STATE v TOPELELE 2010 2 BLR 440 HC

Citation: 2010 2 BLR 440 HC

Court: High Court, Lobatse

Case No: Crim Trial 48 of 2008

Judge: Rwelengera AJ

Judgement Date: May 7, 2010

Counsel: J B Akoonyatse for the accused.rnK Modie with him J Brown for the respondent.

Flynote

Criminal law - Murder - Intent -
Grievous bodily harm - Strangling of victim - Appellant
not intending to kill - Whether sufficient intent to establish murder - Penal
Code (Cap. 08:01), s 204.

Headnote

The accused
pleaded not guilty to a charge of murder and raised the defence that he had not
had the requisite intention to kill the deceased. He admitted suffocating the deceased to the point
that she lost consciousness and to having intercourse with her while she was
'lifeless'. He said that the deceased had bitten him on his left arm as he
dragged her along the path and that he pressed his right hand on her neck in
order to force to her release her bite.

Held:
(1) In terms of s 204(a) of the Penal Code (Cap 08:01), malice aforethought entailed
an intention to cause death or to do grievous harm.

(2) In terms
of s 204(b) of the Penal Code, malice aforethought included knowledge
that an act or omission causing death was likely to cause death and persistence
in such act or omission, indifferent to whether or not death ensued.

(3) On the
facts, the accused must have known, and therefore knew, that strangling the deceased was likely to
cause her death and he was indifferent as to whether or not her death ensued. Ramphanana
v The State [1984] B.L.R. 83, CA distinguished.

(4) The
state had accordingly proven malice aforethought.

Case Information

Cases
referred to:

Ramphanana
v The State [1984] B.L.R. 83, CA

TRIAL on a
charge of murder. The facts are sufficiently stated in the judgment.

J B
Akoonyatse for the accused.

K Modie
(with him J Brown) for the respondent.

Judgement

RWELENGERA
AJ:

The accused,
one Ontiretse Topelele was indicted for the murder of one Violet Sekhang
allegedly committed on 3 March 2006 at Keng village near Jwaneng in the South
Western administrative district.

Following
the accused's plea of not guilty, evidence was adduced to the effect that the deceased is
dead and that the cause of her death was that she was throttled by the accused.
The cause of death was otherwise described by the pathologist, Dr Enock
Prabhakar, as 'asphyxia' which, according to him, is a form of mechanical
obstruction of respiration, occasioned by compression of the neck. This part of
the prosecution's evidence has been admitted considering particularly the
accused's police statement which was not retracted. The judicial officer who took the
confession gave viva-voce evidence and confirmed that it was given voluntarily.
It was tendered as part of the State case with the concurrence of the defence
counsel.

The
background to the tragic incident can be depicted as follows from the evidence
as a whole. On the fateful day, the deceased, a single young woman went out for
some social entertainment in the company of her sister, Segametsi Moriane and a cousin
of hers referred to as Banty. While the three were socialising around the
little settlement of Keng near Jwaneng, the accused came over to them and
engaged the deceased in a conversation on the side. The deceased asked the
sister and the cousin to proceed home and said to them that she would
eventually join them over there some time later. Indeed, she joined them later
but briefly because she (the deceased) and her sister went out again to another social center called
Montshiwa Bar. Segametsi stated that, once again, they met the accused at the
gate of that bar and that he once again got into a conversation with the
deceased while Segametsi went into the bar.

According to
Segametsi, neither the deceased nor the accused followed her into the bar as
she expected. So, after she had waited in the bar for a while, Segametsi
returned to the area around the gate where she had left the accused with the deceased but
she could not see them on that spot or anywhere around the bar premises.
Realising they had disappeared from the premises, she went home and slept.
Regrettably, she learnt of the deceased's demise the following day.

