HB 108/17
HC (CRB) 126/12

THE STATE

Versus

JOSIAS MUTIKANI

IN THE HIGH COURT OF ZIMBABWE
KAMOCHA J
BULAWAYO 12 FEBRUARY 2013, 17 OCTOBER 2016,
31 OCTOBER 2016, 14 NOVEMBER 2016 & 3 APRIL 2017

Criminal Trial

T. Makoni state counsel on 12 February 2013
Ms N. Ngwenya from 17 October 2016 onwards
N. Dube defence counsel

KAMOCHA J: The accused who was aged 24 at the time he allegedly killed Dorris Gill who was 86 years was charged with the crime of murder. It being alleged that on 27 November 2011 at number 34 Qalisa Village Suburbs, Bulawayo he did wrongfully, unlawfully and intentionally kill and murder the deceased a female adult in her lifetime therebeing.

He admitted the charge when it was read to him.

When asked by the court what was it that he was admitting his response was that he admitted killing the deceased. When asked further if it was his intention to kill her when he assaulted her, he said it was. When asked why he did that his explanation was as follows.

He said he had been employed by the deceased and lived with her. She was white and he was black and Shona. But the two failed to understand each other as time went by resulting in the termination of his employment. He then thought that he had lost his job because he was not educated and blamed his parents for not educating him. He concluded that he felt bad about that.

A plea of not guilty was entered on his behalf.

The state produced its outline as exhibit one while the defence outline was produced as exhibit two. It was brief and it reads as follows:

"(1) The accused person is facing a charge of murder as defined in section 47 of the Criminal Law (Codification and Reform) Act [Chapter 9:23]
(2) Accused person pleads not guilty to the allegations leveled against him.
(3) Further accused will put the State to the strictest proof thereof to prove its case beyond a reasonable doubt".

The third exhibit was a post mortem report by Doctor Sanganai Pesanai. Under marks of violence he observed bruises on the frontal region of the neck measuring 6 x 2cm and 7 x 2cm. He noted twenty-two (22) injuries to the head. The multiple injuries caused the following damage to the skull; fracture right parietal and temporal bone measuring 6 x 4cm; multiple bone fragments; and fractured right and left anterial and medical fossae. The brain had a laceration on the right penetal and temporal lobes.

The doctor opined that a heavy blunt object was used to produce the multiple skull fractures and a sharp instrument was used to inflict multiple stab wounds. The bruises he observed on the neck were suggestive of strangulation.

He then concluded that death was due to blunt force trauma to the head; multiple skull fractures and severe brain damage.

Exhibit 4 was the accused's confirmed extra curial statement made on 13 February 2012 – 3 days after he had handed himself to the police at Nyamapanda. He was transferred from Nyamapanda Police to Bulawayo CID Homicide section. He said the following:-

> "I Josias Mutikani I.D. 83-147748 L 28, was born on the 16th of June 1987 and I come from Matorevhu Village under Chief Nyakunhuhwa. I admit the charge of killing, which is levelled against me. She (deceased) was my employer, one Mrs Gill. My employer and I had a misunderstanding and she then terminated my employment. On the 27th of November 2011, I took some metal and proceeded into her bedroom and assaulted her with it four times on the head and she died on the bed. I took a pillow and covered her face. I took the safe key from the wardrobe and opened the safe and took money amounting to US$3 800,00, ZAR2 000,00, £200, a laptop and a Nokia cellphone. I fled to Harare and stayed at a lodge. I then left Harare and proceeded to Masvingo where I bought three bovine beasts (a cow, ox and heifer) at Mashate. I took the beasts to my nephew, one Ever. I then went to Beitbridge where I sold the laptop to a certain man. I then went back to Masvingo and sold the phone to a certain young man who is a money exchanger. I phoned Ever, lying that, I had been arrested and he sold the heifer. I absconded to Chipinge and crossed the border into Mozambique and Malawi. I came back on the 10th of February, 2012 and handed myself over to the Nyamapanda Police.

The above statement is quite detailed although it seems to under play the number of blows delivered during the attack when regard is had to the injuries inflicted to the head and neck. The fifth exhibit was a metal bar which the accused attacked the deceased with weighing 1.03 kg and is 49cm long.

Following indications made to the police by the accused the laptop and cellphone were recovered from the people he had sold them to and were produced as exhibit 6 and 7 respectively.

David Lewellyn Mason gave *viva voce* evidence wherein he stated that he lived at number 35 Qalisa Village, Suburbs, Bulawayo. Deceased also lived at the same complex and he had only met her twice socially at the village. He did not know that she had employed the accused as a gardener and did not even know the accused. He was a member of the resident's association at the village.

On 2 December 2011 one of the neighbours alerted him that the deceased had not been seen for some time. He proceeded to the deceased's house and found Mrs Davis and Mrs Hays who confirmed they had not seen the deceased for a number of days. There was a distinct smell of a decaying body from the premises. The padlock to the gate was locked.

