

**REPORTABLE (45)**

**BERNARD DUBE**  
**v**  
**THE STATE**

**IN THE SUPREME COURT OF ZIMBABWE**  
**GWAUNZA JA, GARWE JA & GUVAVA JA**  
**BULAWAYO, JULY 28, 2014 & JULY 30, 2014**

*R Dzete*, for the Appellant

*N Ngwenya*, for the Respondent

**GARWE JA:** This is an appeal against conviction, firstly, on a charge of rape and, secondly, murder and the sentence of fifteen (15) years imprisonment and death respectively, imposed by the High Court at Hwange on 9 November 2011.

The facts that are common cause are as follows. The deceased was thirty five (35) years old at the time of her death and was residing at her sister's plot at Number 8, Mariposa, Insuza, in Matebeleland North. On 23 January 2008 the deceased was waiting for transport to take her to Bulawayo at a bus stop at the 67km peg along the Bulawayo – Victoria Falls Road. She had in her possession a twenty litre (20) container of milk and a bag containing some money. The appellant came cycling along the road. The appellant thereafter strangled the deceased with a rope in a bush a short distance away from the bus stop. The appellant then took the bag containing approximately twelve (12) million dollars

Zimbabwean currency. He was seen emerging from the bush by one Priscilla Mpofu. He thereafter took his cycle which was leaning against a tree and cycled along the Bulawayo Road. Using the description given by Priscilla Mpofu the police made a follow up. The appellant was apprehended by members of the public and turned over to the police.

A post-mortem examination conducted at Mpilo Hospital the following day revealed the following injuries: various scratch marks and bruises on both feet and ankles; multiple abrasions and bruises around the knees and upper front of both thighs. The examination further revealed a 4 x 3cm wound just below the right armpit and small wounds and scratches on the hands, wrists and shoulder. The vaginal opening was found bruised on the right and back of the vaginal orifice. There were also five (5) small abrasive wounds on the vaginal canal on the right side and on the back; a slippery semen-like fluid mixed with blood was also detected. The doctor found that the cause of death was asphyxia and brain haemorrhage due to ligature strangulation. He remarked that this was a callous rape and murder. In the doctor's opinion, the deceased died a very painful death.

In his defence before the court *a quo*, the appellant stated that the deceased was his girlfriend and that on the day in question he came across the deceased as she was in the act of having sexual intercourse with another man, whose vehicle had been parked at the bus stop. The man had then run away. Owing to a misunderstanding that arose thereafter, he then took a rope with which he used to strangle the deceased. Whilst admitting that he strangled the deceased he denied that it was his intention to kill her. He also told the court that the statement he made to the police had been induced by assault and torture and that it had not been made freely and voluntarily. Whilst admitting killing the deceased, he denied raping her.

In a confirmed warned and cautioned statement, the appellant admitted that he came across the deceased at a bus stop and demanded money from her. He admitted choking her with a piece of rope before raping her and murdering her. In the statement he also admitted that the deceased, on hearing voices, tried to scream. He had then tightened the rope around her neck so that she would not scream. He realised she was dead after which he removed her bag containing the money. He had then walked back to the bus stop where he met the witness Priscilla Mpofu. He had then cycled away but was apprehended by the crew of a commuter omnibus and handed over to the police.

In view of the fact that the appellant was alleging that the warned and cautioned statement had been induced by assault, the court *a quo* conducted a trial within a trial. After hearing evidence, the court *a quo* came to the conclusion that the statement had been given freely and voluntarily and that no undue influences had been brought to bear.

In its judgment, the court *a quo* believed the evidence of the state witnesses. In particular the court believed the evidence of John Phiri who was staying at the same plot as the deceased and who stated that at no time had he seen the appellant at the homestead where the deceased was staying. He also believed the evidence of the arresting detail Sergeant Emmanuel Ziva Chinganga that when the appellant was arrested, he complained that he had been assaulted by the passengers and crew in the commuter omnibus.

As regards the evidence of the appellant, the court *a quo* found that evidence improbable and lacking in credibility. In particular the court found that the appellant, who claimed to have known the deceased for eighteen (18) months before the fateful day, did not

know her name, other than “MaNdlovu”, which name in any event was not correct as the deceased’s name was Sanelisiwe Ngwenya.

