

THE STATE

Versus

CALVIN TSHUMA

IN THE HIGH COURT OF ZIMBABWE

MAKONESE J with Assessors Mr J. Ndubiwa & Mr J. L. M. Zulu

HWANGE 13 & 14 JUNE 2022

Criminal Trial

Ms M. Munsaka for the state

Ms L. Mthombeni for the accused

MAKONESE J:

Late in the afternoon on the 21st of May 2021 the 16 year old accused followed the 9 year old deceased who was on her way home from Kwesengulube Primary School in Nkayi. The deceased was in grade 3. Accused lured the deceased into a bushy area after offering her jiggies corn snacks. Accused had sexual intercourse with the deceased without her consent before choking her and strangling her to death. At around 20:00 hours that same evening the deceased's body was discovered in a bush. Deceased's lifeless body was found with her face facing upwards. Her dress was pulled up to waist level. Her black skin tights were torn in the middle. Her legs were spread apart. There were signs that she had been raped before she was killed.

Accused pleads guilty to one count of rape. He denies the charge of murder as defined in terms of s 47 (1) (a) of the Criminal Law Codification and Reform Act. (Chapter 9:23). Accused tendered a plea of guilty to the lesser offence of culpable homicide. The state rejected the limited plea. The matter proceeded to trial. The state produced a summary of the state case. It now forms part of the record. The accused tendered a defence outline wherein he pleaded guilty to one count of rape. He denied raping the deceased twice. Accused admitted causing the death of the deceased unintentionally. He admitted to the negligent killing of the deceased. Accused avers that he met the deceased on the day in question on her way from school. He was coming from the shops. Accused says he offered the deceased jiggies corn snacks and thereafter asked her to go with him into the bushes so that they could have sexual intercourse. Accused confirms that deceased did not consent to the sexual act.

Accused states that he had had sexual intercourse before with his maternal aunt. Accused had seen his aunt have sexual intercourse with boyfriends several times before this unfortunate encounter with the deceased. Accused denies the charge of murder. He avers that the deceased refused to go with him into the bush. He pulled and dragged her into the bushes. He raped her once. Accused avers that he only remembers beginning to climax and thereafter realizing that he had been gripping the deceased by the neck and had strangled her. Accused states that he was shocked at his actions, fled the scene and went home to inform Sikhulile Maphosa on what had transpired.

Dr S. Pesanayi is a pathologist based at United Bulawayo Hospitals. On the 24th of May 2021 he examined the remains of the deceased and compiled his findings in a post mortem report filed under report number 494/431/21. The cause of death is listed as:

1. Asphyxia
2. Manual strangulation

On internal examination the report revealed multiple abrasions on the right side and left of the neck. There were bruises on the cheeks, nose and mouth. There were signs of subconjunctival haemorrhage. On generative organs there was blood on the vagina. The hymen was not present indicating that penetration had been effected. The vagina was bruised with lacerations.

THE STATE CASE

The state opened its case by leading evidence from Mcinisi Nkiwane. He resides in Huba Village, Chief Madliwa, in Nkayi. Deceased was his neighbour. The deceased was a daughter to Ready Ncube. On the day in question the witness with other villagers traced the shoe prints of the deceased and the accused. The deceased had earlier in the day been reported missing. Two positions where there were signs of a struggle were observed. The witness was present when the deceased's body was discovered lying dead facing upwards. The witness with other members of the search party tracked the accused's shoe prints to Sikhulile Maphosa's homestead where the accused was residing. The accused was found sleeping under a mango tree. Accused admitted killing the deceased. When he was confronted he uttered the following words:

“Do not assault me. I am the one who killed the child.”

The witness was subjected to extensive cross-examination by defence counsel. The witness was forthright in his responses. He was repeatedly asked to describe what he observed when the body of the deceased was discovered. The witness insisted that accused had told him and other villagers that he had raped the young girl twice before strangling her. The witness did not however, provide clear and credible evidence that the deceased had been raped more than once. On the whole, the evidence of this witness was credible and consistent in all material respects. We have no hesitation in accepting the evidence of this witness as an accurate reflection of what transpired on the fateful day.

