

THE STATE
versus
D.M (A Juvenile)

HIGH COURT OF ZIMBABWE
MAWADZE J.
MASVINGO, 13, 28 January and 11 February, 2022

Criminal Trial:

Assessors

1. Mr Mutomba
2. Mr Gweru

B. E. Mathose for the State
J. Makuni for the accused

MAWADZE J: The events in this matter may be deemed to be both tragic and traumatic.

The accused, a female juvenile is facing the charge of murder as defined in s 47(1) of the Criminal Law (Codification and Reform) Act [*Cap 9:23*].

The charge is that on 1 April, 2021 at Nyevedzanai Village, Headman Madyangove, Chief in Masvingo the accused unlawfully and intentionally caused the death of R.M by throwing her and leaving her to drown in Tugwi River.

The accused's age estimate as per exhibit 2 is given as 18 years. However during the course of the trial her Baby Clinic Card or Birth Record exhibit 3 was tendered. She was born on 9 May 2004. This means that as at now she is 17 years old. At the time of the alleged

commission of the offence the accused was therefore 16 years 11 months old. As a juvenile her age has a bearing in this matter.

The facts in this matter are largely common cause. The issue which falls for determination in this matter is a legal one rather than a factual one.

It is important at this stage to lay out the factual issues in this matter.

Sometime in March 2018, [then the accused was in Form 1 and aged 14 years] the accused was allegedly raped by her 56 year old uncle (a cousin to her mother) one L.N. This is a matter pending before the Masvingo Regional Court CRB MSVR 15/20 before Esq. D. Malunga who however was transferred from Masvingo before finalizing the matter. The Charge Sheet and the State Outline of that rape matter were tendered as exhibit 5(a) and 5(b) respectively.

The alleged facts in the rape matter are that sometime in March 2018 L.N requested the accused from accused's grandmother to go with him to his homestead some 400 m away so that the accused would prepare lunch for people who were working in L.N's field. The accused obliged and after serving lunch and when all the people had left L.N intruded into the kitchen when the accused was washing plates and sexually abused her at knife point as per the accused. Threats of death were allegedly made to accused if she divulged the rape. The accused upon returning home did not disclose the rape. Unfortunately the accused fell pregnant as a result of this unlawful and incestuous sexual act. The accused's mother who was away only discovered the accused's pregnancy in December 2018. By then the accused was about 9 months pregnant. She questioned the accused who revealed the rape. A report was made to ZRP Chivi. L.N was arrested. The rape trial commenced and only the accused and her mother testified before the trial stalled. L.N was granted bail pending trial and is currently on bail.

In the meantime the accused gave birth to a child whom she aptly named which child is the now deceased and subject matter of this murder trial.

The accused's family background is as follows:-

The accused's parents are divorced. Her father is believed to be in South Africa. The accused and her young brother D.M (a juvenile) the only siblings are in the custody of their mother at their mother's maternal home in Nyevedzanai Village in Chivi. The accused's mother S.M is a nomadic person who is mostly employed as a housemaid. The accused and her young brother D.M are in the physical custody of their maternal grandmother H.M.

When the accused was allegedly raped and fell pregnant she was in Form 1 at Chitenderano Secondary School. As a result of the pregnancy she dropped out of school to date. The accused gave birth to the now deceased a baby girl who she nurtured until the fateful day on 1 April, 2021, a period of 2 years when the child tragically died.

The events leading to the now deceased's death, the 2-year-old R.M, are also not in dispute.

On 1 April 2021 the accused went to a nearby stream to fetch water alone. Some two local boys S and T followed her. S was proposing love from the accused. The accused's young brother D.M playing a protective and patriarchal role observed this and was unimpressed. He believed the accused, his sister was flirting with older local boys. As a result D.M stealthily followed the accused to and from the stream.

When the accused returned home D.M confronted the accused. Their grandmother was present. In the apparent exercise of his patriarchal responsibilities D.M decided to assault or chastise the accused with the blessing of the grandmother. He plucked a switch from a mulberry tree and assaulted the accused about five times.

