

THE STATE
versus
PRECIOUS HAMANDISHE

HIGH COURT OF ZIMBABWE
MAKONESE J
GWERU 29 JANUARY AND 1 FEBRUARY 2016

Criminal Trial

Mr *Shumba* for the state
Miss *C. Dube* for the accused

MAKONESE J: The accused was aged 29 years old at the time of the alleged offence. The deceased Tadiwa Mangoma was accused's child. He was 2 ½ years old at the time he met his untimely death. Sometime in January 2015, the accused got married to one George Runesu (Junior) and took along the deceased to her husband's village. However, her in laws were not comfortable with the deceased living with them. The in-laws advised the accused to first surrender custody of the deceased to her former husband. Accused made an attempt to surrender the child to her former husband but she was unsuccessful. Accused took the deceased back to her husband. On the way, she took the deceased to a certain spot and placed the child on piece of rock. She proceeded to collect bark fibre from a tree and tied the deceased's neck with it and strangled him. The deceased died as a result, and accused left the remains of the deceased at the scene of the crime. The deceased's body was discovered on 18 January 2015 leading to the arrest of the accused.

The accused now appears in this court on charge of murder in contravention of section 47 (1) of the Criminal Law (Codification and Reform) Act [Chapter 9:23]. The accused denies these allegations and states that at the time she killed her child she was suffering from emotional and psychological stress. She states that having faced denial at the hands of her own mother she had decided to go back to her husband's village. As she walked back, she felt alone, unloved, uncherished and discarded. She states that she felt sorry for her sick child and herself. Faced with this dilemma and also being overwhelmed by the physical and emotional stress, she thought

of committing suicide. She however decided against taking her own life as she realized that her child would suffer. She decided instead to strangle the deceased. She went ahead and carried out her decision. In her defence accused alleged that at the material time she tended to act without thinking about the consequences of her conduct. She further alleged that she regretted her actions but she was somehow confused and sought to raise the defence of diminished responsibility and claimed that she was not in full control of her mental faculties at the relevant time.

The state opened its case by tendering into the record of proceedings the outline of the state case (Exhibit 1). It shall not be necessary to repeat the entire contents of the outline of the state case which now forms part of the record.

The Defence outline is marked Exhibit 2 and it also forms part of the record.

A Post Mortem Report (Exhibit 3) was compiled by Dr I. Betancourt at the request of Zimbabwe Republic Police Charandura. As a result of an examination of the remains of the deceased the pathologist concluded that the cause of death was “unascertained due to decomposition.” On external examination the Post Mortem reflects that human remains in a skeleton reduction were observed, with all the organs absent. There were no signs of external trauma or fracture to the bones.

The accused’s confirmed warned and cautioned statement was also tendered into evidence by consent as (Exhibit 4). The English translation of the warned and cautioned statement is in the following terms:

“I admit the charge leveled against me. On the 1st day of January 2015 I was sent away by my father-in-law George Runesu stating that my son Tadiwa Mangoma was very ill and he was not able to stay with him. On the 7th day of January 2015, I took my child Tadiwa Mangoma to his grandmother Rudada Dzunge in Siyahokwe. Upon arrival the grandmother rejected my child Tadiwa Mangoma and I returned on the same date. When I reached village Mombe, on my way back to my parents’ home and at village Shuro Headman Govere, I decided to commit suicide. I put the child, Tadiwa Mangoma down and took a tree fibre and tied his neck until he succumbed to death. When he was dead, I left him on the dwala and proceeded to our home where I informed my mother, Anna Mutodzaniwa and she chased me away.”

The state sought and obtained the adoption of the evidence of the following witnesses, as it appears in the state outline namely:

- (a) Anna Mutodzaniwa
- (b) Kumbirai Mangena
- (c) Takanai Serere
- (d) Yusuf Gravel
- (e) Bruce Paidamoyo Chikwanda
- (f) Dr I Betancourt, by way of formal admission in terms of the provisions of s314 of the Criminal Procedure and Evidence Act [Chapter 9:07].

The state led oral evidence from one witness, Isaac Mombe. He testified that he resides in village Mombe, Chief Hama in Chirumanzi. He is the head of that village. He was not known to the accused and did not know the deceased during his lifetime. On 18 January 2015 at around 1000 hours he was approached by Kumbirai Mangava who advised him that he had stumbled upon human remains by the side of a road. The witness went to make a report at Charandura Police Station. Isaac Mombe in the company of three police details were led to the crime scene. Upon arrival, the witness saw the remains of the deceased which were in a high state of decomposition. Parts of the remains were covered in a green fleece jacket and brown dungaree. The head had been separated from the rest of the remains and was located some twenty metres away. Some pieces of dry bark fibre were found near the skull/head. The human remains were collected and taken to hospital by the police. The evidence of the witness was a formal nature and the accused's defence counsel did not find it necessary to cross examine the witness.

