

THE STATE  
versus  
CASPER CHIHOTA

HIGH COURT OF ZIMBABWE  
MUSAKWA J  
HARARE, 24, 25, 26 July 2013 and 16 January, 5, 20 and 25 February 2015

Assessors: 1. Mr Barwa  
2. Mr Chivanda

### **Criminal Trial**

*D. Chesa*, for the state  
*F. Murisi*, for accused

MUSAKWA J: The accused person is charged with the murder of his niece, Pamhidzai Chihota. He pleaded not guilty.

The state alleged in its summary of case that on 18 October 2011 the accused sent the deceased and her sisters to buy some milk from Colin Gandiwa's home. After the deceased and her sisters had set off on the errand the accused followed on his bicycle and caught up with them at the gardens. He then instructed the deceased's sisters to proceed to Colin Gandiwa's home whilst the deceased was instructed to fetch vegetables from the garden.

Upon their return the deceased's sisters called out her name. When they got no response they also called out for the accused. Thereafter the accused emerged and told the deceased's sisters that he was looking for her as well. He gave them his bicycle to take home whilst he remained looking for the deceased. Later the deceased's grandmother, father and others looked for her to no avail.

On the following day the search resumed. The deceased's body was eventually found in the bush near the gardens. The body was in a sitting position against a tree stump. There was a string from tree bark around the neck. Upon autopsy it was established that the deceased had been raped before she was strangled.

The accused's defence was to the following effect. He believes the allegations were concocted by James Bopoto with whom he was at loggerheads following the arrest by the accused of James Bopoto's son for theft in 2010.

On the day in question he was at home with his late brother Chihota Chihota who happened to be the deceased's father. The deceased's mother Maslin sent her to buy milk from Colin Gandiwa using the accused's bicycle. Since the accused intended to use the bicycle on his trip to a place called Kamburiya he suggested that the deceased be accompanied by her young sisters, Matipedza and Idah.

Later the accused decided to set off to Kamburiya. His brother suggested that since he was using the same road used by the deceased and her sisters, he should check on them. The accused met his lover, one Maidei outside the compound as per prior arrangement and walked along the road to Kamburiya. When they reached the bridge they came across Matipedza and Idah who were seated. The accused asked whether they been to Colin Gandiwa's place and they confirmed so but added there was no milk. They then stated they were waiting for the deceased who had gone into the garden to fetch some vegetables.

The accused called out the deceased's name but got no response. He then went to the garden but the deceased was not there save for some vegetables which were by the gate. The accused went and informed Maidei, Matipedza and Idah. The four of them went back to the garden but again could not locate the deceased. The accused then told Maidei, Matipedza and Idah to wait by the garden whilst he conducted further searches in the vicinity. He abandoned the search after establishing through the farm guard that the deceased had not been seen around the area. When he re-joined the others they proceeded home and along the way they met Colin Gandiwa and Lazarus Mundanzira.

The accused cancelled his journey to Kamburiya. Having briefed his late brother they again went to the garden where they called out deceased's name. Having received no response they went back home as it was getting dark. The following day the accused and his brother decided to conduct further searches in surrounding farms and they went their separate ways. When his search yielded nothing the accused returned home where a Police Constabulary confronted and arrested him.

The state opened its case by calling Idah Chihota the deceased's ten year old sister. She gave her evidence in the Victim Friendly Courtroom at Harare Magistrates Court which had been gazetted for that purpose. She had previously failed to give her testimony in an open court facing the accused person.

She stated that on the day in question she and her sisters were sent to Colin Gandiwa's home by the accused person. Soon after they had set off the accused followed them on his bicycle. He caught up with them by the gardens. He instructed the witness and the younger sister to proceed to Colin Gandiwa's home whilst the deceased was told to go and fetch vegetables from the garden. The deceased was reluctant. The accused escorted the witness and her younger sister for a distance and turned back.

At Colin Gandiwa's home they did not find anyone. Upon their return they called the deceased's name but there was no response. They also called the accused and he eventually emerged and stated he was looking for the deceased. He instructed them to take his bicycle home whilst he remained behind. The accused explained that he wanted to look for the deceased. They asked the accused if he had assaulted the deceased and he answered in the negative. On the way they met their grandmother whom they briefed. At home they told their father who told them to inform their mother.

Having informed the parents they again returned to the garden. They called out the deceased's name but there was no response. Thereafter they returned home. On the following day they returned to the scene. The deceased's body was eventually seen tied to a tree.

