

THE STATE

Versus

NQOBILE MOYO

IN THE HIGH COURT OF ZIMBABWE

DUBE-BANDA J with Assessors Mr Ndlovu and Mr Bazwi
HWANGE CIRCUIT COURT 14 and 16 OCTOBER 2020

Criminal trial

Ms. Musaka, for the state

Ms L. Mthombeni, for the accused

DUBE-BANDA J: The accused is facing two counts, i.e. one count of rape as defined in section 65 of the Criminal Law (Codification and Reform) Chapter 9:23, and one count of murder as defined in section 47 of the same Act.

In count one, it being alleged that on the 20th of January 2020, and at Misheck Moyo's homestead Village 2B, Stanhope North, Myamandlovu, accused unlawfully had sexually intercourse with Rumbidzai Mkhwananzi, a female person without her consent or knowing that she had not consented to it or realising that there is a real risk or possibility that she had not consented to it.

In count two, it being alleged that 20th of January 2020, and at Misheck Moyo's homestead, Village 2B, Stalope, Nyamandlovu, in the accused unlawfully strangled Rumbidzai Mkhwananzi with bare hands, intending to kill her or realising that there is a real risk or possibility that his conduct may cause her death and continued to engage in that conduct despite the risk or possibility.

The accused pleaded not guilty to count one, and in respect of count two, guilty to the lesser crime of culpable homicide, this plea was not accepted by the state. He was legally represented throughout the trial. The State tendered an outline of the state case. It shall not be necessary to repeat the entire contents of the state outline. It now forms part of the record. The accused tendered into the record an outline of his defence case.

The state produced a confirmed warned and cautioned statement recorded by the police at ZRP Nyamandlovu on 23 January 2020. The statement was confirmed by a magistrate on the 24th January 2020.

The state tendered a post mortem report compiled by Dr Juana Rodriguez Gregori at United Bulawayo Hospitals on 24 January 2020. Following an examination of the remains of the deceased, the pathologist concluded that the cause of death was: mechanic asphyxia; neck constriction and strangulation by hands.

A shovel was produced by the state as areal exhibit. Its measurements are as follows: weight 1.8 kg; circumference of the shaft 11 cm; length of the shovel 92 cm; width of shovel head 22 cm and length of shovel head 20 cm. The state also produced, as a real exhibit a burnt sail, whitish in colour.

State case

The state led oral testimony from two witnesses. The first to testify was Mthulisi Mkwanzani. Prior to the commencement of the testimony of this witness, State Counsel informed this court that this witness was a vulnerable witness. State Counsel applied in terms of section 319 B (b) (3) of the Criminal Procedure and Evidence Act [Chapter 9:07], for this witness to testify by means of a closed-circuit television. The court was informed that the witness, aged 10 years, will suffer substantial emotional stress from giving evidence and be intimidated, by the nature of the proceedings and by the court room. The witness is related to the accused. It was submitted that, as a result of the above, the witness will not to be able to give evidence fully and truthfully in the court room. The application was not opposed. We found merit in the application and granted it. The witness was in the presence of his maternal aunt, and testified through an intermediary by means of a closed-circuit television.

This witness resides at stand 16 Village 2B, Stanhope North, Nyamandlovu. The deceased was his sister. The accused is his cousin. On the 19th January 2020, at approximately 2000 hours, the witness, accused, the deceased and one Sibusisiwe Moyo retired to bed. As a result of the absence of their grandmother, they all slept in one bedroom hut. The witness shared the bed with the accused while deceased and Sibusisiwe Moyo slept on the floor. During the night he did not hear or see anything amiss. In the morning deceased was missing.

The second witness was Petros Nkomo, he is 63 years old and resides at stand 42 Village 2B Stanhope North, Nyamandlovu. He is a member of the special constabulary stationed a Nyamandlovu Police Station. He did not know the deceased during her lifetime. He knows the accused as staying in the same village. The accused made statements and indications to this witness. As a result of these statements and indications this witness arrested the accused

and handed him over the police officers from Nyamandlovu Police Station. He was present when the body of the deceased was exhumed from a shallow grave. He observed that the body was covered with a burnt sail, it had soil on the head and face. The body had burns on the neck, breasts and down to the knees.

