THE STATE
versus
TWOBOY PHIRI

HIGH COURT OF ZIMBABWE
MATHONSI J
BULAWAYO 2 AND 3 FEBRURAY 2016

Criminal Trial

T. Hove for the state
S Chivaura for the accused

MATHONSI J: The accused person is facing a charge of rape and another of murder in contravention of sections 65 and 47 of the Criminal Law Code [Chapter 9:23], the allegations being that on 27 August 2010 and at or next to a tributary that flows into Jeqe River in Esikhoveni Esigodini, he wrongfully, unlawfully and intentionally had sexual intercourse with Simangaliso Ncube, a female juvenile then aged 15, without her consent and thereafter unlawfully and intentionally killed her.

It is alleged that the deceased and the accused were residents of Vukuzenzele One village in the Esikhoveni Area of Esigodini. The deceased lived with her grandmother one Gladys Masuku, who was then aged 73. The accused, who was then aged 30 years had offered to give Gladys Masuku some vegetables from his garden.

On 27 August 2010, while Gladys Masuku was away from home, the accused proceeded to her homestead, where upon arrival, he asked the deceased to accompany him to his garden to collect vegetables for her grandmother. When they got to a tributary along Jeqe River, the accused grabbed the deceased and pushed her to the ground forcing her to lie on her back, raised her skirt and removed her panties, before raping the deceased.

After the act of rape, the accused throttled the deceased until she became unconscious. Thereafter he used a stone to strike the deceased a number of times on the face. After doing that, the accused allegedly picked up another stone which he placed on the deceased's chest before

making good his escape. The deceased's body was only discovered at the scene two days later on 29 August 2010.

The accused person pleaded not guilty to both charges of rape and murder. In his defence outline, he stated that he had a blackout as he sometimes did at the time. He cannot state how the offences were committed but was only informed of his actions by the police and his relatives. The accused went on to say that he has no recollection of what transpired owing to the blackout.

He reiterated that he has a long history of mental illness which he may have inherited from his late mother who also suffered from mental illness. He has been treated for the mental disease mainly by traditional healers and at times he was attended to at Esigodini Hospital.

The bulk of the evidence of the state was admitted by the accused person in terms of s314 of the Criminal Procedure and Evidence Act [Chapter 9:07] as it appears in the state outline. That is the evidence of Alice Masuku, Sibongile Tshuma, Philip Mwinde and Doctor A. D Casteiianos.

We shall deal first with that evidence which was admitted. The evidence of Alice Masuku is to the effect that she was 9 years old at the time the deceased, who was her cousin met her death. The accused person was their neighbour. On the morning of 27 August 2010 the accused person had come to their homestead and inquired about the whereabouts of her grandmother as he wanted to give her some vegetables. When the accused was advised that her grandmother had gone to a wedding ceremony at Bambanani Business Centre, he insisted on the deceased accompanying him to his garden to collect the vegetables.

Initially the deceased refused to go with the accused suggesting instead that the witness and Simelweyinkosi Phiri should accompany him. The accused was however adamant that he wanted the deceased to come with him constraining the deceased to comply. The deceased never returned and when her grandmother came back that afternoon, the witness told her that the deceased had left home in the morning proceeding to the gardens.

Sibongile Tshuma's admitted evidence is that the deceased was her niece and the accused stayed in the same village as herself and the deceased. On 27 August 2010 Gladys Masuku came to her home in the evening to inform her that the deceased had not returned home from the gardens. The two of them looked for the deceased that evening without success. She is the one who discovered the body of the deceased on 29 August 2010. She observed that the deceased

was lying on her back and had injuries on the face. There was a big blood stained stone on her chest and her grey panties were a few metres away from the body.

Philip Mwinde is a police officer stationed at Zimbabwe Republic Police Esigodini. He witnessed the recording of the accused's warned and cautioned statement on 1 September 2010.

Dr Casteiianos is the pathologist who conducted the post mortem on the body of the deceased and compiled a report, exhibit 3. That report records that the deceased suffered multiple deep wounds on the face and multiple bruises all over the body. Her skull had a depressed fracture with brain laceration. In addition the doctor observed evidence of sexual abuse namely the hymen had lacerations on the vagina entrance as indicated, with haemorrhage. There was also semen. She concluded that the deceased was raped before she died.

