

THE STATE  
versus  
STANSILORS MASHAYAMOMBE

HIGH COURT OF ZIMBABWE  
MAWADZE J  
HARARE, 18 & 20 November 2015

Assessors: 1. Mr Mutambira  
2. Mr Mhandu

### **Criminal Trial**

*A Masamha*, for the State  
*T Chagudumba*, for the Accused

MAWADZE J: The accused is charged with murder as defined in s 47 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*], it being alleged that on 31 August 2014 and at Hurungwe Prison Farm, Makuti at about 2000 hours the accused unlawfully and with intent to kill or realising that there was a real risk or possibility that his conduct might cause death murdered BESTEE TAPIWA MUTANDA by strangling her with a neck tie, shoe lace and ladies pant tying her both hands with a rope thereby inflicting injuries from which she died.

The accused was a class 'A' prisoner serving a 40 months jail term for attempted murder at Hurungwe Prison Farm. The now deceased BESTEE TAPIWA MUTANDA was a female prison officer aged 33 years based at HURUNGWE FARM PRISON. At the material time she was staying alone at her house at the Prison Farm. Her lifeless body was discovered by fellow prison officers inside her bedroom on 1 September 2014 after she failed to report for duty. The allegations against the accused are as follows:

It is alleged that on 31 August 2014 at about 1800 hours the accused escaped from prison and went on to hide within the prison farm. It is alleged that at about 2000 hours accused

proceeded to the now deceased's house situated in the prison farm where he used an unknown object to break the spare bedroom window, opened the window and gained entry into the house. It is alleged that accused removed his prison gab, a blue work suit trousers and a white T/Shirt both inscribed "A" and left them in the spare bedroom. The accused is alleged to have proceeded to the main bedroom where the now deceased was sleeping alone and attacked the now deceased. The accused is alleged to have used a shoe lace to tie the now deceased's neck and also used a ladies pant. It is further alleged that accused tied the now deceased's mouth with a neck tie and tied both her hands with a rope. The accused is alleged to have torn the now deceased's pants and raped her. It is alleged that the now deceased thereafter died and accused covered her body with a blanket. It is further alleged that accused proceeded to steal the now deceased's motor vehicle a Nissan Sunny Super Saloon Registration Number ABM 7116 and other property after which the accused drove away with his loot. The accused was later arrested by some prison officers while allegedly in possession of the now deceased's motor vehicle and property on 1 September 2014 in Magunje. The now deceased's body was examined by Dr Chikutiro who concluded that death was due to strangulation and that sexual assault could not be ruled out.

At the commencement of the trial the accused through his legal practitioner Mr *Chagudumba* made an application that the state be compelled to produce results of what accused said were DNA tests done after the extraction of accused's blood samples and semen from the now deceased. The accused said such results were crucial to his defence as they would prove the accused's innocence especially in relation to the alleged rape despite that the charge of rape was not being preferred against accused before us.

Mr *Masamha* for the state opposed the application which he believed was solely made to delay and frustrate the criminal trial. He said he had explained to accused's defence counsel that he was not aware of such DNA examination having been done or that any such samples were taken. Mr *Masamha* submitted that if such samples were taken he had no such results and that the summary of the state case clearly outlines the evidence the state was relying upon and was not relying on such results. In any case Mr *Masamha* submitted that the accused was separately charged for rape and robbery and that those proceedings were long concluded.

We dismissed the application by the accused for lack of merit. The state is *dominis litis* and cannot be directed by the accused how to prosecute its case. We found it untenable that we

should order the state to produce evidence they do not have and which they none the less do not seek to rely upon. In our view it was up to the accused to show the relevance of such evidence if ever it is available, during the accused's defence case.

After we made this ruling the accused through his defence counsel indicated that they intended to exercise the accused's right to silence throughout the trial. Mr *Chagudumba* said he explained to the accused the consequences of exercising the right to silence and that accused insisted that he wanted to exercise that right. Through abundance of caution the court also explained to the accused the consequences of him exercising his right to silence by failing to challenge the evidence placed before the court by the state. The accused insisted that he wanted to exercise the right to silence.

