

THE STATE

vs

LIVERSON MUKUBWA

HIGH COURT OF ZIMBABWE

MAWADZE J

MASVINGO, 22 March, 12 July, 17 October 2018, 6 June, 21 June & 5th July, 2019

Assessors 1. Mr Gweru
 2. Mrs Chademana

Criminal Trial

Ms S. Busvumani, for the state

Ms V. Zvobgo, Ms P Chimwanda and Mr A. Chitengu for the accused

MAWADZE J: The delay in finalising this criminal trial has been occasioned by the none availability of one of the state witnesses the then Sgt Richmore Pepukai who had left the police force and was said to have relocated to Botswana. Although the trial commenced on 22 March 2018, Sgt Richmore Pepukai only availed himself on 6 June, 2019. Meanwhile *pro deo* counsel for the accused constantly changed in the process from Mangwana and Partners. When the trial started *Ms V. Zvobgo* represented the accused. After she relocated *Ms P. Chimwanda* took over who also left and the trial was completed by *Mr A. Chitengu*. Meanwhile *Ms Busvumani* for the state had also been transferred from the High Court, Masvingo and had to come to deal with the partly heard matter. This brief outline explains the inordinate delay in finalising this matter.

We now turn to the matter.

The accused is facing a charge of murder as defined in s 47(1) of the Criminal Law (Codification and Reform) Act, [*Cap 9:23*].

The charge is that on 6 July 2014 at Mafuva Village, Headman Nerupiri, Gutu, Masvingo the accused unlawfully burnt Violet Tohwechipi with a substance believed to be petrol all over her body causing her death.

According to the state this was a crime of passion as the accused and the then 30-year-old now deceased were in love.

The accused resides in Gwangwati Village, Headman Ndahwi, Gutu. The state alleges that after commission of the offence on 6 July 2014 the accused fled to South Africa only to return two years later in 2017 after which he was arrested.

The now deceased Violet Tohwechipi was residing alone at her late parents' homestead. At the material time she had one child, a boy who was staying with her younger sister.

The state's case is that on 6 July, 2014 at night the accused had a misunderstanding with the now deceased whom he suspected of promiscuity. The accused is said to have bought some petrol which was in a 5 litre container and poured it on to the now deceased. The accused is said to have lit up the now deceased and fled. The now deceased ran to Rabson Mapasure's homestead as her body was engulfed in flames crying, naked, with her skin peeling off. She was rushed to Nerupiri Clinic and then to Gutu Mission hospital after which she was transferred to Masvingo General Hospital where she passed on arrival. The cause of her death as per the post mortem report is said to be severe burns.

The accused denies the charge of murder and raised the defence of an *alibi*. According to the accused on the fateful day 6 July 2014 he was already in South Africa. The accused said all he knew is that on a date he could no longer recall he caught the now deceased, his girlfriend with a boyfriend. As a result of this infidelity the accused said he terminated his love affair with the now deceased. The accused said the now deceased was hurt by this development which she could not stomach and vowed to commit suicide. The accused said he did not bother about the now deceased's threats and nonetheless ended the love affair. Later the accused heard of the now deceased's death and believes she committed suicide after being rejected by the accused. The accused denied that he had a hand in the now deceased's death and was surprised to be arrested of this offence of murder. After his arrest the accused said he was forced under duress to sign the warned and cautioned statement admitting to the charge.

During the trial a total of three Exhibits were produced being Exhibit 1 the post mortem report; Exhibit 2 accused's confirmed warned and cautioned statement and Exhibit 3 the red 5 litre plastic container of petrol.

The state led evidence from Rabson Mapasure, Cst Cephas Kunamira, Tamari Mahlaba and the then Sgt Richmore Pepukai. The accused gave evidence and did not call any witnesses.

The state case is based basically on two aspects being the dying declaration and accused's confirmed warned and cautioned statement Exhibit 2. Further we shall also consider the testimony of other state witnesses and accused's evidence.

