stabbed the deceased three times on the head.

- (12) The accused went on to throttle the deceased with both hands until the deceased was bleeding from the mouth and the nose.
- (13) According to the Post-mortem Report tendered and marked Exhibit 5 the cause of death was subarachnoid haemorrhage, head injury and assault.

Upon his arrest the accused gave a detailed warned and cautioned statement to the police in the following terms:

"I admit the charge being preferred against me. We were lovers with the now deceased. On the 27th day of August at around 1700 hours when I was coming from Siganda Business Centre I passed by collecting the now deceased in order to give her some maize as payment of a debt. I took the now deceased to my home. Upon my arrival I entered the main house which is three roomed. I left the now deceased with Austin Moyo, who is my cousin, who stay with me and who was in a thatched hut. I prepared the maize and then called the now deceased to come and see her maize. The now deceased came and entered a separate sitting room with sofas. I pulled down a track bottom she was wearing. I tried to remove her panties but I failed because the now deceased was holding it. I then stretched my hand towards a television stand drawer which was at our heads and opened and took an okapi knife which I used to cut the panties on both sides. I tried again to sexual intercourse (sic) with her but I failed. I then cut the vest I was wearing with a knife so that I bind the now deceased and have sexual intercourse with her. I informed the now deceased that I was now binding her. She then agreed I have sexual intercourse with her unbound. I then had sexual intercourse with her. After a short while the now deceased told me that it was enough and that I should dismount her. I refused and remained on top of her. She then moved about and got hold of my testicles and pressed, saying she will release me if I dismount her. I remained on top of the now deceased. I slapped her with open hands so that she may release me but she continued pressing. I then took the okapi knife which I had put near us and stabbed her thrice on the head and in the left arm once. She remained resolute on pressing. I then let go of the okapi knife and throttled using both hands. The now deceased stopped pressing and released her neck. (sic) She started bleeding through the nostrils as well as the mouth. I carried the now deceased to the bedroom and started pouring water thinking that she would come to. When she did not come to, I then hid her under the bed and left her.

(signed)

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30-08-11 at 1600 hours."

The state led evidence from NOKUTHULA MOYO. Her evidence was clear and credible and she struck as an honest witness. She said that on the fateful day around 1500 hours the deceased came to her home in the company of the accused. The deceased asked her to accompany her to the accused's residence to collect three buckets of maize as payment for accused's debt. The accused quickly intervened to say there was no need for the witness to accompany the two as he was going to assist the deceased himself. Before the deceased left the witness's home she asked that her cellphone be brought to the witness's home so that she could collect the same on her way back. The cellphone was later collected by the witness's daughter but the witness was surprised when she observed that the deceased had failed to return so she returned the cellphone to the deceased's home later that same evening. The following day the witness was advised that the deceased had not slept home and later that in the day she learnt that the deceased had been found dead at accused's house hidden under a bed. The witness thereafter went to view the half naked body of the deceased at the accused's homestead. She identified the body of the deceased to Constable Madyira.

When the witness was asked to comment on the state of sobriety of the accused the witness said she could not tell whether he was drunk or not because she was not used to him. The witness, however said that accused was walking normally and pushing his bicycle and that he had even helped her to mix some sand and correct using a shovel whilst at her home.

The State then led evidence from its second witness HLONIPANI NKOMO. This witness's testimony was to the effect that he was employed together with accused person at John Green's homestead in Mathole village, Inyathi. The witness said that when the deceased arrived in the company of the accused at the homestead the accused told him to take a walk around and came back later. He said that the accused person could have been moderately drunk as he said he had been drinking at Siganda. The witness said when he came back later accused quickly said they should go to Manambone Store where accused promised to buy some beer. To the surprise of the witness when they got to the shops accused person boarded a bread delivery vehicle which was headed for Siganda Business Centre. The witness returned home. The witness said that during the time they went to Manambone the accused person was

unusually quiet and he did not appear drunk. The court found this witness to be credible and his narration was consistent with the facts surrounding the case.

