

STATE
versus
LOVEMORE MLAMBO MAFUKIDZE

HIGH COURT OF ZIMBABWE
HUNGWE J
MUTARE, 23 & 24 March 2017 & 1 March 2017

Assessors: 1. Mr Magorokosho
2. Mr Chagonda

Criminal Trial

M Musarurwa, for the State
Ms Y Chapata and *B Makuni*, for the accused

HUNGWE J: The accused faces a charge of murder arising from the death of Marambeni Sithole an old woman at Shekwa Village Chief Musikavanhu, Chipinge on 26 June 2015.

Upon being charged he pleaded not guilty.

Most of the facts in this are either common cause, or are not in serious dispute. They may be summarised as follows.

Around 2000hours on 26 June 2015 James Mlambo and Spiwe Mangana proceeded to the deceased's residence. Earlier on that day, the deceased's daughter Ellen Mhlanga, had called to check on her mother but was worried when phone-calls made to her mother's mobile number were being picked by a total stranger.

On arrival there, they discovered the body of the deceased sprawled on the floor inside the hut. They alerted the next of kin and other villagers.

Deceased's brother, Samuel Sithole came and attended to the scene. He noticed that his sister's body bore strangulation marks around the neck, abrasions to both knees and elbows.

There were clots of blood to the mouth. He recovered a Samsung mobile handset from under the deceased.

He asked another village Godknows Mandongoma to view contacts from the recovered mobile handset using his own mobile phone in an effort to contact the deceased's relatives. The contacts which came out did not belong to anyone related to the deceased but led them to one Dakarai Mlambo Musori.

Dakarai Mlambo Musori was confronted about the sim card. He confirmed that he had given the Telecel sim card to the accused Lovemore Mlambo Mafukidze for temporary use. A follow up to the accused residence led to the recovery of the deceased's Samsung mobile handset.

Accused was then apprehended that very night. It turned out that the handset recovered at the scene belonged to the accused. He had taken the deceased's mobile phone in error during the commission of the crime. The accused implicated one Josiah Simango. The accused however led to the recovery of the deceased sim card from the jacket belonging to one Simon Makuyana.

Accused's explanation of his connection to the commission of the crime was set out in his defence outline. In summary the following are the points or features of his defence.

Josiah Simango asked the accused to accompany him to the deceased's homestead in order to assist him to carry away some maize which he had worked for. Upon arrival at the deceased's residence Josiah Simango asked to use his torch. He gave it to him. He waited in the yard as Josiah Simango knocked on the deceased's door. The deceased opened the door slightly but suddenly Jonah forced himself into the deceased's room. In the process the deceased and the mobile phone fell to the floor. He witnessed Josiah Simango assault the deceased. He remained in the yard as the assault went on inside the hut.

Josiah then emerged and told him that things were not well inside the deceased's room. They had to leave. Josiah gave him what he believed to be his mobile phone. It later turned out that the mobile phone was not his. He denied that he knew that Josiah intended to assault the deceased or that he had acted in common purpose with Josiah Simango throughout.

In the statement made to police on 28 July 2015, barely two days after the event, the accused gave a detailed sequence of the events preceding the incident in which deceased was assaulted to death. He also attempted to explain away the subsequent recovery of deceased's

mobile phone from him. In the confirmed warned and cautioned statement, exh 5, he explained how he was recruited by Josiah Simango for a quick fix jobs that would supplement his regular wages on a daily basis. They agreed that the next day they would met and proceed to deceased's homestead to take maize.

Upon arrival he gave Josiah his mobile phone when the latter requested to use it as a torch to light up the interior of the house where the maize was. He followed Josiah Simango and waited for him in front of the entrance to the room. He saw how Josiah Simango assaulted the deceased thereby knocking her down after several kicks. He then saw Josiah Simango strangle the deceased. During the melee, he heard the deceased ask Josiah Simango why he had come all the way to assault her in her home. This did not deter him as he continued with the assault despite the old woman's protests. After Josiah Simango strangled the deceased, he picked up the mobile phone. They left empty-handed as things had turned ugly. The accused got back what he then believed was his mobile phone as they left the scene.

The next day or so, someone called on this mobile phone asking if he was the owner. When he confirmed that this was his phone, the caller challenged him telling him that in fact the phone belonged to the deceased. The person asked him to please give it back to the deceased. When he later met Josiah Simango he related the dilemma that he now faced with the mobile phone. Josiah Simango advised him to remove the sim card as he will remain with 'his' mobile phone. He did so and placed the sim card in a jacket at some homestead nearby. They went home. He was later arrested and he led to the recovery of both the mobile phone and the sim card.

In his indications, exh 7, made to the police on 27 July 2015, a day after his arrest the accused pointed to a spot directly opposite the door entrance to the deceased's house from where he witnessed how the master-mind, Jonah Simango, committed the crime.