The witness was asked by state counsel why she could not face the accused and she explained that she was afraid as she had been threatened. She further explained that upon his arrest the accused threatened that he would kill her when he returned from prison.

Under cross examination the witness denied that they had been sent by their mother Maslin. She also denied meeting the accused at the bridge whilst on their way back from Colin Gandiwa's home. When it was also put to her that they came across the accused whilst he was in the company of Maidei, she stated that they only met a lone woman who was on her way to a funeral at Macheka homestead. Apparently the witness's mother was said to have gone to the same funeral.

Anna Tembo the accused's mother also testified. She is employed at Riverhead Farm as a general hand. On the day in question she went to work in the morning. Upon finishing work around 2 p.m. she returned home and then left for the funeral at Macheka homestead. She said the only adults who remained at home were the accused and his brother. Upon return around 5 p.m. the accused was not at home. She established that the accused had escorted some women to the funeral. She heard this from her grandchildren.

The witness further stated that she proceeded to one of the gardens near the compound to pick vegetables. She first met the accused but he did not tell her about the deceased. As she

returned from the garden the grandchildren told her the deceased had run away. She said the deceased had the habit of running away from home when she was reprimanded. She would then return in the evening.

They then searched for the deceased and called out her name. They also looked for her at the compound. She said the accused was nursing a toothache and when she met him she enquired about his ailment and he said he was feeling better. The deceased's body was found the following day. It was in the bush near the big garden which is by the dam. The body was in a sitting position and there was a rope around the neck. The rope was from tree bark and it was thin.

During cross examination the witness stated that on her way from the funeral she went to the garden. On her way from the garden she met Ida and Matipedza near the compound. She asked where they were coming from and she was told they had gone to buy milk. That is when she says she was told the deceased had run away. As to why the deceased ran away she said she was told she did so after being reprimanded. The witness had earlier stated in her evidence in-chief that whenever the deceased was reprimanded she would abscond from home and return in the evening.

It was also during cross examination that the witness confirmed being told by Idah that the accused had sent them to buy milk. She also stated that the accused confirmed having sent the children to buy milk on account of his toothache. Asked why the death of the deceased led to the accused's arrest she stated that it is because he had sent the children to buy milk. In other words, the accused was made responsible for the tragedy because he had earlier sent the children to Colin Gandiwa's home. She also confirmed that both the accused and his brother made separate reports to Police on the missing deceased.

Responding to questions raised by the court the witness stated that in the past when the deceased ran away she would not fail to return home. She also stated that when she met the accused near the compound he told her he was coming from the same funeral she had attended. She further clarified that Idah and Matipedza explained that the deceased had run away whilst they were on their way to buy milk.

The witness had broken down on two occasions during the course of her testimony. She explained that this was because she was overwhelmed by the deaths of her offspring as the accused was the only remaining child. On the second occasion she responded to a question regarding the cause of breakdown by explaining that the accused was not capable of doing what was alleged against him.

The next witness to testify was Lovemore Chanengeta, a member of Glen Esk Neighbourhood Watch. He is attached to Glen Esk Police Base which covers Riverhead Farm.

He confirmed that the accused's brother was the first to make a report. The accused later arrived in the afternoon to make a similar report. He went to the scene in the company of Matipedza, Idah, Constable Zhanero, Anna Chihota and her daughter in law. The children explained being sent to buy milk whilst the deceased was sent to the garden.

At the garden he saw vegetable leaves that had been dropped. They followed the trail of the leaves as there were footprints as well. There was a track in the grass which led to the bush. They reached a point where grass and leaves had been flattened. From that point they followed another track for a short distance. This led to a tree stump and as they got closer the deceased's body was identified to him by Anna Chihota. There was a thin strip of tree bark around the neck. The bark did not look tight around the neck. There were marks on the throat. The skirt looked torn. The deceased's left hand rested on her thigh whilst the right held fresh grass. The witness then guarded the scene whilst awaiting Police Officers from Banket.

Under cross examination the witness stated that without the trail that he saw he would not have gone into the bush. He also stated that the shoe prints he saw at the scene resembled those made by the accused person's shoes. Asked why he was giving new evidence the witness said although this was not in his statement that is what he saw. He then added that the accused person even ran away from him.