The state closed its case. The accused gave her defence under oath. She dwelt at length with events leading to the death of her child. For what it is worth I shall chronicle the events as narrated by the accused. Accused testified that both her parents died whilst she was 13 years old. At age 17 she got married to one Andrew Makambwa and from that marriage a girl named Sharon was born. The marriage did not last for a long time and soon collapsed. In 2005 accused got married to Gift Vurawa and that union led to the birth of a boy child named Method Vurawa. In the meantime the first child Sharon went to reside with accused's grandmother. Gift Vurawa died, having been killed in a road traffic accident and for sometime accused continued to live with Vurawa's relatives in Siyahokwe. Accused found new love and she commenced a relationship with Tawanda Mangoma. Accused conceived leading to the birth of Tadiwa Mangoma, the deceased. At five months pregnancy with Tadiwa, accused was chased away by

her late husband's relatives. She decided to go to Tawanda Mangoma, the man who was responsible for the pregnancy but was again chased away as Tawanda had another wife. Accused went to live with a young sister to her grandmother one Felistas Mpofu. On 26 August 2013 accused gave birth to the deceased. After a short while thereafter accused fell in love again. This time she was involved in a relationship with one George Runesu (Junior) who promised to marry her and also take care of her child Tadiwa (deceased). In January 2015 accused eloped to George Runesu's homestead and took with her the child Tadiwa (deceased). Accused was informed that she was not welcome at George Runesu's homestead by her father-in-law who stated that her child Tadiwa was sickly and could die at anytime. Accused went back to her grandmother who refused to take care of the child. Accused then proceeded to her biological mother and explained her predicament. Accused's mother also refused to take care of the child at the same time hurling insults at her calling a stupid, loose woman who was irresponsible and in the habit of bearing children with various men.

It is the accused's defence that the rejection she suffered at the hands of those closest to her resulted in both mental and physical stress and hopelessness. In her evidence in chief, the accused stated that before she strangled the deceased she had decided to commit suicide by hanging herself. She however, said she thought this would lead to the child suffering with no one to care for him. She stated that she then decided to end the child's life as the child was always sick. The child had general body pains, suffered from chest pains and was of poor health.

The issue for determination by the court is whether the accused caused the death of the deceased with the requisite actual intention to kill or whether at the critical time, she lacked the necessary intention to kill.

In the case of *State v Mungwanda* 2002 (1) ZLR 574 (S), CHIDYAUSIKU (CJ) (per headnote) succinctly stated the position as follows:

“For a court to return a verdict of murder with actual intent, the court must be satisfied beyond reasonable doubt either that the accused desired to bring about the death of his victim and succeeded in completing that purpose, or while pursuing another objective the accused foresaw the death of his victim as a substantially certain result of that activity and proceeded regardless...”

In *casu*, the facts which are largely common cause are that the accused felt a sense of rejection and total hopelessness after she was chased away by her mother. She says she was

physically and emotionally stressed. She thought of committing suicide. She decided against the idea when she realized that the child would suffer as he was of poor health. She then decided instead that it was better to end the child's life. The accused suggested that she was ending the suffering of a child whose health was precarious. In a sense the accused was raising the defence of mercy-killing. I shall explore that defence later. The accused also sought to raise the defence of diminished responsibility. When the requirements of the defence as provided under section 218 (2) of the Criminal Law (Codification and Reform) Act [Chapter 9:23] were brought to the attention of defence counsel Miss *Dube* she had no option but to concede that the defence was not available in this present case. Section 218 (2) of the Criminal Law Codification and Reform) Act provides that:

“If the acute mental or emotional stress, or partial mental disorder or defect, is brought about through the accused's own fault, a court may regard such person's responsibility as not having been diminished.”

The facts of this matter clearly establish that the accused person caused all the problems that befell her. She entered into relationships with several men in a short period of time. She gave her first child Sharon to her grandmother while she went to start a relationship with another man. Her second relationship with Gift Vurawa led to the birth of Method Vurawa. The deceased Tawanda Mangoma was her third child. Before she could even settle down, accused had got herself involved with George Runesu (Junior). Accused's mother refused to take care of Tawanda (the deceased) because of the accused's loose moral tendencies. The misery, emotional and psychological stress resulted from the accused's conscious decisions. Accused could therefore not seek any reliance on the defence of diminished responsibility.

In the case of *S v Chikanda* 2006 (2) ZLR 224 (S), CHEDA (JA) at page 230 stated as follows:

“Other than the medical report and interview by Dr Chikara, there is nothing to point at the appellant having been under a state of abnormality at the time of the commission of the crime.