The right to silence is enshrined in our constitution in s 70 (1)(i) which provides as follows;

“70 Rights of accused persons.

- (1) Any person accused of an offence has the following rights:
- (a) ..... irrelevant.
- (b) ..... irrelevant.
- (c) ..... irrelevant.
- (d) ..... irrelevant.
- (e) ..... irrelevant.
- (f) ..... irrelevant.
- (g) ..... irrelevant.
- (h) ..... irrelevant.
- (i) to remain silent and not to testify or to be compelled to give self-incriminating evidence.....”

The accused chose and was allowed to exercise his right to silence. The accused declined to give a defence outline. The accused declined to cross examine any of the state witnesses or to object to the production of any of the exhibits. The accused declined to give any evidence in his defence case and did not answer any of the questions put to him in cross examination by the trial prosecutor. The accused did not call any witnesses or produced any exhibits. In short, the accused fully exercised his right to silence and declined to exercise his rights also provided for in s 188 (b), s 198 (b) to s 198 (g), s 199 and s 200 of the Criminal Procedure and Evidence Act [*Chapter 9:07*]. The accused who is legally represented was properly warned by the court.

We now deal with the evidence led by the state from the 6 witnesses who testified who are Zecks Mwadura, Rogers Zenzele Sikhosana, Simba Chipumo all prison officers at Hurungwe

Farm Prison, Arlington Makoshori a civilian witness and the Investigating Officer Detective Sergeant Elias Kasere. Before we summarise this evidence we wish to comment on the exhibits produced by the state;

Exhibit 1 is the Post Mortem Report compiled by Dr Admire Chikutiro who also gave *viva voce* evidence. As per the evidence of Dr Chikutiro and the findings made the following is revealed:

- (i) that the 33 year old deceased female's body was apparently healthy and that there were no missing body parts.
- (ii) the deceased was bleeding from the nose and mouth
- (iii) the deceased's mouth was tied and she had bruises on the tongue
- (iv) there was a mark of a tie around her neck
- (v) both wrists were tied
- (vi) deceased's nails were cyanosed which is a bluish discoloration of the nails caused by lack of oxygen on the peripheral part of the body.
- (vii) deceased's legs were tied
- (viii) deceased's abdomen was distended or increased in circumference and that on operating the abdomen her uterus was normal in size and she was not pregnant.
- (ix) deceased was bleeding from the vagina and also producing some whitish discharge.

Dr Chikutiro explained that the cause of death was due to strangulation and that he was also not able to rule out sexual assault due to the whitish discharge which could have been semen or normal vaginal variant discharge.

The uncontroverted evidence of Dr Chikutiro is that the deceased did not die through natural causes. She was strangled as evidenced by the mark on her neck which according to the Doctor shows that external force was used to cause exclusion of blood flow to the brain. This was also evidenced by the frothing on the mouth which he said were a sign of a struggle as deceased gasped for breath.

Exh 2 (a) to (i) are the photographs of the deceased taken at the scene by Detective Sergeant Matsvere. We noted the following;

- Exh 2 (a) depicts the spare bedroom window allegedly used by accused to gain entry into deceased's house.
- Exh 2 (b) depicts the position of the prison gag in the spare bedroom allegedly left by the accused and an axe handle left on the spare bedroom bed.
- Exh 2 (c) shows an axe blade found in deceased's spare bedroom allegedly used to break the spare bedroom window pane.
- Exh 2 (d) shows the position the body of the deceased was found in the main bedroom covered with blankets on the floor.
- Exh 2 (e) depicts the ladies pant and a shoe lace tying the deceased's mouth
- Exh 2 (f) depicts the neck tie also used to tie the deceased's mouth.
- Exh 2(g) depicts the deceased's body showing the rope which was used to tie deceased's hands and also exposing her half-dressed body.
- Exh 2(h) depicts the lower party of deceased's naked body and the neck tie used to tie both her legs.
- Exh 2(i) depicts the scattered clothes strewn all over the now deceased's main bedroom

In our view the various photographs show that the deceased died a violent and painful death. Her mouth was gagged. Her hands, neck and legs were tied. The lower part of her body was undressed exposing her genitalia. The deceased's clothes were strewn all over the main bedroom which is a sign of a possible struggle.