From questions raised by the court the witness explained that when he arrived at the Police Base, the accused was already there. He then asked his colleagues why the report was not being followed up. He asked the accused why a report was not made immediately and he replied that they were still looking for the deceased. Since he had no transport he borrowed the accused's green bicycle whose tyres were deflated. He first had them inflated. He instructed the accused to precede him as they were to meet at his home. However, when he arrived the accused was nowhere to be seen. He established through Anna Tembo that the accused had not been home.

Another resident of Riverhead Farm, James Bopoto also testified. He claimed his son is married to the accused's cousin. In this respect he stated he and the accused regularly visited each other.

On the Monday the deceased's body was found the accused visited the witness's home and knocked on the door. The accused requested to be escorted to his residence as he

claimed people were suspecting that he had murdered the deceased. The witness obliged. Whilst the accused was eating a meal the witness then sought assistance from one Takawira Kachuta who arrested the accused.

Under cross examination he confirmed that his son was once arrested for theft at the instigation of the accused. He conceded that their relationship deteriorated thereafter. However, he denied masterminding the accused's arrest.

The other witness to testify for the state is Detective Constable Chinamano. Having attended the scene of crime he took photographs of the deceased. He also took photographs during autopsy and these were produced.

The last state witness is Design Tsikayi the investigating officer. Upon attending the scene he noted fresh blood on the deceased's panties. There were bruises on the neck. There were also bruises on the deceased's back. He did not see any signs of struggle as the scene had already been disturbed. He was of the view that the bark around the deceased's neck was not strong enough to suspend the body. He suspected that the deceased could have been raped in the vicinity of the body as there was a place where the grass had been flattened. Although he was informed about the shoe prints he did not observe any.

Although specimen taken from the deceased and the accused were submitted to Police Forensic Science Laboratory, they remain unexamined on account of shortage of equipment and chemicals. The state should have sought alternative means to have the specimen examined. The pursuit for justice in serious matters cannot be hampered by the absence of suitable equipment in the Police Force when there are alternative means that are not that expensive when contrasted with the enormity of the crime at hand.

The rest of the witnesses' testimony as summarised in the summary of state case was admitted. Basically it relates to the evidence of Police Officers who corroborated those who testified.

The post-mortem report and other reports by the doctor who examined the deceased for evidence of rape were produced before the state closed its case. Doctor Mushangwe who conducted a genital examination on the deceased noted external and internal vaginal injuries. These included bruises as well as a complete tear of the hymen at the 6 o'clock position. Concerning the bruising on the *labia minora* she explained in her accompanying affidavit that when a person dies the heart stops pumping blood to the body. Therefore in the event of an injury from a blunt object the body cannot sustain bruising that can be inflicted on a living body. The presence of bruises suggested the deceased was alive when she sustained the

injuries. The same applies to the clot on the wound found on the vagina as well. This means the deceased was raped before she died.

On the other hand the doctor who conducted the autopsy noted that the deceased's clothes were blood-stained and soiled. The tongue was bitten between the teeth. There were bruises in the neck, chest, back and arms. There were finger and nail marks in the neck and abrasions on the chest as well as haemorrhage in the neck muscles. There was an abraded furrow around the neck. These injuries were ante-mortem. The liver and right lung were congested and the heart had dark blood. He concluded that the cause of death was asphyxia due to strangulation.

With this evidence the state closed its case. The accused adopted his defence outline as part of his evidence.

He maintained that the deceased's mother, Maslin is the one who sent them to buy milk. He was present at home when they were sent. When the children returned she met them but the deceased was not present. He enquired and he was told she had gone to the garden. This around 3 p.m. He claimed to have looked for the deceased but he did not see her. Idah and her sister then returned home whilst he escorted his girlfriend. He denied emerging from the bush after Ida and Matipedza called his name.

Concerning his implication he stated that he has never been in good books with James Bopoto since the time he arrested James Bopoto's son for theft. James Bopoto came to arrest him whilst in the company of a member of the Neighbourhood Watch. He confirmed that he used to cater for the deceased and her sisters. His elder brother was ailing, so the responsibility to fend for the extended family rested on him. He could also send the children on errands.

In more detail he explained that on the fateful day he and his brother woke up early in the morning and went to cut some logs. The presence of his brother was to provide him with company as he could not spend all the time bed ridden on account of his illness.

