

THE STATE

Versus

EDSON JERE

HIGH COURT OF ZIMBABWE

MAWADZE J

MASVINGO, 24 June, 16 September, 21 October & 12 November, 2021

Assessors

1. Mr Nish
2. Mr Gweru

Mr E. Mbavarira, for the state
Mr J. Chipangura, for the accused

Criminal Trial

MAWADZE J: This matter relates to the death of a male toddler Anesu Mudombi aged just one year and 2 months.

The charge is that on 10 September 2019 at Macheke village, Chief Nhema Zaka the accused unlawfully and intentionally caused the death of the said child Anesu Mudombi by assaulting him on the head and strangling him.

At the material time the accused was 24 years old and married to the deceased's mother also aged 24 years Martha Mudombi. They were staying in Macheke Village, Chief Nhema, Zaka

where the accused was employed as a caretaker at a certain homestead. They were staying with the now deceased and another younger child.

On 10 September 2019 the accused's wife who is also the deceased's mother Martha Mudombi left for the borehole to fetch water in the morning. The accused was at home. What is not in dispute is that the youngest child was left in the custody of the accused. The contentious issue is where the deceased was left. The state alleges the deceased was left in the accused's custody but the accused said he was only with the youngest child.

It is the state case that the accused was a step father to the deceased child as he married deceased's mother when she was already impregnated by another man. Thus although she gave birth to the deceased child after marrying the accused, the accused is said not to have been the author of that pregnancy. According to the state this was the genesis of the problems leading to the deceased's death.

It is the state case that while the deceased's mother was away the accused assaulted the now deceased on the head with a blunt object and strangled the deceased to death. It is alleged that the deceased's mother upon her return found the deceased child already dead.

The accused and the now deceased's mother took the now deceased's body to Chanhanga village; chief Nhema in Zaka at Shamiso Mudombi's homestead who happens to be an aunt to the deceased child's mother. It is alleged that the accused fled from Shamiso Mudombi's homestead at night only to be arrested some 4 months later in January 2020. The cause of the deceased's death is said to be head injury and strangulation.

The accused vehemently protested his innocence. While the accused confirms the sudden death of the deceased child the accused disputes that he had a hand in the death. According to the accused the now deceased child could have been killed by goblins.

The accused denied that he ever disputed the paternity of the deceased child. He said for all intents and purposes he had regarded at the now deceased as his own flesh and blood. In fact he said he was shocked upon his arrest to be advised that he had killed the now deceased because the child was not his own. In that vein therefore the accused contends that he had no cause to assault, strangle or kill his own child the now deceased.

The accused's evidence is that on the fateful day he was resting inside the hut when his wife Martha Mudombi left him in the custody of their last born child going to the borehole to fetch

water. He said he did not know if the now deceased child remained playing outside or followed Martha Mudombi. The accused said as he was sleeping he was woken up by a loud screaming of the deceased child and he rushed only to find the now deceased child outside the gate. He said the now deceased was lying on his back bleeding from the nose and the mouth. He did not know what had caused this. The accused said he proceeded to take the child into the house to clean the blood. As he was doing so his wife then arrived and he explained to her all which had happened.

The accused said he frantically tried to telephone his employer and his relatives as the now deceased had already died but failed due to network problems. He said he only managed to get through to his wife's aunt Shamiso Mudombi at around 2000hrs. The accused said to his surprise Shamiso Mudombi was very hostile and ordered them to bring the now deceased body to Shamiso Mudombi's homestead. The accused said he capitulated. That very night he carried the youngest child and his wife carried the deceased's body strapped on her back to Shamiso Mudombi homestead.

It is the deceased's evidence that the reception he got at Shamiso Mudombi's homestead was very hostile. He was questioned as to how the child died. Despite his explanation he said he was threatened with death. This caused him to flee that very night from Shamiso Mudombi's residence and even failed to attend the burial of the now deceased his child. The accused did not call any witnesses.

The state relied on the evidence of the accused's wife who is the now deceased's mother Martha Mudombi's, Martha Mudombi's aunt one Shamiso Mudombi, the investigating officer Sgt Priscilla Silape and Dr Godfrey Zimbwa who examined the now deceased's remains.

The evidence of Isaac Shoko, a retired Sgt in the ZRP and Clemence Gomana a member of the local neighbourhood watch committee was admitted in terms of section 314 of the Criminal Procedure and Evidence Act [Chapter 9:07. Isaac Shoko simply drove the police vehicle which ferried the now deceased to Masvingo General hospital for a post mortem. Clemence Gomana was advised by the police on 16 September 2019 that the accused was wanted for murder investigations. In January 2020 he got information that accused was now employed at Nheyi Village Chief Nhema , Zaka. On 9 January 2020 he arrested the accused and handed him over to ZRP Zaka.

