

THE STATE
versus
MOSLINE CHAKAMUFUNAH

HIGH COURT OF ZIMBABWE
MAWDZE J
HARARE, 28 January 2016 & 10 May 2016

Assessors: 1. Mr Gonzo
2. Mr Gweme

Criminal Trial

Ms N Mazvimbakupa, for the State
Mrs G Tavenhave, for the accused

MAWADZE J: The accused is charged with murder as defined in s 47(1) of the Criminal Law (Codification and Reform Act) [*Chapter 9:23*].

The charge is that on a date unknown to the prosecutor but during the month of July 2005 at a swamp area near Bindura Showgrounds the accused with intent to kill murdered ANESU ASHLEY CHAKAMUFUNAH by administering rat poison and strangled him causing injuries from which he died.

The deceased was accused's one year old baby boy. In December 2004 the accused together with the deceased started to stay with accused's boyfriend one CHAKANETSA JEMWA at No. B9 Rugare Street in Tsungubvi Township in Greendale.

The state alleges that in a bid to save her relationship with the boyfriend the accused took the deceased to a swamp area near Bindura Showgrounds in July 2005 where she administered rat poison and strangled the deceased after which she dumped the body in the swampy area

among tall grass and gum trees near a sewage pipe. The accused then returned to her boyfriend without the baby.

It is alleged that the accused's boyfriend together with CHARLES BHANYA and ANASTANCIA MABHEKANI questioned the accused about the whereabouts of the child and accused said she had left the child with her mother in law in Bindura. The deceased was discovered by one JAMES SONGA who reported to the police. The state alleges that the post mortem report shows the cause of death as broken larynx and asphyxia.

The accused in her defence outline said she grew up in an orphanage and that she does not know her parents or the identity of any of her relatives. The accused said she was then impregnated by a person she does not know and that this forced her to leave the orphanage and latter gave birth to the deceased. Accused said she then started to live with a boyfriend but the boyfriend threatened to dump her because of the child she had. The accused said she committed this offence in order to salvage her relationship. It is accused's defence that she suffered from diminished responsibility arising from her upbringing.

During the trial three exhibits were produced by consent. These are;

Exhibit 1

A post mortem report done on 20 July 2005 which shows cause of death as asphyxia.

Exhibit 2

Accused's confirmed warned and cautioned statement. In that statement accused said she killed the deceased because her live in boyfriend since January 2005 had said he only loved her and not the child. Accused said this was in June 2005. She said the boyfriend on three different occasions gave her money to take the child to the father of the child but she failed. On the fourth occasion she said when she was given the money she then administered rat poison and dumped the child at about 1800hours in a bush and returned to the boyfriend where she lied that she had left the child with the grandmother of the child. The accused gave this statement on 13 August 2005. As per exh 3 (a) and 3 (b) the accused on 16 November 2015 was examined by two doctors Dr Mabwazara and Dr Ncube to ascertain her mental state. The accused was found to be normal.

All the evidence of the state witnesses except that of accused's then boyfriend CHAKANETSA JEMWA was admitted in terms of s 314 of the Criminal Procedure and

Evidence Act [*Chapter 9:07*]. It means that that evidence is not in issue. For clarity purposes we however summarise the uncontroverted evidence as follows:

DR NORBERT CHITOWA

The evidence of Dr Norbert Chitowa is that external force was used on the throat of the deceased and that this caused asphyxia. It is clear therefore that the deceased was strangled.

CHARLES BHANYA

The evidence of Charles Bhanya is similar to that of the accused's live in boyfriend one CHAKANETSA JEMWA who gave *viva voce* evidence.

ANASTANCIA MABHEKANI

She is a sister to accused's live in boyfriend CHAKANETSA JEMWA and also to one CHARLES BHANYA. Her evidence is similar to that of her brothers.

JAMES SONGA

James Songa is the one who discovered the deceased's body on 17 July 2005 and reported to the police.

JERRFANOS HUNDURE

He is the police detail who attended the scene of crime where the deceased's body was discovered. He found the body without a shirt and caused the post mortem to be done.

MARSHAL THANDIWE MUYAMBI

She is a member of the police special constabulary and was known to both accused and accused's child the deceased. As a result she was able to identify deceased's body as that of accused's child and she caused the police to look for the accused. Her evidence is that accused was only located a week after the discovery of deceased's body and that upon being questioned accused initially lied that she had left the child at SOS Village in Bindura. The accused was then arrested.

