

THE STATE
versus
PRETTY MBIKIZA

HIGH COURT OF ZIMBABWE
MAWADZE J
MASVINGO, 30, 31 May & 24 June 2022

Assessors: 1. Mr Nish
 2. Mr Mutomba

Ms M. Mutumhe, for the state
Ms F. Ndlovu, for the accused

Criminal Trial

MAWADZE J: It is indeed a herculean task to try and factually establish the circumstances of the now deceased's proximate cause of death. It is like looking for a needle in the proverbial haystack.

Be that as it may, the preceding facts leading to the now deceased's rather "mysterious" death [if I can put it that way] are largely not in dispute.

The accused, a 33-year-old married woman and a mother of four children hails from Village 2 Noodle farm in Gutu, Masvingo. She was arraigned for murder as defined in section 47 (1) of the Criminal Law (Codification and Reform Act) [*Chapter 9:23*].

The charge is that on 10 May 2021 at Dewure Ministry of Transport compound the accused caused the death of 36-year-old Owen Munyanyi, by striking him with an unknown object intending to kill him or realising that there was a real risk or possibility that her conduct might cause death and continued to engage in that conduct despite the risk or possibility.

Despite being residents of the same area and both married the accused and the now deceased had an illicit love affair. The love affair started, according to the accused, in October 2020 and tragically ended on 10 May 2021 upon deceased's death.

The now deceased was employed as a youth officer based at Dewure Ministry of Transport compound which was his work place. He resides near the now deceased at Noodle Farm in Gutu where his family stays.

The state case is that on 9 May 2021 the now deceased left his rural home proceeding to his work place at Dewure Ministry of Transport compound (hereinafter Dewure compound). The now deceased however spent the night at his brother's homestead at No. 29, Village 2 Noodle Farm, Gutu. The next day on 10 May 2021 he met the accused his lover and both proceeded to the accused's work place at Dewure compound. It is the state case that on 10 May 2021 they had a dispute whose cause is unknown. The accused is alleged to have struck the now deceased with an unknown object causing his death. Thereafter it is alleged that the accused went to her aunt's homestead in Mushayavanhu Village, Gutu, where she spent the night after telling Ratidzai Munyanyi [the now deceased's sister-in-law or wife of now deceased's elder brother] about the now deceased's death. The state further alleges that the now deceased's decomposed body was only discovered six days later on 15 May 2021 in his room by one Loice Rukasha. The state alleges that the cause of the now deceased's death was haemorrhagic shock arising from blunt trauma.

The accused vehemently denied causing the now deceased's death.

In her defence online the accused said after arriving at the now deceased Dewure compound the two love birds had sexual intercourse. However, she said soon after the sexual act both of them mysteriously started to feel very hot. The now deceased then started to have breathing problems and vomited. Thereafter she said he breathed heavily and died. The accused said she immediately advised the sister-in-law Ratidzai Munyanyi of this tragedy after which she proceeded to her aunt's place Revenia Ndebele where she slept. Thereafter she went to her marital home. She says the now deceased's body was indeed found on 16 May 2021 [if not 15 May 2021].

The accused concluded her defence outline by stating that she never struck the now deceased as she had no cause to do so and that there was no altercation between her and the now deceased. Instead, she said as lovers they had proceeded to Dewure compound for the purposes of having quality time together which they briefly did until tragedy struck. The accused said it is only

the doctor's findings in the post mortem report which alleges foul play. The accused said after advising the now deceased's sister-in-law of this tragedy she did not disclose the now deceased's death to any of his relatives as she wanted to conceal the illicit love affair, she had with the now deceased.

The evidence of most state witnesses was admitted in terms of section 314 of the Criminal Procedure and Evidence Act [Chapter 9:07]. These are Gracious Dhewa the now deceased's 32-year-old wife; Miriam Mashayanyika the 46-year-old fellow resident of the now deceased at Dewure Compound; Loice Rukasha the 15-year-old daughter of Miriam Mashayanyika; and Charity Mhaka a 26-year-old store keeper at Mushayavanhu business centre Gutu.

The state led viva voce evidence from Ratidzai Munyanyi the wife of the now deceased's elder brother; Revenia Ndebele the accused's aunt; Dr Godfrey Zimbwa who did the autopsy on the deceased's remains and D/Sgt Zivanai Tsveta the investigating officer.

