Judgment No. HB 106/08
Case No. CRB 46/08

THE STATE

VERSUS

EMMANUEL JEKISENI

IN THE HIGH COURT OF ZIMBABWE
BERE J
GWERU 24, 25 AND 26 SEPTEMBER 2008 AND 15 OCTOBER 2008

Mr B Nyoka for the applicant
Mr P Mabukwa for the respondent

Criminal Trial

BERE J: For almost two years and in Samambwa Village, Chief Samambwa, Zhombe rural area, Kwekwe District, the accused managed to maintain an incestuous relationship with his daughter.

On 25 July 2004 and as a result of that relationship baby Laina Patience Jekiseni (the deceased) was born. On 31 July 2004, the deceased died mysteriously. No one witnessed the death of the deceased but the evidence gathered created a very strong suspicion against the accused person. The result was that the instant murder charge was preferred against the accused person.

The accused has denied the allegations and the prosecution has sought to rely on circumstantial evidence in an effort to persuade the court to return a verdict of guilty against the accused person.

The legal position

Our law as regards a criminal conviction leaning on circumstantial evidence is settled and both the State Counsel and the accused's counsel are in agreement.

What has become the accepted legal position on circumstantial evidence can be traced back to the position enunciated by WATERMEYER JA in the case of *R v Blom*[1]

[1]. 1939 AD 288 at pp 202-203

where the learned Judge of Appeal summed up the position by referring to two cardinal rules of logic which he referred to as follows;

> "(1) the inference sought to be drawn must be consistent with all the proved facts. If it is not, then the inference cannot be drawn.
> (2) The proved facts should be such that they exclude every reasonable inference from them save the one to be drawn. If they do not exclude other reasonable inferences, then there must be doubt whether the inference sought to be drawn is correct."

KOSAH JA (as he then was) reaffirmed the accepted legal position on circumstantial evidence in the Zimbabwean case of *S v Marange*[2]. See also the case of *S v Masawi and Another*[3] per EBRAHIM JA (as he then was) where the concept is further discussed and the position on circumstantial evidence restated.

Guided by the accepted legal position, an analysis of the evidence led in this case will be closely made.

The State case rested on the evidence of accused's daughter who also happens to be the mother of the deceased, the accused's wife, Doctor P Mapanda and the two police officers viz, Constable Tarusenga Zhanda and Assistant Inspector Boniface Muzunze who at the time of the alleged offence was Member In Charge Crime and based at Zhombe Police station. The accused's case rested on the accused's sole testimony.

THE UNCONFIRMED STATEMENT

As this trial unfolded and in an effort to strengthen the State case the State Counsel sought to tender in evidence the unconfirmed warned and cautioned statement allegedly made by the accused at Zhombe Police station on the 3rd day of August 2004. The intended production was challenged by the accused person prompting the prosecution to embark on a trial within a trial. After the conclusion of that trial I ruled that the statement was inadmissible. I indicated then that my reasons would appear in the main judgment. Here are my reasons.

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[2]. 1991(1) ZLR 244 at p.249
[3]. 1996(2) ZLR 472 (S)

In terms of section 266 of the Criminal Procedure and Evidence Act [Chapter 9:07] where an accused elects to make a statement during the course of criminal investigations and in a subsequent criminal trial it is proved that such a statement was made freely and voluntarily without the accused having been unduly influenced thereto the unconfirmed statement can be tendered by the prosecution as part of the evidence against the accused.

If that statement is challenged by the accused the onus is on the prosecution to establish that such statement was freely and voluntarily made. See *S v Nkomo* 1989 (3) ZLR 117(S) and *S v Mazano and Another* 2000(1) ZLR 347(H).

The thrust of the accused's challenge in this case was that on the day the statement was recorded he was subjected to a prolonged enquiry, it spanned from around 0800 hours right up to around 1600 hours when eventually the statement in question was recorded. It was his position that the enquiry was punctuated by assaults, general threats and deprivation of food by the investigating officer Constable Tarusenga Zhanda.

The threats and the deprivation of food as an inducement to force the accused to sign the statement were denied by the two officers who testified in the trial within a trial.

