

THE STATE

Versus

TINASHE SIZIBA

IN THE HIGH COURT OF ZIMBABWE
MAKONESE J
BULAWAYO 22 & 23 SEPTEMBER 2016

Criminal Trial

Ms N. Ngwenya for state
H. Chimbetete for accused

MAKONESE J: The deceased was aged 24 years when she met her death. She died in a most horrific manner. At the time of her death she was employed as a merchandiser with a company known as Ocean Foods. On the 19th March 2016 deceased dropped off from an omnibus at Makoni Shopping Centre in Pumula South around 2020 hours. She walked along an unnamed tarred road linking the business centre and her place of residence. Without any warning the deceased was struck on the back of her head with a stone and she fell down. Deceased sustained a deep wound on the back of her head and started bleeding profusely. The deceased somehow managed to stagger to her home. She collapsed upon entering her bedroom. She was rushed to hospital where she succumbed to the injuries sustained in the attack and died in hospital on 22nd March 2016.

The 19 year old accused was arrested in connected with the murder of the deceased. A mobile phone stolen from the deceased at the scene of the crime was traced to the accused. Accused pleads not guilty to the charge of murder. He proffers a complete denial to the charge and states that he has been wrongly implicated. His defence outline amounts to a bare denial. He alleges that he will dispute each and every allegation of fact that is inconsistent with his defence outline and puts the state to the proof of each allegation against him. Accused further states in his defence outline that although he was found in possession of the deceased's cellphone he had bought it from one Nkosilathi at a beerhall at Makoni business centre, Pumula South.

No-one witnessed the transaction and Nkosilathi's further particulars are not known to the accused.

The state tendered into the record the outline of the state case (exhibit 1). It shall not be necessary to repeat the entire contents of the state outline, which now forms part of the record. The defence outline was tendered as exhibit 2. Its contents are brief and short on detail and as I have already indicated. The accused's confirmed warned and cautioned statement was produced and marked exhibit 3. The accused's handwritten version of the statement was marked exhibit 3 (a). The English translation of the accused's warned and cautioned statement which was duly confirmed of a magistrate at Tredgold Building on the 19th May 2016 is in the following terms:

“My name is Tinashe Siziba. I stay at Robert Sinyoka at number 118. On 19th day of March 2016 I was drinking beer at Makoni Business Centre, Pumula South, Bulawayo. I left this place around seven in the evening now going home. I met a certain lady near a church in Pumula South. I struck her with a stone and she fell down. I took from her a phone and her bag. It was a Lumia Nokia type of phone with an Econet sim card (line). I opened her bag took out a white T-shirt written Oceans threw it down besides her. I ran away and when I got to a stream I threw away the bag taking away \$2,00. I went home to retire to bed. I woke up in the morning and went to Kudakwashe Mxolisi Moyo's place, I told him that I had a phone for sale but I did not tell him where I got it from. We left for Pumula Old business centre. On getting there we asked Mayors to look for someone who wanted it. Mayors sold the phone to Bekinkosi Gathuso for \$15,00. Mayors came and gave me the money.”

The next documentary exhibit 4, is the affidavit by Constable Edson Chikunguru who identified the body of the deceased at the United Bulawayo Hospital mortuary on the 22nd March 2016. The post mortem report number 246/242/2016 compiled by Dr Roberto Trencu, after an examination of the body of the deceased was tendered as exhibit 5. The post mortem report lists the cause of death as:

- (1) Severe cerebral oedema
- (2) Skull fracture compressive epidural haematoma
- (3) Head trauma in unknown circumstances

Exhibit 6 is a brownish handbag, identified as the one that was in possession of the deceased when she met her tragic death. A Nokia Lumia, black in colour, with a purple pouch was produced as exhibit 7. The cellphone was identified as belonging to the deceased.

State Case

Best Ntini

The state opened its case by leading viva voce evidence from Best Ntini. He testified that he resides at 12129 Pumula South, Bulawayo. He knew the deceased as his niece. They were residing at the residence at the material time. On the 19th of March 2016 the deceased left for work at about 0800 hours. She was carrying a brownish hand bag. On the same date and at about 2000 hours the witness realised that the deceased had not returned from work. This was unusual. At around 2030 hours the deceased arrived home with blood stains all over her clothes. She went straight to her bedroom. The witness followed her to her bedroom and observed that she had a deep cut at the back of her head. She was bleeding severely. She was also bleeding through the ears. She appeared confused. She attempted to get up but collapsed to the floor. The witness was terrified by what he saw but deceased was unable to relate what had transpired. The witness summoned Christopher Gwisi a neighbour for assistance. The witness and his wife failed to secure an ambulance and subsequently deceased's employer sent a motor vehicle which ferried the deceased to hospital. The following day when the witness went for a hospital visit he was informed that the deceased had been taken to the Intensive Care Unit. The deceased's condition deteriorated and she died in the early hours of the 22nd of March 2016. The witness testified that he later recovered a T-shirt belonging to the deceased inscribed "Ocean Foods" at the scene of the crime. The witness testified that the deceased's hand bag and cellphone were missing. The matter was left in the hands of the police who had commenced investigations.

