THE STATE
versus
PETROS MARIMA
and
KUDAKWASHE SIMBARASHE CHAKANETSA

HIGH COURT OF ZIMBABWE
PHIRI J
HARARE,21-23, November 2016, 1 & 13 December 2016

Criminal trial

B Murevanhema, for the State
T Maguvudze, for the 1st accused
M Dunatuna, for the 2nd accused

PHIRI J: The accused were facing a charge of murder in terms of s 47 (1) a of the Criminal law Codification and Reform Act [*Chapter 9:23*] it being alleged that on the 10th day of December, 2015 at Beatrice Farm, Chegutu, one or both of them unlawfully and with intent to kill caused the death of Machaya Sangombe by strangling.

The accused persons pleaded not guilty to the charge.

The State and the defence counsels all conceded that the evidence of the following State witnesses be admitted in terms of s 314 of the Criminal Procedure and Evidence Act [*Chapter 9:07*].

1. Doctor Mauricio Gonzalez
2. Mushuri Wheremu
3. Albert Sangombe
4. Maxwell Kutsara
5. Forget Mudangandi
6. Doesmatter Kahorwa

The following State witnesses gave evidence of under oath;

1. Rashid Marekeni
2. Henderson Banda

3. Abel Chinengamambo
4. Albert Sangombe

The evidence of Doctor Mauricio Gonzalez was to the effect that he is a duly registered medical practitioner employed as a forensic pathologist. On 12 December, 2015 at Harare Hospital and at the request of the Zimbabwe Republic Police he examined the remains of the deceased, Machaya Sangombe and concluded that the cause of death was asphyxia due to hanging. The post mortem report was produced in evidence as exh number 7.

Clever Sangombe led evidence. He stated that deceased was his father. On 9 December 2014 deceased came to his place at 1453 Pfupajena Chegutu for the purposes of collecting rentals. Deceased came with a black mountain bicycle marked Exh 1. He left Clever Sangombe's residence around 7:00 a.m. on 10 December, 2015. He received a report from his wife that police detectives had visited him on 11 December, 2015 he proceeded to Chegutu Hospital mortuary where he identified the body of the deceased before it was conveyed to Harare Hospital for a post mortem examination. He positively identified the recovered bicycle on the 17 December, 2015.

Rashal Marekerepi led evidence. He is a duly attested member of the ZRP. That on the 10th December 2015 he received a report from one Mushumi Vheremu.

He proceeded to the scene of the crime in the company of fellow detectives.

At the scene he observed some struggle marks on the foot path about 20 meters from where the deceased's body was. He observed some drag marks on the foot path about 20 metres from where the deceased's body was. He also observed some drag marks from where he had observed the struggle marks to where the body lay. There was a rope on deceased's neck with the other hand tied to a tree.

Abel Chinengemambo

Is a duly attested member of the CID stationed at Chegutu.

On 10 December around 9:30 hours he was on duty when he was tasked to attend a murder scene at Beatrice Farm, Chegutu.

He took some photographs at the scene of the crime which were produced as exh 4 (a, b and c). Photograph (a) depicted struggle marks at the footpath at the scene of the crime. Exhibit 4 (b) was a photograph depicting the body of the deceased lying down with face down and a rope on the neck. Exh 4 (c) showed photographs showing deceased lying down tied to a tree with, drag marks spoor, and a photograph depicting the height at which the other end of the rope was tied to a tree.

He also made observations that the rope on the deceased's neck was lightly fastened and that the deceased most probably met his death on the part of the footpath where there were no struggle marks.

Albert Sangombe

Stated that he resided at Plot 39 Maridadi Farm, Chegutu. Deceased was his paternal grandfather. Deceased visited him on 9 December, 2015 and he had his mountain bike. He learnt of the deceased's death on the afternoon of the following day. He was invited to CID Chegutu to identify the recovered bicycle.