Gladys Masuku is the grandmother of the deceased who lived with her. Her evidence was corroborative of that of the other admitted evidence. She is a negihbour of the accused. She never requested and was not promised any vegetables by the accused. She would not want any because they had their own garden of vegetables. The deceased was an exceptionally well behaved child. Gladys added that the accused used to attend church and had no history of mental illness whatsoever. She knew him very well from the time that he was born. Although she interacted regularly with the accused he never showed any signs of mental disorder.

Gift Mapfunde is an assistant inspector in the police force and was the investigating officer in the case. He stated that after receiving a report of a missing person, they looked for the accused but could not locate him as he had disappeared from the village. When he was finally arrested he exhibited signs of shabbiness and unkemptness consistent with someone who had been sleeping in the bush and had not taken a bath for days. As far as he was concerned the accused had no mental illness.

The state witnesses gave their evidence very well, in a dignified and credible manner. We have no reason to disbelieve them and accordingly embrace their evidence.

That compliment cannot regrettably be extended to the accused person who tried to feign mental illness but failed dismally. Although he claimed that he had a history of mental illness and suggested that when he committed the offences, he was in a state of automatism there was nothing, other than his say so, pointing to such illness. He was examined by two medical doctors whose reports point to no signs of mental illness. Although he claimed to have been a patient at

Esigodini and Ingutsheni hospitals not a single medical record was produced. In fact when asked about his medical records he claimed that they were destroyed in a fire caused by his deranged mother.

As it turns out his mother died in 1992 and even if he were to be believed that would mean that the fire she started must have occurred 18 years before the offences. It means therefore that he did not gather any other medical record during that period. It is clear that the accused was not being truthful and that the issue of mental illness was an afterthought and his desperate effort to try and escape the consequences of his conduct.

In any event, his confirmed and warned and cautioned statement which he submitted to the police on 1 September 2010 was produced. In that statement he stated:

> "I admit to the charges of raping and killing Simangaliso Ncube. I left my homestead on 27 August 2010 at around 1100hours and got to Alice and Simangaliso's place of residence. I found them in the house. I asked the whereabouts of their grandmother MaKhanye, Simangaliso said she had gone to a wedding. I then asked Simangaliso to go with me to the garden so that I can give her some vegetables. We went together, myself and Simangaliso but we did not go to the garden. We crossed Jeqe river and joined a stream which is from the mountain. Whilst in the stream I grabbed Simangaliso and made her to fall. She tried to ask what I was doing to her telling me to let her free but I continued and raped her once. After that I strangled her with my hands and took a stone and struck her four times on the head and she died. I picked another stone which was bigger and placed on top of her so that she does not stand again. I left and went back home."

The contents of that statement are consistent with and corroborative of all the other circumstantial evidence which has been placed before us.

There is no direct evidence of the commission of the offence led by the state. In other words nobody witnessed the accused rape and thereafter kill the deceased as alleged. It is a case in which reliance is made on circumstantial evidence. What we have to do is to put that evidence together and see whether, circumstantially, it leads to the conclusion of guilt or otherwise.

In *S* v *Vhera* 2003 (1) ZLR 668 (H) 679 C- G this court stated the following on circumstantial evidence:

> "The approach to circumstantial evidence is captured by the learned authors Hoffman DT Zeffert, *supra* (The South African Law of Evidence, 3rd edition, pages 478-479 in the following terms;

> ‘The possibility of error in direct evidence lies in the fact that the witness may be mistaken or lying. All circumstantial evidence depends ultimately upon facts which are proved by direct evidence, but its use involves an additional source of potential error because the court may be mistaken in its reasoning. The inference which it draws may be a *non sequitur*, or it may overlook the possibility of other inferences which are equally probable or at least reasonably possible. It sometimes happens that the trier of fact is so pleased at having thought of a theory to explain the facts that he may tend to overlook inconsistent circumstances or assume the existence of facts which have not been proved and cannot legitimately be inferred. In *R* v *Blom* 1939 AD 188 at 202 -203, WATERMEYER JA referred to ‘two cardinal rules of logic’ which governed the use of circumstantial evidence in a criminal trial:
>
> > ‘(1) The inference sought to be drawn must be consistent with all the proved facts. If it is not, then the inference cannot be drawn.
> >
> > (2) The proved facts should be such that they exclude every reasonable inference from them save the one to be drawn. If they do not exclude other reasonable inferences, then there must be a doubt whether the inference sought to be drawn is correct.
> >
> > The second rule in *R* v *Blom* is, of course, a statement of the criminal standard of proof.’
>
> From the above, it is clear that the cogency of circumstantial evidence usually arises from the number of independent circumstances which all point to the same conclusion.”