PETER SITHOLE

He is a nurse at Bindura General Hospital and certified deceased's body dead.

MAFION MUCHENA

He is a member of ZRP CID who recorded accused's warned and cautioned statement on 13 August 2005 and had it confirmed at court on 16 August 2006.

ENERGY MUNDANDISHE

He is a member of ZRP CID and witnessed the recording of accused's confirmed warned and cautioned statement.

TONDERAI MAGAHA

He is a member of ZRP CID to whom accused made indications at the scene of crime on 12 August 2005.

DR MASVIKOVERE

This is the doctor who compiled the post mortem report as per exh 1 and observed the broken larynx. We now turn to the *viva voce* evidence.

CHAKANETSA JEMWA

He testified that he fell in love with accused who had her own child. The accused told him that the father of the child had gone to the United Kingdom (UK) and had left the accused and the child in the custody of his mother being accused's mother in law. He said accused then said the mother in law later chased the accused and the child away which caused accused to stay as a lodger in an area called 'O' section.

Chakanetsa Jemwa (Jemwa) said the accused told him that she had grown up in an orphanage until she fell pregnant. Jemwa said he was staying at no B 9 Rugare Street Tsungubvi in Glendale and that since he fell in love with the accused he invited the accused to stay with him as husband and wife in December 2004. He said he accepted the accused and her child and had absolutely no issues with the child whom he supported.

Jemwa said the accused would occasionally leave home with the child saying she was going to visit her mother in law the grandmother of the child to show her the child and that he had no problems with that. Upon her return he said the accused would bring soap, porridge and clothes which she alleged she would have been given by the grandmother of the child. He himself had however not seen or talked to this grandmother.

Sometime in July 2005 he said the accused said the father of the child had come from UK and wanted to see the child and he allowed her to go with the child. He said the accused only returned at 8pm without the child saying she had left the child with the grandmother. Jemwa said this was improper as the child was still breast feeding hence he together with his brother Charles Bhanya and his sister Anastancia Mabhekami told the accused to go back and bring the child. The accused promised to bring back the child the following day.

The next day Jemwa said the accused left ostensibly to collect the child and he left for work. Jemwa said upon his return from work he found a note on their bed written by the accused in which the accused said she was no longer coming back to stay with Jemwa because Jemwa's relatives did not want her to stay with Jemwa. He said this surprised him and the accused never returned.

Jemwa said after some weeks he bumped into the accused at OK supermarket in Bindura and the accused did not have the child. He asked where the child was and the accused said the child was with the grandmother. He said he offered to go and see the child but the accused said that was not possible as Jemwa was not known to the grandmother of the child.

Jemwa said after some days CID details came looking for the accused and he told them the accused had left and showed them the note the accused had written. He advised them that the accused was now saying she was staying in Bindura. He was later advised of the accused's arrest and the death of the child.

Under cross examination Jemwa denied that he did not want to stay with the accused's child. He denied ever giving the accused bus fare in order to go with the child to the father but said he gave the accused bus fare to go to the baby clinic with the child. In fact he said he lived very well with the accused and the child and that the accused was a normal person although reserved.

Jemwa said the accused was well aware that he was willing to stay with the accused's child and that he had happily stayed with the accused and the child for 7 months before the accused left with the child. He said he provided for the child and that the accused was of sober habits.

Under cross examination Jemwa said it was only after the accused's arrest that he realised that the accused had lied to him about the grandmother of the child. He dismissed as false that he had at any stage threatened to end his affair with the accused because of the child. Instead he said he fell in love with the accused well knowing that she had a breastfeeding child and that he invited both accused and her child to stay with him. Jemwa said the accused had told him that the father of the child is one Kudakwashe Ndandarika who had left for UK.

In our assessment Jemwa gave his evidence very well. He impressed us as a well-meaning and mature person. In fact the accused's counsel had difficulties in putting any useful questions to him. He was genuinely in love with the accused and it would appear he too was lied to by the accused. Jemwa's account of how he stayed with the accused up to the time of the accused's arrest is clear and straight forward. We therefore assess him as a credible witness.

THE ACCUSED'S EVIDENCE

The accused in her evidence said Jemwa initially accepted her and the child but later on did not want to stay with the child. The accused said she was given money on three occasions to take the child to his father but she resisted until on fourth occasion when she left with the child and then dumped the child near Bindura Show Grounds and returned to Jemwa.

