

**THE STATE**

**Versus**

**WELLINGTON MAPHOSA**

IN THE HIGH COURT OF ZIMBABWE

MAKONESE J with Assessors Mrs C. J. Baye & Mr Shumba

GWERU CIRCUIT COURT 26 & 27 SEPTEMBER 2018

**Criminal Trial**

*Shumba* for the state

*V. Ndlovu* for the accused

**MAKONESE J:** The accused is a male adult, who at the time of the commission of the offence was aged 25 years. He resided at Village Gwanya, Chief Chivi, in Chivi District. He appears in this court on a charge of murder. It is alleged that on the 27<sup>th</sup> October 2016 at or near Village Kufa, Chief Masunda, Zvishavane, the accused unlawfully caused the death of Varaidzo Sibanda, by stabbing her with a knife once in the chest intending to cause her death. The accused pleads not guilty to the charge.

The circumstances surrounding this case are that the deceased was a female adult aged 40 years at the time she met her demise. The deceased met the accused in a bushy area known as Radio 2 which is adjacent to where deceased used to reside. The accused accosted the deceased intending to rob of her hand bag. The deceased resisted, whereupon the accused stabbed her with a home-made knife on the left side of her chest just above the left breast. The deceased screamed and fell to the ground and became unconscious. A neighbour who heard the screams rushed to the scene and rendered first aid to the deceased. The deceased subsequently regained consciousness and was ferried to Zvishavane District Hospital. Her wound was sutured and she was immediately transferred to United Bulawayo Hospitals the same day for further treatment and care. She however died on the way. She had succumbed to injuries sustained during the stabbing.

The accused denies the allegations asserting and raising the defence of mistaken identity. Accused stated that on the day in question he was at Sasula Village, Zvishavane at his aunt's homestead. He left the homestead at around 12noon, enroute to Chivi. The accused contends that he has been wrongly implicated as he arrived at Kufa Village after the incident which led to the death of the deceased.

The state tendered an outline of the state case, marked as exhibit 1. It shall not be necessary to repeat the contents of the state outline which now forms part of the record. The accused's defence outline was produced as exhibit 2. The accused denies the allegations of murder. He denies any involvement in the murder and avers that this is a case of mistaken identity. He alleges that the knife which was recovered from him was a kitchen knife which was produced by his wife after she had been assaulted by the Investigating Officer and one of the arresting details.

The state then produced as exhibit 3 the accused's confirmed warned and cautioned statement recorded on the 30<sup>th</sup> October 2016 at CID offices, Zvishavane. The statement was confirmed by a magistrate on the 15<sup>th</sup> November 2016. The English version of the warned and cautioned statement is in the following terms:

*"I do not admit to the allegations. I left my uncles' rural home in Chivi on the 20<sup>th</sup> October 2016. I arrived in Zvishavane on the same day and slept at Izayi Park at my friend Hosia Chiranda's house, but do not know his address. On the following day we left Izayi Park together with knives. We arrived at a place called radio 2 in village Kufa, Chief Masunda area. Hosia Chiranda then sat on a rock and told me to look out for people so that we would rob them and take their property. I was armed with a knife which I had been given by Hosia Chiranda. After walking for a short distance, I met 5 women and we passed each other. Then I met Clod with his colleague and we greeted each other and continued on my way. I continued walking and I met a young boy who tried to run away and I told him not to run because I was not a gangster. I went back to Hosia and told him that there was a lady approaching. I gave him my slippers and he gave me his sandals since they were painful. Hosia said he was going to harass the now deceased and take her handbag and run away with it. Hosia had a knife in his hand and he wrestled with the now deceased until he took her handbag and ran into the bush. I was 4 metres away from the scene and he threw the handbag at me and I ran into the bush. I ran a few metres and I felt that the handbag was heavy. I stopped and opened it and I saw a 2litre contained with water and a dish towel. I removed them and left them on the ground. I opened the handbag again after a while and I saw 2 metal national identification documents, a wallet and receipts and some papers and I left them there on the ground. I returned to Zvishavane town and proceeded to Mandava to look for Hosia Chiranda and I could not locate him. I then left Zvishavane in the afternoon and went back to Chivi and arrived around 2300 hours. I was arrested on the 29<sup>th</sup> October 2016 in the evening at my homestead. I gave them the knife which I had been given by Hosia Chiranda. I later learnt that the person we had robbed had died."*

