

THE STATE
versus
BRIAN CHIKANYA

HIGH COURT OF ZIMBABWE
FOROMA J
HARARE, 1, 2 & 3 October 2018, 10, 18, & 29 March & 1 April 2022

Criminal Trial

F Zakaria , for the state
E Chimombe, for the accused

FOROMA J: the accused was charged with the murder of Sarah Munhu on the 10th of August 2017 at Ushongani Village Chief Musana Bindura by assaulting her all over her body using a chisel aluminum pot and a wooden stool. The State alleges that the accused intended to kill the deceased or realized that there was a real risk or possibility that his assault of the deceased might cause death but continued with the assault thereby causing the deceased's death.

Accused pleaded not guilty to the charge and claimed that he fought the deceased his girlfriend who reacted violently disputed the allegations of improper association with another man which accused had made against her resulting in the two getting involved in a fight during which he used a wooden stool aluminum pot and a chisel. The alleged fight ended with the deceased confessing to the improper association and an apology to accused. Accused claims that after the apology the deceased left for her friend's homestead one Mai Simon (Simon's Mother) and he went to sleep and only discovered the following morning that deceased had been found dead along the road that passed through the area.

That deceased and accused and accused were in some love relationship is common cause. However it is significant to note that the accused who frequented the deceased's residence was regarded as a family friend in particular by deceased's children who did not know of the intricate love relationship between accused and their mother. For this reason when the deceased's son Martin Nyashanu and daughter Anesu Nyashanu learnt about their mother's death through the

accused who tactfully brought both of them to the road side where deceased's body had been found without breaking the news of their mother's demise they never suspected the deceased to be the culprit, Martin and Anesu only were informed by the police at Manhenga Police Base where the accused was accused of the murder of the deceased.

The State led evidence from Constable Mangidza. As will be observed from a summary of her evidence she was the State's star key witness. She was a member of the ZRP attached to Manhenga Police Base and the attending detail. Constable Mangidza was assigned to attend the report of a scene of a deceased female adult found lying on the road side which report had been made to the Manhenga Police Base. She attended the scene with one Constable Ndlovu. On arrival at the scene she found a Police Constable Madyira who narrated the circumstances of the matter as far as he had gathered and she was told that deceased's son Martin Nyashanu was in attendance. Martin Nyashanu identified the deceased as his mother by the name Sarah Munhu.

She observed that the deceased was lying on her back with her head and face covered with a purple cloth. Deceased was wearing a pair of black plastic sandark sandals and a pair of black and white socks. She also observed that the deceased's dress was neatly tucked underneath her thighs. The area immediately around the deceased's body did not exhibit any signs of struggle. She established from Martin Nyashanu that his sister was last with the deceased at the deceased's homestead the previous day. The witness observed on the deceased's body and noted the following injury- a deep cut on the lower libra of the left leg. There was no blood next to deceased's clothes were not blood stained. Once Constable Mangidza heard that the deceased was last seen alive at her residence the previous day. She decided to visit deceased's homestead to establish any leads she could get. At deceased's home Anesu Nyashanu informed her that deceased had left home wearing a pair of black sandark shoes and a pair of stockings. Anesu indicated to Constable Mangidza the direct ion her mother took as she left the homestead and showed the witness the deceased's foot prints in the direction deceased had taken which foot prints matched the deceased's shoe prints that deceased had been observed wearing where her body was found. In her testimony Constable Mangidza traced the footprints which led her to the accused's bedroom. The witness noted that there were no shoes leaving the said room. From this information gathered she started suspecting the accused of the murder of deceased. On her return to the road side where deceased's body had been located she found the accused present and noted that he left the place returning a