The prosecutor sought admissions from the accused in terms of s 314 of the Criminal Procedure & Evidence Act [*Chapter 9:07*]. The accused admitted the evidence of certain witnesses as contained in the summary of the state case. The first was the evidence of Samuel Mpofo, he resides at Village 4A Stanhope, Nyamandlovu. The deceased was his niece. The accused is his nephew. On the 21st of January 2020, at 0900 hours, the witness was at home when the accused in the company of Mthulisi Mkhwananzi reported to him that the deceased was missing. The witness went and reported to Special Constabulary Petros Nkomo. The witness and Nkomo went to accused's home. Petros Nkomo inspected the bedroom in which the deceased was sleeping before she disappeared. He also discovered a spoor around the bedroom hut which went into the garden alongside the homestead's perimeter fence. The spoor showed that something big had been dragged. Alongside the spoor was the accused's shoe prints. They followed the spoor up to a point where they lost track of it. A search party was also organised by Philip Ndlovu which discovered a shallow grave about a kilometre from the homestead. The shallow grave was covered with soil grass and an umsusu log on top. A report was made to the police.

The second was the evidence of Sergeant Nyikadzino Shumba, a member of ZRP and stationed at Nyamandlovu. He knows the accused and deceased only in connection with this case. On the 21st of January 2020, the witness was at work when he received a report about this case at 1700 hours from Petros Nkomo. The witness attended the scene in the company of Constable Gwangwava on the 22nd of January at 0600 hours. The accused had already been arrested by Petros Nkomo. The witness recorded a warned and cautioned statement from the accused. The accused also made indications at the scene of crime. The witness and Constable Gwangwa exhumed the deceased's body from a shallow grave covered with soil and umsusu log. After digging up the grave the witness saw some logs that had been placed on top of the body. There was also a piece of burnt sail on top of the body which was covered with soil on the face and head. The body had burns on the neck, breasts and the stomach. The legs had no visible injuries. The deceased's uncle Misheck Moyo identified the body. The body was taken to hospital for a post mortem examination. The witness also recovered a shovel used to dig up

a grave. The third was the evidence of Constable Prosper Gwangwava, a member of ZRP stationed at Nyamandlovu. This witness was present when accused's statements was recorded. The fourth was the evidence of Dr Juana Rodriguez Gregori, who examined the remains of the deceased and compiled a post mortem report.

The prosecution witnesses who gave oral evidence were truthful, honest and reliable as witnesses in this court. We accept their evidence as the truth of what happened in connection with this case.

This is the state case.

Defence case

The accused elected to give evidence under oath. He testified that he was 18 years old. He went to school up to Form 3. On the 22nd October 2019, he was at home in the evening from the day's work. He went to sleep in the bedroom hut. He did not notice Mthulisi Mkwanzani, deceased and Sibusisiwe Moyo when they entered the bedroom. He woke up at night, strangled someone, he did not know who he was strangling. When he finished he saw himself carrying the body of the deceased, to the garden. From the garden he started dragging the body, carrying a shovel and a sail and a plastic container. He dug a hole, put the body there, and then poured paraffin on the body. He then set the body alight. After that he covered the body with soil, and returned home.

When he got home he was feeling weak. He harnessed cattle and went to the fields with Mthulisi Mkwanzani, and one Gift. They were going to till the land. After working the fields they went back home. Sibusisiwe Moyo asked accused about the whereabouts of the deceased, he said at that did not know. Accused started informing people about the disappearance of the deceased. The following morning, people came to his homestead, and asked him what happened to the deceased. He told them that it was him who had killed the deceased.

He admitted that the signature in the confirmed warned and cautioned statement is his, but he did not tell the police that he raped the deceased. He told the police that he strangled the deceased until she died.

The second defence witness was Nqhabuthu Moyo. He is 24 years old, and a brother to the accused. The accused's family lost a sister, and her death is still traumatic in the family.

Accused is a quiet person. He likes sports. At home, he would encourage everyone to go to church. He had not observed any odd behaviour from the accused and this case shocked him.

The accused was evading the truth and trying to mislead this court. We find that the accused was a poor witness. He had selective memory, he chose to remember those things that he thought were in his favour and chose to forget those things which were against his interests. Where his evidence contradicts that of the state witnesses, we reject it as false beyond a reasonable doubt.