He went to the front of the house and noticed a partially opened window which he further opened to look inside. The smell was strong leading him to conclude that the deceased was dead in the house. He informed the chairman of the committee and suggested that the police should be called.

With the assistance of the supervisor he was able to cut the padlock of the gate. While inside the court yard they found that the back door of the house was also locked. They then removed the door from the hinges and gained entry into the house.

While inside he proceeded to the bedroom. He found the deceased lying in her bed face up. Her right hand was on her chest covering a blood stain. Her face was partially covered with a pillow. He further noticed blood stains on the left parietal region. He then formed the opinion that foul play had taken place. He spent some seconds in the room and left to go and inform the chairman and found that the police had arrived.

He finally opined that a struggle had ensued because the bedding had been disturbed and some clothing was on the floor. He did not find any weapon in the room.

Under a brief cross-examination the witness stated that the deceased was clothed as she lay dead in her bed.

The witness' evidence confirmed what is contained in the accused's extra-curial statement that the deceased died on the bed and that he covered her face with a pillow.

After the testimony of Mason state counsel applied to have the evidence of the witnesses listed in the state outline to be admitted in evidence as it appears in exhibit one the state outline in terms of the provisions of section 314 (1) of the Criminal Procedure and Evidence Act [Chapter 9:07]. The application was by consent of the defence counsel who further conceded that the weapon exhibit 5 was the one the accused used to attack the deceased. The witnesses are these:- Margaret Joy Davies, detective assistant inspector Onesimo Cikomba, detective assistant inspector S. Ncube and Dr S. Pesanai.

There being no objections the evidence was accordingly admitted.

State case was then closed.

Defence case

In evidence in chief the accused told the court that he was 25 years old. He had worked for the deceased for three weeks and stayed with her at 34 Qalisa Village, Bulawayo. The deceased terminated his employment on 26 November, 2011 but he was allowed to sleep at the premises.

The next morning, he woke up and began to wonder what he was going to do next as a result of the loss of his job. He just did not know where to go and began to think of criminal activities which he thought could be of some assistance in his life. He considered theft but was unable to think of what to steal. He then concluded that theft was not an option.

He said he then decided to commit murder so that he could also be killed. His life would be over and he would not want anything after death. He said he was not pleased to commit the crime but that is what he did. Asked by his counsel if his intention was to kill the deceased? He said he could not say the killing was accidental. He maintained that he committed the crime so that he could also be killed bringing the end to his life. So he had no other option but to commit the crime. He had given up on life since he had no job which would satisfy him. He concluded his evidence by requesting the court to impose a heavy sentence on him.

Under cross-examination he revealed how he got to be employed by the deceased. He said he found the deceased watering her flowers and approached her and spoke to her while he was outside the fence – and told her in broken English that he was looking for a job. She told him that she wanted somebody to work for her. She offered him the job. He was happy to be employed by a white woman and was going to learn to speak English and further hoped that that would also give him an opportunity to obtain a driver's licence.

She then told him to walk around the perimeter fence to the security guards at the gate and she would collect him from there which she did. She told him what she expected from him. He was to do her laundry and gardening. His salary was one hundred dollars ($100,00) per month.

When asked what caused the tension leading to the termination of his employment. He replied that he was not able to understand the instruction for duties to perform given in the English language.

When asked if he had taken any alcohol or drugs on 26 or 27 November, 2011. He said he had not. In fact he had been to the Seventh Day Adventist Church (SDA).

I pause to observe that 26 November, 2011 was a Saturday and 27 November was a Sunday. That church conducts services on Saturdays.

Accused confirmed under cross-examination that there were no lies in his confirmed extra curial statement. What is contained therein is what he did when asked to comment about the stab wounds he said those are more than what he did and maintained that he delivered four blows with the iron bar and left her lying on her bed. When asked what he wanted to achieve by doing what he did he curtly said;

"I have already said" Meaning that he killed her so that he could also be killed. But after killing her he decided to steal her money, laptop exhibit 6 and mobile phone exhibit 7 so that they could be used as evidence in court.

That, of course, cannot be true because he had sold the mobile in Masvingo and the laptop in Beitbridge and had spent all the money by the time he handed himself to the police.

When asked by court what the deceased was doing when he attacked her he said she was sitting on her bed working on her laptop.

And when asked why he stole money after assaulting her he said he did that for more evidence. He was again clearly being untruthful because by the time he handed himself after more than 2 months he had spent all the money.

In re-examination by the defence counsel he revealed that when he left the deceased's bedroom she had not yet died but it was clear to him that she would die.

Due to the accused's persistence that he committed the crime so that he could also be killed, court referred him to Mlondolozi for psychiatric examination to ascertain his mental status at the time of the commission of the crime.

Two psychiatrists gave evidence. The first one Elena Poskotchinova was called by the State while the second one Menache Mawere was called by the defence. Their evidence and conclusions were different. The former concluded that the accused did not show any sign of mental disorder or mental defect at the time of observation and assessment. He did not suffer from any mental disorder or mental defect at the time of crime and was able to understand his actions and was responsible for his actions.