Wonder Tanhamo

Led evidence to the effect that he resided at Plot No. 140, Maridadi Farm. Deceased was a resident of the same farm.

He learnt of the deceased's death on 10 December 2015. On 16 December, 2015 he received a phone call notifying him that deceased's bicycle had been seen along King Street, in Chegutu. He proceeded to the place and positively identified the deceased's bicycle whereupon he alerted the police.

Maxwell Kutsara

Led evidence that he worked with Doesmatter Katurura at number 56 King Street, Chegutu. He stated that the accused brought in the bicycle exh 1 for repairs. He carried out the repairs and placed the bicycle in the shop for collection by accused persons on 16 December, 2015. He was present when enquiries were made over the bicycle and when the accused were arrested.

Doesmatter Katurura

His evidence was admitted in terms of s 314 of the Criminal Procedure & Evidence Act (*supra*) and the court requested him to be called and lead further evidence.

He stated that the two accused persons came to his workplace on 15 December, 2015 at around 1600hrs. They brought a black mountain bicycle to his workplace at number 56 King Street, Chegutu. The witness is self employed as a cobbler and bicycle mechanic.

The accused requested the witness to replace the saddle with a new one which they had in their possession. They also instructed him to repair the bicycle chain and he charged them $2.50 for his services. 1st accused paid him $1.50 and it was agreed that they were going to settle the outstanding balance the following day when they would collect the bicycle. Later he was approached by detectives from CID Chegutu who later arrested the accused at around 1700hrs when the accused came to collect the bicycle.

Hendersen Banda

Led evidence. He was duly attested member of the republic police with 12years experience of which 7 years was investigations in homicide cases. On 10 December, 2015 he and other officers and, Rashid Marekeni visited the scene of the crime.

At the scene he searched the deceased's pockets and found two matchboxes, a bottle of glue, and offer letter and several receipts which bore the address "p1453 Pfupajena Chegutu."

He also observed that the body of the deceased was lying down facing downwards with blood oozing from the ears and froth on the mouth. A rope was tied to the neck of the deceased. The other end of the rope was tied on the trunk of a tree approximately thirty centimetres from the ground.

There were no struggle marks where the deceased's body lay.

He also observed that within about twenty metres from where the deceased's body was were some struggle marks suggesting that some people had fought.

There was also a straight spoor extending from the footpath to the spot where the deceased's body was and this was evidence that the deceased had been dragged to the tree. His conclusion was that the deceased had been tied to the tree when he already had lost his life.

The witness was also on duty on 16 December, 2015 when information was received that deceased's bicycle had been seen along King Street, Chegutu. He teamed up with other officers to arrest the accused and recover the bicycle at Number 56 King Street, Chegutu .

On 17 December, 2015 accused person led the witness and constable Forget Mudangandi for indications. Both accused indicated the position where they picked the rope used to tie the deceased.

The accused further indicated the spot where they tied or inserted the rope around the deceased, and, the spot where there were struggle marks created during the scuffle with the deceased.

The accused person separately made the indications and both their indications matched.

Under cross examination, the witness revealed that his investigations established that deceased had died between approximately 8.30hours and 9.00hrs. he also denied the suggestion that accused persons had left deceased when deceased was still alive, and, also dispelled the notion that the deceased may have hanged himself.

Forget Mudangandi

The evidence of Forget Mudangandi was also admitted in terms of s 314 of the Criminal Procedure & Evidence Act.

He is a duly attested member of the ZRP stationed at CID Chegutu. He teamed up with detectives Aridi, Banda and Nyamapfeka and waylaid and arrested accused person. Accused persons led them to their hide out in a bushy area along Chegutu Kadoma road. An axe belonging to the deceased was recovered from the accused's make shift shelter of pole and dagga.

On 17 December, 2015 the accused persons made indications at the scene of the crime.

Indications made by the first accused, Petros Marima, were admitted as evidence by consent and marked as exh 5.