The cause of the now deceased's death is not in issue. As per the post mortem report the now deceased was examined by Dr Zimbwa on 7 July 2014. Dr Zimbwa observed extensive burns which he put at about 80% all over the body and that the now deceased died of severe burns.

We now turn to the evidence led by the state.

Tamari Mahlaba (Tamari)

At the material time Tamari was staying at Nerupiri business centre and worked as a bar lady at Chidzerwe bottle store. She was not known to the now deceased. Tamari knew the accused very well as one of her patrons who used to drink beer in her bottle store and play the game of snooker. Accused confirms he was indeed known to Tamari although he alleges he was once in love with Tamari and terminated the affair when he fell in love with the now deceased although at one time he alleges he double crossed them.

Tamari said on a date she could not recall but in June or July 2014 the accused came to the bottle store with Exhibit 3 a plastic red 5 litre container of petrol which was full of petrol. It had a lid which was tightened with a plastic paper. She said accused said he had sent one Sebastian Muzvanya to Masvingo town to buy the petrol for the accused as accused said he wanted to use it in his generator at accused's home during a function accused did not specify. Tamari said the accused brought the 5 litre container of petrol in her bottle store and gave Tamari for safekeeping as he played snooker. Tamari said it was normal for her to keep goods for her customers. She said she secured the 5 litres of petrol as accused played snooker in her bottle store. At around 17.00 hrs she said the accused took the 5 litre container of petrol Exhibit 3 and left for his residence which residence Tamari did not know.

After some days Tamari said police came to her inquiring if she had ever seen accused with Exhibit 3 the red plastic container. In response she explained her version of evidence as already outlined above and police advised her of the now deceased's death.

During cross examination the accused sought to discredit Tamari's evidence as utterances of a rejected lover who simply fabricated evidence in order to hit back at the accused. The accused said he double dated Tamari and the now deceased. He said when Tamari

discovered that accused terminated his love affair with Tamari. In response Tamari laughed off these allegations insisting that she was never in love with the accused whom she only knew as one of her many beer patrons who frequented her bottle store. She even challenged accused to give any further particulars of such an affair, a challenge accused did not take. Further Tamari indicated that she was not even known to the now deceased. All in all, Tamari dismissed accused's alleged love affair with her as a fabrication. In fact, Tamari said she absolutely had no reason to lie against accused in relation to the 5 litre container of petrol Exhibit 3 which accused gave her for safekeeping as it was normal for patrons to give her their goods for safekeeping.

In our assessment Tamari gave her evidence well. Her demeanour clearly showed she was taken aback by accused's allegations of a love affair with him. The accused, besides his mere say so could not elaborate his love affair with Tamari. All we could discern is that accused was desperate to distance himself from ever being in possession of Exhibit 3 – the 5 litre container of petrol for obvious reasons. We are not persuaded that Tamari fabricated her evidence. We find her to be a well-meaning witness who was not even known to the now deceased and did not even know the how deceased met her demise.

Rabson Mapasure (Rabson)

Rabson is a young brother to the now deceased's father, an uncle. His homestead was about 200m from that of the now deceased. He explained that the now deceased's parents were both late. The now deceased, a mother of one boy, stayed alone at her parents' homestead. He did not know the accused or his relationship with the now deceased although he knew accused's parents. At the material time the now deceased's child was staying with the now deceased's young sister and not the now deceased.

Rabson said on the fateful day at around 03.00 hrs he was in bed with his wife at his homestead when he heard the now deceased crying out coming to his residence. He said the now deceased reached the verandah of his house and collapsed shouting that she was dying. Rabson said he got out with his wife to find out what was happening. He had a torch. To his utter horror the now deceased was naked and her body badly burnt with the skin peeling off. She no longer had any hair. Rabson's wife quickly covered her with a blanket as she had been severely burnt from head to toe.

Rabson said in shock she asked the now deceased what had happened and in response the now deceased said;

“Liverson Mukubwa has poured petrol on me and lit me up.”