That there was a prolonged enquiry leading to the statement being recorded was confirmed by non other than the investigating officer himself who told the court that it was after a "marathon interrogation" that the accused had his alleged statement recorded. The statement was said to have been an aconfession by the accused.

The key witnesses in the attempted rebuttal of the accused's allegations were the two police officers who inevitably have an interest in securing the conviction of the accused person.

According to the accused, he was subjected to assaults, threats and deprivation of food not by both officers but by the investigating officer. In other words, only Constable Zhanda was privy to the alleged assaults, threats and deprivation of food. The accused did not allege the other officer of any wrongdoing.

It was of concern to the court that when officer Muzunze testified, he could not even make concessions on things which could have possibly happened in his absence. For example, when it was specifically put to the witnesses that the accused was alleging

both the assault and deprivation of food to have been masterminded by the investigating officer in the witness's absence, the witness was quick to dismiss such allegations insteady of giving the accused the benefit of doubt.

Such open bias against the accused and in favour of a fellow officer was of concern to the court. It made it impossible for the court to accept this officer as a credible witness.

Whilst conceding the averment by the accused that he enquiry on accused took long, the investigating officer could not explain the reasons for this marathon enquiry. The accused filled up that gap by alleging that the enquiry took longer than was necessary because he was being forced through assault and threats to agree with what his daughter and wife had stated concerning his alleged involvement in the alleged murder of the deceased.

There was no attempt by the prosecution to call evidence of both the accused's daughter and his wife who could have shed light, on the alleged threats and deprivation of food raised by the accused person. These two witnesses spent the whole of that day with the accused and surely if the accused was assaulted, threatened and or denied food, these witnesses would have either confirmed or denied such allegations. Fair enough, they may not have directly witnessed the assault, but they saw, spoke to and provided the accused with some food on the day. The accused must have spoken to them concerning the happenings at the police station on that day.

In a case of this nature, it is not advisable to exclusively rely on the evidence of police officers who by virtue of their office would have reason to deny everything put to them by the accused person. It must be borne in mind that in criminal prosecution, the average police officer is determined to secure the accused's conviction at all costs. If further evidence can be obtained from witnesses in addition to police officers such avenue must be explored. Such evidence can only add a different dimension to the assumed biased evidence of the main actors- the police officers.

The accused must be believed when he says that the statement was extracted from him by the investigating officer because under normal circumstances this is how investigations are supposed to be conducted. We found it quite curious that officer

Muzunze, who was not even the investigating officer would want this court to believe that of all what happened, he took over the recording of the accused's statement because he reasoned this was a serious case screaning for his intervention in that regard.

His position is not supported by exhibit 1- the accused's confirmed, warned and cautioned statement which was infact recorded by Constable Zhanda on the 6th day of October 2005 and witnessed by another Constable. The question might be asked- if officer Muzunze reasoned the witness was too junior or inexperienced to handle such a murder case, why did he allow a situation where the inexperienced officer would record such a statement from the accused person?

In all probabilities, the court could not rule out the possibility of the accused having been unduly pressurized into signing the unconfirmed statement.

In any event, there is no indication as to why this statement was not taken to court for confirmation if indeed the accused had made such a confession.

It was for these reasons that the court ruled the statement to be inadmissible.

THE MAIN EVIDENCE

Going back to the main evidence, none of all the witnesses who testified saw the accused committing the alleged offence. The different pieces of evidence tendered are supposed to lead to one inference which accommodates no other reasonable and competing inference.

The accused's daughter who was the victim of the incestuous relationship which led to the birth of the deceased took us through the early stages of the incestuous relationship right up to the birth of the deceased, the subsequent mysterious death of the deceased and the post death era coupled with the investigations that followed.

As we followed her evidence, we were convinced that some aspects of her evidence were told with a convincing tongue. She suffered sexual abused from her biological father, the accused at a tender age. This must have traumatized her and we guess it might continue to affect her for sometime.

The witness did not see the accused committing the offence but sought in her evidence to put the accused close to the scene of the crime just before the deceased was subsequently found dead.