Around midday they returned home. He rested for about an hour since he had a toothache. When his sister-in law sent the deceased to Colin Gandiwa's home she suggested that she use the accused's bicycle. The accused intended to use the bicycle himself. He then suggested that the deceased go on the errand in the company of her younger sisters. He remained at home with his brother and sister-in law. Later her wife informed him that she wanted to attend the funeral at Macheke. Although he initially demurred he eventually relented after the wife persisted.

After his wife had gone he received a call from his girlfriend, Maidei. He thereafter left home to meet Maidei. This was about an hour after the deceased and her sisters had gone to buy milk. He met the deceased on their way back whilst he was in the company of Maidei.

Under cross-examination the accused confirmed the closeness between his brother and Bopoto with whom he claimed to have had mutual hatred since 2009. He was taken to task on why he handed himself to James Bopoto despite the hatred between them. It was also put to him that the evidence of James Bopoto was not challenged. Despite the unchallenged evidence the accused insisted that he could not have sought help from his enemy. He also stated that although the deceased used to run away from home after being reprimanded he could not say that is what she did on the fateful day.

The court has to consider Idah's testimony on the material issue in the context of that of a single witness. In this respect s 269 of the Criminal Procedure and Evidence Act [*Chapter 9:07*] provides that-

“It shall be lawful for the court by which any person prosecuted for any offence is tried to convict such person of any offence alleged against him in the indictment, summons or charge under trial on the single evidence of any competent and credible witness:

Provided that it shall not be competent for any court—

(a) to convict any person of perjury on the evidence of any one witness as to the falsity of any statement made by the accused unless, in addition to and independently of the testimony of such witness, some other competent and credible evidence as to the falsity of such statement is given to such court;

(b) to convict any person of treason, except upon the evidence of two witnesses where one overt act is charged in the indictment or, where two or more such overt acts are so charged, upon the evidence of one witness to each such overt act;

(c) to convict any person on the single evidence of any witness of an offence in respect of which provision to the contrary is made by any enactment.”

The court did note that Idah sometimes spoke without directly facing the camera. However, she gave her evidence well. She was consistent with her narration of events and did not deviate at all. As to her mannerisms that is consistent with children of her age. In any event not many witnesses are familiar with courtrooms, let alone a victim friendly court set-up.

There was no serious challenge to this witness' testimony on the following material factors. The accused followed and caught up with them when they set out to buy milk. The accused told Idah and her younger sister to proceed whilst he told the deceased to fetch vegetables from the garden. The accused escorted them for a short distance and returned towards the gardens. When Idah and Matipedza returned they saw the accused in the vicinity. This was after they first called the deceased, and then the accused. The accused told them he



was looking for the deceased. He told them to take his bicycle whilst he remained looking for the deceased.

At the end of the day the case falls for determination on circumstantial evidence. Evidence of this nature is based on drawing conclusions from proven facts. Two cardinal principles of inferential reasoning were stated in the long established case of *R v Blom* 1939 A.D. 188 and these are-

- a) The inference sought to be drawn must be consistent with all proven facts. If it is not consistent with all proven facts, it must not be drawn.
- b) The proved facts must exclude every reasonable inference save the one that is to be drawn. If there are other reasonable inferences then there is doubt regarding the one inference that is sought to be drawn.

Commenting on this requirement Ndou J in *S v Vhera* 2003 (1) ZLR 668 (H) had this to say at p680-

“the court can convict on wholly circumstantial evidence provided it is sufficient to preclude every reasonable inference of the innocence of the accused- see *S v Shoniwa* 1987 91) ZLR 215 (S) at 218F; *R v Onufrejczyk* [1955] 1 ALL ER 247 (CA); *R v Harry* [1952] NZLR 111; *McGreevy v Director of Public Prosecution* [1973] ALL ER 503 (HL).”

As was stated by KORSAH JA in *S v Marange and Others* 1991 (1) ZLR 244 (S) AT 249-

Before I answer this question, I wish to draw attention to the dangers inherent in drawing conclusions from circumstantial evidence. Lord Normand observed in *Teper v R* [1952] AC 480 at p 489 that:

"Circumstantial evidence may sometimes be conclusive, but it must always be narrowly examined, if only because evidence of this kind may be fabricated to cast doubt on another. Joseph commanded the steward of his house, 'put my cup, the silver cup, in the sacks' "mouth of the youngest," and when the cup was found there Benjamin's brethren too hastily assumed that he must have stolen it. It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference."