The state only produced two exhibits by consent. Exhibit one is the post mortem report compiled by Dr Zimbwa on 12 September 2019 after examining the remains of the now deceased

child. The doctor noted that the now deceased was bleeding from the mouth and nostrils. There were facial bruises and the now deceased's neck was loose and hypermobile.

Dr Zimbwa also observed strangulation marks on the anterior of the now deceased's neck and that the now deceased had sustained partially crushed cricoid cartilage or neck bones. The doctor concluded that the cause of death was head injury and strangulation. We shall revert to this later.

Sergeant Priscilla Silape who attended the scene also confirmed observing the following injuries on the now deceased;

- (i) swollen neck
- (ii) bleeding from the nose and mouth
- (iii) hyper mobile or loose neck

Sergeant Priscilla Silape said that due to such injuries she suspected foul play in the now deceased's death and caused a post mortem examination to be done. She confirmed that accused fled in September 2019 only to be arrested in January 2020.

The evidence of Dr Zimbwa is largely uncontroverted. This evidence is critical as regards the cause of the now deceased's death.

Besides the bleeding from the nose and mouth Dr Zimbwa said he also observed generalised bruising of the face. He said the now deceased's neck could be moved in all four directions which was indicative of the fractured neck bones. What is critical is that the doctor observed strangulation marks in front of the neck and that the wind pipe had been partially crushed. He explained that severe force was applied to the neck.

Dr Zimbwa explained the cause of the now deceased's death. He said evidence of the head injury could be ascertained from the bleeding from the nostrils and facial bruising which was most likely to be a result of direct blows to the head. Dr Zimbwa said visible marks on the crushed cricoid cartilage (bones which keep wind pipe open) was indicative of strangulation hence foul play (homicide).

Dr Zimbwa discounted that the wind pipe bones could be broken or crushed if the deceased child just fell down. He explained that the cricoid bone is behind the chin therefore to break such bones one would need to also injure the chin first which was not the case with the now deceased child. In any case he said there were strangulation marks on the neck is unrelated to the now

deceased falling down. Dr Zimbwa said the loose neck was due to direct force applied on the neck which would cause the dislocation of the neck bones. The doctor was clear and adamant that deliberate effort had been made to suffocate the now deceased leading to his death.

In our assessment therefore medical evidence clearly points to foul play. The accused's evidence that goblins killed the now deceased lacks scientific evidence and fails to get traction.

We now turn to the evidence of accused's wife Martha Mudombi and her aunt Shamiso Mudombi.

Shamiso Mudombi (Shamiso)

At the age of 67 years Shamiso is a fairly old woman. The accused's wife was her niece.

Shamiso said on 10 September 2019 at 2200hrs the accused telephoned her advising her of the now deceased's death at his work place where he was staying with his wife Martha Mudombi, the now deceased and another youngest child. Shamiso said she naturally inquired about the cause of death and accused just said the now deceased child had fallen down and died. She inquired about the way forward and accused said he would decide.

Shamiso said at midnight the same night the accused arrived carrying his youngest child and his wife had the now deceased child strapped on her back. This naturally surprised her but since it was late she advised them to retire to bed so as to deal with the matter the following morning. The accused then left saying he was going to the toilet and he never returned. They realised the accused had simply fled.

The next morning they reported the matter to the police.

Shamiso said all she had asked accused was why he had decided to bring the now deceased's body to Shamiso's residence instead of taking it to accused's parents. In response the accused said he could not take the deceased's body to his parents's home as it was not his child.

Under cross examination Shamiso said she would not know the paternity of the now deceased but that her niece accused's wife Martha Mudombi would tell her how accused was disputing the paternity of the now deceased and abused the now deceased child.

Shamiso said it is the accused's conduct which made her to suspect foul play as accused could not clearly explain how the now deceased died except to say the now deceasedes just

fell down. The accused's wife also told her that accused had advised her not to raise alarm after the now deceased's death or to tell neighbours.

Shamiso denied that the accused fled for fear of being assaulted as no one threatened him but he stealthy left. In fact she said only herself, accused wife and the father of accused's wife were present. Shamiso described the father of accused's wife as "a cabbage " on account of his mental retardation, poor memory and inability to do anything. He thus could not have posed any threat to the accused.

