

THE STATE**Versus****VICTOR TEERA**IN THE HIGH COURT OF ZIMBABWE
NDOU J with Assessor Mrs E. Mashengele
BULAWAYO 19 APRIL 2017& 9 MAY 2017**Criminal Trial***W. Mabhaudi* for the state
T. S. Gamure for the accused

NDOU J: The accused was aged 20 years and 10 months at the time of the alleged offence. He was jointly charged with one Lungisani Dube with the crime of murder. (The latter has breached his bail conditions and a warrant of his arrest has been issued). The charge against them is one of murder, it being alleged that on the 24th day of March 2008 and at or near an unnamed road, Habek area, Pumula South, Bulawayo they wrongfully, unlawfully and intentionally kill and murder Mgcini Awsley Nyathi, a male adult in his lifetime therebeing. The accused pleaded not guilty to the charge. Most of the material facts in this matter are common cause or at least beyond any significant dispute. The deceased was aged 21 years at the time of his death.

The deceased and the accused were known to each other before the former met his death. The deceased and the accused lived in the same neighbourhood in Pumula South. On the fateful evening of the 24th March 2008 at about 1800 hours, the deceased went to house 13156 Pumula South where the accused was residing with his sister and brother-in-law one Joseph Gapare. The deceased's mission was to borrow some flour and DVD from his neighbours. There is a dispute on who between the accused and Joseph Gapare accompanied the deceased when he left. The state version is that the deceased was accompanied by the accused. Be that as it may, the deceased met his death that night. His body was discovered the following morning in the bush in the Habek area, between Pumula South and Nkulumane. The body was partially naked as it was wearing a pair of grey shorts. According to Dr Sanganaï Pesanaï who conducted the post

mortem on the deceased's body, the cause of death was (a) Asphyxia; (b) Strangulation; (c) Assault.

The main issue in this case is who strangled the deceased on the 24th March 2008. It is the state case that it was the accused and the said Lungisani Dube who did so. The state does not have direct evidence and is primarily relying on circumstantial evidence. We now propose to consider the testimony of various witnesses in turn.

Nyaradzo Teera testified as the first witness. She is the accused's elder sister who was aged 24 years at the time of her testimony. She confirmed that the accused was born in 1987. She stated that on the morning of 25 March 2008, the accused arrived at her place of residence whilst she was still in bed. She asked him where he was coming from. He said he had spent a number of days in the bush. She enquired on why he was staying in the bush and he told her that he was evading police who were looking for him in connection with his witch hunt activities commonly known as "tsikamutanda". The accused was wearing a checked shirt and pairs of trousers and what she referred to as takkie shoes. She gave him food. After that the accused left and returned on the 26th March in possession of a black Monarch brand bag. He also had a smaller bag containing discs and a DVD player. He placed the bags in the room and connected the DVD player and tried to play discs but this was in vain as it was malfunctioning. She did not ask him where he got the property from. He later left the property and went away. He later returned in the company of police details. She saw the accused indicating to the police the property which he had earlier brought. The police took both men's and women's items of clothing.

She later found some more women's clothes which she took to Bulawayo Central Police. She identified a black disc pouch, a DVD player and Monarch Fubo brand bag as the property that the accused brought to her residence. These are exhibits 7, 8 and 9. She, however, stated that she did not open the Monarch bag to see its contents. She said when the accused brought the property he did not mention Lungisani Dube. She only heard about Lungisani Dube's alleged involvement in offence at Bulawayo Central Police. We are satisfied that this witness gave a

truthful account of what transpired. In any event most of her testimony appears to be common cause.

Sithembekile Dube was the next witness. She said she knew the accused prior this alleged offence. She knew him through his sister. She stated that the accused brought a brown jacket and a small black bag. She identified the brown jacket with inscription "Saints" and "01 Ocean I" with fastening zip in front and a small black Monarch brand bag. These are exhibits 10 and 11. The accused was waiting for his girlfriend Abigail Moyo. Before the latter arrived the accused's sister arrived and left with the accused. He left the above-mentioned property at her (witness' place) and she thought he would return for them. The accused did not return and when his girlfriend arrived she handed the property to her. The next time she saw the accused he was under police escort. The police asked for the property that the accused had left in her custody. She advised the police that she had given the items to accused's girlfriend. She accompanied the police to accused's girlfriend where the property was recovered. We are satisfied that this witness gave credible account of what transpired. Her testimony was not challenged under cross-examination. She only got involved in the matter because the accused came to her house and eventually left some property.