It is our finding that the variations in the statement given by the accused to the police and what he his instructions to counsel show that the accused was not a truthful witness. Soon after his arrest, he placed himself at the entrance door of the room where the deceased was killed by strangulation. In his instructions to counsel he indicated that he stood at the edge of the premises, far away from the scene. In our view, the accused sought to heap all possible blame on his erstwhile co-accused who was not before the court in the vain hope that this could somehow be

exculpatory. We however accept that the accused and his accomplice approached the old lady in order to commit some crime in the dead of the night. They did not expect the resistance that they met. In all probability, they decided to strangle her to death so as to avoid detection as she had recognized them as locals.

He did not dissociate himself by either voicing his disapproval of the manner in which Josiah Simango proceeded with the intended theft of maize or the assault on the deceased that was unfolding before his eyes. He stood guard as Josiah Simango proceeded with the agreed act of theft. He must have realized that the old lady may offer some resistance. He must also have been aware that Josiah Simango was breaking the lady's resistance as he kicked her and strangled her. At no point, did the accused indicate his disapproval of the conduct of his accomplice, even by his own version or that proffered by the State. In the eyes of the law, he is as guilty as Josiah Simango who physically strangled the deceased. Section 196 of the Criminal Law (Codification and Reform) Act, [*Chapter 9:23*] ("the Criminal Law Code") governs the liability of co-perpetrators.

It provides thus:

196 Liability of co-perpetrators

- (1) Subject to this section, where:-
 - (a) two or more persons knowingly associate with each other with the intention that each or any of them shall commit or be prepared to commit any crime; and
 - (b) any one of the persons referred to in paragraph (a) ("the actual perpetrator") commits the crime; and
 - (c) any one of the persons referred to in paragraph (a) other than the actual perpetrator ("the cop perpetrator") is present with the actual perpetrator during the commission of the crime;the conduct of the actual perpetrator shall be deemed also to be the conduct of every co-perpetrator, whether or not the conduct of the co-perpetrator contributed directly in any way to the commission of the crime by the actual perpetrator.
- (2) If the State has established that two or more accused persons—
 - (a) were associated together in any conduct that is preparatory to the conduct which resulted in the crime for which they are charged; or
 - (b) engaged in any criminal behaviour as a team or group prior to the conduct which resulted in the crime for which they are charged;and that they were present at or in the immediate vicinity of the scene of the crime in circumstances which implicate them directly or indirectly in the commission of that crime, then it shall be presumed, unless the contrary is shown, that—
 - (c) they knowingly associated with each other for a criminal purpose; and
 - (d) the crime actually committed—
 - (i) was the crime for the commission of which they associated with each other; or

(ii) was, if not the specific crime for the commission of which they associated with each other, a crime whose commission they realised was a real risk or possibility.

(3) If any accused person referred to in subsection (2) who is not the actual perpetrator of the crime—

(a) does not discharge the burden mentioned in subparagraph (i) or (ii) of paragraph (d) of subsection (2), his or her liability as the co-perpetrator of the crime shall not differ in any respect from the liability of the actual perpetrator, unless he or she satisfies the court that there are special circumstances peculiar to him or her or to the case (which circumstances shall be recorded by the court) why the same penalty as that imposed on the actual perpetrator should not be imposed on him or her; or

(b) discharges the burden mentioned in subparagraphs (i) and (ii) of paragraph (d) of subsection (2), he or she shall be found guilty of assisting the actual perpetrator of the crime as an accomplice or accessory.

[Paragraph amended by section 31 of Act 9 of 2006.]

- (4)
- (5)
- (6)
- (7)
- (8) -----”

By his own admission the accused agreed to resort to other means of making a living which were illegitimate which entailed, among other things, theft from the neighbourhood. On this particular day, they agreed to approach the home which they knew was occupied by a lonely old lad. Clearly, she was an easy target for their nefarious mission. Upon arrival they went about their purpose and met unexpected resistance. They strangled her to death. On these facts, the accused cannot escape a conviction for murder as defined in s 47 (1) (b) of the Criminal Law Code.

The accused is accordingly found guilty on that charge.

Sentence

In assessing sentence I take into account all the mitigating features which were set out in counsel’s submission. I take into particular account the fact that the accused is a young first offender aged 22 years. His accomplice was much older and therefore probably exerted undue influence and played a greater role in the commission of this offence. But that cannot reduce the

heinousness of this crime. It is not lost to this court that the pair pre-planned this misadventure, carefully choosing their victim by reason of her age and hermit-like life. They then unleashed gratuitous violence, consisting the vicious assault, against her before strangling her to death. All this despite the fact that she had pleaded to be spared the agony of their malevolent intent. She had recognized them both but they showed no mercy. No-one heard her cries for help in the night.

The Criminal Law Code provides for the ultimate penalty in appropriate cases where the murder is committed in aggravated circumstances. I take the view that this is not a case in which it could be said that the crime of murder was committed in aggravated circumstances. As such this court is at large with sentence.

In that regard I do not fail to realize that an innocent life was lost needlessly. The victim of the crime was a defenseless old woman who had done nothing to provoke this wanton attack on her person leading to her death. Society abhors this type of crime hence the availability at law of the death penalty. In light of these factors, I am of the view that the following sentence is appropriate.

20 years imprisonment.

National Prosecuting Authority, legal practitioners for the State
Henning Lock, legal practitioners for the accused