The evidence of this witness was given in a clear and logical manner. He was not contradicted under cross-examination. He gave his evidence calmly and did not exaggerate events. He narrated precisely what he knew in connection with the matter. His evidence is credible and the court has no hesitation in accepting his testimony

Ariel Ntini

He resides at 12129 Pumula South Bulawayo with his father, Best Ntini. He knew the deceased during her lifetime as a cousin. His evidence is largely similar and corroborates that of the previous witness. He was seated in the kitchen when the deceased entered the house with blood dripping from her head. Her clothes were full of blood. The witness screamed and he called out for his father. He tried to speak to the deceased but she did not respond. The witness took a bucket of water and cleaned the wound at the back of her head. Best Ntini then went and sought the assistance of a neighbour one Christopher Gwisi. The deceased was taken to hospital where she died after a few days from injuries sustained in an attack upon her on the night of the 19th of March 2016. On the 18th May 29016 the witness was summoned to the CID Homicide offices at Bulawayo. Upon his arrival he was shown a variety of cellphones and was asked to identify the deceased's cellphone. The witness positively identified a Nokia Lumia cellphone as the one belonging to the deceased. The witness recognized the purple pouch and the cracked screen. This witness confirmed that when the deceased left she was carrying a brownish bag. The witness confirmed that the handbag exhibit 6 and the cellphone exhibit 7 tendered in evidence indeed belonged to the deceased. The witness confirmed that he was not known to the accused prior to his arrest. He only came into contact with the accused when he observed him making indications at the crime scene.

This witness gave his evidence in a simple and straight forward manner. There was no tinge of exaggeration in his account. He narrated events in a clear and logical sequence. His evidence was not contradicted in any material respect under cross-examination. The court accepts his evidence as a correct reflection of what transpired on the fateful day. The court also accepts the observations made by the witness as it relates to the identity of the deceased's handbag and cellphone.

Gilbert Sigauke

The next witness for the state was Detective Constable Sigauke. He is a duly attested member of the Zimbabwe Republic Police. He is attached to the CID Homicide Squad, Bulawayo. He has 21 years service in the police force. He is the Investigating Officer in this case. On the 23rd of March 2016 whilst on duty he was allocated a docket of murder to investigate. The docket relates to the deceased, Petronella Zimende, a female adult during her lifetime. The witness revisited the crime scene. He located Best Ntini and the other state witnesses from whom he recorded statements. The witness was alerted to the fact that when deceased had left for work on the fateful day she was in possession of a Nokia Lumia cellphone with an Econet line. The witness proceeded to apply for a court order compelling network service providers to track and establish whether the deceased's handset was being used, using the IMEI (International Mobile Equipment Identity). The IMEI is a unique 15 digit serial number allocated to every mobile phone which can then be used to check information such as the phone's country of origin, the manufacturer and its model number. The model code or serial number and IMEI are printed on the back of the handset. No two devices will have the same IMEI which makes it a very useful tool for tracking lost or stolen cellphones.

On the 17th May 2016, the witness received information from Telecel Zimbabwe to the effect that the deceased's handset was being used by a subscriber registered in the name of Bhekinkosi Gumbo of house number C 5074 Old Pumula, Bulawayo.

The witness managed to locate Bhekinkosi Gumbo who led him to Mayors Zulu as the person who had sold him the cellphone. Mayors Zulu then led the witness to accused person. The accused was arrested and detained for further questioning. At first, the accused told the witness that he had picked up the cellphone at the shopping centre. The accused later admitted involvement in the murder and reduced his version of events in his own handwriting in the Ndebele language. The statement was translated into the English version. A warned and cautioned statement was recorded from the accused and he was taken before a magistrate for

confirmation of this statement. The accused confirmed before the magistrate that he had given his confession freely and voluntarily without any undue influence.