Analysis of the evidence

There is evidence of Mthulisi Mkwanzani that on the 19 January 2020, the accused and the deceased slept in the same bedroom hut. Accused and this witness slept on the bed, while deceased and one Sibusisiwe Moyo slept on the floor. The deceased was missing the following morning. The accused reported to Samuel Mpofu that the deceased was missing, this witness (Samuel Mpofu) reported to Petros Nkomo, that the deceased was indeed missing. In his defence outline, accused says he went that very morning to one Petros Nkomo, a neighbourhood watch in the village to whom he immediately narrated the events that he could remember. Petros Nkomo told the court that the accused said to him that he is the one who dragged the body of the deceased to the bush and put it in a shallow grave. He then handcuffed the accused.

In his confirmed warned and cautioned statement accused gives details of how he strangled the deceased and buried the body in a shallow grave. The statement reads:

I am pleading guilty to the charges laid against me, that I raped and strangled the now deceased to death. At around three at night I shifted from the bed where I was sleeping with Mthulisi Mkwanzani, to the floor where the now late was sleeping. On arrival I closed her mouth and raped her once. On realising that I had made a mistake, I strangled her to death. When she died, I took the body and placed it outside our bedroom house. I then dragged the now late Rumbidzai's body along the shrub fence of the garden. I left the body and went back home to collect a tent, plastic, matches, paraffin and a shovel. I returned to where the body was and wrapped it in a tent plastic and carried it on my shoulders and went to the bush. In the bush, I dug a pit and placed the now late's body inside. I poured paraffin on it and lit matches and burnt it. I placed logs on the body together with soil. On top of the soil I placed another dry teak and after that I went back home.

Accused told the court that he could not remember whether he read the contents of his warned and cautioned statement. He acknowledged that the signature appended in the statement

is his, he signed the statement. He alleges that he did not rape the deceased, only told the police that he strangled the deceased until she died. In cross examination, he said he does not know what the police wrote in the statement. The statement was confirmed by a magistrate in terms of section 113 of the Criminal Procedure and Evidence Act. In the of section 266 (2) of the Criminal Procedure and Evidence Act, a confirmed statement shall be received in evidence before any court upon its mere production by the prosecutor without further proof, provided that the statement shall not be used as evidence against the accused if he proves that the statement was not made by him or was not made freely and voluntarily without his having been unduly influenced thereto.

The accused did not say in evidence that he did not make the warned and cautioned statement freely and voluntarily. Accused did not discharge the *onus* on him to show that the confirmed warned and cautioned statement was not made by him or was not made freely and voluntarily without any undue influence having been brought to bear upon him. Therefore, the statement is properly before court as an exhibit.

In the statement the accused mentions facts which could only be known by him, and he presented a coherent and convincing story into which all the known facts dovetail perfectly. A confession of such a type will often, therefore, itself prove its genuineness. That kind of information could only have come from the appellant. See *Bhebhe v The State* SC 129/02; *R v Sambo* 1964 RLR 565.

In his oral evidence before court, he says he woke up at night, strangled someone. He carried the body to the garden. From the garden he started dragging the body, carrying a shovel and a sail and a plastic container. He dug a hole, put the body there, and then poured paraffin on the body. He then set the body alight. After that, he covered the body with soil, and returned home. This is in sync with his confirmed statement. The pathologist concluded that the cause of death was: mechanic asphyxia; neck constriction and strangulation by hands. This is also in sync with the confirmed statement of the accused and his oral evidence in court. The evidence proves that it is the accused who caused the death of the deceased.

In his defence outline, accused raised diminished responsibility. In relation to the count of rape, he avers that he does not clearly remember all his actions on that night. In relation to

the count of murder, he alleges that he pleads guilty to the crime of culpable homicide, because of diminished responsibility short of insanity. Section 218 (1) of the Criminal Law (Codification and Reform) Act provides that diminished responsibility is not a defence to the crime. Where proved to exist a court convicting such person shall take it in mitigation of sentence. In our law diminished responsibility is not a defence to a crime. It can only reduce the moral blameworthiness of the accused. See Feltoe *A Guide to Criminal Law in Zimbabwe* 20.

We now deal with the individual counts. The count of rape and the count of murder. Accused pleaded not guilty to rape and guilty to a lesser crime of culpable homicide.

Count 1: Rape

In his confirmed statement accused says at around three at night he shifted from the bed where he was sleeping with Mthulisi Mkhwananzi, to the floor where the deceased was sleeping. He closed her mouth and raped her once.

