

THE STATE

Versus

TONDERAI MARABWA

IN THE HIGH COURT OF ZIMBABWE

MAKONESE J with Assessors Mr B. Ngwenya & Mr O. M. Dewa

BULAWAYO 24 & 25 JULY 2018

Criminal Trial

Ms S. Ndlovu for the state

D. Abraham for the accused

MAKONESE J: On the 10th December 2017, around 2200 hours, the accused and the deceased booked for the night at Esikhosini Guest Lodge, Khumalo, Bulawayo. During the night the accused and deceased had a misunderstanding. In the early hours of the morning a receptionist at the lodge observed smoke was emitting from room number 7 where the deceased and accused had booked into. The fire brigade was called to attend to the scene. By the time fire service responders arrived at the scene the deceased was found dead in the room. She had been strangled to death. A mattress had been placed over her dead body and was burning. A burnt cloth was tied around the deceased's neck. Her face was identifiable. The accused was nowhere in sight. He had locked the door from outside and had left the lodge. He was arrested at Mushangavhudzi Township in Mvuma on murder allegations on the 12th December 2017.

The accused who was aged 35 years at the time of the commission of this offence has been arraigned before this court on allegations of murder. The state alleges that on 10th December 2017 and at Esikhosini Guest Lodge, Khumalo, the accused caused the death of Fortunate Sindi Sithole aged 27 years, by strangling her intending to kill her or realising that there was a real risk or possibility that his conduct may cause the death of the deceased. The accused pleaded not guilty.

The state tendered a state outline marked exhibit 1. It shall not be necessary to repeat the contents of the outline which now forms part of the record. The defence outline was produced and marked as exhibit 2. The defence outline is in the following terms:

- “1. *The accused person will state that on the 10th December 2017, he arranged to meet with the deceased in the city centre of Bulawayo. The accused and the deceased intended to discuss the latter’s pregnancy, the accused’s child and also Maxine Birira’s pregnancy, also by the accused person. The accused will further state that he and the deceased met and discussed. However, the two could not fully exhaust the issue upon discussing. The accused suggested that he and deceased meet once again on another weekend to try and ventilate the issue. However, the deceased refused this suggestion and stated that she was no longer comfortable stretching out the issue any longer and insisted that they find a place to put up for the night and continue with their discussion until a resolution satisfactory to her was arrived upon.*
2. *Accused will state that he and the deceased went looking for a lodge to put up for the night. After a lengthy search the deceased and accused arrived at the affordable Esikhosini Lodge. The two then requested for a room and the receptionist, one Happy Ndlovu gave them a key with the agreement that the two would pay in the morning.*
3. *The accused will state once he and the deceased were in the room they resumed discussing the issue of her pregnancy. The parties had previously agreed that accused would marry his fiancée Maxine Birira and also maintain the child he would have with the deceased. The deceased then vehemently refused to abide by the hitherto agreement. Having grown tired, the deceased and accused engaged in coitus before they slept.*
4. *Accused will state that approximately at 3am the next day the deceased woke the accused to continue the discussion. As the two talked the accused dressed himself and lit a cigarette in his mouth. The accused intended to leave the room. Upon realizing that accused wanted to leave the room, the deceased commanded the accused not to leave until they had resolved the issue.*

5. *Deceased will further state that as he was talking to the deceased, the latter's phone began to ring. The accused picked up the phone and pressed the receive call button. Before the accused could say hello, a male voice came from the other end saying "good morning sweetheart". The deceased immediately jumped up and attempted to grab the phone from the accused. The deceased and accused began tussling for possession of the phone. When the deceased realised that she was failing to wrestle the phone from the grasp of the accused, she grabbed the latter by the testicles and twisted them all the while stating that the accused had no right to answer her phone. The deceased also swore at the accused as they tussled. Accused will further state that he let go of her phone to end the altercation. The deceased then took the phone and threw it at the accused's forehead. This then stated a fight between the two. Deceased grabbed accused's hand and bit his middle finger. The two then wrestled and fell on the other side of the bed and all the while the deceased had the accused's middle finger between her teeth.*
6. *Accused will state that while on the floor the accused grabbed hold of the scarf around her neck and pulled it. The accused pulled the scarf until he managed to pull his middle finger free. The accused then restrained her by twisting the deceased's arm behind her back. The accused indicated that he would let the deceased go and she nodded in agreement when the accused released her he feared reprisal from the deceased. Accused took the room key and locked the door from outside.*
7. *Accused will state that as he walked out of the gate and walked past a certain man whom he did not recognize. Upon exiting the gate of the lodge he threw away the key by the side of the road which was directly in front of the gate and headed for Harare road to board a taxi. Accused took a taxi to Gweru and arrived at 7am. Accused then went to National Building Society to withdraw money to buy chicken feed for his mother. Accused then tried calling the deceased using his Netone line, however, she was unreachable".*

This then is the full version of the accused's defence outline. The state also produced a confirmed warned and cautioned statement, recorded at CID Homicide Bulawayo on the 13th December 2017.