The post mortem report compiled by Dr I Betancourt at United Bulawayo Hospitals following an examination of the remains of the deceased was produced as exhibit 4. The pathologist concluded that the cause of death was:

- (a) Hypovolemic shock
- (b) Damaged left axillary and intercostals arteries
- (c) Stabbing injuries

On marks of violence the post mortem reveals that the deceased sustained the following injuries:

1. Saturated wound (5.5cm) on the left haemothorax
2. Haematoma left shoulder
3. Wounds 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> fingers of right hand

#### 4. Abrasion right knee and superior region of right leg

On internal examination, the post mortem report indicates that the deceased suffered haemorrhagic infiltration inside the whole left haemothorax. The state then tendered into the record the home made knife recovered from the accused as exhibit 5. The knife had the following measurements –

- (a) Blade 12.5cm
- (b) Handle 9.5cm
- (c) Total length 22cm
- (d) Widest part of blade 2.5cm
- (e) Weight 0.01kg

A pair of maroon slippers tied with soft wire were tendered into the record as exhibit 6. A blue track suit bottom with white stripes was produced as exhibit 7. A blue T-shirt recovered from the accused with blood stains on the right sleeves was tendered as exhibit 8. A black handbag recovered at the scene of the crime was also produced as exhibit 9. A small black wallet recovered at the scene following indications made by the accused was tendered as exhibit 10. A wrapping cloth (commonly known in local parlance as “*Zambia*”) was tendered and marked exhibit 11. Other objects recovered at the crime scene are an empty 2 litre plastic container, a black handbag strap and a dish towel.

#### **The State case**

The state called as its first witness **PRESTON MARINGE**. This witness is a young man, who at the relevant time was doing Form 3. He was not known to the accused prior to this offence. He knew the deceased as a fellow villager during her lifetime. On the 27<sup>th</sup> October 2016 and around 7am he was on his way to Zvishavane walking along on a foot path which passes through a bushy area known as Radio 2. He saw a male adult walking towards him along the same path. This man was a stranger to him. As the two were approaching each other, the witness observed that this man was donning a blue T-shirt, a blue track suit bottom with white

stripes and a pair of what appeared to be purplish slippers. When the witness was about 10metres from the approaching stranger, the witness noticed that the man had his hand in his track suit bottom. The hand was partially inside the pocket and the man appeared to be holding on to some object. The witness became suspicious and jumped off the path into the bush. The witness narrated that this man remarked that there was no need for him to be afraid as he was not a gangster. The witness identified this man as the accused. He confirmed that he was positive about his identity as the man he had met because he saw his face as they passed each other. The witness was emphatic that he was certain the accused is the person he saw in the Radio 2 area on the 29<sup>th</sup> October 2016. Later that day the witness was informed that the deceased had been stabbed around the very same location where he had met the accused. The witness positively identified the blue track suit bottom, the blue T-shirt and the maroon slippers tendered as exhibits, as the clothes that were worn by the accused on the day in question.

The witness gave his evidence well and indicated that he had good eyesight. The witness maintained that he believed the colour of the slippers was purple. The court takes judicial notice of the fact that the identification of colours cannot be definitive because colours may and can have various shades depending on issues such as lighting and individual perception. It is noted that often times witness may refer to red as brown and vice versa. The weight and accuracy of the witness' observation however, depend on other objects linked to the accused and recovered at the crime scene or from the accused himself. In this instance the slippers in issue were tied with soft wire and this is consistent with the testimony from other witnesses linking these slippers to the accused.