The accused felt she was being unfairly treated. It would appear that D.M and the accused's grandmother H.M were in the habit of constantly rebuking the accused of her so called promiscuous behaviour and alluding to the unfortunate incident when she was allegedly raped by Luckford Nyevedzanai, an uncle, resulting in the birth of the now deceased. This traumatized the accused. She was of a tender age and could not fathom why she was being blamed and ostracized whilst her alleged abused L.N remained a free man even after his arrest and commencement of trial. She instead was facing the wrath of close family members.

After the assault by her brother D.M the accused said she felt hurt physically and emotionally. She decided to commit suicide and left for the nearby Tugwi River. However as she went away her child, the now deceased, cried out for her. The accused decided to return and took the now deceased with her to Tugwi River, some 1.5 km away.

It is common cause that upon arrival at Tugwi River the accused threw the now deceased into a deep pool. The accused said she herself failed to master the courage to drown herself in the same river. She turned back going home and met her brother 500 m from the river who had decided to follow her fearing for the worst. Apparently D.M had used a different route to Tugwi

River and only met the accused on her way from the river. The accused immediately confessed to D.M that she had through the now deceased in a pool in Tugwi river and that it was D.M's fault. In fact she said it is D.M who was going to face the wrath of the police.

The 2 year old deceased drowned in the pool and died.

Upon arrival home the accused made the same confession to her grandmother. The village head and fellow villagers were alerted. A search by the villagers at the pool in Tugwi River did not yield anything. A report was made to ZRP Chivi and accused was arrested. The police searched for the now deceased without success. The body of the now deceased was only retrieved from the pool in Tugwi river the following day on 2 April, 2021. This is the basis of the murder charge the accused is facing.

The accused's defence is that she lacked criminal capacity to comprehend the unlawfulness of her conduct due to emotional stress arising from firstly the alleged rape, the constant hostile environment arising from the conduct of her bother D.M and her grandmother who used punitive language and the trigger caused by the assault on 1 April, 2021.

The accused said as a victim of rape she constantly suffered from emotional stress and trauma. This was compounded by the relatives who labelled her a prostitute. The accused said this emotional trauma came to a boiling point on 1 April, 2021 when, in a fit of rage, she threw the now deceased into a pool in Tugwi River. The accused said it was only after throwing the now deceased into the river and had been arrested that she realized the wrongfulness of her conduct. Prior to that she said she believed that she was simply getting rid of the source of her shame. The accused therefore seeks to be acquitted of the murder charge.

As per exhibit 1 the post mortem report the cause of the now deceased is not in issue. Dr Zimbwa who performed the post mortem observed the following;

- “1. *Facial and abdominal bruising*
2. *Extophthamos*
3. *Draining blood stained fluid from mouth and nostrils*”

The cause of the now deceased's death is drowning.

The accused's confirmed warned and cautioned statement exhibit 4 also shed light on the accused's conduct and/or defence. The accused in that statement said;

“I admit to the charge levelled against me. What caused me to throw the child into the water was that they always called me a prostitute who had a child with an uncle.”

In light of the non-contentious factual issues in this matter the evidence of Esther Mujere, Sgt.Egnetta Jese and Dr Godfrey Zimbwa was admitted in terms of s 314 of the Criminal Procedure and Evidence, Act [*Chapter 9:07*]. Esther Mujere and Tafirenyika Mazhambe are fellow villagers who were alerted about accused's conduct. Sgt Egnetta Jese attended the scene of crime leading to the retrieving of the deceased's body and Dr Zimbwa carried out a post mortem and compiled exhibit 1.

The state only led *viva voce* evidence from the accused's young brother D.M. The accused gave evidence and called her mother S.M and a psychiatrist nurse Tichakunda Mbengo as defence witnesses.

I have already traversed the testimony of D.M and accused's mother S.M when I outlined what is not in dispute. There is no need to repeat that evidence except to highlight the following;

D.M (D)

D is now 16 years old and in Form 2.