The accused made indications where they followed deceased and he held the carrier of the bicycle whilst his co-accused Kudakwashe Simbarashe Chakanetsa came from behind deceased and threw a noose on deceased's neck.

Accused described how deceased fell to the ground from his bicycle, was dragged into the bush and tied to a tree.

Indications made by the second accused were admitted by consent, as evidence and marked as exh number 6.

The accused made indications how he came from behind the deceased and threw a noose on deceased's neck whilst he was cycling. He confirmed that they searched the deceased and discovered he had nothing and subsequently tied him to a tree and took deceased's bicycle with an axe on the carrier and cycled to Chegutu.

That was the close of the State case.

DEFENCE CASE

1st accused :PETROS MARIMA

1st accused gave evidence and adhered to his defence outline.

In his defence outline he stated that he was in the company of the 2nd accused enroute to Chakari from Chegutu.

They saw the deceased cycling and mooted the idea of searching and stealing from the deceased of any valuables on his person. He maintained that their intention was never to kill the deceased.

They ran towards the deceased and second accused grabbed the now deceased's bicycle from the back with the intention of "immobilizing him and the deceased fell down."

He then tied the deceased around the neck with the rope they had picked up and dragged him from the footpath into the bush so that they could search him. Upon realising that the deceased had no money they tied the other rope end to a tree trunk and left the deceased still alive. They then took the deceased's bicycle as a getaway means so that they could make headway in anticipating of the deceased raising the alar.

Under Cross examination the 1st accused testified that he was the one who hatched a plan to steal and this plan was hatched whilst they were in Chegutu.

He also admitted that when he laid the rope around deceased's neck the deceased did not sound the alarm nor resist. He admitted that he wanted to immobilize deceased without deceased raising the alarm.

Under cross examination, the 1st accused testified that he was the one who hatched a plan to steal and this plan was hatched whilst they were in Chegutu.

He also admitted that when he laid the rope around deceased's neck the deceased did not sound the alarm nor resist. He admitted that he wanted to immobilize deceased without deceased raising the alarm.

He denied that they tied deceased to a tree. He stated that he could not dispute the fact that the deceased died as a result of strangulation. He also did not dispute the fact that deceased would not have died if he had not fastened the rope.

Under cross examination by the accused counsel the accused was asked the question:

"Can you also confirm you are the one who dragged the deceased person to the tree?"

His answer was "yes".

On being asked by the court the question, "Who caused the deceased not to breathe?" the accused's answer was

"I did."

2nd Accused's Defence Case

2nd accused, Kudakwashe Simbarashe Chanetsa also gave evidence and adhered to his defence outline.

He stated that he was in the Company of the first accused enroute to Chakari from Chegutu whilst walking he come across a rope which was by the roadside. They took the rope with the intention to sell it.

They saw the now deceased cycling his bicycle and mooted the idea of searching and stealing from him. They never intended to kill him.

They followed and ran towards the deceased and he grabbed the deceased's bicycle from the back with the intention of immobilizing him. The deceased fell down.

The first accused then tied deceased around the neck, with the rope they had picked up and the first accused dragged him from the footpath into the bush.

The first accused then came back from the bush and they decided to run away from the scene. They took the deceased's bicycle as a getaway means so that they could make headway in anticipation of deceased raising alarm.

The accused also gave the explanation that;

> "On our way back we saw the now deceased and the first accused said we shall steal the bicycle from the deceased."

Under Cross Examination the accused admitted that they hatched the plan to steal from the deceased. He agreed that he was a "willing participant."

He also stated that he saw the 1st accused tying deceased with a rope and dragging the deceased using that rope. Deceased was "mourning and crying" and deceased stopped crying as he was being dragged into the bush.

The courts analysis of the evidence

In the court's view it is clear that the evidence adduced before it establishes that deceased met his death due to asphyxia as established by Doctor Mauricio Gonzalez.

The circumstances surrounding deceased's death were best described by the accused persons themselves.