The most significant part of her testimony was that on the day the deceased died the accused had just returned from the bush where he had been cutting roofing poles. According to her the accused entered the kitchen hut to roast dry maize. This was the same hut she was using as her bedroom and where she had just laid the deceased after breastfeeding her. As the accused entered this hut the witness walked out switching directions with the accused. The second nexus was the allegation that the accused had discouraged her from continuing to breastfeed the deceased, arguing that its continued existence entailed a threat to accused's liberty because of the charge of incent. Thirdly the witness alluded to a confession allegedly made by the accused to the murder of the deceased.

The accused's position was a complete denial of having entered the hut in question as suggested by his daughter or at all. He denied discouraging his daughter to breastfeed arguing he desperately needed the baby from her to satisfy his ritual expectations. He was emphatic that from the bush where he had been cutting poles he never entered the hut but insteady asked his son Tapiwa to roast dry maize for him whilst he took a rest on a shed where he was served with his lunch.

That the accused entered the hut was supported by his wife whose version was in line with the evidence as told by her daughter.

In dealing with the evidence of this witness, the court did not loose sight of the fact that for quite some time this woman had been traumatized by the incestuous relationship between her daughter and her biological father, her husband. On one occasion she almost caught the accused and her daughter red handed. She sought assistance from the accused's brother but her plea fell on deaf ears. The accused continued with this embarrassing relationship.

According to her, the intimate relationship between her daughter and, the accused had led to her being denied conjugal rights- which form the backborne of any happy

marriage. The accused had lost interest in her in preference for her own daughter. In her own words, this pained her.

When she gave evidence she struck us as a very strong woman who found herself in a very humiliating situation.

In all probabilities the arrival of the deceased six days before her death must have been an unwelcome development as the incestuous conduct of the accused and this witness's daughter was now no longer going to be confined to the immediate Jekiseni family but would spill over to the whole neighbourhood and possibly beyond. Driving all this wind of humiliation was the accused. For all these reasons the court had to exercise caution in dealing with her evidence. She is typical of a witness who would give testimony with an injured mind/heart.

In our considered view, we felt equally the need to be cautious in dealing with the evidence of accused's daughter who for a long time suffered the humiliation of being abused by her own biological father in silence. Coming to court as a witness must have presented her with the rare opportunity to speak her mind out about the abuse and how she felt about the accused.

The witness, in her evidence in chief gave the impression that the accused had impregnated her and left her to battle with the management of her pregnancy alone.

It was only in cross-examination that the witness's testimony took a slightly different complexion.

For the first time and only as a result of cross-examination the witness revealed that the accused had followed her to Kwekwe though in response to her invitation. Not only that but that the accused was present and went with her to a private doctor, Doctor Zengeza.

It was even more significant to us that the witness allowed her aunt Tendai Dube to waste her resources by paying medical fees for private consultation without disclosing to her the already confirmed pregnancy. Through such non-disclose, the doctor must have repeated the same diagnosis and confirmed her pregnancy.

A further element of dishonesty on this witness is further shown by the witness's attempt to misrepresent the author of her pregnancy to her own mother, the third witness.

It was the third witness's testimony (unconfirmed by the first witness, but accepted by the court) that her daughter initially lied to her by trying to assign or attribute her pregnancy to some boyfriend in Harare. It was only after she had been threatened with assault that she then told the truth about her pregnancy.

The suspect nature of the first witness's testimony does not end here. The record will show that this witness was adamant that from the bush the accused did not have his lunch. But her own mother, the third witness confirmed the acussed's story that he was served with lunch which he had under a shed at the homestead.

The record will further show that the first witness alleged in her testimony that the accused made a confession to her and her mother whilst in a police vehicle as they were going for indications. She tried to restrict this confession to herself and the third witness. But as it turned out, there were five people at the back of the vehicle viz, the witness, the third witness, accused, accused's brother and another person whom accused said had been given a lift by the police. Add to this puzzle, given the police vehicle had no glass between the compartment occupied by the two details and the passengers, it would mean that there were in fact seven people in the police vehicle when the accused is alleged to have made the alleged confession.

In pursuance to this alleged confession the court did put a pointed question to the third witness who expressed no knowledge at all for such a confession.

