

THE STATE
versus
NGONIDZASHE MUGABE

HIGH COURT OF ZIMBABWE
MAWADZE J
MASVINGO, 9 February, 1 & 5 March 2024

Assessors 1. Mr Mazonde
2. Mr Chikukwa

Criminal Trial

E. Mbavarira, for the State

F. Chirairo, for the accused

MAWADZE J: In this matter the back ground facts are largely common cause save for the events surrounding the now deceased's death. In fact, the main issue which falls for determination is whether the now deceased died from natural causes or there is foul play implicating the accused.

The charge the accused is facing entails contravening section 47 (1) of the Criminal Law [Codification and Reform] Act [*Chapter 9:23*].

The charge is that on 25 January 2023 in Guti Village, Chief Shindi, Chivi, Masvingo the accused unlawfully and intentionally caused the death of a newly born baby by squeezing her neck and inserting cotton wool in her mouth and nose.

Background Facts

The 45-year-old accused is a male nurse and a qualified mid-wife of 18 years' experience. He completed his nursing course in 2005 and qualified as a midwife in 2012. He has been so practising both as a nurse and a mid-wife. The accused is married, hence a family man.

The mother of the now deceased is 32-year-old. She is a mother of two children and was single. She is a qualified teacher although at the material time she was yet to be employed. As at now she works for a supermarket in Avondale, Harare. Her rural home is in Bikita but ordinarily is resident in Waterfalls, Harare.

Sometime in 2018 the now deceased's mother DIANAROSE MUDZINGWA (Dianarose) met the accused at his then workplace at rural Chikuku clinic, in Bikita Masvingo. She had visited the said clinic to have a family planning implant on her hand removed after its expiry period. The accused removed it. A love relationship developed between accused and Dianarose. The accused was not staying with his family. As a result, Dianarose would travel from Harare to the accused's work place at Chikuku Clinic, Bikita. The accused would send her money for bus fare. The two would spend days together as they were now in an intimate or sexual relationship. The accused later transferred from Chikuku clinic to Ngundu clinic in Chivi and this love relationship and arrangement continued. While at Ngundu clinic the accused lived in one room where he lodged and there were other tenants at that house. The accused's residence was about 1½ km from his work place Ngundu clinic which was uphill or 2-3km if one used a winding route.

The now deceased's mother Dianarose fell pregnant. She advised the accused. The love relationship and intimate relationship continued as Dianarose would occasionally travel from Harare to Ngundu to be with the accused. Dianarose did not register the pregnancy with any clinic or hospital for usual pre-natal care. She said she had no money to do so as she was unemployed and accused could not help her in that regard despite their intimate relationship. She also, for the same reasons had not bought any clothes as preparation for the newly born baby she was expecting until the pregnancy was full term and the fateful day she gave birth.

As Dianarose's pregnancy was now full term and not registered the accused invited her to proceed from Waterfalls, Harare to Ngundu so that she would deliver the baby at accused's work place at Ngundu clinic for free. The accused said Ngundu clinic offered excellent free maternity services.

On the 24th of January 2023 Dianarose travelled from Harare to Ngundu. Her pregnancy was full term. She arrived at Ngundu in the evening and accused was waiting for her. The lovebirds bought food at Ngundu and proceeded to accused's residence to eat. After supper they retired to bed. Later that night leading to 25 January 2023 Dianarose started to have labour pains. The accused did not take her to Ngundu clinic. She delivered in the privacy of the accused's room. The baby was a girl. This was around 0300hrs.

The State case

It is the State case that soon after delivery of the baby girl the accused strangled the newly born baby girl, the now deceased, by squeezing her neck and suffocating it by closing its nose and mouth with cotton wool. Thereafter it is said the accused immersed the newly born baby girl into a bucket with water headlong. The state alleges that after the newly born baby had died the accused placed it in a plastic bag and proceeded to his work place at Ngundu clinic where he threw the body of the newly born baby girl into a blair toilet or pit latrine. The accused proceeded to work at the clinic as normal doing his daily chores or duties. The now deceased's mother Dianarose had remained sleeping at accused's house. She had not approved of accused's conduct hence she woke up and proceeded to ZRP Ngundu where she made a report of murder of the newly born baby girl against the accused. The accused was arrested at his work place later that day at Ngundu clinic. The accused led the police to the toilet at his work place where he had thrown the baby. The body of the now deceased was retrieved. A post mortem was later done some 10 days later on 3 February 2023 by Dr Godfrey Zimbwa. Unfortunately, the body of the newly born baby had decomposed. The cause of death could therefore not be ascertained by the doctor.