Before the close of the state case, counsel for the state *Ms Munsaka*, applied to have the evidence of the under listed state witnesses as it appears in the summary of the state case admitted by way of formal admissions in terms of s314 of the Criminal Procedure and Evidence Act (Chapter 9:07), namely:

- (a) Ready Ncube
- (b) Wellington Ndlovu
- (c) Constable Muchinga
- (d) Dr S. Pesanayi

The evidence of these witnesses was admitted into the record by consent. The evidence was largely common cause and therefore not contested.

The state closed its case without adducing further evidence.

DEFENCE CASE

The accused, Calvin Tshuma, gave evidence under oath. He testified that at the time of the commission of the offence he was 16 years old. He has just turned 17 years. Accused stuck to his defence outline. He asserted that he had followed the deceased as she was on her way home from school. He led her into a bushy area after offering her some jiggies snacks. He pulled her into the bushes where he raped her once. As he raped the deceased, he firmly held her around the neck with both hands. Accused testified that he had killed the deceased because he did not want her to report the rape. From accused's own words, his motivation for strangling the deceased was clear. The intention to kill is established by accused's own sworn testimony. The attempt to raise the defence of diminished responsibility was only a red-herring introduced by the defence to obfuscate the issues. Accused says that he panicked

after realizing that he had killed the deceased. He demonstrated how he strangled the deceased. Accused was clearly aware of his objectives. His initial objective was to have sexual intercourse with the deceased. Having achieved his mission he proceeded to choke and kill the deceased. Under cross-examination accused was asked why he killed the deceased. His response was as follows:

“I was afraid that she was going to report me.”

Accused’s response was repeated when the court put the same question to him. Accused was not a credible witness. He evaded questions and in some instances blamed “*evil spirits*” for his conduct.

WETHER THE STATE PROVED ITS CASE BEYOND REASONABLE DOUBT

Count one (rape)

No issues arose out of the first count. Accused admitted that he had sexual intercourse without the minor’s consent once. He denied that he raped her twice. The guilt of the accused on the first count is therefore established by accused’s own admission.

Count 2 (rape)

The accused denies that he raped the deceased twice. He indicated that he made no confession to the state witnesses about the second count of rape. The state has conceded that there is no direct evidence that deceased was raped twice. The state concedes that apart from what the state witnesses allege was a confession by the accused, there is no other independent evidence *aliunde* to prove all the essential elements in count two. Accused is therefore entitled to an acquittal in respect of the second count.

Count 3 (murder)

The evidence on this count is common cause. Accused raped the complainant after luring her into a bushy area. He realized that deceased could report the matter. Accused did want the deceased to reveal the sordid details about the rape. Accused made a conscious decision to end the life of the young girl by throttling her. Accused was fully aware of the consequences of his conduct. He had the requisite *mens rea* to bring about the death of the deceased. *Ms Mthombeni*, appearing, for the accused was constrained to concede that accused had by his

own words admitted to causing the death of the deceased. The accused's motive for killing the deceased was so that she would not report the matter.

The state argued that the accused must be found guilty of murder with actual intent. The defence contends that the appropriate verdict is murder with constructive intent. In *Mugwanda v The State* SC-19-02, the learned Chief Justice (Chidyausiku CJ) held as follows:

Actual intent

- (a) Accused desires death. Death is the aim and object; or
- (b) Death is not the aim and object but in the process of engaging in some activity foresees death as a substantially certain result of that activity and proceeds regardless as to whether the consequence ensues.

The learned judge went on to discuss the requirements of legal intention which involved-

- (a) Subjective judgment
- (b) As to possibility not probability
- (c) Recklessness.

I must at this stage draw both counsel to the case of *Mapfoche v the State* SC-84-21, a Supreme Court decision by MAKARAU (JA) (as she then was), where at page 9 of the cyclostyled judgment she held as follows:

“The appellant and his co-accused were charged with murder as defined in section 47 (1) of the Criminal Law (Codification and Reform) Act, (Chapter 9:23). This section defined murder in the following terms:

“47. Murder

(1) Any person who causes the death of another person-

- (a) intending to kill other person; or*
- (b) realising that there is a real risk or possibility that his or her conduct may cause death, and continues to engage in that conduct despite the risk or possibility;*

shall be guilty of murder.

