

THE STATE

Versus

VUSUMUZI MOYO

IN THE HIGH COURT OF ZIMBABWE

DUBE-BANDA J with Assessors Mr T.E Ndlovu and Mr S.L Bazwi

HWANGE 16 & 17 MARCH 2022

Criminal trial

B. Tshabalala, for the State

Ms L. Mtombeni, for the accused

DUBE-BANDA J: The accused person appears before this court facing two counts. In count 1 he is charged with the crime of rape as defined in section 65 of the Criminal Law (Codification and Reform) Act [Chapter 9:23]. It being alleged that on the 18th January 2021, accused unlawfully had sexual intercourse with Lizzie Mpofu, a female person, without her consent knowing that she had not consented to it or realising that there is a risk or possibility that he had not consented to it.

In count 2 he is charged with the crime of murder as defined in section 47 of the Criminal Law (Codification and Reform) Act [Chapter 9:23]. It being alleged that on the 18 January 2021, accused unlawfully caused the death of Lizzie Mpofu (deceased) by striking her with a log four times on the head, with stones twice on the forehead, intending to kill her or realising that there was a real risk or possibility that his conduct may cause her death continued to engage in that conduct despite the risk or possibility.

The accused person was legally represented throughout the trial. He pleaded not guilty to count 1. In respect of count 2 he tendered a plea of guilty to a lesser crime of culpable homicide. Mr. *Tshabalala* counsel for the State informed this court that the State does not accept the limited plea tendered by the accused. The court then entered a plea of not guilty in respect of counts 1 and 2.

The State tendered into the record an outline of the State Case, which is before court and marked Annexure A. The accused tendered into the record an outline of his defence case, which is before court and marked Annexure B.

State case

At the commencement of trial the prosecutor produced a post mortem report compiled by Dr. Juana Rodriguez Gregori and it was received in evidence and is marked Exhibit 1. The prosecutor further produced the following real exhibits which were received in evidence: a stone with the following measurements: weight 2 kg; length 23cm; circumference 29cm, this is Exhibit 2; a stone with the following measurements: weight 500g; length 13cm; circumference 24cm, this is Exhibit 3; and five sticks marked Exhibit 4a to 4e: Exhibit 4a: weight 125g; length 40cm; circumference 8cm. Exhibit 4b weight 150g; length 41cm; circumference 8cm. Exhibit 4c weight 170g; length 41cm; circumference 8.5cm. Exhibit 4d weight 65g; length 21cm; circumference 8.5cm. Exhibit 4e weight 40g; length 22cm; circumference 6cm.

The prosecutor sought and obtained admissions from the accused in terms of section 314 of the Criminal Procedure & Evidence Act [*Chapter 9:07*] (CP & E Act). The admissions related to the evidence of Dr. Juana Rodriguez Gregori and Sergeant Ndlovu as is contained in the summary of the State Case.

The evidence Dr. Juana Rodriguez Gregori is that he is a Forensic Pathologist based United Bulawayo Hospitals. On the 21st January 2021, and during the course of his duties he examined the remains of the deceased and compiled his findings in a post mortem report number 56/55/21 (Exh. 1).

The evidence of Sergeant Ndlovu is that he is a member of the Zimbabwe Republic Police based at Inyathi. On the 20th January 2021, he attended a scene of crime in respect of this case. At the scene he observed the deceased's body lying on the ground, the face covered with a jacket. There were two blood stains stones by her side. The deceased's panties had been removed and were hanging on her left ankle. There were small stones scattered at the scene. The body of the deceased had cut wounds on the forehead and bruises at the back of the head.

The State called the oral evidence of three witnesses. We are going to briefly summarise their evidence. The first to testify was Sithabie Jele. She testified that accused was married to

her niece and deceased was her husband's niece. Accused and his wife had matrimonial problems, and on the 19th January 2021, they met at this witness's homestead to discuss their problems. In attendance at the meeting was accused, Ntandoyenkosi Ngwenya (for easy of reference I call her accused's wife), this witness and deceased. Accused wanted a reconciliation with his wife, he was however told that a reconciliation was not possible. The wife said she was now in a relationship with another man and was pregnant by that man, further she said accused was abusing her. Accused then said he wanted his *lobola* cattle returned to him, and his wife said he should go and discuss the issue of cattle with her parents. Accused said he would see what means he would use to get his *lobola* cattle returned to him. This witness and deceased cautioned accused and pointed out that his words were bad. Accused then said it was deceased who was misleading his wife. He had said this allegation before to this witness. This witness asked deceased about her alleged meddling in the affairs of accused and his wife, she denied that she was meddling. At the meeting deceased again disputed that she was meddling in the issues between accused and his wife. Accused then said she was not afraid of prison. Accused's wife said he must come and take custody of the children of the marriage, accused promised to do so the following day.