Shamiso gave her evidence quite well. We find no motive for her to falsify her evidence. There is no basis for her to have been hostile to the accused upon receipt of the death message of the now deceased. She was clearly taken aback by the accused's allegations against her. She clearly explained why accused brought the now deceased's body to her residence, how accused explained the cause of death, why and how accused fled. The accused never raised issue of goblins to her. The question therefore is why would accused mislead Shamiso and also mispresent his evidence in court.

MARTHA MUDOMBI (Martha)

Martha is accused's wife and the mother of the deceased. When she took the witness stand she appeared confused, unsure and distracted. Out of abundance of caution I issued an order for her to be examined by psychiatrist to determine her state of mind which would impact on her competency to testify. This psychiatrist examination culminated in a medical report Exhibit 2 dated 23 July 2021 by Dr Temba Nyoni a psychiatrist.

The findings by the psychiatrist are that Martha avoided eye contact. She exhibited poor memory and judgement. Martha is barely literate as she struggled to read or write. Dr Nyoni stated that she suffers from some degree of intellectual disability which he described as psychotic features [auditory hallucinations]. However Dr Nyoni states that she is fit to testify in court. We therefore allowed her to testify but kept an eagle's eye on her demenour and remained laser focused on her evidence.

In terms of section 245 of the Criminal Procedure and Evidence Act [Chapter 9:07] this court is enjoined to decide competency of witnesses. The relevant provision states as followings;

"Court to decide questions of competency of witness.

It shall be competent for the court in which any criminal case is depending to decide upon all questions concerning the competency and compellability of any witness to give evidence"

In terms of section 246 of the Criminal Procedure and Evidence Act [Chapter 9:07] a person afflicted with idiocy or mental disorder or defect or labouring under any imbecility of mind which deprives him or her of the proper use of reason is incompetent to give evidence while so afflicted by that condition. This is precisely why this court sought the expert view of a psychiatrist Dr Temba Nyoni so as not to fall foul of the said provision.

We now turn to Martha's evidence. Martha told the court that she is 24 years old and only did grade 6. She said she was 3 months pregnant when she married the accused. This pregnancy had not been authored by accused but by her erstwhile lover. She married accused in 2018 and gave birth to the now deceased a full term baby before the requisite months. This created problems with the accused and she indeed confessed to the accused that he was not the father of the now deceased.

Martha said despite this set back she remained married to the accused and they had a child together. However she said the accused remained hostile to the now deceased whom he frequently ill treated. As an example she said the accused would not allow the now deceased to play with other children and would frequently assault the now deceased for no apparent reason or minor transgressions using very big switches for a child of the deceased's age. She said accused would also not tire to tell her that the now deceased was not his child.

Turning to the events of the day in question Martha said she left both children in accused's custody when she went to fetch water at the borehole and was away for about two hours. Upon her return she was surprised to find accused with the now deceased in the house with the accused wiping blood from the now deceased. The now deceased was no longer wearing clothes she had left him wearing.

Martha said she observed that the now deceased was bleeding from the mouth and the nose. This prompted her to ask accused what had happened and all accused said was that the now

deceased had fallen down without giving details. She said when she checked on the now deceased, she realised he was dead. This was around 1100hrs.

Martha said the accused warned her not to cry or raise alarm or inform neighbours. She was ordered to continue with their daily chores as if nothing was amiss. Due to fear of the accused and resultant confusion she said she obliged.

At about 2200hrs she said accused ordered her to strap the now deceased on her back as accused carried the younger child. The accused said they should proceed to Martha's maternal home at Shamiso's homestead. The accused told her he could not bury the now deceased at accused's home as the now deceased was not his child. She said they arrived late at night and accused repeated his explanation that the now deceased had down fallen and died.

After a short while Martha said the accused indicated that he was going to the toilet but vanished into thin air. A report was then made to the police the next morning. Foul play was suspected due to accused's conduct.

Martha reasonably answered all questions put to her in cross examination. She insisted that contrary to accused's denials she had left the now deceased in accused's custody when she went to the borehole. She denied that accused was not aware until after his arrest that the now deceased was not his child as she had told accused that she was already pregnant when she first became intimate with the accused. Martha denied that accused fled from Shamiso's homestead for fear of being assaulted as no one threatened the accused. She was adamant that the accused is the one who decided that they carry the now deceased's body to her maternal home at night for burial so that they could not be detected that they had a dead body. She repeated that accused told her the now deceased could not be buried at accused's home as he was not his child.

Despite suffering from some degree of mental retardation our view is that Martha is a competent witness. She gave a reasonably coherent account of what happened. In fact most of the factual issues are not even disputed by the accused. On other aspects her testimony is corroborated by Shamiso her aunt. Overallly her testimony can not be said to be rumblings of a mad woman.