The accused's Defence and Evidence

The accused said Dianarose his lover was not truthful with him as he only learnt after his arrest that she was a mother of two children. He said his love relationship with Dianarose was a casual one, purely for sex as he was married and did not intend to marry Dianarose.

The accused said he never visited Dianarose at her residence in Harare and did not even know how she stayed there and with whom.

It is accused's evidence that after Dianarose fell pregnant and advised accused she revealed to the accused that she was also in a sexual relationship with another man in Harare and could not tell the author of her pregnancy. She however made it clear that this man in Harare was not a proper

candidate for marriage hence she would just keep the baby. The accused told her that DNA test would be done after birth of the child to ascertain its father if she wished. Be that as it may the accused said he continued the love relationship with Dianarose.

The accused said she told Dianarose to register the pregnancy at any local clinic in Harare where she stayed as this was for free but Dianarose failed to do so. The accused said as a positive gesture he had arranged with a work colleague, a vendor to order clothes for the expected baby but could not pay or take delivery of the baby clothes as accused wanted for Dianarose to come to Ngundu to choose the clothes.

The accused said he indeed made arrangements for Dianarose to travel to Ngundu for purposes of giving birth at his work place at Ngundu clinic which offer free, super and excellent maternity services. The accused confirmed that Dianarose arrived at Ngundu on 24 January 2023 and that the pregnancy was full term. He said upon arrival she complained of hunger and he bought food at Ngundu business centre and they proceeded home where they retired to bed.

The accused said when Dianarose started to experience labour pains he decided against taking her uphill to Ngundu clinic at night. Instead as a qualified nurse and midwife he assisted her to deliver the baby in his room.

The accused explained in detail how the newly born baby, the now deceased was delivered in his room.

The accused said he caused Dianarose to sit on a mat on the floor to enable accused to check on her. He said he noted that the baby's head was already on the perineum or opening of the vagina. As per procedure he said he felt for the head of the baby and noticed the umbilical cord was tied three times around the neck of the baby. The accused however said Dianarose delivered the baby successfully and in record time. The newly born baby was alive. However, the accused said the newly born baby did not cry as is expected within the first golden minute. According to the accused in medical parlance or terms this was a fresh still birth. In simple terms this means the baby was born with signs of life but died immediately.

The accused denied that he had a hand in the death of the newly born baby. Instead, he said he did all he could do within his experience as a nurse and mid wife and with limited resources to save the life of this baby.

The accused explained what he did. He said he first removed the umbilical cord which was around the baby's neck by cutting it. Thereafter he proceeded to resuscitate the baby by clearing its airway and the nose using cotton wool to try and enable the baby to breathe. This was necessary because some birth substance called meconium was blocking the baby's nose. The accused said he also tilted the head of the baby to avoid it from choking of the meconium thus clearing the airway and throat.

According to the accused, despite his valiant efforts the baby was choked by the meconium as accused did not have the nurses McIntosh bag or suction apparatus. The baby immediately died as it did not cry and its legs and limbs immediately turned blue. The accused said he did all this in the full glare and presence of Dianarose to whom he clearly explained the challenges the baby was facing. The accused said he even told Dianarose that he had lost the battle and that the baby had died.

The accused said naturally Dianarose was saddened by the death of the baby. At the same time Dianarose was bleeding and accused could not afford to lose her too. As a result, he rushed to the clinic to get an injection and injected her to stop the post-delivery bleeding.

The accused said he tried to make Dianarose to hold the body of the dead child but she refused, and was alleging that the accused had killed her newly born baby. However, as an experienced nurse and midwife the accused said he realised Dianarose was suffering from peripheral psychosis due to birth. She was confused and naturally in denial that the baby had died. As a result, Dianarose told him that he could dispose of the body in whatever manner he deemed fit.

The accused said as Dianarose was not interested in the body of the baby he placed it in a plastic bag, proceeded to his work place and threw the baby in a pit latrine at his work place. The accused accordingly proceeded to resume his normal duties at the clinic until his arrest that day. He, upon arrest showed the police where he had dumped the baby's body.