Exhibit 3 (a) to (c) are neck ties which were used to tie the now deceased. We noted that exh 3(a) is blue in colour with white spots. Exhibit 3 (b) is brown in colour with black spots and exh 3(c) is yellow in colour and had blood stains.

Exh 4:

Is a torn black pant which was said to be used to tie the now deceased on the mouth

Exh 5:

Is a white rope with blood stains which was used to tie the now deceased's hands.

Exh 6:

This an all inventory of the property of the stolen from the now deceased and recovered in possession of the accused. They include a Nissan Sunny Super Saloon motor vehicle, various

male clothes belonging to deceased's husband, keys of the Nissan Sunny and Nissan NP 300 motor vehicles, bank cards, cell phone, sugar beans and mazoe cream soda.

Exh 7:

Is a shoe lace, blood stained and used to tie deceased's neck.

Exh 8:

Is a pair of blue work suit trousers, part of prison gab worn by accused, inscribed "A" and found on the bed in deceased's spare bedroom.

Exh 9:

Is a white t/shirt, part of prison gab worn by the accused, inscribed "A" and also found on the bed in deceased's spare bedroom.

We now turn to the evidence led by the state.

#### Zecks Mwadura

He is a member of prison service based at Hurungwe Prison Farm and was deceased's workmate. He told the court that on 31 August 2014 he was asked by the deceased's husband to drive him to Harare using the motor vehicle a Nissan NP 300 belonging to deceased's husband from Hurungwe Farm Prison. The deceased's husband was undergoing studies in Bulawayo. He left the deceased's husband in Harare and returned with the motor vehicle to Hurungwe Farm Prison after he had loaded a kitchen unit in Harare. He arrived at deceased's house at 1900 hrs and surrendered the Nissan motor vehicle to the deceased. As it was now late the deceased told him not to unload the kitchen unit from the motor vehicle and he was given a motor bike by the deceased to ride to his house some 2 km away and he left.

Zecks Mwadura said at about 2100hrs he was telephoned by his seniors and advised that the accused a serving prisoner had escaped. He proceeded to the prison complex and joined in the search of the accused to no avail. The next day on 1 September 2014 at about 13 00hrs while still searching for the accused he was called back to the prison farm after it had been discovered that the now deceased had not reported for duty. He joined prison officers and a police detail who went to deceased's house and discovered that her house had been broken into. He said as they entered the house they saw the axe blade, the axe handle and the prison gab exh 8 and exh 9 on the bed in deceased's spare bedroom. He said he discovered deceased's lifeless body as depicted in exh 2 and graphically described how deceased was tied on the mouth, neck, both

hands and legs and that deceased was not dressed. He managed to identify the various exhibits which were used to tie the deceased.

The evidence of Zecks Mwadura reads well. He is the last witness who saw he deceased alive on 31 August 2014 at about 1900 hrs. His evidence confirms why the now deceased was alone at the house that night as her husband had left for Bulawayo.

Rogers Zenzele Sikhosana

He is a prison officer at Hurungwe Prison Farm and was a workmate of the now deceased. He was alerted on the night of 31 August 2014 that the accused, a serving prisoner had escaped. In his evidence he explained how he joined in search for the accused and ultimately how the now deceased's body was found in the deceased's bedroom. In our view there is no need to repeat this witness' evidence as it is all fours with what Zecks Mwadura observed on entering deceased's house and how deceased was tied and clothes strewn all over the bedroom. The evidence of Rogers Zenzele Sikhosana is also unchallenged.

