

THE STATE

versus

JOYCE TAVARWISA

HIGH COURT OF ZIMBABWE

MAWADZE J

MASVINGO, 26 January, & 10 February, 2017

**Assessors**

Mr P.N. Dhauramanzi

Mr E.J. Gweru

**Criminal Trial**

*Mr B.E. Mathose*, for the state

*Mr F. Chirairo*, for the accused

MAWADZE J: This is an application for the discharge of the accused at the close of the State case in terms of s 198(3) of the Criminal Procedure and Evidence, Act [*Chapter 9:07*].

This court is enjoined to return a verdict of not guilty if at the close of the State case there is no evidence to show that the accused committed the offence charged.

There are now a plethora of cases in which our courts have interpreted the provisions of s 198(3) of the Criminal Procedure and Evidence Act, [*Cap 9:07*]. These include inter alia;

- (a) where there is no evidence to prove an essential element of the offence see *Attorney General v Bvuma* 1987 (2) ZLR 96 (S), or
- (b) Where there is no evidence upon which a reasonable court acting carefully might properly convict see *Attorney General v Mzizi* 1991 (2) ZLR 32 (S), or
- (c) Where the evidence adduced by the State is so manifestly unreliable or has been discredited in cross examination that no reasonable court could safely act on or rely upon it see *Attorney General v Tarwirei* 1997 (1) ZLR 575 (S).

See also *S vs Kachipore* 1998 (2) ZLR 271 (S).

The accused is facing a charge of murder as defined in s 47(1) of the Criminal Code [Cap 9:23]. The charge is that on 7 December 2013 at Gapare Village, Chief Serima in Chatsworth, the accused unlawfully caused the death of baby belonging to SHEILA TAVARWISA by strangling the baby intending to kill the baby or realising that there was a real risk or possibility that her conduct may cause death and continued to engage in that conduct despite the risk or possibility.

The accused then aged 53 years old is the biological mother of Sheila Tavarwisa. Sheila Tavarwisa is the mother of the now deceased who was a newly born child without having an independent circulation at the time of death. On 7<sup>th</sup> December 2013 Sheila Tavarwisa deceased's mother experienced labour pains. It is alleged she suggested to the accused that they go to Matizha Clinic but accused opted to take her to their aunt Loice Makore's homestead. Sheila Tavarwisa gave birth on the way to Loice Makore's homestead to a healthy baby who made the first cry. The accused is alleged to have purported to wrap the newly born baby but in the process intentionally strangled the baby to death and buried the baby in a hole which she covered with a stone and soil. A report was made to police and accused was subsequently arrested.

In her defence outline the accused said she does not know what caused the death of the baby but believes the newly born baby may not have survived in view of the circumstances of its birth, that is being born in the forest, on dry ground and in bad weather. Further its umbilical cord remained attached to its mother for a prolonged time. The accused said Sheila Tavarwisa after giving birth fled to Harare where she was arrested and may as well be falsely incriminating accused in order to save her skin.

According to Dr Zimbwa who examined the newly born baby's body and compiled the post mortem report Exhibit 1 he made the following findings;

1. the neck of the newly born child was loose and hypermobile
2. the umbilical cord was not tied and substantial blood was noted on the placenta
3. the doctor concluded that the cause of death of the newly born baby was haemorrhage shock arising from the bleeding from the placenta.

The accused in Exhibit 2 her confirmed warned and cautioned statement denied strangling the newly born baby but admitted to have buried the baby in the bush after the baby died.

The State led evidence from the mother of the newly born baby Sheila Tavarwisa now aged 30 years and Dr. Zimbwa who compiled the post mortem report. The other evidence of other State witness was admitted in terms s 314 of Criminal Procedure & Evidence Act, [*Cap 9:07*]. The defence proceeded to apply for discharge of the accused at the close of the prosecution case.

In our view it is not necessary to analyse the evidence placed before us as the State in its response conceded to the application. In our view that concession is professional, well informed and properly made. We commend *Mr Mathose* for such professionalism. No useful purposes would be served by flogging a dead horse as it were. The doctor's evidence is clear and unambiguous as regards the cause of the death of the newly born baby. The doctor pointed out that the loose or hypermobile neck cannot possibly be the cause of death of the child as the neck of a newly born child can always be flexible as the neck muscle would not be strong. Thus according to the doctor this was normal. What is critical is the finding by the doctor that the cause of death was certainly haemorrhagic shock and placenta bleeding. The failure to cut the umbilical cord immediately after birth resulted in the baby bleeding into the placenta. No criminal liability therefore can be attached to the accused for that. Further there is no other evidence supporting the conviction of the accused on any other permissible verdict. It is these factors which correctly informed the State's concession.

Consequently, the accused is discharged at the close of the case for the prosecution and is therefore entitled to a verdict of not guilty in terms of s 198(3) of the Criminal Procedure and Evidence Act [*Cap 9:07*].

**VERDICT**: Not guilty and acquitted.

*National Prosecuting Authority, counsel for the State*

*Saratoga Makausi Law Chambers, pro deo counsel for the accused.*