The accused gave evidence and did not call any witnesses.

The only exhibits produced are exhibit 1 the post mortem report and exhibit 2 the accused's confirmed warned and cautioned statement.

As per exhibit the post mortem report, compiled on 19 May 2021 Dr Godfrey Zimbwa estimated the now deceased's height to be 170cm and his weight to be 80kg. The doctor observed the following;

- “1. Body is partially decomposed and full of maggots
2. Extensive subdermal bleeding on left side of neck, left shoulder chest and upper abdomen”

The cause of death is stated as haemorrhagic shock arising from blunt trauma. I shall deal with this in detail when analysing Godfrey Zimbwa's evidence and the cause of the now deceased's death.

In exhibit 2 the confirmed warned and cautioned statement the accused stated as follows;

“I deny the allegations levelled against me that I murdered Owen Munyanyi. I went with the deceased to Dewure. When we got there the deceased started feeling hot. I later discovered he was dead and I did not inform anyone about his death.”

The brief comment I can make in relation to this statement is that the accused made omissions in that statement which are as follows;

- (i) accused did not disclose her illicit love affair with the now deceased.

- (ii) accused did not reveal that at Dewure Compound she had sexual intercourse with the now deceased soon before he died.
- (iii) the accused did not also reveal that she too felt hot soon after the sexual act.
- (iv) the accused did not reveal that she made a report of the now deceased's death to the now deceased's sister-in-law Ratidzai Munyanyi and accused's aunt Revenia Ndebele.
- (v) the accused did not reveal her reason for not reporting the now deceased's death to the police or deceased's relatives.

The accused was not probed about these omissions. Probably the police also did not seek such clarifications during the recording of the statement. No adverse findings can therefore be fairly made against the accused.

Let me dispose of the undisputed evidence first: -

Gracious Dhewa (Gracious)

Gracious is the now deceased's wife and resides at Sonoma Village, Tongogara, Chief Gutu, Gutu. She is well known to the accused as a local person. She was not aware of the illicit love affair between her husband the now deceased and the accused. She said the now deceased left home on 9 May 2021 and said he was spending the night at his elder brother's homestead Ratidzai Munyanyi's residence at Noodle Farm Gutu after which he was to proceed to his work place at Dewure Compound. She tried to contact her husband the now deceased from 10 May 2021 to no avail and was only advised of the now deceased's death on 15 May 2021 after Miriam Mashayanyika discovered the now deceased's body.

Miriam Mashayanyika (Miriam)

Miriam was sent by the now deceased's wife to check on the now deceased on 15 May 2021 as his cell phone was not being answered. She sent her daughter Loice Rukasha who then discovered the now deceased's decomposing body and reported to the police.

Loice Rukasha (Loice)

Loice the 15-year-old girl was sent by her mother Miriam on 15 May 2021 to check on the now deceased and she discovered his decomposing body in the now deceased's room at about 1600hrs and alerted her mother.

Charity Mhaka (Charity)

Charity is a shopkeeper at Mushayavanhu business centre in Gutu which is near Dewure. On 15 May 2021 in the afternoon the accused approached her at her shop. The accused looked confused and told Charity that her (accused's) uncle had died at Dewure. Accused wanted to charge a cell phone but she ended up using Charity's handset to contact her relative whom we now know is Ratidzai Munyanyi the deceased's sister-in-law.

The sequence of events as per the uncontroverted evidence of deceased's sister-in-law Ratidzai Munyanyi who was or is accused's friend; the accused's aunt Revenia Ndebele and D/Sgt Zivanai Tsveta can be summarised as follows;

1. The accused and the now deceased who were residents of the same area in Gutu and both married. They had an illicit love affair which was not known by their spouses. The only person who knew of this love affair was Ratidzai Munyanyi the wife of the now deceased's elder brother and also a very close friend of the accused.
2. On 9 May 2021 the now deceased, Ratidzai Munyanyi and the accused met at their local Weshero business centre after the now deceased had left his rural home enroute to his work place in Dewure. The now deceased was drinking beer and bought drinks for accused and Ratidzai Munyanyi. The now deceased slept at Ratidzai Munyanyi's homestead.
3. It is on 9 May 2021 that a plan was hatched by accused and the now deceased with the knowledge of Ratidzai Munyanyi that the next day accused and the now deceased would proceed together to the now deceased's work place at Dewure Compound. The accused bought some groceries and lied to her husband that she was only visiting her aunt Revenia Ndebele at Mushayavanhu, Gutu.

