

THE STATE  
versus  
PHILLIP TSUMELE

HIGH COURT OF ZIMBABWE  
BERE J  
MASVINGO CIRCUIT, 3 & 8 June 2015

Assessors: 1. Mr Mashuku  
2. Mr Dhauramanzi

### **Criminal Trial**

*T Chikwati*, for the State  
*J Terera*, for the accused

BERE J: The events leading to this case are really tragic and are not in dispute. They can be summarised as follows;

The accused, who is being charged with the crime of murder was 32 years old when he committed this offence. The accused went into an adulterous relationship with his uncle's wife from which an infant baby girl was born on 24 August 2011. On the 27<sup>th</sup> of the same month the mother of the deceased who had conveniently kept her pregnancy unknown to her husband of 15 wives took the newly born baby to the accused, the author of her pregnancy. The mother of the deceased wanted to show the accused the baby so that he would assist in obtaining of the deceased's birth certificate.

The accused, having reflected on the implications of the social impact of his adulterous relationship with the deceased's mother, who was his uncle's wife decided not to assume responsibility over the newly born baby. The accused then decided to have the newly born baby killed to conceal the two's adulterous relationship.

Both the accused and the deceased's mother then took their baby to a secluded place at night, some 5 kilometres due east of Rutenga. The accused then strangled the deceased to death. Having made sure the deceased was dead the two dug a shallow grave in the bush and interred the deceased's remains and returned to their respective homes.

Upon the mother of the deceased's return to her village, the scene of her pregnancy, a vigilant village head became suspicious of the incoherent story told by the deceased's mother when she struggled to explain what had become of the deceased. It was the alertness of this village head which led to the involvement of the police and the eventual recovery of the deceased's remains. The post mortem report shows that the doctor was not able to carry out any examination to determine the cause of the deceased's death as it was recovered in a decomposed state. In a proper case the absence of a post mortem report is no bar to a verdict of guilty in a murder case. See *S v Shoniwa*<sup>1</sup> where the court upheld a conviction on a murder charge in spite of the fact that the deceased's body had not been found.

Initially both the accused and the mother of the deceased were jointly charged with the murder of the deceased. Due to the incompatible nature of their defences the state was forced to apply for separation of trial which the court granted.

In his defence outline which really was more of a loaded confession of his direct involvement and the principal role he played in the murder of the deceased the accused pleaded for mercy. He gave the reason for his abominable conduct as the fear of his uncle whom he believed dabbled in juju or witchcraft. The accused also stated that he resolved to terminate the deceased's life as he feared the social stigma that would stick to him considering the age disparity that existed between him and the deceased's mother. The accused was 32 years old at the time and the deceased's mother was 40 years old. He further stated that the fear of his uncle, the husband to the deceased's mother induced fear in him of the possibility of the most evil end to his life. It was a combination of all these factors that drove the accused to end the deceased's life, so his story went.

To cement the accused's unsolicited confession to the deceased's murder, upon his arrest he gave the following confirmed warned and cautioned statement:

"I have understood the cautioned of the charge. I admit the charge. I am the one who impregnated my aunt. My uncle was away. A child was then born on the 24<sup>th</sup> day of August 2011. The aunt came and showed me the child on the 27<sup>th</sup> day of August 2011 and at the same time wanted to find out from me what I was thinking about the child. I was afraid that if my relatives were going to hear about it would sour my relationship with them. I also feared that my uncle was going to be angry about what I had done to his wife. I then decided to kill the child so that people would not know about it. I killed the child and buried it in a pit I had dug at Rutenga sewage disposal area"

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<sup>1</sup> 1987 (1) ZLR 215

Benjamin Chauke, the sole witness for the state who must be commented for his vigilance in bringing this offence to light confirmed portions of the undisputed aspects of the state case. His evidence was merely to the effect that it was him who reported the deceased's mother to the police after he became suspicious of the incoherent story told by the woman concerning the whereabouts of the newly born baby.

Under cross-examination which was calculated to lay the foundation of extenuating circumstances in this case, he said he knew very little about the alleged magical powers of the husband of the deceased child's mother. The witness also conceded he knew very little about the cultures and norms of the Shangani people who inhabit Chikombedzi area where the husband to the mother of the deceased originated from.

The accused's evidence in chief was largely incriminatory and was devoted to an attempt to mitigate his culpable conduct.

The accused's evidence also took us through the details of the actual murder of the deceased.

We accept that the post mortem report failed to establish the cause of the deceased's death but we take comfort in that the accused admitted to have intentionally murdered the infant by strangulation. The actual intention of the accused in killing the deceased is there for all to see and we are more than satisfied that the accused must be found guilty of having murdered the deceased with actual intention.

Verdict – Guilty of murder with actual intent.

**EXTENUATION:**

As rightly noted by the two counsels in this matter there are no extenuating circumstances. I am not persuaded that the strong remorse shown by the accused person should lead to a finding of extenuation.

Ordinarily, the absence of extenuating circumstances would force this court to impose death penalty. However the enactment of s 48 (2) of the Constitution of the Republic has brought with it another dimension to the imposition of death penalty in this country. The section speaks in my view to the imposition of death penalty where aggravating circumstances are found to exist. See my own views on the implications of this section in *S v Isaac Mlambo*<sup>2</sup>.

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<sup>2</sup> HH 351-15

Following upon my reasoning in that case, despite the instant case having been a bad murder, I am not satisfied that it satisfies the existence of aggravating circumstances as I perceive them. It is precisely because of this that death penalty should not be imposed in this case.

**SENTENCE:**

We do accept the following factors in mitigation and aggravation.

The manner in which the accused conducted himself in these proceedings shows genuine remorse for having killed the deceased. The accused has spent about 4 months at remand prison whilst awaiting the conclusion of this case.

We also accept that the absence of his aunt's husband from visiting his wife exposed the accused person to serious temptation in finding himself in this adulterous relationship which led to the birth of the deceased.

The accused must be commended and obviously rewarded for not wasting the court's time by giving what was for all intents and purposes a confession to this offence.

In all fairness the accused has demonstrated to our satisfaction as a court that he deserves to be given a second chance in life.

We accept the pressure that the accused found himself in when the deceased's mother brought to him the deceased and asked him to find an immediate solution.

In aggravation we will be failing in our mandate if we fail to highlight the sanctity of human life.

This was a bad case of murder where we cannot avoid imagining that the deceased must have instinctively felt some form of security when she was taken to her final resting place.

The accused had a whole period of 9 months before the deceased was born to have reflected on the aunt's pregnancy and found a more sensible solution to his situation. The accused opted for the easy but callous way of getting out of trouble.

The manner in which he killed the deceased demonstrate in our view unmistakable premeditation. He together with the mother of the deceased had to cover a distance of 5 km to choose a secluded place to commit this evil act. The evil that the accused did in this case

must haunt him for some time and he must be given a chance to reflect and cleanse his conscience whilst he is in confinement.

Where the welfare of minor children are concerned this court takes pride in being the upper guardian of all minor children in this country. The sentence to be imposed must demonstrate the court's attitude at the conduct exhibited by the accused person in taking the innocent life that he had himself sired as he sought to derive sexual gratification from his aunt.

30 years imprisonment.

*National prosecution Authority, state's legal practitioners*  
*Mwonzora & Associates, accused's legal practitioners*