Arlington Mukoshori

He testified that he was at Mugunje Growth Point repairing tyres and that on 1 September 2014 accused arrived at his workplace driving a Nissan Super Saloon motor vehicle inquiring where he could buy food. Accused also indicated that he was selling beans for US\$18 a bucket and he bought a bucket of beans at US\$16-00 which he took from a 20kg sack which was on the front passenger seat of the motor vehicle driven by the accused. Later that day at 2100hrs he was approached by prison officers and police officers who asked him to surrender the beans he had bought from the accused. He surrendered the beans which is part of exh 6.

The value of Arlington Mikoshori's evidence is that accused sold him some beans which is part of the beans stolen from the now deceased on the night of 31 August 2014. Secondly he saw accused driving the now deceased's stolen motor vehicle a Nissan Sunny Super Saloon which is part of exh 6.

Simba Chipumo

He is a member of the Zimbabwe Prison Service based at Hurungwe Prison Farm and he led a team of prison officers who arrested the accused on 1 Septemebr 2014 at Mapuranga Business Centre in Magunje. He was advised that on 1 September 2014 that accused a serving prisoner had escaped from prison and he joined the search for the accused on 1 September 2014.

He was also part of the prison officers who went to deceased's house and observed the deceased's body as explained by Zecks Mwadura and Rogers Zenzele Sikhosana. He then explained how they apprehended the accused.

Simba Chipumo said they received information that accused had been seen at Mapuranga Business Centre in Magunje and they proceeded to the place. They sighted accused at the Business Centre seated alone in deceased's Nissan Super Saloon motor vehicle. They approached accused who on seeing them took to his heels. He said they fired warning shots but accused kept on running away. They chased after accused and apprehended him. He said accused was wearing civilian attire of a floral shirt and khaki trousers together with military boots which clothes all belonged to deceased's husband and form part of exh 6. They recovered all property listed in exh 6 which was positively identified by the deceased's husband. He said accused led them to Arlington Makoshori where they recovered some beans accused had stolen from deceased and sold. He further said accused led them to his girlfriend Fungai Kauta whom accused had given a cell phone part of exh 6 stolen from the deceased and they recovered it.

The value of Simba Chipumo's evidence is that accused was apprehended with the deceased's property and that accused tried to flee from arrest.

#### Elias Katsvere

He is the investigating and attended the scene of crime on 1 September 2014. At the scene he made the following pertinent observations;

- (a) He observed the broken window which was used by the intruder to get into deceased's house as shown on exh 2 (a).
- (b) In the spare bedroom he observed the axe blade as depicted on exh 2 (c) and the prison gab exh 8 and 9 which was worn by accused when he escaped which all were in the deceased's spare bedroom as per exh 2 (b).
- (c) In deceased's bedroom he was shown deceased's body and he took photographs as depicted in exh 2 (d) to exh 2 (i). In his evidence he said he made the following observations;
  - (i) deceased was tied on the mouth with a blue spotted tie exh 3 (a)
  - (ii) deceased was tied on the neck with a shoe lace exh 7 and a ladies pant exh 4
  - (iii) deceased had a wound above the right part of her eye

- (iv) deceased was bleeding from the nose, mouth and vagina
- (v) deceased was not dressed on the lower part of her body and had no pants
- (vi) deceased was tied on her both legs with a yellow tie exh 3 (c)
- (vii) deceased's hands were tied with a white rope exh 5
- (viii) deceased's clothes were scattered all over the bedroom as is on exh 2 (1).

Detective Sergeant Elias Katsvere said he caused the post-mortem to be done on deceased and post mortem report exh I was compiled. He said he compiled a list of stolen property from the deceased as per exh 6 with the help of the deceased's husband. After accused's arrest he said accused refused to make any indications and also later disowned his warned and cautioned statement at court during confirmation proceedings. He proceeded to charge the accused with escaping from lawful custody, unlawful entry into premises, theft of deceased's motor vehicle, rape and murder. He said all the other charges were finalised at magistrates court except the murder charge.

