

THE STATE
versus
SHEPHERD CHITSA

HIGH COURT OF ZIMBABWE
BACHI MZAWAZI J
CHINHOYI, 13 March 2024.

Assessors: *1. Mr. Mutombwa*
2. Mr. Kamanga

Criminal Trial

K. Teveraishe, for the State
S. Shoko, for the accused

BACHI MZAWAZI J

Facts

BACHI MZAWAZI J:

Introduction

The accused person, Shepherd Chitsa then aged 20, strangled his 60 year old mother, Melania Matambura to death, in broad day light, in the midst of a heavy rain down pour, in their homestead at house number,1185, Hintonville, Chegutu. On that fateful day, of the 17th of January 2022, only accused and the deceased were at home, in a residence shared with the accused's other two male siblings.

No one else witnessed what transpired apart from the accused and the deceased. Unfortunately the dead tell no tales. The deceased died and took her secrets to the grave. She was buried with her own side of the story. What only remains which makes the foundation of the State case is the accused's recount of what transpired on the dreadful afternoon. Of note, the deceased was not only found asphyxiated to death but her right hand index finger was also mutilated.

The facts

The brief background formulating the undisputed facts is that, the accused has a history of substance abuse and domestic violence. He is a drug addict. Incidences of domestic violence against the deceased were a permanent feature of their household, each time the accused partook the prohibited drug known by its street name, 'bronco'.

It was learnt from the State led evidence that accused was once thoroughly beaten by his two brothers after he had assaulted the deceased. The source of the dispute was in most cases two pronged. It was either the accused's drug induced voracious appetite or his quest to get answers from the deceased about his father's identity and whereabouts. In most instances it was a combination of both.

It is alleged that, on the day and time in question, the accused person after spending the whole morning reveling in the illegal substance, confronted the deceased over his father's issue once again. This contentious and detested topic led the deceased to remonstrate the accused with a small porridge stick. Judging from the exhibit of the same, produced uncontested in court, the porridge stick was less than 30 centimeters in length and 2centimetres in diameter.

From the accused's own word, the deceased's reaction prompted the accused to strangle her with both hands to death. From his description the deceased who was heftily built struggled throwing her hands in desperation until they fell numb on her sides. The accused only released his fatal grip when the deceased lay life less. It is not clear how much time lapsed after the femicide and the time accused then went to report to his sister.

The sister lived in the same suburb but some distance away. To his sister, he underplayed his role by stating that the deceased a hypertension patient had collapsed and succumbed to her ailment. It is said that, the sister and her teenage sons hastily made a bee-line to the deceased's residence. Her two sons outpaced her and arrived at the scene well ahead of her. The first to arrive noticed the body of the deceased lying sprawled on the ground with blood on her mouth. They also discovered the bloodied

hand with a crushed middle finger. Neck marks were also detected. This led to the arrest of the accused as the primary and only suspect. Thus, he is facing charges of murder, in terms of section 47 (1) of the Criminal Law Codification and Reform Act Chapter 9:23

Accused's Case

From that perspective, accused does not deny throttling his mother to death on the day and time in question but claims ignorance of what took place thereafter. In his evidence, in court, a facsimile of the summary of the State case, accused acknowledged that the finger was damaged as per the autopsy report but asserts that he has no recollection as to how that happened.

Accused's defence is that of voluntary intoxication. He adverts that he was under the heavy influence of the habit forming drug, 'Bronco' which impaired his mental state and inhibitions, though he vividly recalled and chronologically narrated the incident in detail up to date. In that regard, he pleads to a lesser charge citing his mental incapacitation and diminished responsibility at the time of the commission of the offence.

Be that as it may, the accused person related a totally different story highlighting the motive behind the killing and the role the intoxicating drug played in the matrix. To the police, he said he planned the killing to get the index finger for a ritual get rich scheme, as instructed by a traditional healer. He also painted the picture that in order to accomplish his mission he imbibed the drug for Dutch courage. This is all embodied in the warned and cautioned statement recorded by the police three weeks after the occurrence. The document was confirmed and has been admitted into evidence by consent as an exhibit. In that regard, what the confirmed warned and cautioned statement revealed was a premeditated and well - orchestrated ritual murder.