He confirmed assaulting the accused on 1 April 2021. His reason was that he did not approve of what he perceived to be improper association between accused and some local boys Simon and Tapiwa as accused already had an out of wedlock child. He confirmed that upon following accused to Tugwi River after the assault the accused, who had left with her baby, the now deceased, told him that she had thrown the baby into Tugwi River. He said accused had left home crying. D said accused retorted that the police would deal with D as accused attributed her conduct of throwing the baby into Tugwi River to D.

D confirmed that their grandmother always insulted the accused over the baby. He however said the accused loved the baby. D was surprised by the accused's conduct and said accused was even crying after throwing the baby into Tugwi River and exhibited signs of stress and anger.

S.M (S)

S is the accused's mother. She confirmed the pending rape case perpetrated on accused by her cousin. She has already testified in the Regional Magistrates Court as she is the person to whom accused made the first report. The alleged rapist L.N is currently on bail pending trial.

Sharia said the accused has always exhibited bitterness over what she said was done to her by L.N and that accused always complained that her grandmother insulted her labelling her a

prostitute despite that she was raped. As a result she said accused is now an emotional person and takes issue with the fact that L.N is a free person to date. S said prior to the sexual abuse accused was a well-balanced character but after the sexual abuse she became easily incensed, irritable, temperamental and withdrawn keeping issues to herself. S said accused's conduct of throwing the child into the river was conduct out of character.

When the accused took the witness stand it was clear that she is a tormented soul. One could detect anger, emotion and helplessness as he narrated the alleged rape ordeal. She cannot understand as to why her alleged abuser is roaming freely at home with his family. The accused said she is hurt more so as her alleged abuser L.N is a neighbor.

In explaining her conduct on 1 April, 2021 the accused could only say she was angry and acted at the spur of the moment. Her explanation is that despite being a victim of rape her grandmother always insulted her labelling her a prostitute who had a child with an uncle L.N.

The accused said she was always troubled by the fact that she had a child with an uncle more so as a result of rape and that her close relatives seemed not to appreciate that the relevant sexual act was non-consensual.

In relation to the events of 1 April, 2021 the accused said she did not find any plausible reason as to why her young brother D assaulted her as she was not in love with Simon or Tapiwa. She said Simon was just proposing love. The accused said she was overcome by anger and decided to kill herself and the baby by drowning but somehow she simply failed to throw herself into Tugwi River after throwing the baby into the river.

In explaining her conduct the accused said she thought D would be held accountable for the death of the child hence she believed the police would arrest D. She said she only realized the gravity of her conduct when she was in police custody.

The accused conceded that she indeed appreciated that by throwing the now deceased into a deep pool the child would die. However she said it is D whom she thought would be held accountable for that and not herself as D had triggered her conduct as a result of an unwarranted assault. The accused said she was very emotional and incensed by D's conduct. As a result she said she failed to control her anger and emotions.

The accused said at the river she simply threw the child into the river, turned back and walked away. In court she was constantly crying. Her explanation was that she now feels the loss of her child and fully appreciates she acted wrongly.

In order to further understand the accused's mental state evidence was led from a psychiatrist nurse one Tichakunda Mbengo. We turn to his evidence.

Tichakunda Mbengo is the author of the Psychometric Assessment Report exhibit 6 and the General Anxiety Disorder Assessment Form exhibit 7 (GAD) both relevant to the accused.

Tichakunda Mbengo is a holder of a Diploma in Psychiatry and Mental Health. He also has a Certificate in Human Rights with specific emphasis on sex and gender violence. Currently he is a nursing counsellor at Masvingo General Hospital. His duties entails assessment, diagnosis, counselling and treatment of victims of sexual abuse. He also compiled the relevant reports.

Tichakunda Mbengo (Mbengo) said the accused was brought to him by defence counsel *Mr Makuni* and accused's mother. He proceeded to interview the accused and later her mother. During the interview he completed exhibit 7 (GAD) which is a questionnaire dealing with depression assessment and anxiety screening tool. In court he explained the various questions (which are on that form) which he asked the accused and the answers accused gave on a scale of 1 to 3. This culminated in the compilation of exhibit 6 the Psychometric Assessment Report.

