

THE STATE
versus
BATHOBILE MOYO
and
NOMALANGA MOYO

HIGH COURT OF ZIMBABWE
MATHONSI J
BULAWAYO 7 AND 8 MARCH 2017

Criminal Trial

W Mabhaudhi for the state
H Malinga for the 1st accused
N Mlala for the 2nd accused

MATHONSI J: At the time that the events of 18 May 2015 unfolded the accused one was married to Nicholas Dube, a man employed and based in South Africa. She was staying at their homestead in Ngwana Area in rural Plumtree together with her four school going children and her 97 old year mother in law, Sibuko Ndebele who met her tragic death on the morning of that day while sheltering under the roof of her own bedroom, the victim of mechanical asphyxia, restriction of neck vessels, strangulation and head trauma and contusion.

The accused two was aged 21 and employed as a maid at the nearby homestead of Yebo Sibanda. The two accused persons have been brought before this court charged with murder in contravention of s47 (1) of the Criminal Law (Codification and Reform) Act [Chapter 9:23]. The state alleges that on 18 May 2015 they each or one of them wrongfully, unlawfully and intentionally killed Sibuko Ndebele (the deceased), a female adult in her lifetime there being.

The two accused persons pleaded not guilty of the charge. The accused one stated in her defence outline that on the day in question she woke up early to prepare food for her school going children notifying the deceased that she would check on a cow that had broken its leg the

day before. Upon her return she found the deceased seated next to her bedroom but she subsequently went to fetch water in the company of Esnath Mguni.

During the course of the morning the deceased had called her to inform her that the accused two had arrived having been sent by someone to request permission to use a donkey. She engaged the accused two in discussion before the two of them proceeded to the vegetable garden leaving the deceased still seated next to her bedroom.

Later Solomon Ndlovu arrived at their home performing debt collection duties as he demanded R10-00 that she owed him. Unable to extract anything from her Solomon Ndlovu departed accompanied by the accused two. At that stage she says she proceeded to fetch firewood, made a fire and prepared porridge to feed the deceased. It was while she was taking the porridge to the deceased's bedroom that after forcing her way in, she beheld the deceased lying on the floor next to her bed. She was not responding causing her to call neighbours for assistance. The accused one denied killing the deceased.

In her defence outline the accused two stated that she knew the deceased and the accused one as relatives of her former employer, one Yebo Sibanda and they lived in the same line. On the fateful day she indeed went to their homestead to enquire about donkeys as well as to fetch seedlings to plant in her garden. Whilst there she did talk to the deceased before proceeding to the garden with the accused one to fetch seedlings. The two of them chatted for a long time in the garden until they were interrupted by Solomon Ndlovu who was demanding his money from the accused one.

At that stage she got the seedlings and proceeded to Yebo Sibanda's homestead where she resided. She later learnt of the passing on of the deceased. She denied killing the deceased and craved for her acquittal.

In terms of s278 (2) of the Criminal Procedure and Evidence Act [Chapter 9:07] the state produced the post mortem report compiled by Dr Roberto Trecu, a pathologist at United Bulawayo Hospitals, following an examination of the body of the deceased on 20 May 2015. The doctor observed the following marks of violence:

- “(1) Superficial furrow around the neck, knot on the back, no oblique, transversal, introglotic, no ascending.
- (2) Two abrasion (s) on the neck, left side.
- (3) Conjunctival haemorrhage (both eyes).”

He concluded that the cause of death was mechanic asphyxia, restriction of the neck's vessels, as a result of strangulation. He also noted head trauma and contusion. In short the evidence of the medical specialist ruled out death by hanging. This is because the furrow that he observed was not oblique or at an angle or of an ascending or upward fashion as would occur when a person hangs from the roof while being pulled down by the force of gravity. Rocket science is therefore not required to show that the deceased was strangled from the back of the head, hence the knot at the back using the black belt found tied round her neck.

The belt itself was produced as exhibit 5. It is 129cm long and weighs 30g. Even without the medical evidence, it was physically impossible for the deceased to hang herself from the roof after tying the belt twice round the neck with a knot at the back and then lifting herself to the roof. Note that according to Reginald Mabuzane, the police officer who attended the scene, the roof was 2 ½ meters from the floor where the body was lying.

Melta Moyo whose homestead is directly opposite that of the deceased, the two are separated by a road running in between them, testified that she was at her home minding her own business when she was called by the accused one who was standing outside the perimeter fence to her homestead at around midday. The accused one desired her presence to assist her feed the 97 year old deceased person who was refusing to take her porridge.