4. On 10 May 2021 the now deceased and his sister-in-law Ratidzai Munyanyi boarded a bus to Gutu growth point and the accused later boarded the same bus at a different bus stop and all three of them went to Gutu growth point.
5. In Gutu the accused and the now deceased proceeded to the now deceased's work place at Dewure Compound where they arrived at around 1200hrs.
6. That same afternoon the accused proceeded to nearby Mushayavanhu business centre from Dewure Compound where she advised a shopkeeper Charity Mhaka about deceased's death. Thereafter she telephoned deceased's sister-in-law Ratidzai Munyanyi advising her of now deceased's death.
7. Ratidzai Munyanyi who was still at Gutu growth point proceeded to Mushayavanhu business centre where she met the accused and both discussed deceased's death and how they would handle the matter. The accused who had the now deceased's cell phone as she had none herself was advised by Ratidzai Munyanyi to return the cell phone to deceased's room at Dewure Compound which she did.
8. Ratidzai Munyanyi proceeded to her residence and did not disclose the now deceased's death.
9. The accused proceeded her aunt Revenia Ndebele's homestead at Mushayavanhu where she disclosed both her illicit love affair and the now deceased's death. The next day she went back to her matrimonial home.
10. Both the accused and Ratidzai Munyanyi kept the deceased's death as a secret, participated at the deceased's funeral vigil and burial without divulging what they knew.
11. Accused and Ratidzai Munyanyi only disclosed the sequence of events from 9 May 2021 and the illicit love affair after being interrogated by the police twice leading to the accused's arrest.

I turn briefly to the analysis of the evidence of Ratidzai Munyanyi, Revenia Ndebele and the D/sgt Zivanai Tsveta.

Ratidzai Munyanyi (Ratidzai)

Ratidzai Munyanyi was not a candid witness at all. She was unwilling to disclose any incriminating evidence showing her key role in the illicit love affair between the accused and the now deceased. As will be shown later the accused was far more a convincing witness.

Save to admit that she was advised of the now deceased's death the very afternoon the now deceased died and that the accused was distraught and crying Ratidzai was very cagey about most issues. She was not forthcoming as to when she got aware of the illicit love affair between accused and the now deceased. She did not disclose her clear close friendship with the accused. She could not explain why accused deemed it fit to tell her about the deceased's death first. She could not explain how this whole matter came to light leading to accused's arrest.

Ratidzai wanted the court to believe that accused's husband was aware of this illicit love affair. She could not explain why if she had not played a key role in this illicit love affair, she decided to keep the death of her brother-in-law the now deceased a secret for 6 days until his decomposed body was found. She could not explain as to why even after the discovery of the deceased's body she pretended not to know the circumstances of his death despite being a close relative. Ratidzai could not explain why police had to interrogate her twice in order to reveal what she knew. She proffered no explanation for her conduct save to say it was tough. What was tough? Her behaviour is shocking and her demeanour was very poor. The inference to be drawn is that she was hiding a lot of issues even in court. On the other hand the accused bared it all in her evidence. Accused disclosed that it is Ratidzai who nudged her into a love relationship with the now deceased, saying the now deceased, unlike accused's husband, was employed and would financially support her and her children. The accused disclosed that Ratidzai would not only act as an intermediary but would offer her residence for the accused and the now deceased to meet and be intimate on many occasions as Ratidzai's husband works in Bulawayo and only a young child stays with Ratidzai. The accused said her husband only became aware of this illicit affair after the accused's arrest. The accused disclosed that the now deceased financially supported

her by buying provisions and even paying school fees for accused's children, something her husband who is not employed failed to do.

Given all this, which accused, said it explains why accused felt duty bound to report the now deceased's death to Ratidzai first. Ratidzai knew accused had gone to for Dewure Compound with the accused and that the issue of visiting accused's aunt was simply a ruse.

One is more inclined to accept accused's version of events than Ratidzai version on why they both decided not to disclose deceased's death to other family members in their area. The accused said Ratidzai initially promised to handle the matter possibly through her (Ratidzai's) husband. Accused said Ratidzai later changed and said if they revealed the illicit love affair it would ruin both their marriages and possibly family relations. It was therefore wise to let sleeping dogs lie. Even after their "arrest", Ratidzai initially prevailed upon the accused until accused decided to tell the truth.