According to the accused, if at all he erred, it can only be how he disposed of the body of the newly born baby.

The accused also explained his conduct after the death of the baby. He said as a nurse and a person working for an organisation expected to uphold women rights, he panicked. He completely failed to think rationally and properly. He became scared that Dianarose had given

birth in his room and not at the clinic. As a result, he failed to disclose this to his superiors at the clinic. He said he could not also tell fellow tenants at his residence. The accused said he again failed, as expected, to advise the local police about the death of the newly born baby. He also became worried about the fate of not only his job but his marriage.

The accused totally denied intentionally killing the new born baby or acting in any negligent manner.

The evidence by the State

The only exhibit tendered is the post mortem report compiled by Dr Zimbwa. It shows that the newly born baby was \pm 3kg, was \pm 35cm and a female. The body was decomposed and the cause of death could not be established. This means the court has to establish the probable cause of death without the aid of medical evidence.

The evidence of two state witnesses, Tangai Mudombo and Dr Zimbwa was admitted in terms of section 314 of the Criminal Procedure and Evidence Act [*Chapter 9:07*].

As already said Dr Godfrey Zimbwa examined the remains of the newly born baby and completed Exhibit 1 the post mortem report.

Tangai Mudombo, a 50-year-old nurse was the sister in charge at Ngundu clinic and accused was his subordinate. He was staying at staff quarters at the clinic. Tangai Mudombo only became aware of this case when police came at the clinic to arrest the accused on 25 January 2023. He witnessed the retrieval of the baby's body from a Blair toilet at the Ngundu clinic after accused's arrest. In any case the accused admitted that even the injection he obtained at the clinic which he used to inject Dianarose to stop the bleeding was obtained stealthily and unlawfully by the accused from the clinic.

The State led *viva voce* evidence from Dianarose Mudzingwa and Assistant Inspector Kennedy Gongolo. We turn to that evidence.

Assistant Inspector Kennedy Gongolo (Gongolo)

The evidence of Assistant Inspector Gongolo is not controverted at all. He confirmed that it is Dianarose who came and made a report of murder of the newly born baby against the accused at ZRP Ngundu on 25 January 2023 around mid-morning. The report was that the accused had strangled and suffocated to death the newly born baby. Dianarose did not know where the baby or body was but reported that accused had gone to work. The police followed the accused and arrested

him. Assistant Inspector Gongolo said accused led him to a blair toilet where the body of the child was thrown by accused. The body was retrieved. The accused denied strangling or suffocating the baby. All accused said was that he was confused when he disposed the body of the baby into the blair toilet. The accused insisted the child died because of the umbilical cord which was around its neck.

Dianarose Mudzingwa (Dianarose)

Dianarose is the only eye witness as to what happened when the accused delivered her baby in accused's room that night.

Dianarose denied that she told accused that she was in any relationship with another man when she fell pregnant. She said when she fell pregnant she told the accused who was author the of her pregnancy. However, she said the accused was non-committal as he did not deny paternity but simply said he would do DNA tests after birth of the child. Dianarose said she agreed because accused is the person who had impregnated her. The intimate love relationship thus continued as usual.

Contrary to accused's evidence Dianarose said she asked for money from accused to register the pregnancy but accused would always say he had no money as he had to take care of his family. On her part she had no means to do so. Equally the accused would always allege lack of money to buy any preparation for the expected baby until the pregnancy was full term. Dianarose said she too had no means as she was not employed.

Dianarose said when the pregnancy was full term she advised accused. The accused in response sent her money to travel from Harare to Ngundu to deliver the baby at Ngundu clinic. She obliged. Upon arrival at Ngundu on 25 January 2023 she met accused. There was no electricity at Ngundu. Accused said he had run out of gas at his house. Accused bought her food at the market. They proceeded home to eat the food.

Dianarose said as they walked home the first waters broke. She advised the accused. The accused inquired if she was in pain. She was not in pain. They proceeded home, had supper and retired to bed and she was still not in pain.

Later that night she went into labour. The accused assisted her to deliver the child. However, she said it is at this stage that her nightmare started.