Upon arrival there she was shocked to find that the person she was supposed to help feed was lying on the floor of her bedroom by the right side motionless. She could not fathom how someone in that state could be fed. She did not see any porridge at the scene but all the time the accused one was wailing. She immediately retreated to call Esnath Mguni at her homestead to come and witness the strange development with her. Upon their return people had already gathered at the deceased's homestead having been attracted by the wailing of the accused one.

Melta Moyo stated that the deceased stayed at that homestead with only the accused one and her children. When she arrived for the first time after being called by the accused one, only the accused one and the deceased were present. Vumani Moyo, the young brother of the accused one who lives elsewhere, happened to be passing by the deceased's homestead at that particular moment. This witness did not see the accused two upon her arrival there.

Esnath Mguni corroborated the evidence of Melta Moyo in respect of being called to the scene by Melta. She also confirmed that when this happened the children were at school. When the police arrived at the scene later that afternoon she was able to enter the room where the deceased was lying dead. She observed that a black belt had been tied around the deceased's neck from behind her back.

Siphathisiwe Khuphe stated that the deceased was her maternal grandmother. She lives at a homestead which is located about 300 to 400 metres from the deceased's homestead. At about 0700 hours on that day she had passed through the deceased's homestead on her way to a brick moulding place. She greeted both the deceased and the accused one who was by the kraal. The deceased was in good spirits, healthy and appeared very clever. At about 1100 hours, she passed by on her way back home. Hungry and in a hurry to get home and have some tea she did not stop to converse with anyone.

She however observed that at the homestead there was now a visitor in the form of the accused two who was sitting with the accused one by the side of the kitchen which was near the vegetable garden. They were lost in conversation. The deceased was by then seated next to her house. She had also observed Solomon Ndlovu at Melta Moyo's homestead as the two of them were also conversing standing next to the graves at that homestead. She assumed that they were discussing building up the graves as Solomon is a builder.

Siphathisiwe Khuphe said she had been home for barely 20 minutes when she observed the accused two cycling past on her way from the deceased's homestead to where she stayed. Immediately after that Solomon arrived at her home asking for plastic containers. He was immediately followed by Vumani Moyo, the young brother to the accused one who had been sent by the latter to call her.

Upon her arrival at the gate to the deceased's homestead she was met by one Zanele Moyo with the sad news that the deceased had passed on. She immediately passed out. When she recovered she assisted in calling the police. When she eventually entered the room with the police she observed that the deceased had been lying on a mat by the side as would a person who would have fallen asleep. She noted that a black belt, not a waist belt but one used on bags as a sling, had been tied around the deceased's neck. It was visible at the back of the head where the two loose ends could be seen. At the front, which was swollen, it could not be seen. It had been tied round the neck twice. There was blood on the mat and on the right ear.

Solomon Ndlovu clarified the case even further especially as he corroborated the evidence of Khuphe in very material respects. He confirmed Khuphe's evidence that he had in fact gone to Melta's homestead to discuss some construction work and was seen by Khuphe there. He says he was there for 20 minutes before he proceeded to the deceased's homestead which is directly opposite that of Melta Moyo.

Khuphe had seen this witness at the same time that she saw the deceased alive sitting by her house and the two accused persons sitting between the kitchen and the garden chatting. It is that position which the two occupied when Ndlovu arrived except that the deceased was nowhere to be found. Ndlovu says that when he inquired after her the two accused persons denied knowledge of her whereabouts. He did not remain there for long, he estimates the period to have been about 10 minutes.

At the time he was leaving the accused two also said she was leaving and immediately rode her bicycle leaving accused one to see him to the gate. The latter returned to make porridge for the deceased. That piece of evidence is also consistent with that of Melta Moyo who was called by the accused one to help feed the deceased with porridge when she was already dead.

What is significant though is that Ndlovu says he left and walked to Khuphe's homestead which is 300 to 400 metres away a distance which took him about 5 minutes. Upon arrival, he had not even taken a sit when Vumani arrived having been sent by the accused one to call Khuphe to attend the scene as the deceased was already dead. Clearly therefore if the accused one was left making a fire to prepare porridge for the deceased, there was not enough time for

her to do so and discover the body while trying to deliver porridge. That story is therefore an elaborate hoax. The arrival of Ndlovu must have disturbed what the two were planning.

According to Reginald Mabuzane the attending police detail, his observations at the scene clearly discounted the possibility of the deceased having fallen from the rafters after hanging herself. The belt which strangled her had only 15cm of loose ends, the rafters were 2 ½ metres from the floor and were not even near the place where the body lay neatly tucked away on the carpet.

In addition the belt was tied twice around the neck and was very tight. The knot was at the back of the head again ruling out the possibility of the deceased having strangled herself.