In relation to behaviour and appearance the accused was reserved and calm but admitted to episodes of panic when probed on the rape allegations and her deceased child. The accused is well oriented and not paranoid. She no longer has suicide inclinations although she was suicidal soon after death of her child.

Mbengo said the accused exhibited episodes of amnesia and disassociation in relation to the ordeal that led to deceased's death. The accused constantly keeps thinking about the alleged rape and has a phobia of her abuser, L.Nwhom she cannot forgive and she is still bitter. The accused was also angry that she was improperly labelled a prostitute by her grandmother which did upset her. This has resulted in episodes of anger and outbursts.

The relevant finding by Mbengo is that the accused suffered from post-traumatic stress disorder and clinical depression. His recommendation was that accused should undergo

psychosocial and physiological counselling with periodic assessments and that even members of her family like the grandmother needs to be counselled.

It is clear that the accused suffers from moments of panic arising from the alleged rape especially when she experiences flashbacks. To her mind she cannot understand as to why her abuser is still a free person. This hurts her causing her to cry. She cannot find closure and is unable to forgive the alleged abuser. As a defence mechanism she resorts to amnesia as a way of trying to forget this rape incident. The mood disorder or clinical depression is caused by the rape incident. The anxiety disorder is due to the post traumatic experience arising from the alleged rape incident or trauma.

From the testimony adduced this explains why the accused is generally moody, feels worthlessness and hopelessness resulting in suicidal tendencies. As Mr Mbengo explained this is shown by accused is abnormal weight loss as she is now about \pm 50 kg instead of being around 60 kg.

There is no doubt that the accused was living under a stressful environment. Punitive language was directed towards her as she was labelled a prostitute. In addition to that she was physical assaulted by her young brother D. It is this emotional and stressful conditions which resulted in her failure to control her anger culminating in thoughts of self-harm or inward self-harm (suicide) or harm towards those she loved like the now deceased (her child). As Mr Mbengo said at the time she threw the baby into Tugwi River she experienced acute mental disorder and clinical depression. This is compounded by her age.

The legal question arising in this matter is whether at the time accused threw her baby, the now deceased, into Tugwi River she was suffering from the mental disorder envisaged in s 227 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] which would vitiate the intention to commit the offence of murder and amounts to a complete defence. If that is the case she would be entitled to a verdict of not guilty.

The other scenario is whether at that material time she simply was suffering from diminished responsibility as is envisaged by s 218 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] which would only operate in mitigation and not a defence to the charge she is facing.

Prior to the codification of our criminal law our courts dealt with these two scenarios I have alluded to. See *S v Chin'ono* 1990 (1) ZLR 244 (H); *S v Gambanga* 1998 (1) ZLR 364 (S).

The simple legal question is whether at the time the accused committed the act charged she is deemed not responsible in law for such conduct because of some mental defect or disorder.

Both s 218 and 227 of Criminal Law (Codification and Reform) Act [*Cap 9:23*] have to some extent codified the common law position as buttressed or supported by case law.

The mental disorder or defect envisaged in s 227 Criminal Law (Codification and Reform) Act [*Cap 9:23*] vitiates the requisite intention to commit crime hence it is a complete defence. On the other hand the state of mind envisaged in s 218 of the Criminal Law (Codification and Reform) Act [*Cap 9:23*] does not vitiate the requisite *men rea* but is merely mitigatory.

In assessing the evidence before us we are not persuaded that the accused at the material time suffered from some mental disorder or defect envisaged in s 227 of the Criminal Law (Codification and Reform) Act [*Cap 9:23*]. It is a fact that the alleged rape, hostile environment and the physical assault took its mental toll on the accused. This is well articulated in the evidence of Mbengo the psychiatrist nurse and is captured in exhibit 6 and exhibit 7. The emotional factors working on accused's mind are quite clear and explain the accused's conduct on 1 April 2021. All these factors which we canvassed in detail inclusive of expert evidence in our view fall far short of the requirements in s 227 Criminal Law (Codification and Reform) Act [*Cap 9:23*].