The court is satisfied that this witness gave his evidence in a clear and straight forward manner. He struck as an honest witness. He was not controverted under cross-examination in any material respects. We find his evidence credible and reliable.

The second witness for the state was **TRUST DUBE**. This witness resides at village Kufa, Chief Masunda, Zvishavane. He is not formally employed. He knew the deceased during her lifetime as his niece. He is known to the accused. Before the commission of the

offence the witness had known the accused as a resident of Sasula area in Zvishavane. The accused had been in the area for at least 2 years. They occasionally met at a local bottle store where they consumed alcohol. The witness indicated that he was well known to the accused and there was no possibility of mistaking him for someone else. On or about the 26<sup>th</sup> or 27<sup>th</sup> October 2016, the witness was at Kisten Mhonga's homestead when the accused arrived. Accused was wearing very dirty clothes. His feet were dusty. He asked for food from Kisten as he indicated that he was hungry. Kisten had to quickly pop some maize for the accused. After eating the popped maize accused indicated that he was leaving, but before leaving, he asked for some tying wire to repair his pair of slippers. The accused was given a piece wire by Kisten and he left after repairing his slippers. The witness indicated that the accused spent up to 15 – 20 minutes at Kisten's homestead. The witness observed that accused was wearing a blue track suit with white stripes and blue T-shirt. He left the homestead and headed towards Zvishavane town. The witness was later advised of the death of Varaidzo Sibanda who was found with a stab wound in the Radio 2 area. Mollen Siziba later handed to this witness a pair of slippers which had been recovered from the crime scene. The witness identified the slippers as those that were won by the accused when he arrived at Kisten's homestead. It was easy to identify the slippers due to the tying wire that had been used to repair the slippers. The witness later handed the slippers to the police. This witness who knew the accused to go by the name Wellington assisted the police in tracking the accused to his home in Chivi. The witness was present when the accused was arrested on allegations of murder. This witness gave his evidence well. He was not contradicted under cross-examination. His account is a truthful narration of his recollection of the events. He had no motive to lie. He had no axe to grind with the accused. We find his evidence to be credible and reliable.

The third state witness was **KISTEN MHONGA**. This witness resides at Kufa Village, Chief Masunda, Zvishavane District. He is well known to the accused whom he considered as an acquaintance and a friend. He was known to the deceased as his niece. On the 26<sup>th</sup> or 27<sup>th</sup> October 2016 and around 4pm the accused arrived at his homestead. The witness was in the company of Trust Dube. The accused complained of hunger and asked for some food. His clothes were dirty. The witness popped some maize and gave the accused to eat. Before he left,

accused requested for tying wire to repair his pair of slippers. The witness directed the accused to a gate where he obtained some pieces of soft wire. The witness observed that accused was wearing a blue track suit bottom and a blue T-shirt. The witness confirmed that the exhibits in court, namely the T-shirt, track suit and pair of slippers were those that were worn by the accused where he arrived at his homestead. The witness testified that there was no question of him mistaking the identity of the accused, as he knew him well before the commission of the offence. The witness was later informed that deceased had been stabbed to death and that a pair of slippers similar to those worn by the accused when he visited his homestead where recovered at the crime scene.

The evidence of this witness was consistent and credible. The witness was well known to the accused. The witness had not reason to fabricate a case against the accused. We have no difficulty in accepting the evidence of this witness.

The last witness to lead *viva voce* evidence was **ALEXANDER MUREWA**. He is a Detective Sergeant stationed at CID Zvishavane. He has been in the police service for the past 17 years. He is the Investigating Officer in this case and was part of the arresting team that located the accused at his rural home at Chivi. His evidence was of a formal nature. He led a team of 4 police officers upon receiving credible leads on the whereabouts of the accused, from the state witnesses. When accused was confronted he made an attempt to escape but was quickly apprehended. Accused admitted committing the offence. He instructed his wife to collect the home-made knife from one of the houses. The witness recovered the blue T-shirt and blue track suit bottom from the accused. He observed that the T-shirt was blood stained. The accused failed to explain the presence of the blood stains on his T-shirt. The witness testified that he also recovered the maroon slippers as well as the rest of the exhibits. The court finds that the evidence of this witness was credible and reliable. The evidence of this witness is consistent and corroborates the testimony of the rest of the state witnesses. His testimony was largely uncontested and the court has no hesitation in accepting his testimony.