The accused's version of events can not possibly be true. It is difficult to accept that accused was unaware that the now deceased was not his child until after his arrest. If he took the

now deceased as his child is it logical that he would take his body to the home of his wife for burial instead of the home of accused's parents. Is it not logical that he would have informed his parents first rather than his in laws. The accused's explanation of network challenges is incredible. Why did he not simply physically go to his parents's home?

The accused's explanation as to what happened to the now deceased is inconsistent. If he believed some goblins had attacked the now deceased why did he not give that account to his wife and Shamiso. In fact why was he creating the story that the now deceased had fatally fallen down.

The accused's conduct is also inconsistent with an innocent mind. Few examples suffice;

- (i) why would the accused not know that the now deceased was at home when his wife went to the borehole to fetch water.
- (ii) why would the accused quietly attend to an injured child alone without seeking help from his neighbours.
- (iii) who had changed the now deceased's clothes and why?
- (iv) is it normal for the accused not to advice neighbours or local elders about the death of " his son?" Is such behaviour normal in a rural set up?
- (v) why would the accused advise his wife not to grieve or alert neighbours if indeed accused believed this was an act by goblins?
- (vi) is it normal that the accused would quietly keep a dead body in his house from 1100hrs to 2200hrs without alerting neighbours?
- (vii) worse still why did the accused not report to the police about the now deceased's sudden death.
- (viii) why did the accused find it normal to cause his wife to carry a dead body on her back at night?
- (ix) as a grieving husband why would accused flee from Shamiso's homestead leaving a dead body of " his son" and not even bother to report to the police or attend to the burial.
- (x) why would accused disappear from September 2019 to January 2020 a period of 4 months until his arrest when he was now happily employed somewhere?

The court is alive to the fact that it is dealing with circumstantial evidence as there was no eye witness to what happened to the now deceased.

It is true that a court can return a verdict of guilty based solely on circumstantial evidence. However the court should be satisfied that the circumstantial evidence precluded every reasonable inference of the innocence of the accused. See *State v Shonhiwa 1987 (1) ZLR 215 (S)*; *State v Vhera 2003 (1) ZLR 688 (H)*.

The leading case of R V Bloom 1939 AD 188 at 202-203 is illustrative on the the principles of logic which govern the applicability or use of circumstantial evidence in a criminal matter. The bottom line is that circumstantial evidence can only be properly used to draw a correct inference if such an inference sought to be drawn is the only reasonable one derived from proved facts.

We have already alluded to proved facts giving rise to accused's suspicious conduct [items (i) to (x) supra]. It is a proven fact that the now deceased did not die of natural causes, but was killed.

Our finding is that no other reasonable inference can be drawn from all these facts now proved other than that they all collectively point to the accused guilt. We do not therefore hesitate to find that the accused caused the head injury on the now deceased and strangled to death the helpless toddler. The accused acted with actual intent.

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

SENTENCE

A paternity dispute has resulted in the tragic and brutal loss of life a toddler aged one year and 2 months.

The sanctity of human life can not be over emphasised. It is difficult to fathom that such a young and innocent child has lost his life at the brutal hands of the accused. One still wonders why the accused found it desirable to take away the life of this child who posed no danger to the accused or had not wronged the accused in any manner.

It was improper for the accused to visit the apparent sins of the deceased child's mother on this innocent child.

If the accused felt strongly that he could not look after the now deceased whom he had not sired surely there were other remedies. The accused could simply separate from the now deceased's mother or set conditions that he could only stay with the now deceased's mother as a

wife if custody of the now deceased was given to its mother's relatives. However the accused chose to have his cake and eat it. He condoned the alleged infidelity of the now deceased's mother and even sired another child with her and remained married to her.

It is disheartening that the accused had a well documented history of physically abusing and ill treating the now deceased.

It is clear from the facts that the accused planned this offence.

The now deceased's life was taken away in a brutal and painful manner. The accused literally squeezed the life out of this toddler. What a brutal act! In addition to that the accused was not willing to own up at all. The accused lied about the cause of death and wanted to hurriedly bury the now deceased.

Throughout the trial the accused was not contrite. Instead he came up with all sorts of nebulous defences.

Be that as it may the accused is still a young first offender. Consequently, he should be treated with some measure of leniency.

The accused is married with a very young child. In light of the mental condition of his wife she may find it very difficult to provide for the child in the absence of the accused.

The accused has suffered from pre trial incarceration of about 2 years.

The attendant stigma that the accused has the innocent blood of a toddler on his hands would haunt him forever.

As the adage goes justice should always be tempered with mercy.

In the result the following sentence would be fair and just in the circumstances;

"Accused is sentenced to 25 years imprisonment"