The state and the defence agreed to have the evidence of the following witnesses introduced in terms of section 314(1) of the Criminal Procedure and Evidence Act [Chapter 9:07] viz AGNES MPALA, IZON MHLANGA, AUSTIN MOYO, MASEMUPA MADYIRA, SUKOLUHLE SIBANDA, ASSISTANT INSPECTOR DUBE L AND DOCTOR SANGANAYI PESANAYI.

ACCUSED'S DEFENCE CASE

(1) INTOXICATION

The defence sought to argue that the accused started drinking beer around 10 o'clock in the morning at Siganda Business Centre. Accused stated that he consumed three pints of black label and then took about 1 litre of "hotstuff" which he shared with a friend. The accused has urged the court to find that his consumption of liquor somewhat impaired his judgment and that he did not appreciate the consequences of his conduct as a result thereof. We reject the argument that the accused was so drunk as to be incapable of being aware of the consequences of his behaviour. His conduct shows that he knew what he was doing and that he was in full control of his mental faculties. He described how he went to the deceased's home and persuaded her to go to his homestead to collect three buckets of maize. He passed through NOKUTHULA MOYO's homestead pushing his bicycle normally. He reasoned that there was no need for NOKUTHULA to accompany him and the deceased and that he would assist the deceased to ferry the maize. He was not a person seen staggering or falling all over the place. When he arrived at his homestead he carefully isolated the deceased, first by telling HLONIPANI to take a walk, and secondly by asking AUSTIN MOYO to turn up the volume of his radio. In his own words the accused wanted to have the deceased person to himself. The accused was a person who knew what he wanted and what he was about to do and nothing was going to stop him. He pretended to be preparing the deceased's maize but then the subject immediately changed to sexual demands. The deceased told accused that she did not want to have sexual intercourse with him. The accused, again in his own words, in evidence in chief then forcibly pushed the deceased onto the sofas. Once he had her lying down he removed her track

bottom and proceeded to cut her panties with an okapi knife on both ends. He mounted the deceased and raped her. The deceased pleaded with accused to stop and to dismount her but the accused proceeded to have sexual intercourse with her forcibly. The deceased somehow managed to get hold of the accused's testicles and pressed them. She told the accused that she would not release him until he dismounted her. The accused did not stop but instead took the okapi knife and stabbed her three times in the head and once on the arm. Realizing that the deceased was still squeezing his testicles the accused dropped the knife and with both hands throttled the deceased. The deceased started bleeding from the mouth and the nose and then the accused released her. She had died. The accused had killed her.

The results of the Post-mortem Report are consisted with stab wounds to the head as the cause of the death.

(2) **SELF DEFENCE**

The other defence raised by accused was one of self defence. The defence Counsel for the accused has properly conceded that this defence is not available to the accused person. The accused is the one who attacked his victim and raped her. The deceased is the one who tried to defence herself. See the case of *S v Nkululeko Nleya* HB 138/02. We find that the accused did not act in self defence. He was the aggressor.

WHETHER THE ACCUSED HAD INTENTION TO KILL

What remains for determination is whether the accused should be convicted of murder with actual or constructive intent. The defence has argued that on the facts the accused should be convicted with murder with constructive rather than actual intention to kill.

In the case of *S v Mugwanda* 2002(1) ZLR 574 at page 581 it was held that:

“for the 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, or that:-
- (b) while pursuing another objective he foresees the death of his victim as a substantially certain result of that activity and proceeds regardless.”

We are satisfied that the state has proved beyond reasonable doubt that when the accused stabbed the deceased three times on the head with an okapi knife in a bid to continue raping the deceased he foresaw death as a certain result of his conduct. The accused could have stopped the rape and dismounted the deceased. He had satisfied his sexual appetite. He chose to further throttle the deceased until she bled from the mouth and nose even after realizing that he had already injured her with the knife. The accused clearly foresaw the death of the deceased and proceeded recklessly with his conduct to secure sexual intercourse at all costs, regardless of whether or not death ensued.

In the result we accordingly find the accused guilty of murder with actual intent.

*Criminal Division, Attorney General's Office, applicant's legal practitioners
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