The warned and cautioned state reads in part as follows:

"... Fortunate woke up so that we could continue with our issue. It was around 3am. As we talked she indicated that she was not going to allow me to leave the room, upon which a scuffle started. We tussled and she bit me on the middle finger upon which I pulled upon the scarf which was around her neck then she relented biting me. I then twisted her arm behind her back to subdue her where upon she then agreed to let me leave the room ..."

A post mortem report compiled by Dr S. Pesanai after an examination of the remains of the deceased lists the cause of death as:

- (a) Asphyxia
- (b) Strangulation

On external examination the pathologist observed that the deceased had 98% burns, and subconjunctival haemorrhage.

The further injuries observed by the pathologist are lineal fractures on the right parietal bone and a fractured right anterior cranial fossae. On generative organ examination it was observed that the deceased was carrying a male foetus weighing 100 grams, fifteen weeks old.

The state produced a DNA report compiled by Zephaniah Dhlamini of the National University of Science and Technology (Applied Genetic Testing Centre). The findings of his report concluded as follows:

“Profiles were obtained for all samples provided. Both vaginal swabs produced profiles matched that of Tonderai Marabwa (accused), with a matching probability of 5.4×10^{30} . This therefore means that the probability of finding a random, unrelated individual with an exact profile as that of the accused’s in 1 in 5 non million people.”

The state opened its case by calling its first state witness, **HAPPY NDLOVU**. She is employed as a receptionist at Esikhosini Guest Lodge. On the 10th December around 2200 hours the deceased and the accused arrived at the lodge and booked for a night. They were allocated room number 7. The deceased undertook to settle the room charge the following morning by Ecocash. Sometime during the night, the witness was alerted to screams from one of the rooms by her workmate, Beauty Moyo. The witness did not concern herself about the screams and went back to sleep. Later that night a fire broke out in room 7. The witness went to seek assistance from a neighbour. When room 7 was eventually opened, the deceased’s lifeless body was discovered inside the room. The deceased was lying on the floor with a burning mattress placed above her body. The fire brigade later came and the deceased’s body was conveyed to hospital by an ambulance.

The evidence of this witness was of a formal nature. She confirmed that accused and deceased booked for a night at the lodge. She testified that the accused had left the lodge without notice and that all the gates were locked. In spite of an attempt by defence counsel to discredit her evidence because she did not have knowledge of what actually transpired inside room number 7 that night the witness gave her evidence well. She was not contradicted in any material respects. The witness was not expected to relate to events she had not witnessed. We find the witness to be credible and accept her evidence as a true recollection of the events of the fateful night.

The next witness called by the state was **MARTIN SANTI NYAGULU**. He is a fire fighter stationed at Famona Fire Station. He has 38 years experience and attended the scene of the crime as the duty officer. He confirmed that when he arrived at the lodge the fire had been extinguished. The witness got inside room 7 and observed that there was a human body that was severely burnt. The body was on the floor facing upwards with its head away from the door. The body was in the middle of the room. The witness indicated that the body of the deceased was covered with a burnt mattress. There was an indication that the mattress had been pulled from the bed and placed over the body of the deceased before setting it ablaze. The witness ruled out the cause of the fire being an electrical fault. The witness concluded that the mattress must have been deliberately set alight. The evidence of the witness was easy to follow. He narrated events as he perceived them. We found the witness to be credible.

The state sought and obtained formal admissions, and in terms of section 314 of the Criminal Procedure and Evidence Act, (Chapter 9:07) the evidence of the underlisted witnesses was admitted as it appears in the summary of the state outline:

- (a) Thabani Ncube
- (b) Beauty Moyo
- (c) Promise Rwodzi
- (d) Charles Nyamukubva
- (e) Mehluli Sibanda

- (f) Mbekezeli Bhebhe
- (g) Maxine Birira
- (h) Siyazuza Ncube
- (i) Khulekani Ncube
- (j) Zephaniah Dhlamini
- (k) Dr Sanganai Pesanai

The state closed its case without leading further oral evidence.

The defence case

The accused **TONDERAI MARABWA** gave evidence under oath. The accused placed himself at the scene of the offence. In his evidence in chief he stated that he had gone to the lodge to try and resolve the issue of the deceased's pregnancy. The accused denies that he intentionally killed the deceased by strangling her. The deceased however made the following critical admissions:

- (a) That he had pulled the scarf around the deceased's neck in a bid to stop her from biting his finger.
- (b) That after pulling the scarf tightly the deceased began to relent and stopped biting him.
- (c) That the deceased must have become weak as he pulled the scarf around her neck.
- (d) That the deceased was unable to speak to accused when he left the room.