The latter opined that at the time of the alleged crime the accused was mentally disordered suffering from epilepsy exacerbated by use of alcohol and cannabis. He did not appreciate the wrongfulness of his actions.

In an attempt to show the process he used to arrive at the conclusion he made his report and narration fell far too short in a number of aspects. He only observed the accused from 10 March, 2015 to 18 May, 2015. He does not name the two psychologists who he alleged had concluded like him that the accused suffered from a mental illness at the time he committed the crime.

He said accused suffered from epilepsy and used to be treated by traditional healers and was also treated at Ngomahuru Hospital. But he did not confirm with Ngomahuru because Ngomahuru have no record of him having been treated there. The traditional healers were not

named. He claimed he relied on clinical evidence to show that accused was suffering from epilepsy but was unable to name the nurse who had reported to him that the accused had suffered an epileptic seizure the previous day.

He said at the time he attacked the deceased, the accused had suffered a seizure which had been exacerbated by the use of alcohol and cannabis. But the accused's evidence was that on 26 and 27 November he could not have done so because he was at church. The question of indulgence in alcohol and cannabis was only told Mawere. He heavily relied on what he was told by the accused.

A look at his report exhibit 9 on which he relied reveals that his examination was very fascile and scant. It cannot be relied on. He did not conduct an EEG test to show whether or not the accused suffered from epilepsy.

His report and conclusion are hereby rejected *ipso facto*.

This court accepts the report exhibit 8 and conclusion by Elena Poskotchnova. The process used to arrive at the conclusion she made was thorough, clear and comprehensive.

Two psychologists namely I. Mataruse and F. Ntuli who examined the accused reported that he did not suffer from any mental illness. One of them went so far as stating that he (accused) was being deceptive about mental illness. He was found by both to be stable at the time of the commission of the offence.

The superintendent of Ngomahuru Hospital Dr Maramba said the accused had no record of previous admission at the hospital. An EEG test was done at Ingutsheni Hospital which showed that accused did not suffer from epilepsy.

This court is persuaded to find that the accused did not suffer from any mental illness at the time he committed the murder.

The accused's story that he killed the deceased so that he could also be killed cannot be accepted. If that was his intention he would have gone to hand himself to the police. If he had given up on life as he wants this court to believe he would have committed suicide instead of killing an innocent person in order to achieve that.

The reason why he killed the deceased was that during the 3 weeks he worked for deceased he had seen that she kept some money in her safe. He found out where she kept the safe key in the wardrobe. He decided to kill her so that he could steal money and property. This was a murder with actual intent as it was committed in order to rob. He is accordingly guilty of murder with actual intent.

Aggravating circumstances

State Counsel

Section 48 (2) of the Constitution provides that a law may permit a death sentence to be imposed only on a person who is convicted of murder committed in aggravating circumstances. General Laws Amendment Act of 2016 lays down such circumstances which the court may take into account *id est* (1) murder committed in order to rob; (2) murder of a victim who is over the age of 70 years; (3) where the murder was pre-meditated.

In casu the accused planned to kill the deceased who was 86 years in order to rob her of her money, laptop and mobile phone. This is an appropriate case where the death sentence may be imposed.

I, however, concede that the long period he spent in prison awaiting trial is a mitigating factor. That is all. The most appropriate sentence therefore would be imprisonment for life.

Defence Counsel

The accused has spent 5 years in jail which is a mitigatory factor. This was not due to any fault of his. He is a first offender who was aged 24 years at the time of the crime. There was youthfulness on his part. Leniency is a whole mark of our law. The worst he should get is imprisonment for life. That is all.

By Court

The accused spent a long period of pre-trial incarceration through no fault of his. This court agrees with both legal representatives that that is a mitigatory feature. In the result, he escapes the death sentence.

Sentence

The only thing that can be said in the accused's favour is that he has spent an inordinate long period of pre-trial incarceration of 5 years 2 months and 2 days through no fault of his. Although the fact that he wanted the court to believe that he suffered from a mental illness contributed to a certain extent. It became necessary to refer him to Mlondolozi for psychiatric examination to ascertain his mental status at the time he killed the deceased.

A look at the other side of the coin reveals that the accused is inherently wicked. He killed the deceased in a callous fashion. He killed a woman aged 86 years by throttling her and pounding her head into fragments.

He killed her for her kindness as she had given him a job at a monthly salary of one hundred dollars ($100). Within three months he had found out that she kept a lot of money in her safe in the house. He found out where she kept the safe key in the wardrobe. He then decided to kill her to steal the money.

The mitigating factor has saved him from capital punishment. However, his wickedness makes him unsuitable to join society in his life. He is accordingly sentenced to: **Imprisonment for life.**

National Prosecuting Authority, state's legal practitioners
Cheda & Partners, accused's legal practitioners