

THE STATE
versus
CHEST MOYO

HIGH COURT OF ZIMBABWE
MATHONSI J
BULAWAYO 7 AND 8 JUNE 2016

Criminal Trial

Ms N. Ngwenya for the state
K. Dube for the accused

MATHONSI J: The accused person was 43 years old at the time of the alleged offence on 27 January 2000 and was residing at his homestead in the Wabayi area of rural Gwanda under village head Matshina Ndlovu. 16 years and 4 months down the line he is appearing before us at the age of 59 charged with the murder of his daughter Sisasenkosi Moyo who was aged 5 years when she died.

The accused has pleaded not guilty to the charge. The allegations are that on 27 January 2000 the accused's wife had left the deceased under the care of the accused when she went looking for her missing sister. In the early hours of the following morning, that is at about 0500 hours the accused had reported to a neighbour that the deceased was dead. Indeed her body was found lying in the kitchen with a big gash on the forehead, a missing forearm and was partially burnt leading to the eventual arrest of the accused person.

In his defence outline, the accused has stated that he was indeed left in charge of his daughter by his wife Gladys Mpofu on 27 January 2000. He and the deceased had worked in the fields in the morning before he later did domestic chores at the homestead. He started drinking what he calls "some brewed spirit."

It was after he had started drinking that he realized that the deceased's clothes, which she had been putting on, were dirty and he washed those clothes. He continued drinking alcohol and proceeded to Phineas Ndlovu's homestead where there was a beer drink but returned to his

homestead and slaughtered a chicken. After dinner he and the deceased retired to the bedroom where he continued drinking but he later slept leaving the deceased reading.

The accused went on to say that it was at midnight when he woke up and discovered that the deceased was not in bed. He went to look for her in the kitchen where, upon arrival, he beheld the body of the deceased lying on the floor with her face smashed by the ridge of a tripod, dead. He says he removed the body from the tripod and covered it with a blanket before proceeding to notify his neighbour Gift Sibanda of the death.

The state lined up ten witnesses to prove its case but owing to the unexplained delay in the commencement of the trial three key witnesses, namely Matshina Ndlovu, Ndazu Ndlovu and Philimon Moyo who had played central roles in bringing the accused person to book, have since died. In addition, the arresting police detail, Elvis Mwakajila, then attached to CID Gwanda who had gathered the evidence, is said to have since left the police service and could not be found.

The evidence of Milton Mkize, Ronald Mhene and Doctor Mukwendi Kashalala Kayembe was admitted in terms of s314 of the Criminal Procedure and Evidence Act [Chapter 9:07] as it appears on the state outline.

We will begin by looking at that evidence which was admitted. According to Milton Mkize, an attested member of the Zimbabwe Republic Police based at CID Gwanda, on 1 February 2000 he attended the scene of crime in the company of the investigating officer and interviewed the accused person. He told them that on the day in question he had consumed copious amounts of the illicit brew known as *tototo*. Of course, when the accused gave evidence in court he changed the brand of liquor to what he called “hot stuff” mixed with a soft drink.

According to Mkize, the accused narrated to the police officers that the deceased had disappeared from bed leaving him fast asleep heavy with alcohol. The witness recorded a warned and cautioned statement from the accused which was later confirmed by a magistrate at Gwanda on 16 February 2000. The statement itself was produced in court.

It is a lengthy and detailed statement in which the accused set out in chronological order the events of 27 and 28 January 2000 from the time he was left in charge of the deceased by his wife right up to the time of his arrest. It reads in part:

“After driving the cattle, I then passed by Phineas George Ndlovu’s homestead, since their home is near the river Tuli. I then asked Phineas Ndlovu whether Nomagugu’s mother had not passed by his place. Phineas replied, that she had not passed by his place. At that juncture I was still wearing the clothes which I was wearing in the morning consisting of a cream long sleeved shirt and a cream pair of long trousers. I went back to my home and cooked some chicken of which I left slaughtered after it had fallen into (a) pail of water.