while later with a change of clothes. She narrated her suspicious to Constable Ndlovu. The witness observed the accused trying to board a commuter vehicle (kombi) and stopped him. As Martin Nyashanu had related to Constable Mangidza how the accused had get them to the place where his mother's body had been found she decided on some clear reason for preventing the accused leaving the scene. She decided to tell him that since he had broken the news to deceased's children he had to accompany the children to the police at Manhenga where they were required to give a statement and accused obliged. Without so much as suspecting anything amiss. Constable Mangidza then consulted Constable Shoko at Manhenga Police base and arranged that he arrange to arrest accused whom she was sending with the deceased's children as she considered him to be the prime suspect and her reasons for so saying. The witness's plan to get the accused arrested worked perfecting and accused and the deceased's children (who until then were on the dark as to their mother's assailant) boarded a kombi that passed through the scene to go to Manhenga Police base accompanied by two police details who had since arrived at the scene. On arrival at Manhenga accused was arrested and charged with the murder of the deceased.

Accused was taken back to the scene where Constable Mangidza and other police details interrogated him before taking the accused to his homestead. On being interrogated accused admitted that he had assaulted the deceased after some misunderstanding. On being or asked why he had assaulted the deceased accused replied that he had learnt that she was developing an interest in other men and that had not gone down well with him. The witness asked accused to take them where the incident had taken place which the accused voluntarily offered to do.

At the accused's homestead Constable Mangidza asked the accused to open his bedroom and on entering the room she noticed all the walls blood stained. She also noticed blooded stained blue jean trousers and petticoat batch towel white T-shirt black and white small blanket. On further interrogation accused revealed that as he was fighting the deceased he had used a stool which broke and that he also used a chisel and an aluminum pot which items accused handed up to the police.

When asked how the walls got blood stained the accused told the police that in the early stages of the fight he had smashing deceased's head on the wall although he could not remember how many times he did so. Constable Mangidza further testified that she observed that the floor had been cleaned as there was stagnant water in the room which had not dried up. From the bedroom the witness informed the accused that she wanted to search the environment. Before

going far the accused called the witness and offered to make a clean breast by revealing some of the material used. Accused then took the witness to the kitchen where he showed the witness the following:

- 1) one by two in one big blanket
- 2) a bed cover
- 3) a pink female panty and;
- 4) a red wallet

Both blankets were wet and blood stained. These were recovered as exhibits. The witness asked accused as to ownership of items of clothing and accused as to ownership of items of clothing and accused indicated that the female panty belonged to the deceased and so did the wallet. When the witness asked why the accused had hidden these items accused replied that he had thought he would succeed. It is important to note that when Mangidza inspected the deceased's body she found a lot of wounds some of which the accused could not explain how they were inflicted. Constable Mangidza testified that she collected all exhibits which she handed to the police details going to the main station as she, was posted at Manhenga Police Base. Worth nothing too is that some of the wounds she had observed on inspecting the deceased's body were confirmed by the pathologist who conducted an autopsy on the remains of the deceased and these include the broken right hand, the broken tibia of the left leg.

When asked to comment on the accused's assertion that after the fight the deceased visited her friend (Simon's mother). The witness pointed out that the foot/shoe prints she observed showed that the deceased entered the accused's bedroom but did not come out. The area around accused's homestead was described as not covered with grass or loan and so the shoe prints were readily visible. It is also worth noting that the witness remarked that the deceased had a broken leg and arm and could not have washed from accused's residence to the road where her body was found. It is also significant to note that the witness did not find any of the wounds on the deceased to be bleeding and she considered that either the wounds had been washed or wiped as she would have expected the type of wound inflicted on deceased's body to bleed. It was the witness' understanding that when accused indicated that the reason he had hidden the items he had used was that he had hoped he could successfully conceal evidence of his involvement in the death of

the deceased. Although the witness observed that the deceased was wearing a male under pant she had not asked the accused as to whose panty the deceased was wearing.

This witness largely stuck to her evidence and was not shaken under cross examination. Through this witness the following exhibits were produced:

- 1) home-made chisel
- 2) broken wooden chair pieces
- 3) deformed aluminum pot
- 4) a brown floral blanket
- 5) a small grey and white striped blanket
- 6) peach towel with blood stains
- 7) a peach female panty
- 8) cream petticoat with blood stains
- 9) red female purse
- 10) white T shirt

Items (4), (5), (6), (7) and 8 belonged to the deceased and the rest belonged to accused. The said exhibits which were recovered from the accused by the witness are corroborative of the witness' testimony and were admitted as evidence with the constant of the accused. The only other exhibits not produced through Constable Mangidza were the post mortem report and the accused's confirmed warned and cautioned statement.