The witness testified that the accused took him and his team of detectives for indications at an open space at Pumula South where the deceased was attacked. The witness invited Best Ntini to the crime scene where he indicated the place where he had picked up the T-shirt belonging to the deceased. The accused led the witness to a stream bank where the brown handbag belonging to the deceased was recovered from a location where it was covered by grass. The handbag was positively identified by Ariel Ntini as the bag deceased had been carrying on the day she had been attacked. The witness described the accused as a person who had given “excellent” co-operation during the course of indications and investigations. The witness flatly denied that the accused had been subjected to any physical assaults. The report from Telecel Zimbabwe indicating that the deceased’s handset was traced to Bhekinkosi Gumbo was tendered into evidence as exhibit 8.

The evidence of the witness was credible and reliable. He was not contradicted under cross-examination in any material respect. His evidence corroborates the accused’s version as contained in the confirmed warned and cautioned statement. There was no motivation for this witness to lie. In my view this matter was properly investigated, leading to the arrest of the accused. The court accepts the evidence of this witness.

The state then applied for formal admissions in terms of section 314 of the Criminal Procedure and Evidence Act (Chapter 9:07) in respect of the evidence of the remaining state witnesses to be tendered into the record as it appears in respect of the outline of the state case. The application was not opposed by counsel for the accused and, in the event, the evidence of the following state witnesses was admitted:

- (1) Christopher Gwisi
- (2) Thili Moyo
- (3) Bhekinkosi Gumbo
- (4) Mayors Zulu

- (5) Kudakwashe Moyo
- (6) Bukhosi Mbekezeli Ncube
- (7) Dr Roberto Trecu

The state closed its case and the defence opened their case.

Defence Case

Tinashe Siziba

The defence led oral testimony from the accused person under oath. The accused stuck to his defence outline. He denied any involvement in the murder of the deceased. He stated that he never met the deceased person on the day in question. He denied attacking the deceased and robbing her of handbag, cellphone and cash amounting to \$2,00 as alleged by the state. The accused averred that he was a victim of circumstances and that he was being falsely implicated. He stated that he was assaulted by police detectives leading him to admit committing the murder. Accused could not however proffer any motive for him to be falsely implicated. Accused could not stand by his defence outline because there was no defence outline. His defence outline was a bare denial. He denied each and every allegation as contained in the state outline. He deprived himself the opportunity of rebutting the crucial allegations regarding the link between himself and the deceased's cellphone. That piece of evidence was extremely damaging to the accused's case. When he was confronted by Police Detectives at the first instance, accused said that he had picked up the deceased's phone. When pressed to explain how and where he picked the cellphone accused had no choice but to relate the truth to the police. The police asked accused to write his own statement in long hand in his own handwriting. The statement recorded in the vernacular language was translated into the English version. That version now forms part of the record. The statement contains precise details regarding the murder to such an extent that there is no possibility to infer that the statement was dictated to the accused. The details in the warned and cautioned statement could only have come from one with actual knowledge of how that crime was committed. The Investigating Officer gave clear and reliable evidence of how he had used the IMEI (International Mobile Equipment Identity) number of the deceased's cellphone to

link it to the deceased. The police followed their leads and interviewed Bhekinkosi Gumbo who led them to Mayors Zulu. Mayors Zulu led the police to the accused. The net had closed in and ultimately accused had nowhere to hide. His attempt to cast aspersions on the conduct of the police is without merit. If accused had been assaulted to give a false confession, he would have raised this with the magistrate who confirmed his statement. The court takes judicial notice of the fact that if accuse had been kicked in the neck by the detective in the manner he described he would have suffered serious if not fatal injuries. This allegation, in my view was made to simply mislead the court. The accused conveniently averred that when he bought the cellphone from Nkosilathi there was noone to witness the transaction. The accused does not have any further details on this Nkosilathi. The court can safely conclude that the said Nkosilathi is a fictitious creation by the accused person.

The evidence of Kudakwashe Moyo was formally admitted into the record is to the effect that:

“... accused told him that he had a cellphone he wanted to sell. The accused showed this witness a black Nokia Lumia cellphone with a purple cover. This witness will state that he asked the source of the cellphone and he told the witness that he stole it in Pumula North and his polo neck jersey with a trade mark of Lacoste was torn during the robbery.”

It has to be noted that Kudakwashe Moyo was accused's friend at the relevant time. There was no motive for this witness to fabricate such evidence. There was nothing for Kudakwashe to gain. From the accused's own testimony the relationship between the two was good. The only conclusion is that Kudakwashe must have been giving the correct version of what transpired. The handbag was recovered through the initiative of the accused. The police would not have guessed that the handbag was some 2 kilometres from the crime scene under some grass on a stream bank. The accused must have made the indications that led to the recovery of the handbag.