This is the evidence which was placed before us. As already said all this evidence is uncontroverted as accused exercised his right to silence. The accused also elected not to give any evidence. The accused was cross examined by the prosecutor and he chose not to answer all the questions put to him.

#### Assessment of Evidence

The credibility of all state witnesses is beyond reproach. Their evidence was clear, free flowing and coherent. They were not challenged by the accused in any manner for us to make an adverse finding on their demeanor. There is therefore no objective basis not to accept their evidence in *toto*.

From the evidence led them state cases hinges on circumstantial evidence as there was no eye witness to the murder. It is competent for this court to return a verdict of guilty based solely on circumstantial evidence if this court is satisfied that the circumstantial evidence preclude every reasonable inference of the innocence of the accused. See *S v Shonhiwa* 1987 (1) ZLR 215 (S), *S v Vhera* 2003 (1) ZLR 668 (H) at 680 C.

In the case of *R v Blom* 1939 AD 188 at 202-203 Watemayer JA refers to the important principles or rules of logic which govern the use of circumstantial evidence in a criminal matter. These are;

- (a) that the inference sought to be drawn must be consistent with all proved facts and
- (b) that the proved facts should be such that they exclude every reasonable inference from them save the one to be drawn. If they do not exclude other reasonable inferences then there must be a doubt whether the inference sought to be drawn is correct.

It is therefore clear that circumstantial evidence can only be used to draw an inference if such an inference sought to be drawn is the only reasonable one derived from the proved facts. As was said in the case of *S v Marange & Ors* 1991 (1) ZLR 244 (S) at 249 circumstantial evidence must always be narrowly examined.

In applying these principles to this case we find that the following facts were proved.

- a) The now deceased did not die from natural causes as per post mortem report Exh 1 and other evidence led especially from Doctor Admire Chikutiro. She died as a result of being strangled in a very violent and cruel manner which Doctor Chikutiro described as a slow painful death. Her mouth was tied and muzzled. Her neck was tied. Her hands and legs were tied. In all probabilities she was sexually abused as she had no undergarments and was discharging whitish slimmy substance from her vagina. In short she was murdered.
- b) It has been proved that the accused escaped from Hurungwe Farm Prison Farm on 31 August 2014. The accused was an 'A' class prisoner who worked in the workshop for tractors and was not guarded. He was only arrested on 1 September 2014 at Mapuranga Business Centre in Magunje.
- c) The now deceased's house was broken into the very night the accused escaped from prison. No other prisoner escaped.
- d) The accused's prison gab exh 8 and 9 which accused was wearing when the escaped was later found abandoned inside the now deceased's house which had been broken into.
- e) The now deceased's property was stolen the night she was murdered and this property is as per exh 6.
- f) The accused upon his arrest was found in possession of now deceased's property exh 6 which include a Nissan Sunny Super Saloon motor vehicle which accused was seen

driving. The accused was found wearing the clothes which belong to the now deceased's husband and had disposed the deceased's bucket of beans and cellphone.

- g) The accused made a spirited effort to avoid being arrested even when warning shots were fired.

In our view no other reasonable inference can be drawn from all these facts proved other than that they all point to the guilty of the accused. The only reasonable inference we can draw is that it is the accused who killed the now deceased by strangling her. When one considers all the factors found proved it is clear that this was a premeditated murder. The accused knew that the now deceased was alone in her house as he worked in a workshop near to her house. After breaking into the house the now deceased was rendered defenceless. Her mouth, hands and legs were tied. She was then strangled using a shoe lace. The inescapable conclusion is that the accused intended to kill the now deceased.

We are therefore satisfied, having considered all facts found proved that the only reasonable inference we can draw point to accused's guilt beyond reasonable doubt. We therefore find the accused guilty of contravening s 47 (1) (a) of the Criminal Law (Codification and Reform Act) [*Chapter 9:23*] which relates to murder with actual intent.

**VERDICT:** Guilty of contravening s 47 (1) (a) of the Criminal Law (Codification and Reform Act) Chapter 9:23÷ Murder with actual intent.