The court has deliberately not followed the order the witness were called. This is in consideration of the weight of evidence adduced from the other witness in view of such evidence not having been challenged by the accused. For the value of completeness the testimony of the other witness is summarized below.

Killen Musesani chronicled how early in the morning on 11 August (about 7:00 a.m.) he saw the deceased lying on her back with her face covered with a printed cloth wearing sandak shoes with a white sole and a black top. She was also wearing a brownish orange dress. He could not identify the deceased at that stage and all he was clear about is that the body was motionless suggesting the person was dead. He is the one who reported the matter to Constable Shoko at Manhanga Police Base. When the deceased was identified he realized he knew her as the person

he used to see selling pots made by tin smiths. When he saw the deceased's body lying on the road side he did not get close to it. This evidence was largely not challenged.

Martin Nyashanu was deceased's son who used to assist accused with some odd construction jobs. He considered accused as his friend. He described events of 10 August when he and the accused went together to Manhenga shops to purchase some roofing sheets for a rabbit cage they intended to construct. Accused and himself returned home about 8:00 p.m. and dropped the sheets before going to sleep. He also testified that the following morning about 6:00 a.m. the accused arrived at their homestead crying and suggesting that he prepare to go to Domboshava where the witness's father was but the accused did not disclose why he had to go to Domboshava. He invited him and Anesu his sister to come with him to the road without disclosing that their mother had been found dead there. When they got to the road side he discovered that his mother no more. The whole incident was very difficult for him to comprehend. He fell asleep and at one point that morning Constable Mangidza woke him up and told him he had to go to the police base to give a statement.

He was accompanied to Manhenga Police Base by a police detail called Madyiwa. Accused and Martin's sister Anesu went with him to Manhenga Police Base using a commuter vehicle and it was at Manhenga Police Base where they gathered from police that accused had killed his mother as they arrested him. Martin also testified that as the police attested accused they removed his shirt exposing some fresh and old wounds on accused's body. When police asked accused about the fresh wounds on his body he referred them to the witness who denied any knowledge about them. The witness did not describe any other wounds he observed on accused's body except marks of teeth bite on his shoulder and bruised hands.

Anesu Nyashanu testified under oath after Martin Nyashanu. Her evidence was that accused was friends with her brother Martin with whom he used to do some construction work and the accused was affectionately addressed as Matemayi. She testified that on 10 August 2017 her mother (deceased) left home at about 6:00 p.m. purportedly going to attend an All Night Church Prayer Meeting and indicated she would pass through Simon's mother's evidence so that they would go together. She also testified that the deceased was a regular church goer. The evening Martha arrived and asked after their mother before they went to sleep. She further testified that the following morning accused arrived at their residence at about 6:00 a.m. and asked after their

and she told him that she had gone to church the previous evening where upon he invited them to come with him to the road and when they asked as to why they had to come up with him he started crying crocodile tears. Accused went ahead of her with Martin and when she followed she found people gathered. She was counselled by the elderly women who suggested she go back home.

Around 9:00 a.m. a woman police detail arrived at the witness homestead and made enquiries concerning her mother. She was asked when her mother left home and what clothes she was putting on and the type of shoes she was wearing and what direction she had taken. The woman police detail felt the homestead trailing the direction her mother had taken. When she went back to the road side police asked her and Martin to go to Manhenga Police Base and at Manhenga Base the accused was arrested. At Manhenga Police base Constable Shoko told them Martin and her that the accused was the one who killed their mother that was the first time she got to know about his involvement in the death of her mother. She further testified that whole at Manhenga Police Base accused was asked to remove his shirt. When accused removed his shirt she saw fresh teeth bite marks on accused's shoulder. Whilst still at the Manhenga she was asked if there was a man who used to frequent their home and that she had replied that she had replied that she did not know any. During cross examination the witness was asked if the accused had any fresh wound on his body and she replied that apart from the teeth bite marks accused had fresh bruises on his back. She did not know that her mother was in a relationship with the accused when she and her sibling regarded as a family friend. She was also able to identify some of the exhibits produced as belonging to her mother.