It should be borne in mind that medical reports suggesting that a person may have been suffering from a state of diminished responsibility at the time of the commission of the offence, need to be supported by some other evidence. On their own the reports are not conclusive.

The decision as to whether there is diminished responsibility is to be made by the court and not just by medical experts.”

In *S v Chinono* 1990 (1) ZLR 244 (H), it was held that diminished responsibility was sufficient to establish extenuating circumstances only. The verdict of guilty of murder with actual was still upheld in that case.

In this case the narration of the events by the accused, leading up to the strangulation of the deceased tend to show that accused chose to save her marriage to George Runesu (Junior) by disposing of her child (the deceased). It was the child who was not welcome in the Runesu family. The accused made a decision to get rid of the child. This position is fortified by the fact that upon her arrest accused was residing at the Runesu homestead.

I now briefly turn to deal with the issue of mercy killing which was raised by accused. She contended that her 2 ½ year old child was of poor health. She further stated that the child suffered from chest pains and had breathing difficulties. There is simply no evidence to show that the deceased was suffering from some terminal illness. The accused testified that the child had received some medical treatment at a local clinic but to no effort was made to produce any medical reports or clinical records to show the nature and extent of the child’s illness. The facts of this case are clearly distinguishable from the circumstances in the case of *S v Hove* 2009 (1) ZLR (H).

In that case, the accused, a young unmarried mother killed her five month old baby. The child had been ill from birth, having been diagnosed with HIV, and had been hospitalized in various health institutions for a period of five months. The child had experienced excruciating pain as a result of gaping wounds and open sores all over the body and was always crying uncontrollably due to the endless pain. The accused had been told by medical personnel that there was no help they could offer the child and that the child was facing imminent death.

In the instant case I am not persuaded that the accused was compelled to strangle the child in order to save her from further pain. Instead I find that accused selfishly decided to extinguish the child’s life to save her marriage with George Runesu (Junior). She succeeded in achieving her objective. She was reunited with George Runesu (Junior) after strangling the deceased.

After carefully assessing all the evidence and considering the accused's defence I have no hesitation in rejecting the accused's defences. Accused carefully planned the killing. She did not act in the heat of the moment and there was an element of pre-meditation. Firstly, she decided to end the child's life, then secondly she planned how she would achieve this purpose. She placed the child on the ground and collected some bark fibre from a tree. She then tied the bark fibre around the child's neck and strangled him. She walked away. It is my finding that the state has managed to prove beyond reasonable doubt that the accused had the requisite *mens rea* to commit the crime of murder.

Accordingly, the accused is found guilty of murder with actual intent.

Sentence

The accused has been convicted of murder with actual intent. In terms of section 48 (2) (d) of the Constitution of Zimbabwe No. 20 (2013), the imposition of punishment on female offenders is specifically prohibited. It is an established principle of sentencing in our jurisdiction that female first offenders are to be treated with leniency. The sentence this court will impose takes into account that accused lived a blameless life for 29 years and that this conviction is her first brush with the law. She has, however been convicted of a serious offence. In assessing an appropriate sentence this court shall have regard to all the mitigating features of the case outlined by accused's defence counsel. The court shall take into consideration, inter alia, the following factors:

- (a) That the accused is an unsophisticated person who dropped out school at Form One level.
- (b) She comes from a disintegrated family her parents having divorced when she was 13 years old.
- (c) Accused person is sole breadwinner of her two minor children who shall suffer as a result of this conviction.
- (d) The accused underwent extreme physical, psychological and emotional stress as a result of rejection by her close family members.
- (e) Accused did not deny involvement in this offence and co-operated with law enforcement officers.

- (f) Accused tried to protect her marriage and took a foolish decision to prefer marriage over the child's life.
- (g) The accused has been in prison awaiting trial for a period of one year and has thus already served part of her sentence.
- (h) She is HIV positive.

This court, however finds that the accused's moral blameworthiness is of a high degree. Her decision to terminate her child's life was purely selfish. There can be no doubt that after going through three previous marriages, the accused knew or must have known that failing to get into a marriage relationship with George Runesu (Junior) was not the end of the world. She acted after careful planning and there was an element of premeditation. Her conduct was utterly cruel as she took the life of her child by strangulation. She killed her own child who looked to her for protection. The offence is inexcusable, and the court must impose a sentence that should blend leniency and mercy with a just and proper sentence.

In the result;

The court finds that an appropriate sentence is as follows:

10 years imprisonment of which 3 years is suspended for 5 years on condition accused is not within that period convicted of an offence or which violence is an element and for which she is sentenced to imprisonment without the option of a fine.

Effective sentence: **7 years imprisonment**

*National Prosecuting Authority, state's legal practitioners
Chitere, Chidawanyika & Partners, accused's legal practitioners*