The bottom line is that whereas the first witness gave aspects of her testimony convincingly there were several aspects of her testimony which were unsatisfactory.

In her evidence in chief, the first witness and given the impression that the source of the money she used to go to Kwekwe was exclusively from her own gold panning activities. But through cross-examination she disclosed for the first time that the third witness had also given her some money. The revelation of further medical examination by a private medical practitioner was only a result of searching cross-examination and so was the roll played by the accused.

Whilst the third witness corroborated the story by the first witness that she saw accused going inside the kitchen where he deceased was, under cross-examination she

clearly gave the impression that she could not possibly have been able to see the accused entering the hut as she was plastering her granary with her back to the kitchen hut.

She stubbornly refused to concede that any of her children who were playing a game of soccer could have entered the hut in the absence of the first witness who had gone to relieve herself in a bush close to the homestead.

The witness was adamant that Tapiwa could not have been send by accused to roast dry maize for him. Her reason among others was that Tapiwa was too young to be able to do such an assignment. However, as it turned out Tapiwa was 11 years old at the time and it is highly improbable in our view that at such an age, a child with a rural background would not be able to roast dry maize.

The second witness Doctor Patricia Mapamba, a government medical officer is the one who carried out the post mortem examination on the remains of the deceased almost four days after death. She examined the remains of a six day old whose remains had not been kept in a mortuary for almost three days.

The remains had been kept wrapped in a blanket in a kitchen in a rural set up.

On examining the deceased's remains she noted two big haematomas (clots of blood) on the left pariental and frontal scalp. She also noted that the left pariental and frontal bones were fractured. There were traces of bleeding into the brain. The doctor said that her examination led her to conclude that death was not due to normal circumstances but due to induced intracranial haemorrhage.

Under normal circumstances it is extremely difficult for the court to challenge or not to accept the evidence of a professional witness such as a doctor particularly in the absence of a competing professional examination.

It will be noted that in this case the doctor had the misfortune of observing the deceased's remains four days after death- the deceased being a six day old baby whose remains had not been deposited in a mortuary for three days after death. As already noted, the remains had been kept wrapped up in a blanket in a rural hut, where cockroaches had started feasting on it as was testified to by the first witness.

We found it to be quite revealing that both the first, third witness and the accused person who were the first to see the deceased immediately after her death did not observe

the injuries observed by the doctor four days later at the time of the post mortem examination.

Equally true is the fact that the investigating officer, Constable Tarusenga Zhanda who attended the scene of crime two or three days after the deceased's death did not see the head injuries seen by the Doctor. What the investigating officer noted were slight marks on the deceased's face and chest.

The first witness did not make reference to slight marks on the deceased's chest but confirmed the marks on the face which she attributed to cockroaches.

All these injuries observed by the doctor and the police officer must not be looked at in isolation but within the context of the Application for post mortem examination which stated that it was suspected the deceased had died of suffocation or strangulation. In addition one must also bear in mind the implications of the sketch plan (exhibit 5) which seemed to suggest the deceased died as a result of being kicked with booted feet by the accused. I will come back to deal with this evidence in detail later in my judgment.

We found it to be of significance that the first people to see the deceased immediately after death, that is, the first, third witness and the accused did not see the injuries allegedly seen by the doctor some four days after death. It is equally puzzling that the investigating officer did not see the same injuries.

There is an attempt to resolve this paradox though – this is brought about by the evidence of the third state witness, the accused and the investigating officer.

Contrary to the evidence of Inspector Muzunze, the court now knows and accepts that the remains of the deceased were conveyed to Zhombe clinic on the night of 2nd August 2004 in a private open truck vehicle. The court was advised by the above- referred witnesses that the journey was covered at night and the distance covered was about 50km.

The third witness told the court it was her who was holding the remains of the deceased from Samabwa homestead to Empress Police station and to Zhombe clinic (about 50 km) at night and at the back of the open truck motor vehicle. The witness described the night as windy and the road as gravel or dust road. In her own words she

described the road as "a very bad dusty road." The court specifically asked her the following question;

"Question- Would you rule out the possibility of the remains having been damaged along the way to the clinic.
Answer- We were seated on the floor and at times we would be pushed from one side of the car and again to the other side".

