

THE STATE

VERSUS

SIBUSANI MLOYI

IN THE HIGH COURT OF ZIMBABWE
MAKONESE J
HWANGE 14 MARCH 2012

Ms N. Ndlovu for the state
Mr E. Mashindi for the accused

Criminal Trial

MAKONESE J: The accused was charged with murder, it being alleged that on or about the 10th September 2011 in the early hours of the morning and in a bushy area near Joes Trading Centre, Queens area, Inyathi the accused wrongfully and unlawfully and intentionally kill Petronella Ncube (“the deceased”). The accused pleaded not guilty to the charge.

Upon his arrest, the accused made a warned and cautioned statement to the police on the 10th September 2011. The statement which was made hours after the offence was committed reads as follows:

“I admit the allegations of killing one Petronella Ncube preferred against me. On the 10th September 2011, around 0200 hours in the morning, I was at Queens Compound Beer Garden having a beer drink. Around 0200 hours, I saw the now deceased, who was one of the commercial worker. (sic) I engaged her and we proceeded into a bush near Jones Trading Store. I was with Innocencier Mpofo and Cleopas Moyo. I then gave her (US\$5-00) five United States American Dollars as payment for sex services. We parted ways further on and left with the now deceased. When we arrived and when I asked the now deceased to provide with her services, she refused. I then demanded my money back but refused and made a turnaround and saying she was taking out a firearm. I the just pounced on her, stabbing her with a knife which had been in my pocket. I no longer remember the number of times I stabbed her as well as the area of the body.”

The brief facts surrounding this case as summarised by the state in the State outline are as follows:

On the 10th September 2011 at around 0250 hours the accused and deceased met at Queens Mine Compound, Inyathi where they were drinking beer. The deceased was in the company of Innoncier Mpofu and his friend Cleopas Moyo. The four agreed to have sexual intercourse, the accused with the deceased, and the accused's friend Cleopas Moyo, with Innoncier Mpofu. In return for the sexual services the accused and his friend agreed to pay the women US\$5-00 each. Once the terms of the agreement were agreed the four parties left the compound for a bushy area to perform the sexual acts. At that stage everything seemed to be going on well. Each couple went to a separate spot in the bush. When accused's friend and Innoncier Mpofu were done they went back to the shopping centre and waited for the accused and the deceased to return. After about 45 minutes they heard the deceased screaming, calling for help from the direction of the bush. They rushed to the scene and found the deceased lying on the ground. The deceased was rolling on the ground. The accused who had been in the bushes hiding, emerged and Innoncier Mpofu asked him to assist. The accused removed the deceased's jacket and blouse and took a knife from his pocket which he used to cut off the brassier. The deceased was complaining that she was feeling hot. Accused made the deceased lie on her back. Innoncier Mpofu rushed back to the shopping centre to get assistance. When she got back to the scene in the company of two security guards she had called, the accused and Cleopas Moyo had left the scene. The deceased had died on that spot and a report was made to the police who attended the scene and conveyed the deceased's body to the United Bulawayo Hospitals for a post mortem examination.

The state led evidence from only one witness Innoncier Mpofu. The evidence of Cleopas Moyo, Smanga Moyo, Handsome Mnkandla, Constable Michael Sibanda, Assitant Inspector Ncube Salani, Constable Sibanda S, and Doctor Sanganaï Pesanayi was introduced into evidence by consent of the State and Defence in terms of Section 314(1) of the Criminal Procedure and Evidence Act [Chapter 9:07].

Both the Defence and the State agreed in their written submissions that the State witness Innoncier Mpofu gave her testimony with accuracy and detail and that she was a credible witness. We found her evidence to be straight forward and reliable. She was not at

the scene when the stabbing occurred, but she was the first on the scene, when she heard the deceased's cries for help.