In submissions before this Court the appellant has attacked the conviction and sentence on a number of grounds. As regards the conviction for rape, he has submitted that the State did not prove beyond a reasonable doubt that he had indeed committed rape. Further he contended that the court *a quo* misdirected itself in relying on the warned and cautioned statement which he had challenged. He also challenged the finding by the court *a quo* that his version was not credible and was not supported by the probabilities. On the conviction for murder he submitted that the court *a quo* erred in finding that murder with actual intent had been proved and further that the court *a quo* had erred in conducting a trial within a trial in respect of a confirmed warned and cautioned statement which had already been admitted into evidence. As regards the sentence of death that was imposed, he has attacked the finding that there were no extenuating circumstances in the light of the fact that this was a crime of passion and the appellant had been tortured by the police.

It seems to me that, since the warned and cautioned statement was relied upon to a large extent in reaching findings of fact, its admissibility should be determined right at the outset.

The warned and cautioned statement made by the appellant was confirmed before a magistrate at Lupane. This is common cause. In terms of the law therefore the statement was admissible on its mere production by the prosecutor. The appellant, however, was permitted to lead evidence and show on a balance of probabilities that notwithstanding that it had been confirmed, it had been induced by assault and was therefore not admissible.

I pause here to comment that the procedure adopted by the court *a quo* to conduct a trial within a trial was wrong as such a process is mandatory where the State seeks to rely on a statement that has not been confirmed. It is clear that, instead of a trial within a trial, the court *a quo* should have merely conducted an inquiry into the allegations made by the appellant. Such inquiry would have entailed allowing the appellant to give evidence on the alleged torture and the State leading evidence from the police in rebuttal. In effect this is what happened. Both the prosecution and the defence led evidence on the allegation that the statement had been induced by assaults. At the end of that process, the court came to the opinion that the allegation was not true and therefore that the statement had not been induced by assaults or threats of further assaults. In my view, whilst the adoption of the trial-within-a-trial procedure was not correct, an inquiry was nevertheless conducted during which both parties led evidence. The confirming magistrate was called and he specifically stated that the appellant had no complains against the Police or the manner in which the statement had been taken. He complained of assaults at the hands of the commuter omnibus crew and passengers at the time he was arrested.

In all the circumstances I am satisfied that the court *a quo* correctly determined that the statement was not induced by assaults or threats of assaults. The statement therefore remained admissible against the appellant.

The statement gives a detailed account of the circumstances surrounding the rape and murder of the deceased. In the statement the appellant says he had demanded money from the deceased. When he tried to search her, she ran away and he followed her. He caught her as she was trying to go through a fence. He then tied a rope around her neck at which stage she pleaded with him not to kill her and instead offered him sexual intercourse.

He then raped her. When they heard voices, she tried to scream and he then tightened the rope around her neck, killing her almost instantly. He then took her bag containing money and went back to the bus stop to retrieve his cycle. There he met the witness Priscilla Mpofu.

The warned and cautioned statement confirms that he did not know the deceased before this encounter and that he came across her by mere chance. John Phiri who was staying with the deceased at the same plot told the court he had never seen the appellant at the plot and that the appellant could not have come to the plot undetected as he had vicious dogs there.

Moreover the medical evidence shows that the deceased was attacked and was violently raped. This could not have happened during the time the appellant says the deceased was found having sexual intercourse with an unknown man who, on seeing the appellant, absconded to his car and drove away. This claim is highly improbable and in my view false. On the appellant's own version such intercourse would have been consensual. The injuries found during the post-mortem examination were not consistent with intercourse having taken place by consent.

In my view the only inference that can be drawn is that the appellant violently raped the deceased in the manner described in his warned and cautioned statement.

I am satisfied that the court *a quo* was correct in coming to the conclusion that the version given by the appellant was not credible. The appellant did not even know the name of the deceased, whom he claimed was his girlfriend of eighteen (18) months.

In the circumstances the suggestion that the appellant should not have been convicted of rape and murder with actual intent has no merit.

Further, on the facts found proved, it cannot be seriously contended that the appellant should have been found guilty of any other offence other than murder with actual intent or that circumstances of extenuation should have been found.

This was a vicious attack on a defenceless woman who was at a bus stop waiting for lifts to take milk to Bulawayo for sale. As the doctor points out in the post-mortem report, the deceased died a most painful death. The murder was committed to facilitate a robbery and consequent to a rape.

I am satisfied that there is no merit to this appeal.

The appeal against both conviction and sentence, both on the rape and murder charges, is dismissed.

**GWAUNZA JA:** I agree

**GUVAVA JA:** I agree

*Messrs Ndove, Museta & Partners*, appellant's Legal Practitioners

*The Attorney-General's Office*, respondent's Legal Practitioners