The accused in his own testimony under cross-examination told the court that in conveying the deceased's remains they used a Mr Musimwa's pick up truck and used "a gravel road which is dusty with ditches- 20km to Empress and from Empress they used a short cut route with pot holes. It was windy. My wife who was holding the deceased's remains would be moved from one end of the vehicle to the other in the process of moving."

If this evidence of conveying the deceased's remains is accepted (which the court feels inclined to) it cannot be ruled out that probabilities are that the injuries noted by the doctor as the possible cause of death are post death injuries on the deceased' body whilst in transit from Samambwa homestead to Empress Police station and then to Zhombe clinic.

Constable Zhanda told the court that once he deposited the deceased's remains at Zhombe clinic he had nothing further to do with the conveying of the deceased's remains to Kwekwe General Hospital for post mortem examination. He said that the mandate to convey the deceased's remains was given to a Constable Mhlanga. Constable Mhlanga was neither called nor his affidavit produced to confirm that there was no further damage to the deceased's remains when transported from Zhombe clinic to Kwekwe General Hospital. The possibility for further damage in transit can therefore not be completely ruled out.

We are not therefore able to conclude that the observation made by the doctor are consistent with the condition of the deceased immediately after death.

As part of the State case, the state counsel sought to produce exhibit 5 (the sketch plan) which contained indications allegedly made by the accused person at the scene of crime on the 4th of August 2004.

The accused's position was a complete denial of having made such indications and the enquiry was therefore restricted to a factual one.

The accused stated that the signature attributed to him on exhibit 5 is in fact not his but that there was an arbortive attempt to forge his signature.

The investigating officer Constable Zhanda stated that the accused person and the other two witnesses, viz, the first and third witness had signed on the original sketch plan drawn at the scene.

The difficulty the court had in dealing with exhibit 5 was the absence of the original sketch plan where all the witnesses allegedly signed accepting to have made the indications. The investigating officer pointed out that the original plan was on a rough piece of paper (not an official police note book) which rough piece of paper was never produced in court.

A close examination of the accused's alleged signature on exhibit 5 would clearly show that that signature is quite different from his signature on his exculpatory statement contained in exhibit 1 where his signature appears twice. One does not need to be a handwriting expert to appreciate the distinction in those signatures.

Secondly and even more importantly is the fact that none of the other makers of the indication signed on exhibit 5. Both the first and the second witness did nor endorse their signatures despite Assistant Inspector Muzunze purporting to be a witness to those signatures.

There is another complication which is caused by exhibit 5. If the accused person killed the deceased by kicking her with his booted feet, why would this not have been apparent immediately the deceased died. Surely those who first saw the deceased immediately after death would have noted something consistent with such a violent attack. Given the delicate condition of the deceased (6 days old) surely marks of such violence would have been observed by the three witnesses, namely the mother of the deceased (first witness), third witness, the accused and even the two police officers who attended the scene of crime.

We concluded unanimously that there is a real possibility that accused did not make the indications in exhibit 5.

Throughout his defence, the accused maintained his innocence and speculated that the deceased could have died through natural causes.

On 6th October 2005 when a warned and cautioned statement was recorded from him he stuck to his story. When this statement was taken to court for confirmation on 27th September 2006 before the learned Magistrate Mudzongachisvo at Kwekwe Magistrates Court, the accused maintained his consistency.

There is not doubt in our mind that the accused committed a heinous offence by having an incestuous relationship with his own biological daughter. Society has every justification to be angry with such persons. The accused's conduct is socially aborminable.

Despite this reprehensible conduct on the part of the accused we remain far from being convinced that the various pieces of evidence put together by the prosecution point to the guilt of the accused. We are unanimously unable to conclude that there are no other reasonable co-existing circumstances which could have led to the death of the deceased including but not limited to natural causes of death.
Consequently we are enjoined to give the accused the benefit of doubt.

Verdict- not guilty and acquitted.

Attorney General's Office, applicant's legal practitioners
Mabukwa and Associates, respondent's legal practitioners