What
actually happened, according to the prosecution's evidence is that the accused lured the
deceased from the bar premises to a secluded place where he wanted to have
sexual intercourse with her. The deceased resisted the accused's advances and
the two got into a struggle, whereupon the accused dragged the deceased along a
foot path for some distance and then into a bush. It is the prosecution's case
that the accused strangled the deceased to subdue her resistance to his sexual
advances and that such an intention is proved partly by the facts admitted by
the accused in his

statement
that he suffocated the deceased to a point when she lost consciousness and that even at that
stage the accused admitted to have still proceeded to have sexual intercourse
with her when she was 'lifeless'.

On the other hand, the accused stated in his police statement that the deceased had been his girlfriend. In terms of the accused's statement, the deceased wanted to go to another bar while the accused wanted to take her to his home, hence the reason for the accused pulling her along forcibly.

As for the accused's defence, I noted that although the accused elected to remain silent at the close of the prosecution's case, his defence is strongly implied in his extra judicial statement. The implied defence is that the deceased bit him on his left arm as he (accused) pulled her along and that he pressed his right hand on her neck to force her to release the bite on his left arm. To quote from the statement:

'My intention was not to kill Violet.... Violet fell down and became unconscious. Whilst she was unconscious I had sexual intercourse with her. After I finished having sexual intercourse with her I realised that she was dead. I pulled her to a certain yard and left. I took Violet's shoes, watch and cap and went to put them in a sideboard at my place.'

This is the background to the death of the deceased.

Under the provisions of s 202 of the Penal Code (Cap 08:01), any person who of malice aforethought causes the death of another person by an unlawful act or omission is guilty of murder. This means that in order to succeed under the count of murder, the prosecution must prove beyond reasonable doubt the following essential elements in terms of this section:

(i) the death of a person;

(ii) an intention to cause the death of another, or intention to cause grievous harm to another; and

(iii) that the cause of death was unlawful.

Section 204(a) of the Penal Code provides, inter alia, that malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances:

'(a) an intention to cause the death of or to do grievous harm to any person, whether such person is the person actually killed or not.'

As the defence counsel correctly pointed out, the only issue that arises from the available evidence for the court's determination is whether the accused person caused the death of the deceased with malice aforethought.

Considering the provisions of s 204 of the Penal Code which defines 'malice aforethought' as (inter alia) 'the intention to cause or do grievous harm to any person ...' the defence counsel submitted that:

'his intention was never to kill the deceased or to cause grievous harm ... (as) the throttling of the deceased's neck by the accused did not amount to dangerous harm or serious or permanent injury to health....'

The defence counsel referred to the evidence of the pathologist who gave

AJ

an opinion
to the effect that the amount of force applied on the deceased's neck was between 'moderate to heavy', contending that there could not have been (on the part of the accused) an intention to kill or cause grievous harm if the force applied on the neck was possibly moderate. The narrower question, therefore, is whether accused throttled the deceased so as to stop her from biting him?

In
determining the narrower issue, one needs to consider the circumstances constituting the encounter between the accused and the deceased as well as the admitted conduct of the accused before and after he throttled the deceased. The inference that could be drawn which is consistent with the admitted facts and proven circumstances and which is also the most plausible inference is that in throttling the deceased, the accused intended to achieve more than just to release the
deceased's bite on his arm.

I am making
this conclusion on the basis of the following considerations:

One
particular trait which appears to have remained constant in the conduct of the accused that evening is his vicious and persistent desire to have sexual intercourse with the deceased. That must have been the reason the accused pulled her from the bar premises. The deceased resisted the accused's advances but the accused persisted by mounting a physical struggle with her. As for the deceased, the bite on the accused's arm must have been part of her effort to physically disengage herself from the accused's grip and his continuing threat of sexual assault.

There is
otherwise no indication that a mere bite on the arm imminently threatened the deceased with death or serious bodily injury so as to justify the accused's application of force on a part of a woman's body which is as delicate as the neck. Besides, the deceased had the right to rebuff the accused's advances and resist being pulled along. The attack on her was unjustifiable and therefore unlawful. The accused must have known so. By persisting in this physical struggle, the accused was evidently the aggressor. He is the one who violently maintained a physical grip on the deceased. With such an upper hand in the struggle, he would easily have disengaged his own physical clasp on her, withdrawn and let go of her. That is what should have harmlessly released the bite on his arm. In other words, even if the accused felt that his life was threatened by the bite, which is most unlikely, he had the easy alternative of withdrawing from the struggle and spontaneously from the bite.