The other witness who gave oral testimony was Assistant Inspector Fungai Masoja. His evidence was largely formal. However, he also testified that he interviewed a woman called Sarudzai Chisvo (Mai Simon) to verify whether the deceased had been to her residence the evening of 10 August 2017 and she indicated that the deceased had not arrived at her homestead the previous night that is the night of the 10th of August 2017 and when accused was confronted with this I response by Sarudzai Chisvo the accused did not respond. It is important to note all this stage that police had been inclined to record a statement from Sarudzai Chisvo but she declined to give statements. The witness also testified that the accused in his defence said he fought with deceased over infidelity issues. According to this witness Accused had also indicated that the he had been intimate with deceased before the misunderstanding. The witness further testified that

the accused whilst accepting that the deceased was found wearing his male underwear he did not know why deceased was wearing his panty.

After the state had closed case the accused opened his defence by taking the witness stand. He gave evidence under oath. He testified that he had fought the deceased over a dispute arising from his complainant and accusation that she was seeing other man and yet he was providing for her adequately. Accused maintained his defence online in detail and the highlights of his evidence was that:

- (i) He passed through deceased's residence in the company. Of Martin Nyashanu with when he had gone to spent day at Manhenga where he had a building assignment. He passed through deceased's homestead and dropped some items they had bought.
- (ii) When he arrived at deceased's residence, she (deceased was in the company of her children).
- (iii) Around 4.00 pm deceased gave him some 750ml bottle of illicit brews called Kanha and urged him not to delay in getting home as she was going to stand night together with him.
- (iv) Deceased gave the accused some money to buy opaque beer and cold drink which she urged him to bring home so that they could spent quality time drinking and he obliged.
- (v) When he got to his residence him around 7.00 pm found deceased listening to the radio.
- (vi) When he got home, he gave the deceased have cold drink and had some discussion whole in the blankets.
- (vii) When accused raised the issue of infidelity namely that he was not happy that deceased was having other they both got angry and accused slapped the deceased once whole in the blankets and this resulted in fight.
- (viii) In the fight accused threw an old broken stool at the deceased which broke to pieces and the deceased used some of the broken pieces of the stool to assault accused.
- (ix) During the fight a chisel was used and also an aluminium pot.

- (x) The fight ended with deceased confessing to have infidelity and apologies to the accused.
- (xi) When the fight stopped the deceased left deceased bedroom saying she was going to her friends that is Simon's mother learning accused who immediately feel asleep. He woke up in the morning to find deceased had not come back.
- (xii) On hearing about a woman found at the road side he realized that it was deceased and he decided to alert deceased's children tactfully to avoid the wholly trauma.
- (xiii) Accused blamed his savage attack of his girlfriend (deceased) to the consumption of alcohol even though he arrested that he was not so drunk as not to know what he was doing. He insisted that the deceased did not die as a result of the injuries sustained during his fight with her.
- (xiv) Accused admitted to having attempted to conceal any tell-tale signs of a bloody encounter with deceased as he feared he would be accused of having caused her death.

Analysis of Evidence

It is common cause that:

- (i) Accused and the deceased had an altercation on the night of the 10th of August 2017 which culminated in the accused assaulting the deceased using an old stool which broke to pieces and a chisel and an aluminum pot.
- (ii) The deceased bled profusely from injuries she sustained from the assault by the accused as evidenced by blood stained walls of accused's bedroom walls and deceased's blankets which were also blood stained.
- (iii) The accused attempted to conceal evidence of a bloody assault of the deceased fearing that he might be accused of killing her.
- (iv) The post mortem report gives the cause of deceased's death as (a) severe celebrate
 - (b) Subdural hematoma
 - (c) Head trauma due to blunt trauma

The post mortem report also highlights:

- (d) Hepatic laudation and
- (e) Multiple trauma and bones fracture the whole body.
- (v) More specifically the post mortem report details in para(s) 15-17 bruised and multiple abrasions on thorax abdomen upper and lower limbs face plenty on the back and on buttocks.