The next witness was Detective Assistant Inspector Simba Zimbande. He is stationed at CID Stores Section. He has been in the police force for around 15 years. He said he was part of the team investigating the death of the deceased. The team went to Pumula and found that the body of the deceased had already been retrieved. They went to Pumula Hall and were shown the accused who was in the custody of police details who were carrying out polling duties. They found one Joseph Gapare and two members of the Neighbourhood Watch Committee. Joseph Gapare and the latter had brought the accused to the police details at Pumula Hall polling station. They warned and cautioned him that they were arresting him on a charge of murder. He then conducted a search on the accused and retrieved a Nokia 1200 charger. He then enquired from the accused where the cellphone was. The accused initially said he had no cellphone. Joseph Gapare intervened and the accused eventually led them to a bus stop. The accused indicated to him where the cellphone was beside a stone. They recovered the cellphone. He produced the

charged and the cellphone as exhibits 12 and 13 respectively. He then evinced on how he recovered property from the accused's sister, accused's girlfriend and Lungisani Dube. The property that he deceased was wearing at the time of the alleged murder were recovered from Lungisani Dube.

The items of property were produced as exhibits 14, 15, 16 and 17 respectively. They proceeded to recover some more property from Abigail Moyo which was produced as exhibits 18, 19, 20, 21, 22, 23 24 and 25. They also recovered exhibits 10 and 11 from Abigail Moyo.

They later learnt from the deceased's sister Constance Nyathi that she was still missing certificates and a Telecel line. They asked the accused about these. The accused indicated to them that he had left these items in a bush area between Nketa 8 and Emganinwi. He led them to the spot in the bush. He indicated a shrub where he had left a paper bag containing these documents and the Telecel line chip. These items were recovered as pointed out by the accused. He also produced exhibits 26 – 52 recovered from accused's sister. This witness was subjected to detailed and tactful cross-examination by counsel. We are satisfied that this witness performed well in witness stand. He gave a logical account of their investigations from the time they arrested the accused to the time they recovered the deceased's property. His explanation is, in our view, reliable. The next witness was the deceased's sister Constance Nomalanga Nyathi. She is now resident in South Africa where she is employed. After she learnt of the untimely death of her younger brother she travelled back home. She approached the police dealing with the matter. The police showed her various items of property to check if she was in a position to identify any. In her testimony she identified exhibits 7, 8, 9, 10, 11, 12, 13, and 14. She gave details of the identification features of each of these items. She stated that she was unable to identify exhibits 15 and 16. She further identified exhibits 17 – 27. She said that she did not recognize exhibit 28. She further identified exhibits 29 – 52. She identified most of these items as she personally bought them and others through use by members of her family. Her identification is, in our view, credible and reliable. She was a fair witness who readily conceded items that she did recognize. We are satisfied with her overall testimony of identification. As

far as her certificates are concerned there is no doubt about their identification as there were in her names.

The state successfully produced accused's ex-curiar states after a trial within a trial. In the statement the accused stated:

"I admit to the charge of killing Mgcini Nyathi. It was on Monday night at about 2100 hours when we assaulted him until he died. I met Lungisani Dube at his place of residence, we then went to my place of residence. Mgcini Nyathi came to my place of residence because he used to come to my place of residence. Lungisani Dube, Mgcini Nyathi and I left my place of residence going to Mgcini Nyathi's place of residence. Lungisani Dube and I had a plan of taking away from Mgcini Nyathi some property which were in their house so that we could sell it, raise money to pay the person who was to transport us to South Africa. After arriving at Mgcini's place of residence, Mgcini received a phone call to the effect that there was sugar to be delivered at Nkulumane Complex so I told him that I had the money to buy the sugar. Mgcini finished cooking and eating, we left for Nkulumane Complex. We walked until we got to Habek. We pretended to be lagging behind him, that is when we started assaulting Mgcini with intention to take from him R200 and his cellphone. I struck him with a fist on his ear Mgcini then fell down I then held him by his hands on the other hand Lungisani started searching him to take money and the cellphone.