In that statement he bragged of selecting the most sensitive and sensational subject which would incense and provoke the deceased to bring about the expected reaction and repercussions. The rest of the story borne by this statement tallies in all material respects to the

accused's rendition of events in his defence and summary of the State case.

Notwithstanding that, the accused person in court, recanted from his confirmed warned and cautioned statement citing undue pressure. He denied and dismissed the Dutch courage and ritual killing insinuations. He told the court that the police would not give him peace until he gave them a reason why his mother's body missed a finger. As result of their persistent interrogation he gave in and accepted their conclusion of a ritual murder. He explained that because the whole ritual killing saga was a fabrication is the reason why the police never thoroughly and independently investigated the existence and the whereabouts of the witch doctor. He claimed that he had ended up giving and showing them a Chakari Settlement address which they pursued and did not yield any results. It was a wild goose chase.

The State Case

Ms Teveraishe, for the State, produced the autopsy report as an exhibit by consent. It revealed the cause of death primarily as asphyxia due to strangulation. It also revealed that the deceased finger had been crushed with the cartilage and some bones protruding from the wound with a missing cap. The confirmed warned and cautioned statement, the sketch outline and indications were also adduced unopposed. An application to expunge the evidence of Tsitsi Chitsa, the accused's sister was made and granted as she is now deceased. The rest of the witnesses written evidence was admitted uncontested as it was a carbon copy of their summary of evidence and that of Blessing Chitsa who testified orally in court.

Evidence from The State's first witness

Blessing Chitsa, a juvenile aged 17 years was the first to testify in court. His testimony is mainly pertinent to the discoveries he made upon visiting the scene as he was the first to do so. He also shed light into the life history of both the deceased and the accused who are his family members. In short, the deceased was his maternal grandmother. She had

four children, three boys and one girl, his mother. The accused was the last born of the family. From what he learnt when growing up, his grandfather deserted his family before the birth of the accused and vanished without a trace to date. He informed the court that the subject of his grandfather always infuriated the deceased as it brought back sad memories. It was a Pandora's box she preferred to be left untouched and unopened.

Blessing attested that the accused was a drug addict and illiterate. He has always been a problem child. This witness disclosed several instances of domestic violence perpetrated on the deceased by the accused. The disputes always emanated from the forbidden formidable subject, accused's quest to know his father's identity and whereabouts so as to establish his genealogy and paternal lineage. The second source of discordant was that the accused had a drug-induced voracious and garrulous appetite. He always demanded larger quantities of food and meat.

In respect to the offence, the witness who was deductively fifteen years old, at the time of the offence, was with his mother when the accused reported of the collapse of the deceased. This prompted the whole family of three to dash to the deceased's residence. He and his younger brother out-sprint their mother and arrived first. He found the deceased lying unresponsive on the floor with some blood on the mouth.

He also noticed several twenty-liter water buckets heaped on her right hand. He dashed to remove them and discovered blood oozing from the middle finger spreading to the floor. The finger looked amputated with bones protruding. In his panicky youthfulness, he tried to render first aid by resuscitating the deceased, whilst his young brother was fanning her to no avail. He only learnt that the deceased's body was lifeless and stiff cold when the adults inclusive of his mother arrived. From his observations, the accused appeared inebriated and agitated. Blessing Chitsa's evidence was coherent, consistent and unexaggerated. The court finds his evidence cogent and credible.

Evidence from the second state witness

Maxwell Kashiri, the investigating officer assigned to the case, was called as the second State witness. He only recorded the confirmed and warned cautioned statement several weeks after the commission of the crime. His reasons were that at the time of the accused's arrest on the day of the murder, he exhibited signs of drug induced intoxication. He was neither coherent nor stable. He testified that after they had extricated evidence of the missing tip of the finger from the accused he led them to a hat which was produced in court. The hat had neither signs of blood nor the finger.