It is necessary to summarise in brief what Innoncier Mpofu told the court. She said that once they had been given their payment for sexual intercourse they chose separate spots in the bush. After she had had sexual intercourse with Cleopas Moyo she retired to the compound and sat around a fire. After a period of about 45 minutes she heard screams from the direction they had come from. She heard a loud voice saying:-

"Linda, Linda, assist me. Here is a person who is killing me."

The witness said that she initially ignored the calls because she did not think anyone in that area knew her other name which was Linda or her name at all. After a while the person called out again saying:-

"Linda assist me. Here is a person who is killing me."

The witness says she told Cleopas Moyo that the voice that was calling out seemed to be that of the deceased. She got up and ran in the direction the voice was coming from. Cleopas was following behind walking slowly. As the witness got to the scene she heard the deceased groaning. The accused person was hiding on the bushes. The deceased person indicated that she was dying. When Cleopas arrived at the scene accused emerged from the bushes. When accused came out the witness said he was in an aggressive mood. Accused said he was going to kill a person. He said he would cut up a person like a chicken and that he could not be assaulted by a woman. The witness says Cleopas asked the accused what he had just done. He said to the accused:

"Man is this what you can do to a woman."

Accused person retorted saying that he did not intend to kill the deceased but she had advanced towards him aggressively with fists. The accused also complained that the deceased had torn off his shirt.

The witness Innoncier Mpofu testified that at that stage the deceased was rolling on the ground and she was complaining that she was feeling hot. The accused moved towards the deceased and held her hand and roughly removed her jacket. The deceased was bleeding profusely. As deceased's jacket was removed two condoms fell out of her pockets and

deceased said they should also remove her blouse as she was still feeling hot. The accused removed the blouse and then tried to remove the deceased's brassier. After failing to locate the pins accused took out a bloody knife from his pocket and used it to cut off the deceased's brassier. The accused thereafter replaced the knife into his pocket. The witness said that the accused person knelt near the deceased person as she was rolling on ground. At that stage the witness heard a gasp of heavy breath from the deceased person. The deceased had died. The witness covered the deceased's upper body with a piece of material. The accused and Cleopas then engaged in some discussions in low voices and fearing that the two men could be plotting to eliminate her the witness ran back to the compound where she reported the incident to two security guards. When she get back to the scene of the crime in the company of the two guards both accused and Cleopas had disappeared. The witness observed that the deceased's cellphone had been placed near the deceased's body. The deceased's body was later ferried to Hospital. The accused was later that day arrested at Mathendele Mine were he was drinking beer with his friend.

The statement of Cleopas Moyo which was accepted into evidence confirms most of what Innonceir Mpfu stated in court. Although Cleopas did not witness the stabbing of the deceased he confirms in his statement that after the deceased had been confirmed dead he heard accused blaming himself for having killed the deceased. Accused did not give his reasons for having done so.

The only piece of evidence this court can rely on in deciding what led the accused to stab the deceased comes from Innonceir Mpfu. This witness said that accused was in an aggressive mood and was saying that the deceased had not satisfied him and yet he wanted him to pay the US\$5-00. Accused further complained that the deceased had refused to perform a second round of sexual intercourse and that there was no reason for him to have paid anything to the deceased. In fact, Innonceir Mpfu stated that accused said that he had already taken back his US\$5-00. It seems clear that this is where the dispute arose. Innonceir conceded that there was some evidence that the parties fought as the accused's shirt was torn. In the absence of any other independent evidence it becomes difficult to rule out the fact that the parties had engaged in a fight before the stabbing.

The accused testified in court but as properly conceded by his defence counsel *Mr Mashindi* the accused's testimony was plagued with grave inconsistencies and he was not a credible witness. The accused admitted in his warned and cautioned statement that he took a knife from his pocket but he sought to reject this in his evidence in court. The accused's claim that the deceased threatened to shoot him should be rejected as a false defence. The deceased was not carrying a firearm and the accused had no reason to believe the deceased could have any weapon let alone a gun because she was not even carrying a hand bag. The accused was not under any imminent or perceived threat of attack. The defence of self defence clearly falls away. The accused was found by Innonceir Mpofo with a knife in his pocket. This is supported by the statement of Assistant Inspector Ncube Salani who stated that the accused admitted having stabbed the deceased with a knife and that he had thrown the knife away. *Mr Mashindi* also conceded that the defence that the deceased was the aggressor because she produced a knife was an afterthought.