However,
instead of disengaging from the deceased, the accused compressed her neck. Was the intention just to gain the release of the bite? The answer is certainly, no! And so the irresistible inference to be drawn from the accused's conduct immediately before and immediately after the throttling act is that his intention in compressing the neck was to overpower the deceased's resistance and achieve sexual gratification against a subdued woman. The amount of force could have been moderate to heavy; but such force was heavy enough to inflict what the pathologist referred to as a 'contusion of the neck tissues and muscles' and a fracture of the 'left superior horn of the thyroid cartilage' that is, a horn-like projection of the larynx [the voice box]. The force exerted on the neck was also for a sufficiently long time to cause death.

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AJ

Meanwhile,
what the accused's mind was pre-occupied with was to gain forced sexual intercourse and not the amount of pressure on the neck that would have been sufficient to release the bite on his arm. This is why he proceeded to have sex with the deceased even after she had fallen unconscious, obviously after releasing her

bite on the arm. The ultimate sexual act was consistent with every physical effort the accused made against the deceased from the start of the struggle. In such a situation, it cannot be said that the accused throttled the deceased just to stop her from biting him.

In terms of s 2 of the Penal Code, I find that the evidence of the pathologist indicates that the compression of the neck which resulted in death by asphyxia is a serious injury especially with regard to the delicate internal organs of the neck and was capable of permanently injuring health. The pathologist said the injury was 'fatal'. It is therefore a grievous harm by the definition provided under s 2 of the Penal Code.

On the other hand, the relevant provision of s 204 of the Penal Code on the definition of 'malice aforethought' states as follows:

'204. Malice aforethought shall be deemed to be established by evidence proving anyone or more of the following circumstances -

(a) ...

(b) knowing that the act or omission causing death is likely to cause the death of some person, whether such person is the person actually killed or not, although such knowledge is accompanied by indifference whether death is caused or not, or by a wish that it may not be caused.' (my emphasis)

In terms of s 204 quoted above, I find that the circumstantial evidence I have analysed, taken together with the police statement, is insufficient to prove beyond reasonable doubt that the accused intended to cause the death of the deceased. However, in his persistence for forced sexual intercourse, he was indifferent as to whether throttling a person in the course of a struggle was likely to cause death. Besides, common sense dictates that he must have been aware that throttling is likely to cause the death of someone.

In considering some precedents on the element of awareness of what harm is dangerous to life, I referred to a few previous decisions of this court and the Court of Appeal. In this regard, I formed a view that the conduct of the accused in strangling the deceased is distinguishable from the facts in the case of Ramphanana v The State [1984] B.L.R. 83, CA, for example. In Ramphanana's case, the accused strangled the deceased by holding his neck in the crook of his arm during a fight. It was held by the Court of Appeal, per the judgment of Dendy Young JA, that the accused's act could not be said to have been 'calculated to cause strangulation nor could such an act be viewed as an obvious danger to life'.

What distinguishes the case at hand with the decision in Ramphanana (supra) is that in the latter instance, the deceased had provoked the accused while at a party. He had hurled insults at the accused and enraged him. The deceased also hit the accused with a blow to the head and another on his leg. In the trial for murder, the accused was pleading

provocation and self defence for holding the deceased as he did, that is, with an elbow around the deceased's neck. The deceased was tall and hefty and the appellant was drunk. Consequently (as to whether the appellant realised the danger to life in his actions) the Court of Appeal found it doubtful as to whether the appellant knew

of the danger to life in what he was doing.

In casu,
there is no element of provocation arising from a fight. As discussed earlier, no element of self-defence is acceptable. In the result, I find that the State has succeeded to establish malice aforethought against the accused as envisaged by s 204(b) as read with s 2 of the Penal Code. The verdict of the court is that of guilty. The accused is convicted of murder as charged under s 202 of the Penal Code.

Accused convicted
of murder.