Mr. Kashiri commented that that they failed to locate the alleged witch-doctor at the address supplied by the accused and during their indications tour with the accused. This police officer and acclaimed law enforcement agent of more than 15 years of service did not efficiently and effectively explain, under cross examination, why he delayed in obtaining crucial scene evidence timeously before the scene was tainted.

A hoe, a knife and a woolen red hat were produced through this witness as exhibits in relation to the mutilation of the finger. The exhibits noticeably did not have any remnant traces of blood. However, he was to a certain extent a credible witness.

State's closing submissions

In their closing submissions the State, correctly pointed out that in terms of section 222 of the Criminal Law Code[Chapter, 9:23], voluntary intoxication cannot be a defence that reduces the charge of murder to culpable homicide. In view of that, *Ms Teveraishe*, pointed out that the accused should be convicted of murder as charged. It is their argument that, the court should be swayed by the confirmed and warned and cautioned statement which discloses meditation and consumption of drugs as Dutch courage to facilitate the commission and furtherance of the heinous offence.

From that angle, the State counsel contends that it was a strategized and well executed ritual murder as buttressed by the autopsy report. It is the

State's further contention that they have indeed managed to adduce evidence from the proved facts to prove murder with actual intent.

The defence's closing submissions

On the other hand the accused's *pro deo* counsel, Ms Shoko's submissions were bereft of any legal principles backings. It was very brief and half-heartedly prepared, questioning the counsel's commitment to the case and the interests of justice. A reasonable explanation in that regard did not come forth from the accused's counsel.

Issues

Nevertheless, the issues emerging from the foregoing are as follows: Did the accused person intentionally cause the death of the deceased? Can he be found guilty of murder with actual or constructive intent?

Assessment of the facts, law and evidence

On analysis, for a person to be criminally liable for an offence of this nature they must have had the requisite *mensrea* to commit the crime even though the *actus reas* is present. The State bears the burden of proof to prove beyond a reasonable doubt that the accused did have the intention to bring about the death of the victim. The *mens rea* is the mental element of the offence. The conduct that brought about the end result is the physical component, the *actus reus*. G. Feltoe, in his book, 'A Guide to Criminal Law in Zimbabwe' 3rd edition 2004 at page 8 clearly and succinctly explains the two terms.

In that regard, s47 (1) of the Criminal Law Code defines murder as;

- a) any person who causes the death of another person intending to kill the other person, or
- b) realizing there is a real risk or possibility that his or her conduct may cause death, and continues to engage in that conduct despite the risk or possibility,

Shall be guilty of murder.

Evidently, section 47(1)(a) relates to actual and part (b) to constructive intention. In terms of section 18(1) of the Criminal Law Codification and Reform Act, no person shall be guilty of a crime in terms of the Code or any other enactment unless each essential element of the offence is proved beyond a reasonable doubt. The burden of proof lies with the State to prove each and every essential element of the offence. See, *Mugwanda v S-S-19-2002* which defines and differentiates actual and legal intent.

As already observed, the *actus reas* in this case is not in question. Accused in his own words gave a vivid and detailed description of how he killed the deceased. He did not mince his words or falter. His statement to the police, in his defence outline and his oral evidence is coherent and consistent. It is beyond doubt that it is the accused's physical conduct that brought about the death of the deceased. See, *Ncube A-186-79*.

For criminal liability to attach the accused's mental state must be free from any extraneous encumbrances such as intoxication and or mental disorder. Differently put, what the State has to prove is whether or not the accused had legal or actual intention to kill the deceased. From the facts it is clear that negligence does not come into play. Section 13 of the Criminal Law Code further elaborates on the test to be applied in determining intention by stating that, that where intention is an element of any crime, the test is subjective and is whether or not the person whose conduct is in issue intended to engage in the conduct or produce the consequences he or she did. See, *Mugwanda* above.