Section 273 of the Criminal Procedure and Evidence Act, provides that any court which is trying any person on a charge of any offence may convict him of any offence with which he is charged by reason of a confession of that offence proved to have been made by him, although the confession is not confirmed by other evidence: Provided that the offence has, by competent evidence other than such confession, been proved to have been actually committed. There must be competent evidence *aliunde*, i.e. outside the statement proving that the crime of rape was indeed committed. In *casu*, there must be competent evidence proving that the crime of rape was committed. See *S v Tsorayi* 1985 (1) ZLR 138 (HC); *Bhebhe v The State* SC 192/02; *R v Taputsa & Ors* 1966 RLR 662; *S v Jokasi* 1986 (2) ZLR 79; *S v Shoniwa* 1987 (1) ZLR 215; *S v Dube* 1992 (1) ZLR 234.

The first witness, Mthulisi Mkwanzani, who was in the same hut with the accused and the deceased, did not testify about the crime of rape. He was sleeping on the bed with the accused while deceased was sleeping on the floor with another young girl. The post mortem report says the generative organs ¹ were normal. This means they did not show any signs of rape. There must be evidence outside the statement proving that the crime of rape was

¹The female internal reproductive organs are the vagina, uterus, Fallopian tubes, and ovaries.

committed. The outside evidence must corroborate the statement, but need not directly implicate the accused. See *S v Tsorayi* (supra). The State Counsel submitted that the accused's motive in strangling the deceased and burying her body on a shallow grave was to conceal the crime of rape. It was argued that this is evidence outside the confession which proves that the crime of rape was indeed committed. We do not agree. We find that there is no competent evidence *aliunde*, or outside the statement proving that the crime of rape was indeed committed.

Count 2: Murder

Mthulisi Mkwanzanji testified that he slept in the same bedroom hut with the accused, deceased and Sibusisiwe Moyo. In the following morning the deceased was missing. The evidence of Samuel Mpofu; Petros Nkomo and Sergeant Nyikadzino Shumba proves that the accused made indications that led to the discovery and the exhumation of the body of the deceased. The accused in his confirmed statement says that strangled her to death, he repeats this in his oral evidence before this court. The pathologist, in the post mortem report concluded that the cause of death was: mechanic asphyxia; neck constriction and strangulation by hands. There is overwhelming competent evidence, outside the confirmed statement that the crime of murder was indeed committed.

The prosecution seeks a conviction of murder with actual intent in terms of section 47 (1) (a) of the Criminal Law [Codification and Reform] Act. For this court to return a verdict of murder with actual intent, we must be satisfied that the accused desired death, and that death was his aim and object. The accused strangled the deceased by the neck until she died. The post mortem report confirms that the deceased died of mechanic asphyxia; neck constriction and strangulation by hands. We are satisfied on the evidence before us, that the accused desired death, and that death was his aim and object. See *S v Mugwanda* SC 215/01.

Verdict

Having carefully weighed the evidence adduced as a whole in this trial:

1. The accused is found not guilty and acquitted of count 1 i.e. the crime of rape.
2. The accused is found guilty of murder with actual intent as defined in terms section 47 (1) (a) of the Criminal Law (Codification & Reform Act) [*Chapter 9:23*].

Sentence

Mr. Moyo, the first issue that we have to decide is whether the murder you have been convicted off, was committed in aggravating circumstances. State Counsel and Defence Counsel submitted that this murder was indeed committed in aggravating circumstances. Both relied on section 47 (3) (b) of the Criminal Law [Codification and Reform] Act, argued that because the victim was a minor, it follows that this murder was committed in aggravating circumstances.

In relation to aggravating, ssection 47 (2) of the Criminal Law [Codification and Reform] Act provides that:

In determining an appropriate sentence to be imposed upon a person convicted of murder, and without limitation on any other factors or circumstances which a court may take into account, a court shall regard it as an aggravating circumstance if—

a) the murder was committed by the accused in the course of, or in connection with, or as the result of, the commission of any one or more of the following crimes, or of any act constituting an essential element of any such crime (whether or not the accused was also charged with or convicted of such crime)—

(i) an act of insurgency, banditry, sabotage or terrorism; or

(ii) the rape or other sexual assault of the victim; or

(iii) kidnapping or illegal detention, robbery, hijacking, piracy or escaping from lawful custody; or (iv) unlawful entry into a dwelling house, or malicious damage to property if the property in question was a dwelling house and the damage was effected by the use of fire or explosives; or

b) the murder was one of two or more murders committed by the accused during the same episode, or was one of a series of two or more murders committed by the accused over any period of time; or

c) the murder was preceded or accompanied by physical torture or mutilation inflicted by the accused on the victim; or

d) the victim was murdered in a public place or in an aircraft, public passenger transport vehicle or vessel, railway car or other public conveyance by the use of means (such as fire, explosives or the indiscriminate firing of a weapon) that caused or involved a substantial risk of serious injury to bystanders.

