

THE STATE

Versus

GRASSIAN TAKAIDZA

IN THE HIGH COURT OF ZIMBABWE
CHEDA J
GWERU 26 – 29 JANUARY & 25 MARCH 2004

Masuku for the state
T N Malunga for the defence

Judgment

CHEDA J: Accused is charged with murder of one Elizabeth Millias Lundu to which he pleaded not guilty but tendered a guilty plea to culpable homicide.

The facts of this case which are common cause are that accused and deceased were married under customary law and were tenants at 2112 Mkoba Village 4, Gweru. On this fateful day accused left his home for a beer drink and returned at about 0200 hours on 6 May 2002. In the room was the deceased with her young sister and were already in bed. A misunderstanding arose between the two over allegations of infidelity being levelled against the deceased.

Accused then assaulted the deceased with a wooden chair several times on the head, face and body. The deceased died as a result of the injuries sustained therefrom. The state produced a post mortem report, marked exhibit 3 which recorded the cause of death as:

- (a) Brain haemorrhage
- (b) Head injury
- (c) Assault

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The above is common cause. The state opened its case by calling Precious Millias Lundu, a girl aged 9 years . The deceased was her sister. Her evidence is that on the night in question she was sleeping with deceased when the accused arrived.

She said she heard him saying that he was not interested in the deceased's *sadza* he had been told that there had been a boyfriend in the room. She was then ordered by the deceased to wake up pack her things so that they could go home. She further stated that as they were packing, her sister got on top of the bed which was against the window in order to remove her school uniform which was hanging against the wall. At that point accused got hold of the deceased and throttled her and hit her against the window which resulted in the window panes breaking. She noticed that deceased had a cut on the back of her head which was as a result of her hitting her head against the window. Deceased then fell down. Upon falling down accused picked up a wooden chair which he used to assault her all over the body until it broke into pieces. She further stated that accused continued to assault her with an empty bottle.

She hid under a drawer which I think she meant a table, she later came out and started crying. Accused then slapped her with an open hand on the face and further hit her with a broken handle. In the morning she went to school and was later told that deceased had died. It is also her evidence that deceased did not provoke accused and that accused was extremely drunk. She was intensely cross-examined by Mr *Malunga* but she stuck to her version of events of the night in question.

Lulu Svova also gave evidence. She was also a tenant in this house together with accused and deceased. It is her evidence that she first heard noise from the

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accused as he remarked “do not take me as a fool”. This was followed by a struggle and subsequently deceased cried out. “Auntie *mai* Simon i.e. (Simon’s mother) I am dying”. She then heard smashing of window panes. As a result of this commotion she intervened but accused rebuked her. She further called out for other people to call the police. However, accused did not take this kindly, he came out of the room and threatened to kill her together with her husband. At about 6am she heard deceased groaning in the room. She went away and when she came back she noticed a group of people gathered outside and was then advised of deceased’s demise.

According to her evidence deceased did not drink alcohol and she did not know whether she had a boyfriend or not. She denied ever peddling lies to the effect that deceased had a boyfriend.

The court held an inspection in loco at the house in question and made the following observations.

1. The house has 4 rooms with 2 external doors, i.e. the main and kitchen doors. Deceased’s room has a window facing the south-westerly direction with the following measurements:

Window frame – (a) Length – 98cm (b) Width – 47cm

Window pane – (a) Length – 47cm (b) Width – 47cm

There are medium size rocks which form a flower bed and these are directly near the window, allowing a small path between the rocks and the house wall. There is also a large guava tree directly in front of the window. The window opens upwards. The state then closed its case.