Accused was the first to leave this witness's homestead. Accused's wife and deceased left the homestead later. This witness accompanied them for about a kilometre and then she returned to her homestead. At around 11 pm she received a report that deceased had died.

In cross examination this witness was asked about how accused reacted when his wife told him that she was pregnant by another man. Accused is said to have said it does not matter, he still wanted a reconciliation. It is only when his wife insisted that a reconciliation was not possible, that accused demanded his *lobola* cattle. At this point accused became very angry. He was also very angry when he alleged that deceased was meddling in his affairs between him and his wife. Sithabile Jele was a very good witness, never stating more than she knew or believed. We accept her evidence without reservation.

The second witness to testify was Ntandoyenkosi Ngwenya (accused's wife). This witness testified that accused was her ex-husband. She initiated a separation with accused because he was very violent and abusive. She attended a meeting with accused at her aunts' homestead. She was accompanied by the deceased. She told accused that she was not interested in a reconciliation because he was abusive and she was also pregnant by another man. Accused

said he was not afraid of prison. Accused alleged that deceased was misleading this witness. In fact her evidence is that deceased was encouraging her to reconcile with the accused.

As she was walking with the deceased from the meeting and while on the way the accused came from behind and grabbed the deceased. He wrapped his hands around the deceased. Deceased made a distress call. Accused asked deceased what she was saying at the meeting. She did not see anyone throwing stones.

This witness ran away and reported to the people at the farm where she and deceased worked and stayed. This witness in the company of some man went to the place where she had left accused and deceased, looking for the deceased. After a search they found deceased dead. Her body was lying on the ground facing upwards. Her dress was lifted up, and her underwear had been removed. She had semen in her vagina. Her face was covered with a jacket that she was wearing before she died. They were some blood stained stones close to the body of the deceased. She identified Exhibits 2 and 3 as the stones that were close to the body of the deceased. This witness and others guarded the body the whole night until it was collected by the police. Accused was later arrested. Police came with accused to the scene, and he was asked to remove his trouser. The witness saw semen on head of his penis.

In cross examination she testified that as she ran she heard deceased saying to the accused, “do not kill me, and ask what you want, I will give you, instead of me dying leaving my children.” A suggestion was put to her that anyone, other than the accused could have raped the deceased, she insisted that it was the accused who raped the deceased. She did not see accused raping deceased, but she heard some noise suggesting that he was raping her, and she saw his penis with semen. She also saw semen on the vagina of the deceased. A suggestion was put to her that she could not tell that the semen on the vagina of the deceased was that of the accused. She said accused raped the deceased. It was put to this witness that accused grabbed deceased and asked her to repeat what she said and the meeting, because the two i.e. deceased and accused and exchanged insults at the meeting, accused wanted deceased to repeat those insults, this witness said she did not hear deceased insulting accused. At the meeting all she heard was deceased saying to accused “she could not be beaten by someone who wears sandals.” Ntandoyenkosi Ngwenya (accused’s wife) came across as a witness who had a reasonable recall of events. Her evidence was not challenged in any material respects and there is no reason not to accept it.

The third witness to testify was Victor Moyo. He testified that he worked at the same farm with the deceased and the accused's wife. On the 19th January 2021, Ntandoyenkosi Ngwenya (accused's wife) reported to him that she left accused holding deceased from behind. This witness with other two men ran to the place where he was told accused was left holding deceased. After searching for a while they saw the body of the deceased about 6 to 7 metres from the road. She was dead. She was naked. The face of her body was covered with a jacket. Deceased was struck with a stone and the area around the left eye and the left eye itself was detached or separated from the face.

The accused person was brought to the scene by the police. The police took the accused to some secluded place and asked him to remove his trousers. This witness did go to the place where accused was made to remove his trousers. He heard that semen was seen in the head of the penis of the accused. He did not see semen on the vagina of the deceased because he did not look at it.