In relation to the circumstances in 47 (2) of the Act, the law giver uses the word *shall*. The word shall is peremptory. It leaves the court with no discretion. Once the court finds that the murder was committed under any of the circumstance listed in subsection (2), the court has no discretion but to find that the murder was indeed committed in aggravating circumstances.

Section 47 (3) of the Act provides that: “A court may also, in the absence of other circumstances of a mitigating nature, or together with other circumstances of an aggravating

nature, regard as an aggravating circumstance the fact that—(a) the murder was premeditated; or (b) the murder victim was a police officer or prison officer, a minor, or was pregnant, or was of or over the age of seventy years, or was physically disabled.”

In relation to in 47 (3) of the Act, the legislature uses the word *may*. The use of the word *may*, gives the court a discretion. It is not peremptory. The discretion must be exercised judiciously. In deciding whether this murder was committed in aggravating circumstances, we factor into account the following: the victim was 14 years at the time she met her death. She was a minor, and that the accused was had just turned 18 years. The accused was in his youthfulness. On these facts, we find that this murder was not committed in aggravating circumstances.

Mr. Moyo, this Court must now decide what sentence is appropriate for the offence for which you have been found guilty. It is firmly established that in determining upon an appropriate sentence a court should have regard to the nature of the crime the accused has committed, the interests of the community and the individual circumstances of the accused. These considerations are commonly referred to as the '*Zinn triad*' after the often quoted decision of the Appellate Division that authoritatively confirmed them to be the relevant compass points. See *S v Zinn* 1969 (2) SA 537 (A).

We factor into the equation your personal circumstances which are as follows: you are 18 years old; not married; no child. You are a first offender.

The only strong mitigatory factor in your favour is your youthfulness. Which connotes immaturity, lack of experience of life, and thoughtlessness. It is the policy of the courts to give sympathetic consideration to youthfulness because to measure the youth's conduct using the yardstick of adult behaviour would be unfair.

Otherwise you stand convicted of a brutal murder of a young girl. The deceased was a child and her young life has been unnecessarily lost and the court has the duty to protect the sanctity of human life. Society requires protection from dangerous criminals and in fact the society looks up to the court to do justice not condone crime in a manner which would intrigue society into losing confidence in the whole justice delivery system. The attack was brutal and savage. The kind of brutality you exhibited on the day in question is alarming indeed. The

deceased died a violent death. You displayed a high degree of callousness. After killing the deceased you sought to conceal the crime, you dragged the body to the bush, dug a pit, put the body in the pit, set it alight and covered the pit with soil.

During her submissions, defence counsel told the court that you were examined by two medical doctors, who concluded that you did not suffer from any mental disorder or defect as defined in the Mental Health Act. This court accepts that diminished responsibility is some form of mental disturbance, which is not of a sufficient nature to justify a verdict that you were not responsible for your actions, which nonetheless reduces the blameworthiness of an accused. See Feltoe *A Guide to the Criminal Law in Zimbabwe* 20. Diminished responsibility, to be factored into the equation in mitigation, must be proved by way of evidence. There is no evidence that you suffered from diminished responsibility. We take the view that you faked diminished responsibility to escape the consequences of the crime that you committed.

You are a dangerous person and you must be kept away from the mainstream society for quite some time. Your age is a compelling mitigatory factor. You are just 18 years old. The court hopes that by the time you come out of prison you would have matured enough to be a useful member of society.

This court takes into consideration all the mitigating features of the case and balance these against the interests of justice. We take into account the period of the pre-trial incarceration. You spent a period of approximately 8 months in remand prison pending trial. The appropriate sentence that reflects society's disapproval of your actions and takes into account mitigatory circumstances in your favour is the following:

You are sentenced to 18 years imprisonment.