What therefore are the proved facts from which an inference of guilt may be drawn? It has been proved that the deceased was at home minding her own business on the morning of 27 August 2010 when the accused came and took her away under the guise of going to collect vegetables. She was a reluctant participant as she tried to avoid going away with the accused but he persisted.

The deceased did not return home after she had been led away by the accused and no vegetables found their way to her home. Instead her battered body was found at a tributary of Jeqe River two days later by a search party. According to the medical evidence, before she was brutally killed she had been raped. The last person to be seen with her was the accused person who has not rendered any evidence to disprove those facts.

The question which arises therefore is; can it be said that the only inference to be drawn from those proved facts is that it is the accused person who raped and killed the deceased? In our view there can be no other inference, than that the accused person did commit the offences.

We are therefore satisfied that the state has proved its case against the accused person beyond a reasonable doubt.

As to the intent of the accused person we examine the post mortem report in which Dr. A. R. Casteiianos observed the following marks of violence on the deceased's body:

> "Multiple deep wound(s) on the face (6) multiple bruises (on) body --- depressed skull fracture---brain laceration ---. The post mortem findings show multiple rib fractures head injury second to depressed skull fracture. There are also signs of rape on the genitals with vital signs indicating that she was raped before she died."

For a trial court to return a verdict of murder with actual intent, it must be satisfied beyond a reasonable doubt that;

(a) either the accused desired to bring about the death of his victim and succeeded in completing his purpose; or

(b) while pursuing another objective, forsees the death of his victim as a substantially certain result of that activity and proceeds regardless.

See *S* v *Mugwanda* 2002 (1) ZLR 574 (S) 581 D – F.

Here is an accused person who went about identifying his victim with care. He first inquired after her grandmother and when he confirmed she was out of the way, he pounced. He isolated the victim from everyone and led her to a place by the river where he ravished her. Having satisfied himself, he set about obliterating the evidence by battering the victim. The blows on the deceased were directed to none other than the most vulnerable part of the body, the head so as to achieve a speedy termination of life. The victim was a 15 year old who was lying on the ground when she was attacked and did not pose any danger whatsoever to the accused.

Where a person meticulously plans an attack on a defencelss girl, then sexually attacks her before callously killing her, when he was not under any risk of attack or threat, they can only desire bringing about the death of the victim.

Accordingly the accused is found guilty of murder with actual intent. He is also found guilty of rape.

Reasons for sentence

In assessing sentence we have weighed the mitigating factors set out by your legal practitioner and find that they do not come anywhere near outweighing the aggravation. Nothing whatsoever

can outweigh a loss of a blossoming young life at the hand of a perverted sex athlete with no respect whatsoever for the girl child.

You come out as having been one of those fossilized male chauvinists in whose toxicated eyes a woman is an object of quenching the sexual urges of man and to be thereafter thrown away with contempt.

You preyed on a vulnerable young girl under the care of a grandmother whom you appropriated as a sex slave before arrogating to yourself the power of God, of deciding when to terminate her life and in the most callous, primitive and senseless manner.

Society looks up to this court for protection against people like you. There can be no doubt that there is a pressing need to clear the neighbourhood of people like you and to remind society that women not only have rights too but also that anybody who offends against the girl child will be dealt with in a manner that recognizes the sanctity of human life.

You are accordingly sentenced as follows:

1. On the one count of rape in contravention of section 65 of the Criminal Law Code [Chapter 9:23] – 20 years imprisonment.
2. On the one count of murder in contravention of s47 of the Criminal Law Code [Chapter 9:23] – you are sentenced to life imprisonment.

National Prosecuting Authority, the state's legal practitioners
Mashayamombe and Company Attorney's, accused's legal practitioners