We ate food, I then went to bedroom together with Sisasenkosi when I got there I drank some more of my ‘tototo.’ I then retired to bed at seven in the evening leaving Sisasenkosi browsing through some books whilst seated at the table. Before going to bed I first closed the door. I fell into a deep sleep for sometime, before I woke up. I woke up in the middle of the night then searched around the bed with my hand for the child and could not find her. I woke up and found the door open, I went outside looking for the child until I got to the kitchen hut. When I got to the kitchen hut I found Sisasenkosi Moyo having fallen onto a metal tripod stand and her face was smashed onto the ridge of the tripod stand----.

I then retrieved her from the top of the tripod stand, but by then she was dead. I then placed her on the floor. Thinking it was around 0300 hours in the morning. I stood for a long time thinking, I then took a blanket and covered the body and left to inform Gift Sibanda who is my neighbour about the tragedy. I took him to my home to see for himself the tragedy after which we notified other villagers on Friday morning---.”

The admitted evidence of Dr Kayembe is to the effect that he examined the body of the deceased at United Bulawayo Hospital mortuary on 3 February 2000 and compiled his findings in the post mortem report number 75-69-2000 which concluded that the cause of death was multiple injuries and assault.

The post mortem report itself was produced in terms of s278 (2) of the Criminal Procedure and Evidence Act [Chapter 9:07]. The section provides that an affidavit by the doctor who has carried out an examination stating that he or she carried out such an examination and ascertained facts and arrived at an opinion, shall be *prima facie* proof of those facts and that opinion “on its mere production.”

The doctor who conducted the post mortem observed that the time of death was 1900 hours, that the deceased was 90cm in height and he noted the following marks of violence:

- a) Laceration right forehead (7 x 3cm) left arm (8 x 4cm)
- b) Below elbow amputation left arm with dislocated elbow joint and missing radius.
- c) Burns involving the head, limbs, abdomen, back and buttock 32%.”

He also noted a skull fracture of frontal and left parietal bones, fractures in the anterior and medial left cranial fassae. In addition there was extensive brain damage. The doctor concluded;

“The injuries observed, besides the burns due to hot water, were caused by a sharp and heavy object like an axe.”

He made a finding that the cause of death was multiple injuries due to assault. The admitted evidence and that which cannot be disputed prove the following, that;

1. The accused was left in charge of the 5 year old deceased by her mother on 27 January 2000.
2. During the day he was putting on a cream long sleeved shirt and a cream pair of long trousers. These are the same clothes which he was putting on when he met Phineas George Ndlovu.
3. It is the accused who first found the body of the deceased. When he did that in the middle of the night, he retrieved the body from the tripod while still alone and lay it on the floor and covered it with a blanket.
4. After that he proceeded to notify Gift Sibanda, his neighbour, of the death.
5. The accused told the police that he had been drinking tototo and not hot stuff that he mentioned in court.
6. The deceased died as a result of multiple injuries due to assault. The injuries, which included skull fracture and brain damage, were caused by a heavy object like an axe. She also had 32% hot water burns.
7. The body of the deceased was found with the left forearm missing and it was never recovered after it was crudely amputated at the elbow joint position.

Over and above the admitted evidence and that which was produced in terms of the law, the state led evidence from three more witnesses namely Gift Sibanda, Albert Ndlovu and Phineas George Ndlovu.

Gift Sibanda is a neighbour of the accused who was awakened by the accused in the morning of 28 January 2000. He woke up to the sad news that the deceased had died. As he and the accused found their way to the scene, he says he inquired from the accused as to what had

transpired only to be told that the child had fallen on top of a metal tripod stand at the fireplace. Upon arrival he found the body still on what he described as a small tripod stand but covered with a blanket. The stand did not have protruding edges but only raised ridges. He removed the blanket and observed an injury on the right frontal part of the forehead and signs of burns towards the buttocks. It had a missing left forearm. The clothes she was wearing did not have any blood.

Sibanda also observed a small pot which was by the fireplace. It was empty. He did not observe any blood. Although the accused said he had discovered the body during the night between 2100 and 2200 hours, he had only alerted the witness in the morning. Albert Ndlovu is another neighbour of the accused who had passed by the accused's homestead on the evening of 27 January 2000 at about 5pm going to a funeral wake. He saw the accused chopping firewood in the company of the deceased. The following morning he was on his way to the funeral when he received the news that the deceased had died.