The evidence of the under listed witnesses was admitted by way of formal admissions in terms of section 314 of the Criminal Procedure and Evidence Act (Chapter 9:07), namely:-

- (a) Never Moyo
- (b) Julia Gumbo
- (c) Vande Ganyani
- (d) Molline Siziba
- (e) Moses Msipa
- (f) Godknows Ganyani
- (g) Hosia Chirinda
- (h) Abraham Vengesai
- (i) Dr Ivan Betancourt

### **The Defence Case**

The accused elected to give evidence under oath. He denied having stabbed the deceased. He states that on the day in question he was at Sasula Village, Zvishavane at his aunt's homestead. He left the homestead around midday for Chivi. On his way he passed through Kisten Mhonga's homestead. When he arrived he met Trust Dube who was nicknamed "*Mukanya*". The accused was well known to both Kisten and Trust Dube. They ate popped maize together and before he left he asked for a piece of wire to repair his pair of slippers. On that day accused says he was wearing a white  $\frac{3}{4}$  short, with a blue T- shirt with white dots. He was wearing brown slippers. He confirmed that before the commission of this offence he enjoyed good relations with Kisten. His wife and Kisten's wife were close friends. Accused could not proffer any reason why the state witnesses would lie against him. He stuck to his defence of mistaken identity. In the end however, defence counsel for the accused conceded that the state had led unassailable evidence against the accused. We are grateful for the concession made by *Ms Ndlovu*, appearing for the accused, and for that reason, we find it unnecessary to explore in detail the law regarding evidence of identification in great detail. Suffice to say that the court is satisfied that on the evidence led there is no danger that the accused was wrongly

identified. See *Mutters & Anor* SC-66-89, and *Makoni & Ors* SC-67-89. Defence counsel, however, implored the court to render a verdict of guilty on the basis of constructive intent. The submission by the defence was that when accused perpetrated the robbery his intention was not to bring about the death of the victim. The deceased suffered one stab wound. There is no indication that accused deliberately inflicted the wound in order to cause the death of the deceased. There is a reasonable possibility that the deceased was rattled by the deceased's resistance and was unprepared for it. The cuts on the deceased's fingers suggest that there was a struggle between the accused and the deceased. In the circumstances, the appropriate verdict would be murder with constructive intent.

The accused is accordingly found guilty of murder with constructive intent.

### **Sentence**

In assessing an appropriate sentence this court takes into account all the mitigating features of the case as highlighted by accused's defence counsel. The court takes into account that accused is a 26 year old man with the usual family responsibilities. He is married and has dependents whose survival depended on the income he earned. The court also takes into account the fact that accused has spent close to 2 years in remand prison before this trial. The accused has therefore served part of his sentence. The accused has, however, been convicted of a very serious offence. The accused has shown no regret for his conduct. He has exhibited no remorse. He pursued a false defence to the bitter end. His defence crumbled. He was forced to concede due to the weight of the evidence against him. The court abhors violence against women. In robbing the deceased, the accused induced severe trauma in his victim before stabbing her once in the chest. The robbery was committed against a defenceless woman. Violence against women is not countenanced by our courts. The attack upon the deceased violates the rights of the victim as enshrined under section 52 of the Constitution of Zimbabwe ( Amendment No 20), 2013. This court will not condone violence, particularly murder, committed during the course of a robbery. The only appropriate sentence is a lengthy prison term. For the foregoing reasons, the following sentence is imposed;

“Accused is sentenced to 20 years imprisonment.”

*National Prosecuting Authority, state’s legal practitioners*  
*Legal Aid Directorate, accused’s legal practitioners*