In cross examination this witness testified that the deceased's body was found about 1km to 1.2 km from the farm compound. They went to the scene at around 7 pm. It took him and others about 30 minutes to 40 minutes to get to the scene of crime. It was suggested to him that with that period of 30 to 40 minutes anyone could have tampered with the body of the deceased, he disputed this suggestion saying no one could do such a thing. He is the one who removed the jacket covering the face of the deceased. The dress of the deceased was pulled up to just below the shoulders. The underwear was only on one leg, it was completely removed from the other leg. When accused was taken to a secluded place and asked to remove his trouser, Ntandoyenkosi Ngwenya was amongst the people who examined his penis. Asked by the court he said accused was arrested on the 20th January 2021, early morning before sunrise. He was then brought to the scene of crime between 1 O'clock and 2 O'clock. Mr Victor Moyo appeared to be a credible and honest witness. He was not challenged in cross-examination and we accept his account of what happened without qualification.

At the conclusion of the testimony of Victor Moyo the prosecution closed the State case.

Defence case

Accused testified in his defence. He testified that he admits that he had a fight with the deceased, but denies that he raped her. He blamed deceased for meddling in his affairs with his wife. He attended a meeting at the homestead of Sithabile Jele (1st State witness). When it became apparent that a reconciliation with his wife was impossible, he told the deceased that “he cannot be eaten watching like *matemba* fish.” He then demanded return of *lobola* he paid for his wife. The deceased and his wife said they was something they were planning against him, but they refused to disclose that “something.” The meeting ended on that note.

The accused testified that he followed deceased and his wife when they left Sithabile Jele’s homestead. He ran towards them. He wrapped his hands around deceased. He got hold of her and struck her by a stick. Deceased picked a stone and struck him on the knee. He attacked deceased because she insulted him. He was very angry and ended up assaulting the deceased in a manner he should not have done. When she was close he picked two stones and struck her and she died. He disputed that he raped deceased. He disputed that his trousers was removed and semen seen on the head of his penis.

In cross examination it was put to the accused that the post mortem report shows that deceased had a skull fracture, and it was suggested to him that he caused the injury, he agreed. He conceded that he used severe force in striking the deceased. Asked what he wanted to achieve by striking the deceased in the manner he did, his answer was he wanted to stop her from meddling in his affairs with his wife. When put to him that he wanted to kill the deceased, he said it was a mistake. He said he was very angry that deceased was planning something against him. It was put to the accused that deceased was last seen alive in his company, he agreed. He disputed that he raped deceased. The accused was not an honest and credible witness.

At the end of the testimony of the accused, the defence closed its case.

Analysis of evidence

The evidence shows that the accused had a matrimonial dispute with his wife. The two separated. The wife got employed at the farm and eventually got pregnant by another man. A meeting was arranged at Sithabile Jele’s homestead. Accused’s wife was accompanied to the meeting by the deceased. Accused blamed deceased of being a bad influence to his wife. In

the meeting accused said he wanted a reconciliation with his wife. The wife rejected a reconciliation on the basis that accused was abusive and she was also pregnant by another man. Accused was the first to leave the meeting. Deceased and accused' wife left and were accompanied by Sithabile Jele for about a 1km.

When deceased and accused's wife were on the way to their place of work and residence, accused emerged from behind and grabbed deceased, and asked her to repeat what she said at the meeting. The wife started running way, but she heard deceased pleading with the accused that he must not kill her, she could give him whatever he wanted, and she did not want to die because she had children.

The wife ran to the farm and reported to Victor Moyo that she left accused holding deceased. Victor Moyo and others, including the wife went to the scene. It took them between 30 minutes to 40 minutes to get to the scene of crime. After a search they found the body of the deceased. She was dead. The face covered with a jacket. Her body lay facing upwards. Her dress was lifted to below the shoulders. Her underwear was completely removed from one leg, and on the other leg removed to knee level. Her vagina had semen. Stones were seen next to the body. Exhibit 2 and 3 are some of the stones seen next to the body of the deceased.

Accused was arrested and taken to the scene of crime by the police. The police caused him to remove his trousers. The wife, who was the second State witness was present when this happened, and she observed accused penis and realised that it had semen on its head.

Count 1

In count one accused is charged with the crime of rape, it being alleged that he had unlawfully sexual intercourse with deceased without her consent knowing that she had not consented to it or realising that there is a risk or possibility that he had not consented to it. He denied the charge. In his defence outline he contends that when she left deceased she was unconscious and bleeding but with her clothes intact.

There is no direct evidence relating to who sexually violated the deceased. The evidence is circumstantial. When dealing with circumstantial evidence the enquiry before the court is whether on the evidence before it, it could reasonably come to a conclusion that it was indeed the accused who perpetrated the offence in question. See: *S v Nduna* 2011 (1) SACR 115

(SCA). This involves a determination of whether the two cardinal rules of logic in *R v Blom* 1939 AD had been satisfied: firstly, whether the inference sought to be drawn is consistent with all the proven facts because if not, then the inference cannot be drawn; and secondly, whether the proven facts are such that they exclude all other reasonable inferences from them save the one sought to be drawn. If the proved facts do not so exclude all other reasonable inferences, then there must be a doubt whether the inference sought to be drawn is correct.