The critical issue is the cause of the now deceased's death. In the absence of any other expert opinion one is hamstrung not to accept Dr Zimbwa's evidence. He has 28 years' experience as a doctor and has been carrying out post mortem examinations for 17 years. Dr Zimbwa explained that despite the state of the body which was well after the fourth stage of decomposition and full of maggots he could still observe that the now deceased had bleed under the skin before his death on left side of the neck, left shoulder, chest and upper abdomen. These areas had a reddish colour and not the whitish colour of the rest of the body. However, Dr Zimbwa could not tell the nature of the injury which caused the bleeding, whether it was a laceration or just internal bleeding, as the skin had peeled off. Such bleeding according to Dr Zimbwa could be a result of blunt trauma or penetrating injury which caused underlying tissue injuries. The extensive bleeding was not due to lividity. As per the doctor he could not say with certainty whether the injuries he observed were a result of assault or accidental trauma (falling). Lastly the doctor said if the now deceased felt hot and had breathing difficulties there is no single possible cause to that as many ailments could cause that.

Given this evidence can one say with certainty that the now deceased was fatally assaulted? This question can not be answered with certainty. Why?

- a) the police initially treated this matter as a sudden death hence excluding foul play. This means the attending details did not pay much regard to possible evidence of foul play.
- b) no evidence had been placed before the court as to the nature of the room the now deceased was in. Could it be possible that as he felt hot he possibly did hit against some object or surface due to the intensity of pain?
- c) the time lapse between period accused went to bath after the sexual act and time she returned remains unclear. At this critical time the now deceased was alone but no one can say what the intensity of pain the now deceased felt was or what the now deceased did as a result. There are a lot of possibilities as the now deceased could have writhed in pain or rolled on whatever surface or falling inside his room.
- d) the allegation that the accused and the now deceased had an altercation as conceded by D/sgt Tsvetai is purely speculation or conjecture. The same goes for the said blunt object it is said accused used to assault the now deceased. The assault itself is not a fact proved.
- e) there is no motive as to why the accused would assault her lover. All the evidence points to a blissful *albeit* illicit love affair. They had both made elaborate plans to ensure that they would go to Dewure Compound together. They wanted to have quality time together. They had sexual intercourse soon after arrival as per the accused. What then could have gone wrong between them?
- f) The accused's conduct is not supportive of a guilt mind. Why?
 - (i) If she had fatally assaulted the now deceased, would she not have just quietly left and go to her aunt's place and pretend all was well and lie that she had left the now deceased alive? Why would she bother to call Ratidzai and advise her of the deceased's death soon after it happened? Ratidzai would never had known the truth.
 - (ii) why would she tell a stranger Charity the storekeeper of deceased's death and the place it occurred. Why would she disclose not only her illicit love affair to her aunt but also the deceased's death?
 - (iii) the accused's conduct and demeanour suggests not a guilt mind keen to cover up the now deceased's death. Charity said accused who was confused upon arrival at Mushayavanhu business centre. Ratidzai said when she met accused, the accused

was crying. Revenai Ndebele accused's aunt said when accused arrived the very same day at around 1600hrs she was visibly stressed, breathing heavily and made a voluntary report of the now deceased's death. Upon arrival in her village she still engaged Ratidzai several times with the intention to have now deceased's death revealed. Despite Ratidzai insistence to the contrary she ultimately revealed what had actually happened to police.

There is no direct evidence that accused fatally assaulted the now deceased. The inference the state seeks to draw cannot be said to be consistent with all or any proved facts. The cause of the now deceased's injuries and death cannot be premised on proved facts which exclude every reasonable interference other than an assault perpetrated by the accused. The accused's version of events remains reasonably possible. A doubt lingers in the mind of the court that accused is the one who fatally assaulted the now deceased moreso in the absence of every possible motive and being inconsistent with the prevailing circumstances of two lovers having quality time at a secluded and safe place. This doubt should favour the accused.

The state has not proved its case beyond reasonable doubt. Accordingly accused can not be found guilty of the charge.

VERDICT: - NOT GUILTY AND ACQUITTED

National Prosecuting Authority, counsel for the state
H. Tafa & Associates, pro deo counsel for the accused