

THE STATE
versus
NICHOLAS DAMOTA

HIGH COURT OF ZIMBABWE
MUSAKWA J
HARARE, 24 & 25 September, 26, 27 & 28 October 2020

Assessors: Mrs Chitsiga
Mr Kunaka

Criminal Trial

B. Murevanhema, for the state
N. Chigoro, for accused

MUSAKWA J: The accused stands charged with the murder of his daughter Modester Damota. The incident took place on 10 September 2013 at Chawarura village, Chief Chiweshe, Centenary. It is not in dispute that the accused person set on fire a hut in which the deceased perished.

The facts of the matter are that the accused was married to Evernice Kasiyabvumba the mother of the deceased. A day before the incident the accused had a misunderstanding with Evernice. According to the accused Evernice had gone out to attend some traditional dance and returned home late. Having assaulted Evernice, the latter sought refuge at her parents' home in the same village. During his absence Evernice had collected seven bags of maize, six bags of fertiliser, two cameras, two printers, a bed, accused's clothes and blankets.

The accused made a follow-up. The sequence of events appears to be mixed up. This is because prior to engaging Evernice and her parents the accused was summoned to attend a hearing before the village chairman and it is not clear if this was on the same day that Evernice left for her parents' home. At the time he quarrelled with and assaulted Evernice the accused had told her that she had not been brought up properly by her parents. Obviously this was relayed to accused's in-laws who then reported to the village chairman. At the village chairman's home the accused saw his in-laws and Evernice in attendance. It was resolved that the accused pay two chickens to his in-laws for disrespecting them. He was then told to collect his wife and child on the following day.

It is common cause that on the day of the incident the accused sought to collect Evernice and deceased. There is some dispute on some aspects preceding the incident. According to Ringson Piano the father in-law, the accused arrived around 6 pm. On the other hand, according to Evermary Kasiyabvumba who is Evernice's younger sister, the accused arrived in the course of the morning. However both Ringson and Evermary insisted that following Evernice's refusal to go with the accused, the latter left after uttering some threats. According to Ringson, before the accused left he said he was going to say something for the last time. The accused then said he was going to do something about Modester and go to Mozambique. On the other hand, according to Evermary, the accused said he would take poison or some people were going to die.

Later during the night Ringson was awakened by a raging fire. As he sought to leave his hut the accused attempted to strike him with an axe handle. This happened thrice. Eventually Ringson managed to get out after the accused had left. He found his daughters lying within the homestead having been injured. Police officers later attended in the course of the morning and retrieved the charred remains of the deceased.

According to Evermary who was fifteen years old at the time, she put up in the hut together with the deceased and Evernice. Late at night they woke up as fire was burning. She was the first to open the door and the accused struck her on the head with a stick. She ran towards her parents' hut but changed course and headed for the neighbours. The accused pursued and struck her again and she fell down. She left Evernice and the deceased in the hut.

According to the attending Police officer, the body of the deceased was about one metre from the door. Evernice and Evermary had been taken to the clinic. Evernice had a swollen shoulder, a cut on the hand and some bruises on the legs. On the other hand Evermary had a cut on the head. They looked for the accused but failed to locate him. Neighbourhood watch members were put on alert. The accused person was arrested on 12 September 2013 following a tip-off. He was found sitting under a tree in the vicinity of some gardens. The officer confirmed that the accused's warned and cautioned statement was not confirmed as he objected to some contents which he claimed had been added.

The warned and cautioned statement recorded from the accused person was produced by consent. It reads as follows:

"I have understood the warned and cautioned statement (sic) but I do not admit charges levelled against me. I arrived at my father in-law's homestead during the dead of the night with the aim of collecting my property which was taken by my wife Evernice Kasiyabvumba together with my mother in-law after an altercation with my wife. My father in-law refused to hand

over my property alleging that the property was suitable for use by their daughter Everncie Kasiyabvumba and her boyfriend called Kayongo. I told my father in-law that what he has just said was impossible and should he still keep on resisting with my property, I will set fire on the hut which contained my property so that the property will burn inside. Soon after those words, I set fire on the hut with a match stick. I burnt the hut from the doorstep. As I had said earlier on that when I married his daughter, she had nothing so I'm burning all the property. My father in-law grabbed my daughter Modesta Dhamota and threw her in the hut that was burning. I was angry with this incident and assaulted Evernice Kasiyabvumba with an axe handle. I missed my father in-law when I wanted to attack him and hit Koshiwayi Evermary Kasiyabvumba, my sister in-law with an axe handle. I assaulted these people because of the pain on my daughter alone. who was thrown on fire by my father in-law. I then vowed that my daughter will not die. I am not the one who burnt my daughter in the hut but it is my father in-law who threw my daughter inside a burning hut which I had set on fire intending to burn my property.”

The post-mortem report noted that the body was badly burnt, charred. The cause of death was open fire burns.

The accused's defence was to the effect that following marital problems with his wife Evernice Kasiyabvumba he was summoned by the village chairman, a Mr Dice. He was ordered to pay two chickens for disrespecting his mother in-law. Upon going to his in-laws home he saw Evernice in the company of a young man who immediately fled. Upon querying the association the issue was resolved. He remained at the home until 8 pm when he told his in-laws that he had come to collect his family. His mother in-law objected and was supported by Everncie.

The accused demanded his property which comprised six bags of fertiliser, seven bags of maize, a bed and cameras which Evernice had taken. His in-laws disputed and claimed that their daughter had also contributed towards the acquisition of the property. In anger the accused resolved to destroy the property as he was of the view that no one should benefit from it. Hence he torched the hut and fled. He stopped and heard people crying that the child had died. When he went back he was confronted by his father in-law who struck him on the knee with a machete. He picked up a stick in a bid to fight back and struck Evernice on the head. Evernice's sister Evermary joined in and assaulted him. The accused hit Evermary on the back. The accused then fled. He subsequently went to the Police after learning that they were looking for him.