Dianarose said soon after delivery the accused just put the baby on the floor uncovered. As she lifted her head to check the sex of the child, she saw accused putting cotton wool on the nose and mouth of the child. The child was producing muffled sounds of struggling to cry. The accused's other hand was on the neck of the child. Naturally Dianarose said she got worried and asked the accused what he was doing to the baby.

She said accused could not give her a clear answer. Accused simply told her not to worry but she realised accused was pressing his hand around the baby's neck, strangling the child. Dianarose said she again asked accused as to why he was acting in that manner as he was also obstructing the baby from breathing using cotton wool on nose and mouth. All accused said was that the baby will give her problems. She inquired what problems or what accused meant. The accused said the baby had abnormalities. She asked the accused the nature of these abnormalities. Accused proffered none but just said the baby would give her problems. Instead accused instructed her to lay down as labour fluids were still coming out and she obliged.

Dianarose said after a while she again raised her head as accused was obstructing her and asked why the bay was still on the floor and the umbilical cord not cut as usual. The accused said he would attend to all that and proceeded to make the baby lay on top of the cotton wool and proceeded to cut the umbilical cord. She denied that the umbilical cord was around the neck of the child.

Thereafter she said the accused lifted the baby tilting it holding a cup of water with the other hand as if pouring water on the baby. Dianarose said this baffled her and she asked again what he was up to. The accused repeated that the child would give her unspecified problems and proceeded to put the baby into a bucket.

Dianarose said accused lifted her from the floor on to the bed after putting the discharge from her into a plastic bag. By then the baby had been placed into a bucket. At that stage Dianarose said she was too weak, was bleeding and almost asleep. All she could perceive was that accused was preparing to go to work.

Later when she woke up that morning accused was gone. The baby was not there. She texted her sister expressing her fears that accused may have harmed the child. The sister advised her to go to the local police which she did. She was taken by police to accused's work place. The body of the baby was retrieved from a toilet on accused's indications.

Dianarose was adamant that the baby was born alive as it produced choking like sound when accused was pressing cotton wool on its nose and mouth and squeezing its neck. She could tell the child was struggling to cry.

Mr Chirairo for the accused cross examined Dianarose extensively and she stuck to her evidence. She said when she started to have labour pains that night accused never called for help. She agreed that before that when the first waters broke, she was not in pain and did not ask to be taken to the clinic as she was also hungry. Besides the cotton wool there was no other item bought in preparation for the baby.

Dianarose said as this was her third pregnancy and accused was not only just a nurse but a midwife she believed he was fit for the purpose and could deliver her baby if the need arose. She said she indeed delivered the baby properly but soon after that the accused used the cotton wool to press the nose and mouth of the baby thus muffling the crying sounds of the baby. She disputed that the umbilical cord was around the neck of the child. She denied that accused ever told her he was resuscitating the child but only said the baby will give her problems. Dianarose said she was never told about the said meconium by accused. Instead, she said all accused did after suffocating the baby was to put it into a bucket which was not resuscitation.

Dianarose said she bled profusely after accused left for work and texted the accused. The accused reacted by coming back to inject her and she fell asleep. She disputed that accused advised her of the death or disposal of the body child; but only learnt of the disposal of the body after accused's arrest.

Dianarose said she had an affair with the accused as he had promised her marriage as a second wife and as a mother of two kids she had no issues with entering into a polygamous marriage. She said she came to Ngundu to deliver the baby at accused's behest as he was the author of her pregnancy and had said maternity at Ngundu clinic was free.

Despite her apparent naivety Dianarose impresses as a well-meaning and truthful witness. There is nothing inherently improbable about her testimony. In fact, most of the issues in this case are common cause save for the accused's alleged improper conduct. Her credibility cannot be doubted. She was alive to all what happened during and soon after delivery.

Analysis of the Evidence

The cause of death of then newly born baby this matter can be resolved on both direct and circumstantial evidence. There is no medical evidence to establish the cause.

- 1) The direct evidence is from Dianarose's evidence. The physical acts of accused's conduct are not challenged by the accused per se. In other words, the accused admits the baby was born alive. It is agreed the child did not cry. Accused admits placing some cotton wool on the nose and mouth of the baby as Dianarose said. He however gave a different explanation for this conduct, which relates to resuscitating the baby Dianarose vehemently disputed this hence her report to the police.
- 2) Circumstantial evidence relates to the facts proved which facts only lead to an inference of accused's guilt see *R v Blom* 1939 AD 188 at 202-3; *State v Shonhiwa* 1987 (1) ZLR 215; *State v Vhera* 2003 (1) ZLR 668 at 680 C.