When he attended the scene he was told by the accused that the child had been cooking when she fell onto the fire. He observed some pots on the floor which had chicken offals. When he enquired from the accused what had happened to the missing arm, he was told that it had been eaten by dogs. A search around yielded no bones. He observed blood on the floor of the kitchen. He observed that the clothes the deceased had been wearing had been washed although they still had signs of blood on them.

Phineas George Ndlovu is yet another neighbour who had been visited by the accused at sun set on 27 January 2000. He observed that his clothing, a white shirt and a yellowish pair of trousers were blood stained. When he inquired from the accused as to why this was so, the accused had not given a satisfactory answer content to say may be he had fallen or maybe he would be visited by the police. The accused had been in a drunken state.

The following morning he was advised by Gift Sibanda about the deceased's death and attended the scene. He noted that the accused had changed the blood stained clothing he had been putting on the previous day and that the deceased's clothing had been immersed in water. The presentation of the evidence of the state witnesses was generally satisfactory. Although a long of time has lapsed since the events of the death of the deceased, the three witnesses still

testified fairly well in what they observed. Only Gift Sibanda seemed to stray but only when asked to speculate about what could have caused the injuries and what happened to the missing left forearm, things for which he had no direct knowledge. He only said it was possible that the gash on the forehead could have been inflicted by a fall onto the tripod and that it was possible that the forearm could have been chewed off by dogs, speculation not helpful at all.

The accused person also gave evidence. He quickly recanted the narrative contained in his confirmed warned and cautioned statement, which was given when events were expected to have been fresh in his mind. He even departed from the contents of his defence outline. For instance while in the caution he said he had been putting on a cream long sleeved shirt and a cream pair of long trousers, as observed by Phineas Ndlovu, he testified in court that he had been putting on a brown trousers and a white T-shirt under a yellowish shirt.

While in the caution he said he retrieved the body of the deceased from the tripod stand and placed it on the floor while still alone at about 0300 hours, he changed that during his testimony. He said he did that together with Gift Sibanda. In both the caution and the defence outline he said nothing about the deceased's forehead being stuck in a protruding metal on the tripod, something he insisted on in his evidence. Indeed during the trial, he invented this story of carrying a plate of offals backwards and forth from the kitchen to the bedroom and the deceased also waking up in the dead of the night to transport the plate of offals back to the kitchen which does not appear anywhere else.

A closer look at the accused's three versions shows that the defence outline is closer to the warned and cautioned statement and that his evidence in court became stranger and stranger as he continued to conjure a new defence as he went alone. In the end his testimony assumed not only chameleon colour changes in response to whatever was thrown at him at any one time but also the complexion of a fictitious novel.

Hence he found nothing wrong with the very improbable story he fed the court that a 5 year old girl would be allowed to cook by the fire on her own and would wake up in the middle of the night and find her way to the kitchen for no other reason but to roast or cook chicken offals not afraid of the darkness. Therein also lies the desperation to invent the story of carrying

a plate of offals to the bedroom while leaving behind in the kitchen the rest of the cooked chicken. Its all unmitigated falsehood which is as improbable as it is a figment of an idle mind.

But then there is method on all this. There has to be a reason why the accused was at pains to invent theories about how his daughter met her death when he did not have to really. It is because he was intent on hiding the correct version of how the little girl met her death.

In our law no onus rests on the accused to convince the court of the truth of any explanation he gives. If he gives an explanation, even if that explanation is improbable the court is not at liberty to convict unless satisfied, not only that the explanation is improbable but that beyond any reasonable doubt it is false. See *R v Difford* 1937 AD 370 at 373; *R v M* 1946 AD 1023 at 1027; *S v Pisirayi* HB 121/16.