In view of the accused's defence of voluntary intoxication, the State brought in the aspect of section 222 of the Criminal Law Codification and Reform Act [Chapter, 9:23] which needs some interrogation. Indeed, the said section introduces a strict liability tenor to the defence of voluntary intoxication.

Whilst part (a) of section 222 is easily discernible from the facts and evidence, the challenge is on part (b). The first part of the section simply enjoins the State to prove that the accused was voluntarily intoxicated when he or she did or omitted to do anything which is an essential

element of the crime charged. *In casu* that is apparent as already deduced from the facts and evidence.

The tricky part is section 222(b) which places the second onus on the State to then prove that the effect of the intoxication was such that the accused lacked the requisite intention, knowledge or realization as in my considered view is required in terms of section 222(b) cited above. See, *S v Muchemesi* HH287/2015.

In *V1979(2) SA656 (A)* it was held that the degree to which accused was affected and the quantity must be weighed up. The understanding and judgment of an ordinary sober person must not be ascribed to a drunkard.

A closer examination of the evidence advanced herein reveals that the accused could detail in sequence what transpired on the day in question although under the influence of the prohibited substance. The explanation of his *modus operandi* before and after the incident minus the motive has the exactitude of someone who although intoxicated knew and would recall what was happening. After strangling his own mother to death he still was conscious enough to visit call his sister who lived a good distance away.

Yes, the drugs are also known as habit forming drugs with long lasting adverse consequences which may affect behavioral patterns. However, in this case there is nothing that shows that accused's state of intoxication was such that it affected his mental state to the extent of lacking the requisite intention. See, "*Domestic Violence, Old problems New Approaches, Stuart*" *LM Links (Oxford) 1997. PMID:12320799*, "*Substance Abuse and Behavioral Correlations of Sexual Assault Amongst South African Adolescents King G. etal. Child Abuse Negl.2004 PMID*", "*The Current Status of Drug Abuse and Dependence in Japan*" *Wada K Niton Arukoru Yakubutsu Isakkai Zashi 1998*.

Given the above, we are not satisfied that, section 222 of Act, Chapter 9:23, applies to alter the complexion of this offence warranting the verdict of guilty of voluntary intoxication leading to unlawful conduct. As such a

finding of guilty to the crime originally charged as dictated by the same section and advocated for by the state cannot be sustained.

The most applicable section in this scenario is section 221 of the same Statute. Section 221(1)(a) and (b) stipulates that ,if a person charged with a crime requiring proof of intention, knowledge or the realization of a real or possibility was voluntarily or involuntarily intoxicated when he or she did or omitted to do anything which is an essential element of the crime, but the effect of the intoxication was not such that he or she lacked the requisite intention, knowledge or realization, such intoxication shall not be a defence to the crime, but the court may regard it as mitigatory when assessing sentence. See, *A guide to Criminal law in Zimbabwe*, above and the case of *S v Muchemesi* above.

Having observed that, what it now translates to is to determine whether the accused is guilty of murder with actual or legal intent? In the present case, it is apparent that the accused, a drug addict was under the influence of a drug which he had voluntarily taken when he committed the offence. From the proved facts, the accused person's behavior as drug addict was heavily influenced by the drugs which were now part and parcel of his life. Gender based domestic violence directed at the deceased was an established pattern and a common feature in their household. He genuinely wanted to elicit information about his father from the deceased who shunned the subject at every turn. Against this background it cannot safely be concluded that accused person had actual intention to kill the deceased.

Intoxication affected his rational thought and powers of self- restraint.

The court is alive to the contents of the confirmed warned and cautioned statement and its insinuations. Nonetheless, the accused person distanced himself from the motive of ritual murder and the consumption of drugs for the purpose of Dutch courage to achieve his ends. The court believes him as his evidence in court was credible. It is trite that, once an extra curiae statement has been confirmed and tendered unchallenged it is difficult to rebut. It also an established fact that even though evidence

may have been admitted into evidence the court can still weigh and determine its probative value. See, *Nyathi & Ors S-52-95* and *Tavakonza A-24-71*.