The inference sought to be drawn is that accused raped the deceased before murdering her. The accused was the last to be with the deceased before she died. In his own evidence, before he started changing his version, he said when she was close he picked two stones and struck her and she died. So when he left deceased had died. Approximately an hour later, taking into account the time his wife took to go and report to Victor Moyo, and the approximately 30 minutes to 40 minutes that was taken to go the scene, deceased was found dead. The face covered with a jacket. Her body lay facing upwards. Her dress was lifted to below the shoulders. Her underwear was completely removed from one leg, and on the other leg removed to knee level. Her vagina had semen. Later accused was observed and it was seen that his penis had semen on its head. The pathologist who examined the body of the deceased observed a white secretion exit by the vagina similar to semen. In his evidence in chief accused said when he left deceased had died. Even in his defence outline he says when she left he left deceased was unconscious.

We find it so remote as to be absolutely impossible that some other person could have sexually violated the body of the deceased. In cross examination accused's wife testified that as she ran she heard deceased saying to the accused, "do not kill me, ask what you want, I will give you, instead of me dying leaving my children." This statement is telling and point to the guilty of the accused on this count of rape.

The inference sought to be drawn is that accused raped deceased. In the circumstances the proven facts are such that they exclude all other reasonable inferences from them save the one sought to be drawn. In *Miller v Minister of Pensions* [1947] ALL ER 372 at 373, it was stated thus:

Proof beyond reasonable doubt does mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence ‘of course it is possible, but not in the least probable,’ the case is proved beyond reasonable doubt, but nothing short of that will suffice.

In the English headnote in the matter of *S v Glegg* 1973 (1) SA 34 AD it is put this way:

The phrase “reasonable doubt” in the phrase “proof beyond reasonable doubt” cannot be precisely defined but it can well be said that it is a doubt which exists because of probabilities or possibilities which can be regarded as reasonable on the ground of generally accepted human knowledge and experience. Proof beyond reasonable doubt cannot be put on the same level as proof beyond the slightest doubt, because the *onus* of adducing proof as high as that would in practice lead to defeating the ends of criminal justice.

The deceased was last seen alive putting on her clothes. She was being held by the accused. By his own version she left her dead. To suggest that some other person might have found the body of the deceased and sexually violated it is just unreasonable speculation. Such speculation has no place in this court. The law would indeed fail to protect the community if it admitted such doubts and speculations to deflect the course of justice. The inference sought to be drawn is consistent with all the proven facts, and the proven facts are such that they exclude all other reasonable inferences from them save the one sought to be drawn. It is the accused who raped the deceased before he caused her death.

Count 2

In count 2 it is alleged that accused unlawfully caused the death of deceased by striking her with a log four times on the head, with stones twice on the forehead, intending to kill her or realising that there was a real risk or possibility that his conduct may cause her death continued to engage in that conduct despite the risk or possibility.

The evidence is that accused came running and grabbed deceased from behind. That is the last time deceased was seen alive. Later her body was found between 6 to 7 metres from the road. There were stones close to the body, Exhibit 2 and 3. Accused had left the scene. In

his evidence he contends that he followed deceased and his wife from behind. He ran towards them. He grabbed deceased. He got hold of her and struck her with a stick. Deceased picked a stone and struck him on the knee. When deceased was close he picked two stones and struck her and she died. He is trying to raise the defence of private defence. He repeated this falsehood in his defence outline. By his own version he was the aggressor and this defence is not available. He was not under any lawful attack. In any event his version is false because he grabbed deceased from behind, he was holding her, there is no way she could under those circumstances be able to pick a stone and throw it at him. She was helpless merely pleading for her life.

The evidence shows that the injuries sustained by the deceased were caused by the accused. The post mortem report shows that the injuries inflicted by the accused caused the death of the deceased. From the totality of the evidence led herein, we find that the State proved its case against the accused beyond reasonable doubt.

State counsel submitted that this court finds accused guilty of murder in terms of section 47(1) (a) of the Criminal Law (Codification and Reform Act) [Chapter 9:23]. For this court to return a verdict of murder with actual intent, we must be satisfied that the accused desired death, and that death was his aim and object or death was not his aim and object but in process of striking the deceased with stones and sticks he foresaw death as a substantially certain result of that activity and proceeded regardless as to whether death ensues. See: *S v Mugwanda* SC 215/01.