The explanation given by the accused about how the deceased died, including his belated claim that her head was stuck on a protruding metal of a tripod stand which he only remembered in court, fits the description given by MCNALLY JA in *Matambo v Mutsago* 1996 (1) ZLR 101 (S) 103D -E that:

“However charmingly, smoothly or impressively Mr Mutsago made these statements, the fact is that they are mechanically impossible. If a witness says he saw water flowing uphill unaided by a pump, you do not judge his veracity by reference to his demeanor. You apply the law of physics.”

Which then brings us to the issue of circumstantial evidence. There is no direct evidence of the killing of the deceased. The prosecution is anchored on circumstantial evidence. In our law, the guiding principle is that circumstantial evidence depends upon facts which are proved by direct evidence from which the court is required to draw inferences. Means, motive and opportunity are all examples of circumstantial evidence.

To show that the accused person had the means, a motive and the opportunity assists in persuading the court of his guilt and raises a *prima facie* case against him for him to answer. However, where the conviction of the accused is dependent upon circumstantial evidence, the inference sought to be drawn must be consistent with the proved facts and the facts should be such that they exclude every reasonable inference from them except that which is sought to be drawn. See *S v Gwebu* HB 124/16; *S v Edwards* 1949 SR 30; *R v Blom* 1939 AD 188 at 202 - 203; *S v Vhera* 2003 (1) ZLR 668 (H) 679 C-G; *S v Phiri* HB 19/16.

The proved facts are that the accused had custody of the deceased on the day in question in the absence of the child's mother. He had in his possession an axe he had used earlier while chopping wood as admitted by himself and as observed by Albert Ndlovu. He was observed by Phineas George Ndlovu putting on blood stained clothes which he later took off and says he washed together with those of the deceased, a very unusual activity for a rural man who was expecting the return of his wife from her trip that very same day.

He is the one who solely "discovered" the body of the deceased and tampered with a crime scene under cover of the night hours before alerting neighbours and calling the police. The deceased was found with fatal wounds which, according to the medical evidence, were inflicted by an instrument like an axe. The conduct of the accused of washing his clothes and those of the deceased when viewed together with that of interfering with the crime scene, removing the body of the deceased and covering it with a blanket before people arrived, is consistent with a guilty person setting about to destroy evidence.

It also explains why no blood was found at the scene if one may assume that the deceased met her death at that kitchen hut. She may have been planted there for all we know after being killed elsewhere. We also cannot ignore the missing forearm which may constitute the final missing link of the jig-saw puzzle, the motive to kill the girl. We take judicial notice that quite often in contemporary history strange killings for ritual purposes have been occurring in this country and the killing of the 5 year old girl may have been one of them.

We conclude therefore that the accused person had the means and the opportunity to kill the deceased the way she was killed. As pointed out, the missing forearm also provides the motive. Accordingly, on the proved facts we have no hesitation in finding that the only inference to be drawn is that the accused did kill the deceased and probably used the liquor that he says he continued consuming slowly even from his bedroom as the source of dutch courage for the commission of the heinous crime.

According to the manner in which the deceased was attacked, the severance of the forearm and the crushing of her head, there was actual intention to kill her.

Accordingly, the accused is found guilty of murder with actual intent.

Reasons for sentence

We consider that the accused person is now 59 years old. He is married. The deceased was his daughter. This matter has been hanging over his head for 16 years. The accused is a first offender. He is HIV positive and under treatment.

Having said that we are indeed perplexed by the callousness exhibited by the accused in the commission of the offence. It is unimaginable that a human being and a parent could find it in him to end the life of his own progeny the way the deceased was killed. Nothing can mitigate this crime. It is worrying indeed that this court continues to preside over such cases where offenders seem to compete to commit the most heinous of these killings especially against young girls.

This court shall never tire of discharging its responsibility of upholding the sanctity of human life. The only way of protecting society against such people is to remove the perpetrators from society. This is a matter in which the ultimate penalty could have been preferred but for the *lacunae* that exists in the law.

However in light of his age, his ill-health and the inordinate delay in the commencement of the trial which has meant that he has endured the trauma of living with the offence hanging over his head for so long we will temper justice with mercy.

Accordingly the accused is hereby sentenced to 20 years imprisonment.

National Prosecuting Authority, state's legal practitioners
Shenje and Company, accused's legal practitioners