In his evidence the accused stuck to his defence outline. He also claimed that he set the hut on fire when everybody was outside. However, he claimed that in his anger he did not ascertain the deceased's whereabouts. He stated that he had no time to take out his property from the hut because of anger. When he left the scene he knew that the deceased had died.

Concerning the warned and cautioned statement, the accused explained he was given an opportunity to write. However the typed version now had additional details. Prison officers then threatened to assault him if he did not sign. He did not name the Prison officers and the prison where this happened.

Submissions

In his address Mr *Murevanhema* submitted that the defence of provocation cannot be sustained. There was no motive for state witnesses to lie that people were inside when the hut was burnt. He pointed out that the accused's claim that witnesses were outside when the hut was burnt was never put to the witnesses. Notwithstanding some discrepancies in some aspects of the witnesses' testimony, he urged the court to find them credible. Thus he prayed that the accused be found guilty as charged.

Mr *Chigoro* submitted that the accused had no intention to kill, despite admitting to setting the hut on fire. He submitted that he accused might still have harboured residual anger despite having resolved the issue of the young man who had been in Evernice's company. The anger must have flared up when Evernice refused to go back with the accused. He attacked the reliability of state witnesses on account of the disharmony in respect of the time when accused visited the homestead and the age of the deceased. He was of the view that evidence was cooked up. For example he cited the issue about a cell phone belonging to the accused having been picked up being disputed by Police. In essence he submitted that there was no evidence on which an intention to kill can be established.

Analysis

The facts of the matter are largely not complicated despite some discrepancies. These discrepancies do not go to the root of the matter. The issues are narrowed by the accused's admission that he set the hut on fire. That in itself amounts to a confession.

The court also has to resolve when the incident took place. The warned and cautioned statement provides the answer. The accused stated in the statement that this happened in the dead of the night. This gels with the evidence of Evermary and Ringson that they were awakened by the burning.

We come to the finding that the accused visited his in-laws' home twice. On the second visit that is when he burnt the hut. If he visited the in-laws' home in the dead of the night, there was no dialogue that took place. He woke up no one. He must have known that there were people inside. He knew the hut he intended to burn because it had his personal

effects. He therefore went to the scene with the intention to set fire to a hut in which his wife, child and sister in-law were sleeping. Even if he claims he wanted to destroy his property, he tried to prevent Evernice and Evermary from escaping the fire. He even tried to prevent his father in-law from attending to the fire. This is what confirms the accused's intention. He was not merely reckless, but he had direct intention to kill.

The warned and cautioned statement exposes the accused. If it was not freely and voluntarily given in certain respects, the accused should not have consented to its production. After all he claimed to have been threatened in order to induce him to sign the statement. It is inconceivable that a Police officer would compel a suspect to incriminate a third party as opposed to compelling the suspect to confess to the allegations. Of what value is such a statement? If that was the case it would have made sense for Police to arrest Ringson as the murderer.

A confession or statement that is not proven to have been made freely and voluntarily without undue influence cannot be used as evidence against an accused person. This is in accordance with s 256 (2) of the Criminal Procedure and Evidence Act [*Chapter 9:07*]. In the present case these issues do not arise because the accused consented to the production of the statement.

The warned and cautioned statement is a mixture of confession as regards setting the hut on fire and a poor attempt on the part of the accused to explain how the deceased died. It serves to illustrate the conflict that takes place in the mind of a perpetrator of crime.

Accordingly the accused is found guilty as charged.

Sentence

S 47 (3) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] provides that:

“A court may also, in the absence of other circumstances of a mitigating nature, or together with other circumstances of an aggravating nature, regard as an aggravating circumstance the fact that—

(a) the murder was premeditated; or

(b) the murder victim was a police officer or prison officer, a minor, or was pregnant, or was of or over the age of seventy years, or was physically disabled.”

In the present case the two aggravating factors are that the offence was premeditated and that the victim was a minor.

The court has discretion regarding the imposition of the death penalty. It is apparent that the accused had problems with his wife. He had previously assaulted the wife after she

attended a traditional dance without informing him and returned home late. The wife went to her parents' home and the accused followed up after he had been fined by the village chairman. Upon visiting his in-laws the accused saw his wife seated with a young man who immediately disappeared. Ringson confirmed the presence of the young man whom he described as a friend of his son. But why would the young man leave at the time of the accused's arrival? The accused was angered by his wife's refusal to go back with him. The court failed to get the benefit of Evernice's testimony as the state explained that she could not be located.

Nonetheless the accused's conduct is reprehensible. He chose the wrong way to settle scores with his wife. The accused finished serving a ten year sentence for attempted murder in July 2020. The attempted murder related to his wife.

The accused person was taking care of his nephews and nieces. There was nothing to show that he is an inherently wicked person. He should be given an opportunity to pick up the pieces if he is given a definite term of imprisonment. If the attempted murder had been determined together with the present matter or the accused had not finished serving the sentence, it is most likely that the sentences would have been made to run concurrently.

Where a court decides not to impose the death penalty, it may opt for life imprisonment or a definite term of imprisonment. In the event of the court opting for a definite term of imprisonment and there are aggravating circumstances as provided in s 47 (3) of the Code, the sentence shall be not less than twenty years. This is in terms of s 47 (4) of the Code.

Accordingly the accused is sentenced to twenty years' imprisonment.

National Prosecuting Authority, legal practitioners for the state
Chigoro Law Chambers, accused's legal practitioners