Bruised abrasions and small multiple wounds the whole body fracture and deformity of left leg, deformity and open fracture with wound of right arm swollen eyes and checks no frictional injuries on her body.”

Whilst Accused admits that he used the stool and aluminum pot and chisel he snatched the chisel from deceased and assaulted deceased with it and also policed her with it.

At the time the deceased’s body was located and inspected by the police constable Mangidza zone of the deceased’s severely injured body as described in the post mortem report was bleeding nor showed signs that they had bled.

From the foregoing common cause facts the questions that arise is

- (i) Did the deceased leave accused’s bedroom alive?

The accused claims that deceased told him she was leaving for Sarudzai Chisvo (Mai Simon’s place and left him sleeping in his bed room. It is highly unlikely that the deceased ever left the accused’s bedroom alive given the nature of injuries she has sustained from admitted assaults by the deceased in particular the fractured and deformed leg and right hand. In any event the investigating officer testified that Sarudzai Chisvo denied that the deceased arrived at her residence on the night of the 10th August 2017.

Given the cause of death as per the post-mortem and the injuries detailed in the post-mortem report it is impossible that the deceased could even stand up once the fractures to the leg had been inflicted. The cause finds that on his own admission the accused sought to conceal all evidence as that would lead to the police suspecting that it was him who had murdered the deceased. Accused made every effort to dissonate himself from having had any contact with deceased the previous night as that would have made him the prime suspect.

The fact that when deceased body was found her wounds did not show any signs of having bled leads to one inescapable conclusion namely that the deceased's body had been washed before it was carried and left by the road side. If the accused did not leave the accused's bedroom alive it is beyond any doubt that the accused can only be the one who either carefully nipped the deceased's wounds or washed them and cleaned his bedroom before he carried the corpse to the roadside so that there would be no trace or link with his dastardly act. The court dismisses as a recent fabrication the accused's explanation that there was a fight between the deceased and himself. Any wounds observed on him may have been caused by the deceased as she desperately sought to defend herself from the savage assault by the accused.

What was the effect of any consumption of alcohol by the accused. Accused if affected by any alcohol intake was victim of voluntary intoxication which cannot avail him as a defence to a murder charge. In any event accused was not intoxicated as not to know what he was doing. He says so himself.

The savage attack as is apparent from the post mortem report betrays a recklessness as to the foreseeable probable consequences of death to the victim.

The court dismisses the accused's explanation for the savage attack. He after all did not catch the deceased with a man *infragant decto* to justify any possible segregation provocation. In any event accused confirmed.

Warned and cautioned statement is a clear confession of the murder of deceased. He says:

"I do admit assaulting Sarah Munhu until she died.... after supper when we were about to sleep I advised her why she was having an affair with the man I had seen her with. She denied having an affair with that man. I slapped her once on the face. We both stood up. She pushed me and I fell down. I took a wooden stool which was nearby and I hit her twice with it and it broke to pieces. I did not see where I hit her with the stool during the assault. She picked a piece of the stool and hit me with it on the back. I took a pot hit her twice with it again and she fell down. Since I was angry, I took a chiesel and stabbed her all over her body."

This statement was recorded on the 14th August 2017 about 4 days after the death of the deceased.

In that statement there is no mention of any intimacy before the bloody assault. Neither does the accused mention having consumed substantial amounts of alcohol prior to the incident. All he says is that after work he went home and found the now deceased there. Accused omitted to mention his intake of alcohol in his warned and cautioned statement and over played same in his defence outline – this despite washing in the confirmed warned and cautioned statement that

his failure to mention any facts relevant to his defence may result in the court drawing inferences against him.