Accused executed a brutal attack on the deceased. In his defence outline he euphemistically says one of his stones connected with the head of the deceased and she fell to the ground. He then says he picked a log and hit deceased several times on the head. Realising that deceased lay unmoving on the ground, he fled from the scene. Striking a human being on the head with a log and stones, can only be with an intention to kill such a person. Exhibit 2 and 3 are huge stones, is no wonder that the deceased's skull was fractured. Accused conceded that he used severe force in striking deceased. The post mortem report confirms these serious injuries inflicted by the accused on the deceased. She died of subarachnoid haemorrhage, skull bones fracture and head trauma. The skull bones were fractured. This speaks to the weapons used, the part of the body targeted and force deployed.

The accused desired death, and death was his aim and object, and he achieved his aim and object which was the death of the deceased. We are satisfied on the evidence before us, that the accused is guilty of murder with actual intent.

Verdict

In the result having carefully all weighed all the evidence adduced in this trial, it is ordered that:

1. Count 1: Accused is found guilty of the crime of rape as defined in section 65 of the Criminal Law (Codification and Reform) Act [Chapter 9:23].
2. Count 2: Accused is found guilty of murder with actual intent as defined in terms section 47 (1) (a) of the Criminal Law (Codification & Reform Act) [*Chapter 9:23*].

Sentence

Mr *Moyo*, this court must now decide what sentence is appropriate for the offences for which you have been found guilty. To arrive at the appropriate sentence to be imposed, this court will look at your personal circumstances, take into account the nature of the offence you have been convicted of, and factor in the interests of society.

Your personal circumstances have been placed on record, are they are these: you were 36 years old when you committed these crimes. You are now 37 years old. You are not married, and you have three children. You are a substance farmer. You have no assets of value. You were in pre-trial custody for a period of approximately a year. It has been placed on record that you are remorseful.

The offences for which you have been convicted of are grave and serious. The prevalence of the crime of murder is such that cognisance is sometimes lost of the extreme consequences that flow from it. A life is ended. Not only is a life ended, but the lives of family and friends are irreparably altered and damaged. It is for this reason that the rule of law requires that the perpetrator should generally be visited with severe punishment.

We note that you committed a barbaric act of mindless brutality directed at a helpless and vulnerable woman. That the injuries you inflicted are severe is borne out by the post-mortem report. The interests of society is significantly implicated in a case in that involves violence of an extremely serious degree against a woman. Violence against woman is generally prevalent, society is entitled to expect of courts to impose sentences that send a message clearly, loudly and without ambiguity that violence against the weak and vulnerable in our society will not be tolerated. This court must deal effectively and severely with this kind of violence.

The evidence shows that an extraordinary degree of violence was deployed against a defenceless human being. The violence that preceded the killing of the deceased was such as to place this crime in the category of the most serious. It is difficult to conceive the degree of violence that you meted out against the deceased, and what the deceased experienced in her last moments. You even had audacity to rape her when she was most vulnerable, pleading for her life. You sexually violated the deceased in the most despicable manner.

What a horrible way to end the life of another human being. This court must say it, and say it strongly that such conduct will not be tolerated. This court has taken a stand, and it will continue taking a stand, against this wanton violence and destruction of life. Such conduct must be answered with appropriate and severe punishment.

The mitigating factors in your favour pale into insignificance when consideration is given to the nature of these crimes. You used rape as a weapon to dehumanize deceased, you attacked her humanity. You first reduced her to a non-human and then murdered her. You must be punished separately for the rape you committed.

We note that this court has found that count 2 was committed in aggravating circumstances, such circumstances are those that relate to count 1, this means the sentence in count 2 is influenced by count 1. There is somehow an overlapping and to some extent double punishment. Notwithstanding this you still have to be punished for two crimes you committed separately. You have no one to blame but yourself, you committed crimes of mindless brutality against another human being. That your wife had moved in with another man is no mitigation in this matter. That she was pregnant by another man is no mitigation. You continued blaming deceased for your problems, refusing to take responsibility for your own problems. In fact the

evidence is that she was encouraging your wife to reconcile with you. You have to be permanently removed from society. You still have to be punished for the rape you perpetrated on the deceased, and serve such sentence as a stand-alone sentence. Society needs effective protection from you.

Taking into account the facts of this case we are of the view that the following sentences will meet the justice of this case:

Count 1: Accused is sentenced to 20 years imprisonment.

Count 2: Accused is sentenced to life imprisonment.

*National Prosecuting Authority, state's legal practitioners
Dube & Nkala, accused's legal practitioners*