Having found Idah to be credible we accept that the accused followed her and others when they set out to buy milk. At the gardens the accused isolated the deceased by ordering her to fetch vegetables. The accused remained in the vicinity of the garden as Idah and her younger sister proceeded on their errand, having briefly escorted them. When Idah and her

sister returned and passed by the garden they called out for the deceased. Instead, the accused responded and said he was looking for the deceased. Idah and her sister were told by the accused to take his bicycle home whilst he remained looking for the deceased.

What inference can be drawn from these facts? Why did the accused isolate the deceased and remain at the gardens as well? Why was he found looking for the deceased when Idah and her younger sister returned? Why did the accused temporarily flee from home only to turn himself in and seek James Bopoto to escort him? The only reasonable inference that can be drawn from these facts is that the accused had some sinister motive when he told the deceased to remain behind. This, coupled with the fact that he was found looking for the deceased whom he had told to fetch vegetables from the garden and that he subsequently fled from home can only mean he is the one who killed the deceased.

Accordingly, the accused is found guilty as charged.

### **Sentence**

Section 48 of the Constitution of Zimbabwe provides for the imposition of the death penalty upon a person convicted of murder in aggravating circumstances. The provision further states that the law authorising the imposition of the death penalty must allow the court a discretion.

Section 337 of the Criminal Procedure and Evidence Act provides that-

“Subject to section *three hundred and thirty-eight*, the High Court—

(a) shall pass sentence of death upon an offender convicted by it of murder:

Provided that, if the High Court is of the opinion that there are extenuating circumstances or if the offender is a woman convicted of the murder of her newly-born child, the court may impose

(a) a sentence of imprisonment for life; or

(b) any sentence other than the death sentence or imprisonment for life, if the court considers such a sentence appropriate in all the circumstances of the case.

[Proviso amended by section 12 of Act 8 of 1997.]

(b) may pass sentence of death upon an offender convicted of treason.”

It is apparent that the term aggravating circumstances is not defined. S 337 of the Criminal Procedure and Evidence Act is not in conformity with s 48 of the Constitution on this aspect. The absence of a definition of aggravating circumstances does not in my view preclude a court from imposing the death penalty in appropriate cases. This is because at common law aggravating circumstances must be understood to be factors that worsen an accused person’s moral blameworthiness.

It may be noted that within this jurisdiction, offences like stock theft involving bovines or equines as well as unlawful possession and dealing in precious stones attract mandatory minimum penalties in the absence of special reasons or special circumstances. Special reasons or circumstances are not defined in the relevant statutes. Nonetheless the courts have been able to define these terms.

Counsel for the defence approached the matter on the basis of extenuating circumstances. The issues he highlighted are the age of the accused, the fact that he is a first offender and the period he has spent in custody. Reference was also made to *S v Jonathan Mutsinze* HH-645-14 in which HUNGWE J held that the introduction of aggravating circumstances entails that a law be enacted which defines that term. The learned judge further opined that in the absence of a law defining aggravating circumstances the death penalty may be imposed upon application by the state.

State counsel quite rightly submitted that even where a court finds aggravating circumstances, it has an unfettered discretion not to impose the death penalty. In support of the death penalty state counsel submitted that the offence was committed to cover up a rape. He cited several cases in which the death penalty was imposed for murder committed in aggravating circumstances in the sense that the accused were committing either robbery, sabotage or escaping from lawful custody. These are *Ernest Masuku v S* SC 234/96, *Bigboy Ncube v S* SC 179/98, *Thompson Sibanda v S* SC 5/87 and *Elias Mahiya Chauke and Stephen Chidhumo v S* SC 139/2000. The only blemish is that despite being judgments of the Supreme Court, they are not reportable. The court also makes reference to *S v Sibanda* 1992 (2) ZLR 438 (S) in which the death penalty was upheld for murder committed in the course of robbery.

Coming to the present case, the accused isolated the deceased at the gardens. He then brutally raped his own niece. There were marks of violence around the neck, arms, back and chest of the deceased. The accused must have then strangled the deceased to suppress disclosure. In the absence of any explanation from the accused, that is the finding the court has had to make. The other aggravating feature is that the deceased was a twelve year old niece of the accused. She looked up to the accused for protection and not abuse.

Accordingly, the accused shall be returned to custody where the sentence of death shall be executed according to law.

*Murisi And Associates*, accused's legal practitioners  
*Prosecutor General's Office*, legal practitioners for the state