It is clear that the evidence of Constable Mangidza is a truthful reflection of what the accused related when confronted by police at a time he had not given consideration to what story to tender if he got caught. He was proverbially “caught napping”. The court is satisfied that Constable Mangidza was a credible witness and in any event the accused voluntarily gave her corroborated her evidence in all material respects. That he said he had tried to conceal evidence in the hope that he might succeed in misleading any one inclined to suspect him of the murder of the deceased can be well be understood. In the circumstances the court rejects the accused’s evidence where it materially contradicts what he told Constable Mangidza as detailed in Constable Mangidza’s testimony.

Disposition

Considering the court’s finding that the accused’s assault of the deceased was so vicious and brutal as confirmed by the post mortem report the court is satisfied that the deceased died as a result of such assault. This is confirmed by accused’s own admission in the confirmed warned and cautioned statement where he indicates that he assaulted the deceased until she died.

Accused was quite reckless in his assault of the accused. The court accordingly finds the accused guilty of murder with constructive intent.

The offender has been convicted of murdering the deceased Sarah Munhu as defined in s 47(1) (b) of the Criminal Law (Codification and Reform) Act [*Chapter 9:07*].

The defence submitted that the offender committed a crime of passion by which is meant that he was moved by jealousy as he suspected the deceased to be cheating on him. It is clear though that the offender was the one who assaulted the deceased first by slapping deceased in the face when deceased denied his allegation that she was having an affair with another man.

The court considers that the offender was totally unjustified in assaulting the deceased in the first place. The man that the offender suspected deceased to be having an affair with was not identified. He did not claim that he caught deceased *in flagrante delicto*. Considering that deceased used to sell illicit brew at her residence it surely must have been obvious that not every male patron found at the deceased’s residence could be her boyfriend. The offender brutally assaulted the deceased until she died that night. It is difficult to understand why the offender so violently

attacked his girl-friend. The post mortem report describes the injuries in detail and the pathologist made an overall comment that the deceased body displayed multiple trauma and bone fractures the whole body. The offender admits that he hit the deceased with a wooden stool which broke into pieces and took a pot and hit the deceased with it and she fell down. He also took a chisel and stabbed her all over the body. What aggravates the offence is that after killing the deceased the offender sought to conceal the dastardly act by taking the corpse to the road side where it was found the following morning by a passer-by. The court does not believe that the deceased confessed to a concurrent relationship with another man as suggested by the offender which suggestion the court dismisses as spiteful. As a result of the brutal attack of the deceased and resultant death a precious and innocent life was needlessly lost. Every person has a right to the God given gift of life which the constitution of this country considers to be a fundamental human right. Courts have an obligation to protect every person's right to life and will always guard jealously the said right.

A message should be sent to the offender and any and like reminded that violence in this day and age of civilised human behaviour will not be tolerated no matter the circumstances. People should always realise that violence as a resort to self-help is a risk that can lead to disastrous consequences often resulting to loss of life and limb. Crimes of passion are occurring much too often and are evidence of domestic violence which courts will always frown upon. Life lost through passion related violence is irreplaceable. Near and dear ones deprived of the company of their own can never be adequately compensated by any sentence the court will pass on the offender in its quest to do justice. It is not pardonable that the offender became so enraged that he assaulted a person with whom he was in a relationship to death. The constitution of this country prohibits imposing on a woman offender a death penalty. This is a clear indication that a woman's life cannot lightly be taken and that anyone who without just cause takes a woman's life commits a crime deserving of a most severe penalty. In his warned and cautioned statement the offender does not blame his inhuman and brutal attack on the fact that he had consumed same beer. The offender's moral blameworthiness is extremely high and any alcohol intake does not provide any excuse in the least. The court finds the offender to be a very violent person as confirmed by the recent conviction for culpable homicide. The suspended sentence hanging over his head clearly did not have the desired deterrent effect. In the circumstances the offender is sentenced as follows:

“You are sentenced to 20 years imprisonment and the suspended sentence of three and a half year’s imprisonment is brought into effect.”

Magwaliba and Kwirira, accused’s legal practitioners
National Prosecuting Authority, state’s legal practitioners