What are the facts proved or not in issue in this matter?

- a) the accused is a married man and by his own admission had no intention of marrying Dianarose but engaging in casual sex only.
- b) it is improbable that accused would continue his intimate relationship fully aware as he alleges that Dianarose had been impregnated by another man in Harare and even invite her to deliver at his work place in Ngundu. The truth is that accused clearly accepted being the author of the pregnancy.
- c) no preparation was done by the accused for the newly born baby and he never assisted Dianarose in registering the pregnancy.
- d) when Dianarose started to experience labour, pains accused did not take her to the clinic, or sought any help or alerted anyone.
- e) The accused is an experienced nurse and mid wife of about 18 years' experience.
- f) accused delivered the child in the privacy of his room.
- g) the accused did put cotton wool on the mouth and nose of the child.
- h) Dianarose did ask accused to explain his conduct.
- i) the baby was born alive but did not cry.
- j) Dianarose and accused had a dispute in accused's room as to how the child had died as Dianarose alleged foul play.

- k) the accused stole an injection from the clinic to inject Dianarose to stop her from bleeding.
- l) accused stealthily disposed of the body of the baby into a pit latrine or blair toilet at his work place.
- m) the accused did not report the death of the baby to the police or to his superiors or to anyone.
- n) accused's arrest was at the behest of Dianarose.

Given all these factors Dianarose's version of events is the more probable. She protested immediately to accused as regards his conduct and actions on the baby. When she realised accused was not relenting, she did the obvious by making immediate police report of foul play.

The same can not be said for the accused. It would appear accused was keen to make this whole incident a closely guarded secret. Did he really intent to keep they baby without buying any preparation but professing love to its mother? When Dianarose experienced labour pains why did he not call for help either from fellow tenants at his lodgings or the duty nurse telephonically? Again, when he realised the child had complications of the umbilical cord and meconium as he alleges why did he not call for help from other nurses or try to take both the mother and child to the clinic? What really was confusing in seeking medical help at his work place? If accused had the presence of mind to go and steal an injection at his work place to inject Dianarose, why would he not advise his colleagues at work of what had happened?

What completely destroys accused's credibility and his denial of foul play is his conduct after the baby had died. The accused admits Dianarose alleged foul play, was angry and pointing a finger at the accused. Now what did the accused do to disprove this or to resolve this dispute? He does not alert the police or his workmates let alone fellow tenants. Instead he nicodemously walked for about 2km with a dead baby and dumped it in a toilet. He continues to work as normal. How was he going to disprove Dianarose's allegations after destroying the evidence? As a nurse and midwife accused knows the importance of a post mortem examination where the cause of death is an issue. All accused could have simply done was to alert the police so that a post mortem is done to exonerate him by confirming his allegation that the umbilical cord strangled the child or that meconium choked the child. If not, his mere conduct of allowing a post mortem to be done would dispel notions of foul play. Instead, he hides or destroys the very evidence which would set him free.

To cap it all the accused is not a lay person. He is nurse and mid wife. He knows what is to be done when there is a still birth especially where only himself had been involved. The accused also knows how deceased newly born babies are disposed of. It can not be by throwing them secretly into a blair toilets!!

The accused's explanation for his conduct cannot possibly be true. In fact, is false. The only reasonable inference is that there was foul play in the death of the baby. Dianarose explains not only the nature of the foul play but identifies the responsible culprit. The accused confirms it buy his clearly inexplicable conduct.

Disposition

The now deceased, a baby girl was born alive. The accused took her life by suffocating her with cotton wool and strangling her. Thereafter the accused proceeded to destroy this evidence by disposing of her body in a pit latrine or toilet without advising the police or anyone.

The accused intended to kill the newly born baby. He proceeded to do so and brought the desired result. His story of the umbilical cord strangling the child and meconium choking the child is false.

Accordingly, the accused is found guilty of murder with actual intent.

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

MAWADZE J

National Prosecuting Authority, counsel for the state

Chirairo & Associates, for the accused pro deo counsel