In her evidence in chief the accused said she simply dumped the child and did not do anything to the child. The accused said when Jemwa asked her where the child was she said she told him that she had dumped the child in the bush. In fact the accused said this is precisely why she was arrested after telling Jemwa the truth of what she had done. The accused said when she was arrested she was now staying in Bindura with a relative. In her evidence the accused said she did not kill the child but just gave the child two drops of rat poison.

Under cross examination the accused said that while Jemwa had initially agreed to stay with the child he changed after 2 months. The accused was not able to say what had changed but simply said she persevered for 5 months until she realised the situation was untenable and

decided to dump the child. The accused grudgingly accepted that she administered rat poison to the child but denied strangling the child. The accused under cross examination said she told her friend that she had dumped the child and that it is this friend who caused her arrest. Later she changed and said after dumping the child she went and reported to the police.

Our view is that the accused is a very untruthful witness. She seemed to be determined not to tell the truth at all.

Initially in her evidence she said she went back to Jemwa after dumping the child and told Jemwa she had dumped the child hence she was arrested. Accused later changed and said after dumping the child she did not return to Jemwa but went to stay with a friend in Bindura. Accused was now saying it is the friend whom she told about dumping the child who caused her arrest. Accused still shifted ground and said she reported herself to the Police. It is clear that the accused is lying hence these different versions. The admitted evidence clearly shows how accused was arrested some weeks after dumping the child.

In her evidence the accused tried to disown her confirmed warned and cautioned statement. This was after it had been pointed out to her that her evidence in chief is at variance with her confirmed warned and cautioned statement. Again accused could not meaningfully distance herself from the contents of her warned and cautioned statement.

The accused seemed even to be unwilling to tell the truth of what she did to the child. In her defence outline she admitted committing the offence but hiding behind diminished responsibility. In her evidence in chief she said she did nothing to the child. She later on admitted administering rat poison but denied strangling the child. The accused only admitted under intense cross examination that she was aware of the fatal effect of administering rat poison to the child.

The cause of death of the child is very clear. The child was strangled and suffocated. The intention of the accused which she grudgingly admitted was to kill the child. The body of the child was discovered on 17 July 2005 and the accused was only arrested in August 2005.

In her defence outline accused said she did not know the father of the child. However she told Jemwa that the father of the child is one Kudakwashe. In her evidence she said the father of the child is one Tinashe. Again this shows that accused is untruthful.

The fact of the matter is that the accused was a person who was simply unwilling to tell the truth even to Jemwa her live in boyfriend. This explains why she came out with the story of a none existant grandmother of the child. This explains why she lied about the whereabouts of the child to Jemwa and her friend that the child was at SOS Children's home in Bindura. In court the accused continued with her consistency of being untruthful.

The issue of diminished responsibility in terms of s 218 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] is not a defence to a charge of murder but is simply mitigatory.

The learned author JOHN REID ROWLAND in Criminal Law in Zimbabwe at 12-12 (d) has this to say on the aspect of diminished responsibility:

“If the accused's mental condition at the time of the offence does not satisfy the requirements of insanity, but was abnormal, he will be legally responsible for the offence and must be convicted. However, if his mental condition, although falling short of legal insanity, prevented the accused from forming the intent required for the crime charge, he may, if such verdict is competent, be convicted of a less crime. Thus, in a murder trial a successful plea of diminished responsibility reduces the crime of murder to one of culpable homicide”.

On the facts before us the accused has not successfully raised the plea of diminished responsibility. The accused's evidence is tainted with deliberate and well calculated falsehoods. The accused's lies cannot be construed as diminished responsibility. While her upbringing may not have been the best there is nothing to suggest that this seriously affected her mental state. Jemwa described her as a normal person. The two doctors did not find anything amiss with her mental state. We also did not find anything wrong with the accused other than that she is an incorrigible liar.

The truth of the matter is that the accused strangled her child as she seemed not interested to be burdened with the responsibility of motherhood. This explains why she even left Jemwa who was willing to look after the child.

We are unanimous that the accused is guilty of murder as defined in s 47 (1) (a) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] which relates to murder with actual intent.

VERDICT: Guilty of contravention s 47 (1) (a) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] :- Murder with actual intent.

*National Prosecuting Authority, State's legal practitioners
V. Nyemba & Associates, accused's legal practitioners*