The accused admits that before he left the lodge he had not alerted the staff at the lodge that he was leaving. He did not call for help neither did he advise any of the staff members what had been involved in a fight with the deceased. The accused's suggestion that the fire was caused by a burning cigarette was refuted by the witness, Nyagulu who stated that the fire could only have been caused by someone setting the mattress ablaze. The accused failed to reconcile his assertion in his defence outline and warned and cautioned statement that he did not intend to kill the deceased. From his own evidence he decided to leave the lodge once the deceased was

incapacitated. He claimed that if he had alerted the staff at the lodge the deceased might have escalated the fight. This was clearly false because the accused locked the room from outside and threw away the room key. His intention was clearly for the deceased to receive no assistance. He knew that the deceased was in bad shape and probably dead. He had strangled her. The post mortem reflects that the cause of death is asphyxia and strangulation. The Cambridge English Dictionary defines strangulation as:

“To compress or constrict a duct or intestine, vessel, etc so as to prevent circulation of blood or air.”

In pulling the scarf around the accused’s neck, the accused strangled the deceased. The Merriam-Webster Dictionary defines asphyxiation as:

“deprivation of oxygen that can result in unconsciousness and often death.”

There can be no doubt therefore that the accused’s conduct on that night was deliberate and purposeful. He blocked the deceased’s windpipe in a deliberate act aware of the consequences or realising that there was a real risk that in pursuing that conduct he could bring about the death of his victim. If the accused person intended to save the deceased’s life he would have called for help and would not have locked the door from the outside. The accused would not have burnt the deceased’s body. The post mortem indicates that deceased sustained 98% burns, although her face was identifiable.

The legal position

The offence of murder is committed when a person kills another person unlawfully and with intention to kill. The intent to kill may be actual and direct or it may be constructive intention. *Mr Abraham*, appearing for the accused, argued that accused may only be guilty of culpable homicide. He avers that his conduct was reckless and negligent. In other words, he lacked the necessary *mens rea* to commit murder. The established facts, however, indicate that to the contrary, accused must have deliberately caused death by strangulation. In his own words the accused said that he pulled the scarf around the deceased’s

neck so tightly that the deceased eventually relented. The accused admitted that he must have caused the deceased to become weak. This is consistent with the findings in the post mortem report which indicate that the cause of death was asphyxia and strangulation. The accused reasonably foresaw death as a substantial possibility. The narration of the events leading to the death of the deceased have only been explained by the accused himself. There is no other version. In the circumstances, it is not possible to state with absolute certainty that the accused had actual intention to kill.

The requirements for a finding of murder with constructive intent are set out in the case of *State v Mugwanda* SC-19-02. See also ; *S v Sigwahla* 1967 (4) SA 556 (A) and *S v Malinga & Ors* 1963 (1) SA 692(AD)

It is our view that the facts prove that accused may not have actually intended to bring about the death of his victim. He however, confirmed strangling her when he should have realised that death may ensue. We accordingly find the accused guilty of murder with constructive intent.

Sentence

The accused has been convicted of murder with constructive intent. The accused aged 34 years and is a well educated man with impressive academic qualifications. He is a holder of a Degree in Biology and Chemistry. He was a Head of Department at Pakhama High School in Shurugwi. He is a man with the usual family responsibilities. As a result of this conviction he will lose his job and those who depend on him for sustenance shall be deprived of financial assistance. Accused is a first offender. He has spent 8 months in remand pending his trial. These are the mitigating features of the case. As indicated by state counsel, *Ms Ndlovu*, this matter once again brings to the fore the level of violence against women. In spite of stiff sentences being imposed by the courts, this does not seem to deter persons like the accused and other like-minded persons. The accused presented himself as an articulate and calculative individual. He showed no remorse or contrition throughout the trial. He instead shifted the blame to the deceased. His conduct was callous and wicked. He strangled the deceased,

blocking her wind pipe with a scarf. After ensuring that his victim was incapacitated he took a burning mattress and placed it over the deceased's body. The deceased sustained 98% burns. The accused then locked the room from outside before leaving the lodge. His conduct indicates that he realized that his victim may die or was dead. In assessing an appropriate sentence, the court must balance the interests of society against those of the accused person. The sentence must be fair and just. The sentence must not be entirely retributive but reformatory.

In the circumstances the accused person is sentenced as follows:

“25 years imprisonment of which 5 years is suspended for a period of 5 years on condition accused is not within that period convicted of an offence involving violence and for which upon conviction he is sentenced to imprisonment without the option of a fine.

Effective sentence: 20 years.”

National Prosecuting Authority, state's legal practitioners
Tanaka Law Chambers, accused's legal practitioners