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NOT REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH)

In the matter between:

Case No: CC40/2017

THE STATE

And

PHUMZILE MABOPE

Accused

Coram: **Chetty J**

Heard: **17 August 2018**

Delivered: **21 August 2018**

JUDGMENT

Chetty J:

[1] The accused stands arraigned on a multiplicity of charges committed during the period October 2015 to February 2017. At the commencement of the trial he pleaded guilty to counts 1, 2, 3 and 6 (Housebreaking with intent to steal and theft), 7 (Theft), 10 (Murder) and 11 (Housebreaking with intent to steal and theft) and not guilty to the remaining counts. In amplification thereof a written plea explanation was handed in pursuant to the provisions of sec. 112 (2) of the **Criminal Procedure Act**¹ (the Act) as exhibit "A" wherein the factual basis underlying the individual pleas was succinctly tabulated. Mrs *September*, who appears on behalf of the State, accepted the pleas tendered only in respect of counts 1, 2, 3, 6, 7, 10 and 11 but joined issue with the factual matrix proffered underpinning the remaining counts. It is consequently wholly unnecessary to regurgitate the aforesaid content save to emphasize that extant the plea, they constitute an admission of all the essential elements in respect of those charges and warrants a finding of guilt thereanent. I turn thus to consider those to which the accused pleaded not guilty, viz, counts 4, 5, 8 and 9.

[2] Counts 4 and 5 are interrelated and allege that –

"4. **Housebreaking with intent to rob**

IN THAT upon or about 22 January 2017 and at or near no. [...] V. Street, Central, Uitenhage, in the district of Uitenhage, the said accused did unlawfully and intentionally break open and enter the house of **ELIZABETH COETZER** with the intention to commit robbery.

¹ Act No, 51 of 1977

5. Robbery with aggravating circumstances

IN THAT upon or about the date and place mentioned in count 4, the accused did unlawfully and with the intent to induce her to submit, do violence to **ELIZABETH COETZER**, and 86 year old female person, and did then and there by means of such force, and with intent to steal, take from the possession of the said **ELIZABETH COETZER**, cash in the amount of R400-00, her property in her lawful possession, and did rob her of same.

Aggravating circumstances being present in that the accused, during the commission of the robbery wielded a knife and threatened to stab **ELIZABETH COETZER.**"

[3] The accused, in amplification of his not guilty plea, delineated its factual basis as follows –

"3.4 Counts 4 and 5: Housebreaking with the intent to steal and theft and Assault

- (g) The incident occurred on 22 January 2017 in the afternoon at [...] V. Street, Central, Uitenhage, in the district of Uitenhage. I unlawfully and with the intent to steal broke into and entered the house situated at the above address by breaking the window above the back door. I noticed the owner of the house was at home and sitting in the living room.

- (h) I was in the kitchen stealing food and I then decided to leave it in the kitchen and proceeded to the bedroom. Whilst I was in the bedroom trying to open the drawers I heard the owner of the house moving to her bedroom. I decided to run away but as I left the bedroom she was about to enter the bedroom and she found me in the entrance of her room. She asked me not to hurt her. I demanded money from her. She proceeded to her room and I followed her. She handed me cash to the value of R400.00.
- (i) She then enquired where I entered her house and wanted to follow me to see where I came in. I then aggressively pushed her to the ground and she fell. I then ran away.
- (j) I further admit that the house and the property inside the house as well as the money that was handed to me was in the lawful possession of Elizabeth Coetzer and that I stole from her R400.00.”

The rubric prefacing the accused’s narrative of the circumstances under which these offences were committed is at variance with the plea tendered *viva voce* but the conflict is of no real consequence. It is apparent from that chronology that whilst admitting having unlawfully and intentionally breaking into the complainant’s home with the intent to steal he seeks to avoid culpability on the robbery with aggravating circumstances charge (count 5). By his own admission he broke into the complainant’s home with the intent to steal and having achieved his goal, perfected that crime. A conviction with intent to commit a crime other than that specified in the indictment is entirely permissible and an accused may be found guilty of the offence so proved.² However, in the absence of any evidence by the state to prove that the accused was armed in the manner detailed in the indictment, I am unable to

² See sec 262(1) of the Criminal Procedure Act, No 51 of 1977.

conclude that aggravating circumstances were indeed present. That she was robbed admits of no doubt whatsoever and he is clearly guilty of robbery on count 5, albeit not with aggravating circumstances.