Accused one also gave evidence. She generally accepted most of the evidence presented on behalf of the state. She stated that after the arrival of the accused two who had been sent to discuss a donkey that was being sold, the two of them immediately withdrew from where the deceased had been seated and went to the garden as accused two wanted to look for seedlings. They however did not look for seedlings as there was none. Instead they sat on chairs behind the kitchen making sure though that the accused two was strategically positioned to see the movement of the deceased. She indeed saw the deceased standing up and going to her room.

She confirmed that the moment Solomon came in they discontinued whatever they were doing and the accused two immediately left. She says she also immediately showed Solomon Ndlovu the way out and remained making a fire to cook porridge which we have found to be a lie.

Accused two also confirmed almost all the evidence that was led on behalf of the state. She added that she had arrived at this homestead around 0900 hours and left after 1000 hours. Although she had gone there to talk about a donkey having been sent by a church mate it is not clear what it is about the donkey she wanted to talk about. She says that the moment the accused one came after being called by the deceased; she immediately stood up from where she had been sitting next to the deceased. The two of them immediately withdrew to the garden ostensibly to look for seedlings. Upon arrival they did not look for any but sat down and started chatting, not about the donkey or the seedlings, but about a boy who had stolen from her. In her defence

outline she said they had been talking for a very long time when Ndlovu arrived which is likely because she says when she left it was after 1000 hours. Therefore her new version during her testimony that she took 30 minutes is false.

It is significant that she is the one who positioned herself strategically to watch the movements of the deceased. She is the one who saw her stand up going to her room although this is not what they told Solomon Ndlovu. We can only speculate that the long time they spent strategically seated behind the kitchen they were biding their time for the deceased to finally retire to her room before they could pounce.

Accused two's story does not make sense. She does not even justify being at that homestead on the day in question. What it however achieves is to place her at the scene of the crime at exactly the time that the deceased met her death.

In fact what the evidence of the state does is to place the two accused persons at the scene where, moments later the deceased was found lying on the floor in her bedroom with a black belt tied twice around her neck. The medical evidence proves that she had been strangled. Those who were at the scene with the deceased for a long time (at least by the accused two's own admission) are the two accused persons. They were interrupted by Solomon at which point they parted ways.

A short while after that the accused one raised alarm. While calling Melta Moyo to help feed the deceased woman, she was actually calling her to feed a corpse with porridge, porridge which was non-existent. The moment the elderly woman arrived she started wailing attracting more villagers to the scene. Those are the circumstances, the proved facts.

Clearly the state case hinges on circumstantial evidence, that is, any fact from which any disputed fact may be inferred. In our law circumstantial evidence depends upon facts which are proved by direct evidence from which the court is required to draw inferences. 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.

The proved facts are that the deceased died as a result of strangulation and did not hang herself or strangle herself. Someone else did. At the time that this happened only the two accused persons were present and they were behaving funny having taken a position to watch her until she went into her room. We therefore have no hesitation in drawing the inference that it is the two accused persons who strangled the deceased with exhibit 5.

As to the liability of co-perpetrators, that is governed by s196A of the Criminal Law Code [Chapter 9:23]. What is important is that the two of them associated with each other before, during and after the commission of the offence. It is not important who did what. They were co-perpetrators and are equally liable.

The manner in which the deceased was strangled, the force used and the tightening of the belt behind her back can only mean that the two accused persons intended to bring about her death. They succeeded.

Accordingly the two accused persons are hereby found guilty of murder with actual intent.

Reasons for sentence

In consideration an appropriate sentence we take into account the fact that the accused persons were aged 35 and 20 years respectively at the time of the commission of the offence. They are first offenders. They have children of their own they were looking after before their arrest. We also take judicial notice of the fact that Nicholas Dube, the husband of the accused one, has been arrested and is awaiting trial for his role in this matter. Once again, women have been used by a man as tools to perpetrate his nefarious deeds against his own mother. These are two simple rural women who respected the accused one's husband and were prepared to implement whatever orders he gave them. They were extremely vulnerable. For that reason their moral blameworthiness is low. They have been in custody for close to two years since their arrest.

Having said that we cannot lose sight of the fact that a life was needlessly lost under very tragic circumstances. People should learn to respect the sanctity of human life. Taking

someone's life will be met with lengthy terms of imprisonment even in respect of women so that people will know that such conduct will not be tolerated.

What makes it difficult for us to look at the case favorably for them is that the two accused persons have not co-operated with the court. Even when they were against the wire they have withheld a lot of vital information which would have been helpful in assessing an appropriate sentence content to die with their secret. As it is now we are left to speculate as to what informed their behavior which was clearly influenced by someone else.

Accordingly each accused person is hereby sentenced to 14 years imprisonment

National Prosecuting Authority, applicant's legal practitioners
Malinga & Mpofu legal practitioners, 1st accused's legal practitioners