We make the finding that the accused must have been aggressor. He was not satisfied with the sexual services rendered to him. He wanted a second round of sex. This must have incensed the accused who demanded his US\$5-00 back. Curiously enough this sum of money had been paid by Cleopas on behalf of the accused but nonetheless because of accused's aggression he recovered this money back before the stabbing. The parties seem to have engaged in some tussle. The accused then stabbed the deceased indiscriminately all over the body.

The post-mortem report concluded that the cause of death was:

- (a) Haemorrhagic shock
- (b) multiple stab wounds
- (c) Assault
- (d) Homicide

A summary of the marks of violence observed by the pathologist Dr Sangani Pesanai noted that the deceased had stab wounds on her body all concentrated in the upper part of the body, viz, the head, the chest and the back.

This court accepts that the accused person was intoxicated when he committed the offence. The intoxication of the accused however cannot be a full defence in this matter.

The defence have argued that the accused be convicted of murder with constructive intent.

We are of the view that the state has properly conceded that as alternative the accused be convicted of murder with constructive intent. His manner of stabbing of the deceased proves that the accused foresaw death as a possibility and continued recklessly with the unlawful attack.

Professor G. Feltoe, in his book, p107 The Guide to Zimbabwe Criminal Law discusses the distinction between positive or actual intent in manner that is very lucid and instructive. The learned author characterises the distinction as follows:

“Actual intention

- (a) Desires death. Death is aim and object.
or
- (b) Death is not the aim and object but in the process of engaging in some activity his proceeds regardless as to whether this consequences ensues.

Legal intention/Constructive intention

Does not mean to bring about death but foresees it as a possibility whilst engaged in some activity regardless as to whether death ensues.

- (a) subjective foresight
- (b) as to possibility not probability
- (c) reckless”

It is therefore this court’s finding that the accused reasonably foresaw death as a possibility. He had constructive intention to cause the death of the deceased.

See also the case of *Robert Mugwanda v The State* SC 19/02 reported in 2002 (1) ZLR 574 at page 581. The accused is accordingly found guilty of murder with constructive intent.

Sentence

In assessing an appropriate sentence the court takes into account what has been said on your behalf by your legal counsel in mitigation. The court shall note that

- (1) you are a first offender

- (2) you are aged 27 years
- (3) you are not married and have no children
- (4) you were drunk when you committed this offence.

In aggravation the court notes that you pleaded not guilty and defended yourself to the bitter end. You tried to twist the facts to suit yourself. You have shown no remorse or contrition when you realized that the deceased had died you actually tried to render assistance but you later disappeared from the scene. You disposed of the knife you had used to inflict the injuries. You were arrested at a beer drink, drinking beer as if nothing had happened. You sought to manufacture a defence that the deceased had threatened you with a gun which defence was rejected by this court. Your attack was vicious and brutal. You aimed the blows to the head, chest and the back. You stabbed the deceased nine times. You acted in the manner you did because you claimed the deceased had not satisfied your sexual desires. The deceased had refused and you became aggressive. You had taken some alcohol but your behaviour during and after the stabbing shows that you appreciated that you could cause the death of the deceased. You used a high degree of force to inflict serious injuries. Your moral blameworthiness is very high. These courts must send a message that violence against women, especially defenceless women is not tolerated. In fact violence against any person is not tolerated. You behaved in a very irrational manner.

A lengthy custodial sentence is called for. The only factors that are in your favour are that you had consumed alcohol and that there appeared to have been a struggle between you and deceased prior to the stabbing.

Effective sentence: 25 years imprisonment

Mashindi and associates, accused's legal practitioners
Criminal Division, Attorney General's Office, applicant's legal practitioners