The court is swayed by the accused's submissions for three reasons. Firstly, the court cannot ignore the accused's mannerisms in court. Moreover, a trier of facts is largely influenced by the behavior of litigants in court in assessing the authenticity of their testimony. It seemed the accused was still suffering from the aftermaths of the substance abuse. He was carefree, emotionless and detached in his rendition of how the offence was committed and the manner in which the deceased suffered in her last moments. He could not stand straight or steadily. He behaved like someone who was trembling from cold or being chased by someone. This made the court wonder that, if the debilitating effects of the habit forming drug was still evident when the accused was in incarceration and not exposed to the drug after such a considerable period of time what about at the time of the recording of the warned and cautioned statement.

Secondly, the investigating officer testified that the accused was not in a fit mental state to give a statement upon arrest and interrogation. He was visibly suffering from drug induced post traumatic shock. This assertion was corroborated by the evidence of Blessing Chitsa that the accused was visibly intoxicated after the occurrence. Given this view, it cannot be ruled out that coupled with the behavior displayed by the accused in court, the accused is still suffering from the after effects of the drugs.

Further, the police despite recording the issue of the witch doctor, they did not fully investigate that lead so as to establish the existence or not of such a traditional healer.

Thirdly, as already observed, though the said statement was admitted unopposed, from the general attitude of the defence- counsel she may not have fully consulted the accused on the production of the same unchallenged. This is evidenced by the accused's challenge of part of the contents of the exhibit's contents in court. Had the counsel taken full

instructions she would not have been on cross roads with the deceased in this regard.

This in our considered view destroys the probative value of the exhibit. It is accordingly disregarded. That in a way puts to rest the argument on Dutch courage and motive which have a bearing on the degree of blame worthiness and the accused.

In any event Section 13 of the Criminal law Code states;

“Except as may be expressly provided in this code or in the enactment concerned, the motive or underlying reason for a person’s doing or omitting to do anything, or forming any intention, is immaterial to that person’s criminal liability in terms of this code or any other enactment”.

Against the provisions of s13 above, whether the murder was for rituals or not it is neither here nor there as the motive is said to be of consideration. In the case of the *State v Sibanda* HB262/16, an equally young man who fatally stabbed his mother to death whilst intoxicated was held to have had the intention to kill. The court found that despite his intoxication from drugs and alcohol, he had the intention to kill his mother.

In *S v Ngobese* 1936 AD 296, the accused stabbed his friend whilst still drunk under the influence of liquor, was found guilty of legal intention. See, *S v Zimondi* HH179/15 and *S v Togara* HH13/17, *S v Phiri* HH581/16 and *Sv Mupange v-S-143-94. Mungwanda v S-S-19-2002*.

Accordingly, guided by the case of *State v Sibanda*, and *Ngobese* above, we find the accused guilty of murder with constructive intent.

Sentencing

In sentencing the accused both the pre-sentencing report and the victim impact statement recorded from a relative of both the accused and the deceased has been taken into account. The submissions in mitigation and aggravation from both counsels have also been considered. The facts and the charge need no repetition.

From the victim impact statement, the court learnt that the deceased was a very industrious single mother who was the pillar of the family. She fended for all her children and grandchildren including the accused and the first witness Blessing Chitsa. He is a person directly affected by the impact of the deceased's death. Blessing stated that his mother who was mentally impaired died prematurely soon after the deceased as she could not cope with her loss. As a result both the witness and his young brother were orphaned and are now in the care of Good Samaritans who are total strangers.

On the other hand, from the pre-sentencing report emphasis was placed on the accused's abuse of drugs. He was a drug addict who also suffered from the broken home syndrome. He was twenty years, illiterate and unemployed. He hid his frustration in over indulging in drugs. The witness revealed that the surrounding the accused's father was a thorn in the flesh which always made him restless.