Accused gave evidence. He stated that indeed deceased was his customary law wife. On 4 July 2002 he left home to attend to family wedding arrangement at

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10am. He went into a drinking spree consuming clear, opaque beer and spirits. He left for home towards 0002hrs. When he got home he knocked on the window and further went to the kitchen door where he knocked for sometime before the deceased opened the door. After opening, the deceased walked back to their bedroom while he remained behind locking the door. Before he got to the bedroom he heard glasses breaking. He sat on the bed and started asking his wife what the noise was. The wife answered that it was breaking glass. When further asked what had caused it to break, she did not answer. He then observed that the upper part of the window which was previously closed when he initially knocked was now open. At that stage the deceased started packing her clothes as she wanted to go to her home. When he asked her why, she replied that, he had delayed in coming home and he was promiscuous. Accused then concluded that she wanted to go to her home because she had committed adultery. His conclusion was based on the fact that there was this now open window and broken glass which were previously intact. He then started assaulting her with the wooden chair. He denied using a bottle to assault her. He realised that she was bleeding and started applying hot water compress on her but she subsequently died as a result of the injuries sustained.

I find as a fact that accused assaulted deceased in the early hours of the morning using a wooden chair several times on her body more particularly on the head and face. He was extremely drunk, but he clearly recalls all the relevant and material events of the night in question. Deceased did not provoke her at all.

He did not see any man in the house but merely concluded that deceased was unfaithful, this was based on the rumour which he had picked-up while drinking beer. I find that he did not use a bottle as alleged. In as much as a person could fit through

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the window in question, he can only do so with great care and can not do so when under pursuit. He can not jump out without injuring himself on the rocks under the window. Accused's evidence about this is rejected. I find that there was no man in the room and the window was broken by the deceased when he knocked her against the window as observed by Precious.

Accused brutally assaulted a defenceless woman clearly without provocation. He threatened to harm those who tried to intervene. Although drunk he was able to describe in detail the events of the day up to the assault which led to death of the deceased.

The state witnesses gave their evidence very well. Precious stated that she saw accused using the chair and not the pieces. Although accused made that confession himself. She therefore did not seek to exaggerate her evidence in that regard. She however stated that accused used a bottle as well. This, in my view, is neither here nor there as neither the state nor defence seemed to place any significance on this weapon. It is safe therefore to accept that accused used the chair in assaulting deceased several times all over the body but more specifically aimed his blows on the head and face.

Ms Svova was also a truthful witness and her evidence is therefore accepted by the court. On the other hand accused was not entirely a truthful witness. He was very evasive resulting in both counsels repeating their questions. The court had to remind him on several occasions to answer questions.

The question remaining therefore is whether or not accused should be convicted of murder with actual intent as submitted by the state or constructive intent as submitted by the defence. In order to return a verdict of murder with actual intent

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the accused must have aimed to cause the death of the deceased or alternatively even if he did not aim to do so, but continued with his act when he realised that the said act will almost certainly result in deceased's death. According to the facts before the court there is nothing to show that accused aimed to cause the death of the deceased. He assaulted her by firstly throttling her and thereafter by throwing the wooden chair at her. It appears that he was throwing the said chair randomly hence the chair breaking into several pieces which resulted in injuries all over her body. In addition thereto, Precious whose evidence the court accepts stated that accused assaulted her all over the body including the legs. The court finds that the state had not the case for murder with actual intent. What remains, therefore, is whether he can be convicted of murder with constructive intent. The test for this principle is ably laid down in Feltoe's *A Guide to the Criminal Law of Zimbabwe* LRF 2nd Ed 1997 at pages 110-111. The learned author stated at page 110 –

“Accused does not mean to bring about death but he continues to engage in an activity after he foresees that there is a real risk that the activity will result in the death of a person. There are three elements:

- (a) subjective foresight;
- (b) of the real possibility (not probability of death); and
- (c) recklessness.”

As pointed out above it can not be safely said accused's aim was to cause deceased's death. He, however, with his continuous assault on the defenceless deceased with a wooden chair all over the body and by his own admission that he struck her with the chair on the head he foresaw that his action will result in the death of the deceased. Despite this foresight he continued to assault her irrespective of the consequences.

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Mr *Malunga*, has urged the court to find accused guilty of culpable homicide. Accused was indeed drunk, but he was not so drunk to an extent of not appreciating what he was doing. He therefore foresaw the real risk of death being occasioned by his activity.

For the above reasons I find accused guilty of murder with constructive intent.

Criminal Division of the Attorney-General's Office state's legal practitioners
Chakanetsa & Associates accused's legal practitioners