[4] Counts 8, 9 and 10 relate to events which culminated in the death of the deceased on 23 February 2017. As adumbrated, the accused pleaded guilty to the charge of murder (count 10) but denied culpability in respect of counts 8 and 9. The factual basis underpinning his defence appears thus. I interpolate to say that whilst the plea is similarly in conflict with that tendered in answer to the specific charges, the conflict is of no real moment -

"3.7 Counts 8 and 10: Housebreaking with the intent to Steal and Theft and Murder

- (r) The incident occurred on 23 February 2017 in the afternoon at [...] L. Street, Canon Hill, Uitenhage, in the district of Uitenhage. I unlawfully and with the intent to steal broke into and entered the house situated at the above address.
- (s) I went to the house with the intention to steal avocados from the avocado tree situated at the house. I climbed over the back wall. Once on the property I decided to go to the house and noticed that the back door was standing slightly ajar and I opened it further and entered the property. I then decided to go to the bedroom in search of items that I could steal. I found nothing worth stealing.
- (t) I then went to the kitchen in order to steal food items but the owner of the house, that I now know to be M V, entered the front door. I then hid under a bed in a bedroom. She again left the house and I

returned to the kitchen. As I opened her food cupboards she again returned to the house. She opened the door to a room when I unlawfully and intentionally assaulted her by grabbing her around the neck and strangled her with my hands where after she fell to the ground. I then took the telephone cord and strangled her further with the intention to kill her. Eventually it appeared as if she was not breathing anymore and that I had indeed killed her. I then left the house and committed the offence as described in count 11 below. After committing the particular offence, I returned to the house situated at the abovementioned address and I again entered the house and searched the house for food items which I then also placed in plastic bags. Before I placed the further food items in the plastic bags I noticed that the deceased was still laying on the floor in the same position and it still appeared to me that she was not breathing. I thought that she was dead. I then decided to have sexual intercourse with the deceased by penetrating her vagina. My intention was to have sex with a corpse.

- (u) I then left and hid the plastic bags containing the stolen groceries in the bushy garden of the deceased's property with the intention to later return and collect it.
- (v) I knew that it was wrong to kill someone.
- (w) I further admit that the house and the property contained therein was the property or in the lawful possession of the deceased M V."

[5] What clearly emerges herefrom is that the sole purpose of entering the erf was to steal avocados. The intention to kill the deceased manifested itself only after

he gained entry to the house and there is no evidence to justify the inference that he broke into and entered the home with the intent to rape. However, the supposition advanced that the admitted sexual intercourse was merely a necrophiliac aberration and not rape, is entirely contrived. Dr *Anthonie De Beer* (Dr *De Beer*) conducted a post-mortem examination on the cadaver on 27 February 2017. The correctness of his report was not placed in issue and was received in evidence as exhibit "B". His clinical examination established that there was bruising present **"in entrance to vagina anterior on left and right"**. His uncontroverted testimony establishes the falsity of the accused's narrative concerning the events which transpired in the deceased's home. The medical evidence not merely debunks the contrived assertion but moreover proves the falsity of the alleged strangulation. Dr *De Beer* iterated that the marks to the deceased's neck were caused by blow(s) and not as a result of any manual strangulation. I am satisfied that the deceased was, to the knowledge of the accused alive when he raped her and that his denial to the contrary can summarily be rejected. In the result the accused is found guilty as follows -

- Count 1 - Housebreaking with intent to steal and theft;
- Count 2 - Housebreaking with intent to steal and theft;
- Count 3 - Housebreaking with intent to steal and theft;
- Count 4 - Housebreaking with intent to steal and theft;
- Count 5 - Robbery;
- Count 6 - Housebreaking with intent to steal and theft;

- Count 7 - Theft;
- Count 8 - Housebreaking with intent to steal and theft;
- Count 9 - Rape;
- Count 10 - Murder;
- Count 11 - Housebreaking with intent to steal and theft.

D. CHETTY

JUDGE OF THE HIGH COURT

Obo the State:

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