Mgcini Nyathi when he started crying, Lungisani Dube then removed a string from Mgcini's track suit he then used it to tie Mgcini around the neck, I kept on holding Mgcini by his hands until he was no longer able to breathe. On realising that Mgcini was no longer breathing, Lungisani Dube and I carried him into the bush. We then undressed him and left him with a pair of shorts. From there we went to Lungisani Dube's place of residence where we left the clothes which we had removed on undressing Mgcini. We then went to Mgcini's place of residence where we took a DVD player and clothes which were in the house of both males and females. We then went to sleep at Lungisani Dube's place of residence, in the morning I went to leave the property which we had taken from Mgcini's house to my sisters' house.

As for the money we had already shared it with Lungisani each getting R100."

The accused testified as the sole witness in support of his case. He made a valiant attempt to explain his possession of the deceased's property which was stolen at the time of the deceased's demise. His explanations were inconsistent and characterised by after-thoughts. We are satisfied that his evidence is untruthful. He was clearly telling lies on material aspects of his defence. When he was required to explain the possession of the items found after he distributed

it he suddenly claimed ownership of some of the property. Such ownership was not put to Constance Nyathi when she ably identified the property as belonging to her and her family members.

The proved facts are the following. The post mortem reveals that the cause of death is strangulation and asphyxia. The accused in his warned and cautioned statement stated that they strangled the deceased using a track suit string. The string was found around the deceased's neck.

The accused was busy distributing the property stolen from the deceased. He led to the recovery of a cellphone belonging to the deceased as a result of pointing it out at a bus stop.

He told his sister, Nyaradzo, that he was fleeing from the police. This was early in the morning after the night on which the deceased was killed. He was indeed fleeing from the police. The question is why? He said it was because of his tsikamutanda activities. We are satisfied that the reason was because of the murder. He said he was from the bush which is consistent with the scene of the murder i.e. deceased's body was found in the bush. Constance Nyathi satisfactorily identified the property items which the accused had distributed or left at his sister's residence, his girlfriend's residence and at Lungisani's residence. The accused pointed out a plastic bag in the bush which contained Constance Nyathi's certificate and Telecel cellphone chip. Further, the accused himself admitted killing the deceased in order to rob him. Accused's evidence has shown him to be a liar. The only inference that can be drawn from these proved facts is that the accused is the one who brought about the death of the deceased – *R v Blom* 1939 AD 188 and *S v Vhera* 2003 (1) ZLR 668 (H).

By tying the string around the deceased's neck until he lost his breath the accused may actual have intended to kill the deceased or may have intended to weaken him in order to facilitate the robbery. This is, in our view, a borderline case between actual intent and legal intent. That being the case the accused is entitled to the benefit of the doubt. There is however, no doubt that he subjectively foresaw that the conduct had real possibility of resulting in the

death of the deceased and he nevertheless proceeded with it. Accordingly, the accused is found guilty of murder with constructive intent.

Sentence [After submissions on mitigation and aggravation]

The mitigatory factors of this case are that the accused is a youthful first offender. He has been in custody from 2008. Admittedly he is to blame for part of the delay as he feigned mental illness. There is however a delay that is not of his making. However, there are strong aggravatory circumstances in this case.

The accused designed a plan to rob the deceased. They lured the deceased to a bush when they attacked him. They assaulted him and he fell to the ground. Whilst the accused was holding him by both hands his co-accused took a string and tied him around his neck and strangulated him. This was a cruel way of killing someone in the cause of robbery. Murder is a very serious offence. It is even more serious when the motive is robbery. Offences of this kind are unfortunately committed by young men of the accused's age group.

The courts have to emphasise the sanctity of human life. This is another young life lost unnecessarily. The aggravating features of this case by far outweigh the mitigatory ones. The sentence urged by the state is the only one suitable for such a conduct.

Accordingly, the accused is sentenced to imprisonment for life.

The National Prosecuting Authority, state's legal practitioners
Messrs Mudenda Attorneys, accused's legal practitioners