On the day in question the accused appreciated the nature of her conduct. She explained what she did in proper chronological order until she threw the now deceased into Tugwi River. The accused indicated that she wanted to get rid of the object of her ridicule (the child). She decided to throw the child into a deep pool. The 2 year old child could not swim. She appreciated the child would drown and die. The accused knew that her conduct was unlawful hence soon after throwing the child into the river she met her brother D and naively told him that it is D who would be arrested by the police. Indeed the accused was suffering from acute mental and or emotional stress. The accused's state of mind as proved would not absolve her of legal liability but simply reduces her moral liability.

There is no doubt that the accused, by throwing the 2 year old deceased into a deep pool of water she wanted to take away the life of the child. She desired that result and it is what happened. The accused acted with actual intent as defined in s 47(1) Criminal Law (Codification and Reform) Act [Cap 9:23]. Be that as it may, her conduct still amounts to diminished responsibility as per s 218 of the Criminal Law (Codification and Reform) Act [Cap 9:23].

VERDICT: Guilty of contravening section 47(1) of Criminal Law (Codification and Reform) Act [Cap 9:23]:- Murder with actual intent.

No record.

SENTENCE

This is a rather unusual case which obviously calls for also a rather unusual sentence.

In the reasons for judgment most of the mitigating factors are canvassed. No useful purpose would be saved in repeating them. The court is grateful to the written submissions by counsel for the accused and the lucid response by *Mr Mathose* for the state.

The only aggravating factor in this case is that the accused stand convicted of a very serious offence of murder with actual intent. Ordinarily the court would impose a lengthy custodial sentence. The victim in this matter is a two year old child. It matters not that the child was a product of incestuous rape. This innocent child died a painful death by being drowned in Tugwi River. The accused is the person who was expected to protect this child and not to harm the child.

The right to life is a non-derogatory right in our Constitution. No one, even the mother of a child has the right to take away the life of her child. All things equal the accused's blameworthiness would be high.

This case calls for the highest degree of empathy and mercy. The accused is indeed a tormented soul. No useful purpose would be saved by further punishing her or sending her to prison.

The court did find that the accused's moral blameworthiness is very low taking into account the factors surrounding the commission of the offence. A finding of diminished responsibility has been made. Few factors drive this point home.

The accused was raped by an uncle at 14 years, and fell pregnant. She became a mother at 15 years and dropped out of school in Form 1. After giving birth she virtually had no social

support systems. Instead her custodial person the grandmother gratuitously and frequently verbally abused her using derogatory and punitive language. Despite being a victim of rape she is labelled a prostitute. Her brother goes further to physically assault her. This hostile environment is well captured in both exhibit 6 and exhibit 7 authored by psychiatric nurse and also in exhibit 8 the probation officer's report. This justifies the finding of diminished responsibility.

The question of the type of sentence fully exercised my mind.

The starting point is the penalty section which is s 47(4) of the Criminal Law (Codification and Reform) Act [*Cap 9:23*]. It makes reference to s 337 and s 338 of the Criminal Procedure and Evidence Act [*Cap 9:07*]. The penalty provisions referred therein are inappropriate as accused is a juvenile female offender.

Recourse should therefore be made to 336 of the Criminal Procedure and Evidence, Act [Chapter 9:07]. However as already said a fine for such an offence is inappropriate. Since this is a murder case it is improper to either impose a wholly suspended sentence or to postpone the passing of sentence. The other options like community service are clearly unsuitable for an offence of this nature. Since the accused herself is not deemed to have any negative characteristics in relation to her character a sentence of institutionalization or committal to a Training Institute would be inappropriate. However counselling is still recommended.

The fact remains that a non-custodial sentence is in order. The sentence which is deemed to be appropriate in the circumstances would be on the basis of s 336(1) (b1) of the Criminal Procedure and Evidence Act [*Cap 9:07*].

In the result the accused is sentence as follows;

“The accused is sentenced to remain in custody until the rising of the court”