#### **SENTENCE**

The accused who had been exercising his right to silence decided after conviction to address the court in mitigation.

We agree with the accused's defence counsel that that it is difficult to meaningfully address the court in mitigation in view of heinous and callous manner in which this offence was committed. This is a proper case in which the accused deserves the full wrath of the law.

The accused is 31 years old and has two minor children. The accused is already serving long term custodial sentences. For escaping from lawful custody the accused was sentenced to 12 months imprisonment. He was sentenced to 40 months imprisonment for unlawful entry into premises in aggravating circumstances. Apparently accused was also sentenced to 6 months for

driving without a valid licence. The accused was further slapped with 20 years' imprisonment for rape and 10 years imprisonment for theft of the motor vehicle. While this ordinarily may have been mitigatory, the accused is the author of his own misfortunes. He decided to go on a criminal spree involving very serious offences after escaping from awful custody. We do not agree that the manner in which the state proceeded to prosecute the accused for this offence is improper. In fact this aspect was addressed by my brother Zhou J in HH 596/15 when accused brought an application for permanent stay of his prosecution. We will therefore not place much due weight on this factor.

It has been submitted that we should consider the exercise of accused's right to silence as mitigatory factor as accused did not waste court's time. Again this is not a mitigatory factor as witnesses were called and the court went through full process of trial as there was no curtailment of proceedings in any manner. There were no formal admissions made by the accused.

The accused submitted that we should treat him leniently on account of the fact that he is allegedly being ill-treated by female prison officers whom he said are assaulting him every day and denying him medical attention. Accused raised these concerns at the close of the defence case and we ordered that these allegations be investigated. At this stage these remain unsubstantiated allegations which we cannot take as facts proved. As the state submitted the accused should furnish them with further details to enable them to meaningfully investigate the allegations.

It was also submitted that the accused once suffered from some mental problem in the past and that he was treated. We are surprised that such an issue is only being raised now at the eleventh hour when it was not raised by the accused at any stage. No such evidence have been placed before the court and as the state rightly pointed out accused has not shown how this is relevant to his criminal conduct, in the past and the current murder charge. The facts of this case show that the accused meticulously planned and executed this offence.

It is aggravating that the accused is not a first offender. The accused escaped from lawful custody while serving for the offence of Attempted Murder. He had hoodwinked Prison Officers who had classified him as an 'A' class prisoner when in fact he had not reformed but remained a renegade determined to even commit more and serious offences. This shows the accused's total disregard and disdain of the law.

The manner in which accused committed this offence exhibits astounding cruelty and callousness. It is a wicked act. One would have thought that after making good his escape from prison the accused would be pre occupied with simply gaining his freedom. Instead accused used his knowledge of the circumstances of the deceased who was staying alone to murder her in cold blood. The accused had to achieve this in a very determined and sadistic manner. The accused broke into deceased's house and attacked her. The deceased was not an obstacle to accused's escape. The accused proceeded to tie the deceased's mouth, hands and legs to render her completely defenceless and unable to raise alarm. He then proceeded to rape her. As if that was not enough accused then stole property from the deceased and dressed himself in the clothes of the deceased's husband. The accused then drove away with the loot in deceased's motor vehicle. It is clear that the murder was committed in furtherance of other crimes and this elevates the accused's moral blameworthiness to the highest possible level.

In terms of s 337 of the Criminal Procedure and Evidence Act [*Chapter 9:07*] we would not have hesitated to impose a death penalty in this case. It is clear that the accused would have struggled to find any extenuating circumstances in this case. However in terms of s 48 (2) of our Constitution there is currently no law which defines the aggravating circumstances to warrant this court to impose a death penalty. See *S v Mutsinze* HH 645/15. The accused is therefore fortunate that he shall benefit from this lacuna in the law.

It is however clear that the accused is a social misfit who should be removed from society permanently.

The accused is therefore sentenced to imprisonment for life.

*National Prosecuting Authority, State's legal practitioners  
Atherstone & Cook, prodeo, accused's legal practitioners*