Conclusion

The court is satisfied that the state has adduced overwhelming evidence against the accused to secure a conviction. The accused was not an impressive witness. He sought to depart from his confession in the most unconvincing fashion. The accused's demeanour on the witness stand was poor. He did not answer questions directly and he put up a patently false defence.

Our law on the admissibility of confessions is settled.

See the case of *Colgate Duffen Mudenda vs The State* SC-54-15

In this matter the Supreme Court upheld a death sentence imposed in the lower court and held that a confession had properly been admitted into evidence. The court held per MALABA DCJ at page 2 of the cyclostyled judgment as follows:

“The trial court correctly found on the analysis of the contents of the warned and cautioned statement that it was an expression of a genuine confession by the appellant of his involvement in the planning and murder of the deceased. The statement contains references to facts which could only have come to the knowledge of the appellant through direct participation in the conspiracy and execution of the agreement to kill the deceased for money and to extract warm blood from his body for ritual purposes. Not only did the appellant give a comprehensive statement of what he said happened, the facts to which it relates were presented in a coherent manner producing a convincing story into which all the known facts dovetailed perfectly.”

See also the case of *Edward Dima v The State* SC-129-04

In the instant case there is sufficient evidence aliunde to prove that the accused's confession is a genuine admission of the commission of the offence.

The court notes that there is no direct eye witness account relating to the murder. The state case is therefore premised on circumstantial evidence. The cardinal rules of logic were established in the case of *State v Blom* 1939 AD 188. We are satisfied that all the proved facts are consistent with the version contained in accused's confession.

The state has conceded that the accused may only be convicted of murder with constructive intent. We agree with that assertion. There is no evidence before the court to establish the fact that accused set out to rob and kill the deceased. On the facts, he however foresaw death as a real possibility: Accused is accordingly found guilty of murder with constructive intent.

Reasons for sentence

In assessing an appropriate sentence the court takes into consideration all the mitigating features of the case as set out by accused's defence counsel. Accused is a 19 year old youthful offender. He lost both parents when he was still young. He therefore lacked the requisite parental love and care. The accused is a first offender. Accused has however thrust himself at the deep end. He finds himself guilty of murder with constructive intent. The murder was perpetrated during the course of a robbery. For her part the deceased lost her life for a cellphone and a paltry \$2,00. Those were the only valuables accused took from the deceased. The court frowns upon the unruly behaviour that is reflected in this matter. The accused has shown no remorse up to the end. He has chosen to defend himself on the hope that he would escape punishment. Accused caused the unnecessary and tragic loss of human life. The victim was pregnant at the time and therefore two lives were lost. Courts will impose stiff sentences in cases where people choose to disregard the law and live by means of violence. This court must however balance the interests of the accused and those of the administration of justice. A lengthy prison sentence is unavoidable inspite of the Constitutional provision under section 81 Constitution of Zimbabwe Amendment No. 20 (2013) as argued by defence counsel. It was argued by counsel for the accused that the court must have regard to the provisions of section 81 (1) (i), which provides as follows:

- “Every child has, that is to say every boy and girl under the age of eighteen years, has the right –
- (i) Not to be detained except as a measure of last resort, and if detained –
 - (ii) To be detained for the shortest appropriate period;
 - (iii) To be kept separately from detained persons over the age of eighteen years ...”

Whilst in every other case the courts always endeavour to keep youthful offenders out of prison, in cases such as murder, the courts are enjoined to impose such custodial sentences as will fit the offence and the offender. It cannot be argued that a short custodial sentence would be appropriate for a murder committed in aggravating circumstances. The General Laws Amendment Act (No. 3) 2016 now provides a guideline on the range of sentences that should be imposed where a murder is committed in aggravating circumstances. Part XX of the General Laws Amendment provides under section 2 and section 3 that a court shall regard as an aggravating circumstance the following:

- (a) the murder was committed in a robbery
- (b) the murder victim was pregnant

In my view, the murder was clearly committed in aggravating circumstances. However, the court must take into consideration the accused's youthfulness. The court has also made the finding that this was a murder committed with constructive intent. These two factors tend to substantially reduce the accused's moral blameworthiness. The court must not condemn the accused to a sentence that provides no opportunity for rehabilitation.

The courts must however protect the sanctity of human life. In the circumstance the accused is sentenced as follows.

“Accused is sentenced to 20 years imprisonment”.

Prosecutor General's Office, state's legal practitioners
Coghlan & Welsh, accused's legal practitioners