Notably, the presentencing report is accused person centric, whereas the victim impact statement is recorded from either the primary or secondary victims of the crime. See, *S v Nevanji* HCC17/24.

In mitigation the accused's age at the time of the commission of the offence coupled with drugs intake largely influenced his behavior in general and in committing this offence. Synonymous with youthfulness, is immature and impulsive decisions. Sight cannot be lost that prolonged use of habit formulating drugs has long term effects calling for rehabilitative measures. Drug abuse both domestically and internationally is a common social problem. It has its roots in social, cultural and economic malfunctions that impact heavily and adversely on the youth. Accused despite his wayward behavior has no criminal record. First offenders usually attract lenient penalties See, *S v Mantwana*- S-20/20, *S v Zikhali*. 2017 (1) ZLR 84.

In aggravation, however, precious life was needlessly lost. The offence was committed callously on a defence-less woman. The facts of this case have revealed the height of domestic violence in general and violence against women *per se*. The accused was ungrateful that his mother brought him up singlehandedly. He failed to respect her reasons for not divulging and venturing into a subject which evidently brought her so much pain and would rather not discuss or share. The accused failed to accept his father's desertion and lack of love and ties with him for a good twenty years.

In addition, the manner in which the accused throttled his mother, the deceased is deplorable. He watched her struggle but did not bring himself to release his deadly grip. He enjoyed watching her fight to breathe until she could not struggle any more like in a horror movie. It seems like from his recount he was enjoying the show.

In the final analysis, a balance should be struck between the interests of the accused, society and the victim. This is what is referred to as the triad in sentencing in the case of *S v Zinn 1969(2) SA 537 (A)*. In that regard, the court has given weight to the accused's historical background and environment that largely shaped his character and the person he has become.

The beauty about the introduction of a pre-sentencing report in our jurisdiction by the promulgation of S.I.146/23, is that the court is accorded an insight into what makes the accused tick. As opposed to victim impact statement which is victim of the crime centric, the pre-sentencing report is all about the convicted person. It allows individualization of sentencing and propagates the principle of the treatment of each case on its own unique circumstances. It has some humanity element into it permitting for a moment to also view criminal offenders as victims of socio-economic circumstances not of their own making and choice. See, *S Dyonaise (CC47/2018[2020] ZAWCHC-SAFLLI*.

A van der Harem and Ovens, in their article, "*A Forensic Study of a Paedophile: Illustrating the Presentation and Value of the Pre-sentence Evaluation Report*", commented as follows:

"The primary purpose of a pre-sentencing report is to provide the court with comprehensive information about the offender as a person in order to assist in the passing of sentence. The report provides details with regards to the accused's childhood years, education and training, personality make ups, relationships as well as an explanation with regard to the causes and context within which the crime took place. This is the stage in the court process is often known to the Magistrates and can serve to individualize the offender."

Disposition

In conclusion, the presumptive sentence of murder with constructive intent is 20 years. This is also the sentencing range in most decided cases. In the case of *S v Togara* HH13/17 a person convicted of murder with constructive intent was sentenced to 18 years imprisonment. In *S v Phiri* HH581/16 upon conviction of murder with legal intent the accused was sentenced to a 20-year custodial term.

That be as it may, in light of the accused's own unique circumstances evinced from his mitigation and pre-sentencing report, the court is of the view that twenty years will not meet the justice of this case. He is an apparent drug addict still exhibiting side effects of prolonged drug abuse. He is definitely in need of rehabilitation. He poses danger to himself and the society if he is let loose into society. The court has also deductively taken into account his youthfulness and the two year pre-trial incarceration stint, amongst other factors examined herein. Taking all the factors of this case holistically and in striking a balance between the mitigation and aggravation features, the interests of the accused, the victim and the society, the accused is sentenced to fifteen years imprisonment.

National Prosecuting Authority for the State.

Pundu Law Chambers for the accused.