Thus, under this section, it is not necessary, as was the position under the common law, to find the accused guilty of murder with either actual intent or with constructive intent. Put differently, it is not necessary under the Code to specify that the accused has been convicted under 47 (1) (a) or (b). Killing or causing the death of another person with either of the two intentions is murder as defined by that section ...”

In the circumstances of the case at hand, the accused admitted strangling the deceased. It matters not whether he had actual or constructive intent to kill. On the evidence on record, particularly by the accused, that he killed the deceased to prevent her from making a report, the accused must be convicted of murder as defined in s 47(1) (a) of the Criminal Code.

In the result and accordingly;

- (a) Accused is found guilty as charged in count one (rape)
- (b) Accused is found not guilty on count two (rape)
- (c) Accused is found guilty of murder as defined in s 47 (1) (a) of the Code.

Sentence

The accused has been convicted of one count of rape and one count of murder. The offences are very serious. The accused is a sexual predator who was on the prowl and after a young girl aged 9 years. Accused lured the young girl with jiggies in order to violate her and rape her in the most brutal and vile manner. Accused confessed that at his age he had had previous sexual encounters with his aunt. His own conduct depicts that of a young juvenile with experience in sexual matters. The suggestion that accused was being sexually abused by his aunt cannot withstand scrutiny. If that were the case, accused would have reported the alleged sexual abuse. It is clear that accused was a willing partner in these previous sexual activities. Accused’s desire to have sexual intercourse with a young girl of 9 years was motivated by his desire to quench his sexual needs. Having succeeded on the first and primary objective, accused went a gear further and decided to end the life of the young girl by throttling her. His desire was to silence her permanently. We reject the notion that accused’s conduct reflected thoughtlessness. Instead, accused must be seen as a manipulative and callous killer. Accused has to be treated as an adult. Where a young offender acts with courage and determination not consistent with youthfulness the court is entitled to treat him as an adult. This view finds support in the case of *Cuthbert Mpofu v The State* SC-63/13. In

that matter an 18 year old youthful offender was convicted of murdering a 10 year old female juvenile. The appellant had been sentenced to death. On appeal, MALABA (DCJ) (as he then was), stated as follows;

“It had been suggested in the court a quo which argument was not pursued by Miss Ncube on appeal that the youthfulness of the appellant at the age of 18 years was an extenuating circumstance. In dismissing the argument the court a quo correctly observed that the facts surrounding the commission of the offence show an element of courage and wickedness on the part of the appellant wholly inconsistent with youthful behaviour. The court shares the same view.”

In assessing an appropriate sentence the court shall take into account that accused is a first offender. He was aged 16 years at the time of the offence. Accused has shown no flicker of remorse or contrition. He chose to blame “evil spirits” for his conduct. Accused has spent a period of one year and some weeks in remand prison awaiting trial. To a certain degree, he has served a portion of his sentence. Accused has pleaded guilty to lesser charge of culpable homicide. He has admitted causing the death of the deceased. Accused must be credited for that.

We have had sight of the probation officer’s report which suggests that accused is a good candidate for placement in a Training Institute in terms of s 351 (2) (d) of the Criminal Procedure and Evidence Act. We do not accept the recommendation. The murder was committed in aggravating circumstances. The sentence has been codified as provided under s47 (4) (a) of the Criminal Code. The minimum sentence for such a murder is 20 years imprisonment. The murder was committed in pursuance of a rape. The victim was a minor aged 9 years. I agree with state counsel that there is need to protect the girl child. The courts will lose public trust if inappropriate sentences are imposed for such serious offences.

In the result, the following is deemed an appropriate sentence.

“Count One (rape)	-	8 years imprisonment
Count Three (Murder)	-	20 years imprisonment

The sentences shall run consecutively.”

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