It is clear that he accused persons hatched a plan to steal. Deceased unfortunately fell victim to this plan in that as he was riding his bicycle he was waylaid by the two accused.

It is clear that the 1st accused threw the noose around deceased's neck whilst the 2nd accused held the bicycle. The deceased fell down and was dragged towards the bush. There is evidence that there was a struggle signified by struggle marks on the ground. There was evidence led by the 2nd accused, that deceased was 'morning and crying' as he was dragged to the bush and this subsequently stopped.

We find that deceased met his death as he was being dragged by the rope which was tied round deceased's neck. The court does not accept the accused's evidence that they left the deceased whilst he was alive.

Accordingly this court holds that the state proved its case that deceased met his death due to the direct actions of the first accused.

The court also accepts submissions made for on behalf of the state that the plan which the two accused hatched materialized. The doctrine of common purpose was proved. The 2nd accused agreed to commit the offence and grabbed the bicycle whilst the rope was inserted on the deceased's neck. Both accused associated with each other's acts.

The second accused remained holding the bicycle and watched the 1st accused dragging the deceased with the rope. He clearly knew that the actions of the first accused would be fatal and did not dissociate himself with the 1st accused's actions.

The State witnesses led evidence that the two accused persons freely and voluntarily made indications and none of the accused challenged, these indications. The evidence of the officers who attended the scene and the evidence of the accused's indications corroborates the fact that deceased was dragged from a distance of twenty metres. The indications also confirm the spot where the deceased was found lying dead.

The indications so made are admissible in terms of s 256 of the Criminal Procedure and Evidence Act.

The observations of blood oozing from the ears and froth at the deceased's mouth confirm the fact that he first accused applied force.

The court also accepts the submissions made for on behalf of the State that the accused's defence, that, they wanted to use the bicycle as a getaway vehicle and that they left deceased alive was an after thought.

The court is also persuaded that the accused persons had the actual intention to kill.

> "'Murder' is unlawful and intentional killing of another person. In order to prove the guilt of an accused on a charge of murder, the State must …… establish that the perpetrator committed the act that led to the death of the deceased with the necessary intention to kill, known as *dolus.* Negligence, or *culpa* or the part of the perpetrator is insufficient."

In cases of murder there are preapaly two types of *dolus* which arise:

> "*Dolus directus* and *dolus evenualis.* These terms are nothing more than labels used by lawyers to connote a particular form of intention on the part of a person who commits a criminal act. In the case of murder, a person acts with *dolus directus* if he or she committed the offence with the object and purpose of killing the deceased. *Dolus eventualis* on the other hand, although a relatively straight forward concept, is somewhat different. In contrast to *dolus directus* in a case of murder where the object and purpose of the perpetrator is specifically to cause death, a person's intention in the form of *dolus eventualis* arises of the perpetrator foresees the risk of death occurring, but nevertheless continues the act appealing that death might well occur, therefore 'gambling' as it were with the life of the person against whom the Act is directed. It therefore consists of two parts : (1) foresight of

> the possibility of death occurring and (2) reconciliation with that foreseen possibility. This second element has been expressed in various ways. For example, it has been said that the person must not 'reckless as to the consequences' or must have been 'reconciled' with the foreseeable outcome. It is sufficient that the possibility of death is foreseen which, coupled with a disregard of that consequence, is sufficient to constitute the necessary criminal intent."

See *Director of Public Prosecutions* v *Pistorious Oscar Leaonard Carth* 96/215 ZASCA 204 at pp 14 to 15 of the judgment.

The test of realization and for see ability of death was also considered in the local case of *State* v *Paliza* HH 111/15, a judgment of MUSAKWA J. In that case the learned judge cites the test for realization or possibility as subjective as provided for in s 15 of the Criminal Codification and Reform Act and he observes that it has two components namely;

(a) Awareness that there is a risk or possibility that the conduct embarked on might result in the relevant consequence and the relevant fact or circumstance existed when the accused engaged in the conduct.

(b) Recklessness: This entails that despite the real risk or possibility the person whose conduct is complained of continued to engage in such conduct.

In the present matter, the 1st accused inserted a rope on the deceased's neck and dragged the deceased for a distance of twenty metres, clearly, aware that such conduct would result in deceased suffocating, and, as testified by the 2nd accused, continued to do so in total disregard that such conduct would result in deceased's death. Death was clearly foreseeable and the first accused proceeded dragging deceased regardless of consideration of the fact that such conduct would result in deceased's death.

This court accordingly finds the first accused guilty of murder in terms of s 47 (a) of the code.

This court finds that the 2nd accused actively participated in the commission of this offence. He picked the rope, violently disposed the deceased of his bicycle and did not dissociate himself with the actions of the first accused. He participated in the retention of the bicycle that was stolen from the deceased up until the two were arrested by the police.

This court also imputes the 1st accused's conduct on the 2nd accused and accordingly also finds the 2nd accused guilty of murder in terms of s 47 (a) of the code.

Sentence

The two accused stand convicted of murder in terms of s 47 (a) of the Criminal law (Codification and Reform) Act [*Chapter 9:23*].

This court has taken into account what has been stated in mitigation for and on behalf of the accused persons.

The 1st accused is aged 31 years old and is married. He is blessed with two minor children. He is a first offender and suffered pre-trial incaseration for almost a year.

The 2nd accused is aged 19 years and is a first offender. His counsel submitted that as his surname (Chakanetsa) suggests he has had a troubled past, is of low intellect and unsophisticated. He grew up as an orphan.

In aggravation the State submitted that the murder is a very serious offence. It is an aggravatory feature that in this case murder was committed during the course of a robbery.

The court was referred to the case of *State* v *Prisca Nyamadzawo & 2 Others* in which TAKUVA J observed that this is a crime deserving a severe sentence.

The State also referred this court to the case of *State* v *Kennedy Paliza* HH 111/15 at pp 6 to 7 and considered factors which constitute aggravatory circumstances.

The court also directed all counsel in this case, to the General Laws Amendment Act No.3 of 2016 which defines what constitutes aggravating circumstances and these are outlined in s 8 of the said General Laws Amendment.

All counsel involved conceded that, in this case, the murder was committed in aggravatory circumstances.

This court finds that:

The 1st accused was the "Mastermind" in so far as the commission of this offence was concerned. He was the older of the two and appears to have played a greater role in engineering the commission of the present offence. His moral blameworthiness is therefore high and accordingly the sentence of this court has to be commensurate with this role that he played.

The second accused is a youthful; offender who appeared to have been chiefly influenced by the 1st accused. The sentence to be imposed on him should also reflect and be commensurate with the accepted role which he played in the commission of the offence.

In terms of s 8 (4) of the aforesaid General Laws Amendment Act a person convicted of murder shall be liable to:

> "(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."

This court takes the view that the severity of human life must always be preserved.

The deceased, who was aged 85 years old, met his fate when he was on a mission to provide for himself and his family.

If an old person, such as the deceased, was working so tirelessly and try and survive it was very "wicked" of the accused persons, who are of a young age and capable of fending for themselves to execute such a "wicked" plan to steal from the deceased and totally disregard the sanctity of the life of such an aged person. The accused had at their disposal, decent and alternative ways of earning their living.

This court therefore needs to pass deterrent sentences in order to discourage such conduct and send the strong message that crime does not pay, and, that life is sacrosanct.

In the circumstances this court passes the following sentence:

(1) The 1st accused is sentenced to imprisonment for life.
(2) The 2nd accused is sentenced to twenty years imprisonment.

National Prosecuting Authority, State's legal practitioners
G N Mlotshwa & Company, 1st accused's legal practitioners
Chivore and Partners, accused's legal practitioners