Due to the severity of the situation Rabson said he quickly ran to the nearby police base to alert the police. Police also asked the now deceased and she repeated the same words that she had been set alight by Liverson Mukubwa using petrol. Rabson said as the now deceased's life was in clear danger and that she was in severe pain she could not elaborate further circumstances under which she had been injured. He said she now had serious difficulties in talking. They rushed her to the local clinic after which an ambulance took her to Gutu Mission Hospital. Rabson later learnt she died en route to Masvingo Hospital that same day.

Later the same day Rabson said he went to the now deceased's homestead with the police who were looking for further details of what possibly happened. Inside the now deceased's bedroom Rabson said there were signs of a struggle as the blankets were strewn all over, and had blood. The blood trail indicated that the now deceased should have been dragged to her kitchen hut where she was set alight. As a result, her kitchen hut had also caught fire and collapsed. The police recovered inside the deceased's yard an empty container of opaque beer and a red 5 litre plastic container which was also empty Exhibit 3.

Under cross examination Rabson was clear that the now deceased implicated the accused by name as her assailant specifying exactly what she said the accused did, that is pouring petrol on to her and setting her alight with matches. Rabson described the now deceased's condition as dire saying she was badly burnt from head to toe, with no hair left and her skin peeling off.

The evidence of Rabson is crystally clear. It is therefore foolhardy for the accused to allege in his closing written submissions that either Rabson did not comprehend what the now deceased said had befallen her or that the now deceased was just hallucinating! Rabson is a fairly old man who clearly has no motive to falsely implicate the accused who was even not known to him. The traumatic scene he witnessed was evident from his testimony and demeanour. No sane person can take lightly such a ghastly sight and experience. We therefore find no reason to disbelieve Rabson. The criticism of Rabson's evidence is not only in bad faith but totally unfounded.

Constable Cephass Kunamira (Cst Kunamira)

At the material time Cst Kunamira was stationed at Nerupiri police base. Cst Kunamira said on 6 July 2014 the now deceased was brought by Rabson to the police base. The now deceased had been severely burnt, could no longer see but could talk. Cst Kunamira inquired from the now deceased what had happened. In response the now deceased said the accused

whom she mentioned by name had poured petrol on to her and set her alight. She said this repeatedly.

Constable Kunamira said the now deceased's situation was dire as he could tell she was dying. This was so because she had been badly burnt, was visibly weak and speaking in a fading low voice. As a result, he quickly called for an ambulance to ferry her to Gutu Mission Hospital but by then she could no longer talk. The now deceased was then rushed to Masvingo General Hospital but passed on before being attended.

Constable Kunamira later attended the scene of crime at the now deceased's homestead and noticed that the roof of her kitchen hut had been burnt and collapsed. He picked Exhibit 3, a 5 litre red plastic empty container in the deceased's yard and it was smelling of petrol.

Constable Kunamira said he then proceeded to the accused's residence as he had been implicated by the now deceased. The accused was nowhere to be found and his mother indicated that accused was at the material time staying with the now deceased. Efforts to locate the accused were fruitless.

The evidence of Constable Kunamira does not deserve any further comment as it was uncontroverted. Constable Kunamira was clear that the accused was implicated by the now deceased as her assailant.

Richmore Pepukai (Pepukai)

At the material time Pepukai was a Sergeant in the Zimbabwe Republic Police based at Gutu. He has since left the police force.

Pepukai said police looked for the accused soon after the commission of the offence in 2014 and gathered that the accused had probably gone to South Africa. Some 3 years later police gathered information in 2017 that the accused had returned to his home in Zimbabwe. The police raided the accused's residence on 23 May 2017 and arrested him.

Pepukai said he was tasked to record accused's warned and cautioned statement. He proceeded to do so after complying with the law and explaining accused's rights. He said the accused elected to give a statement and that he did so freely and voluntarily. Thereafter some other police detail took accused to the Magistrates Court where his statement was confirmed being Exhibit 2.

Pepukai said he later took accused for indications where accused freely made indications at the now deceased's homestead explaining that on the fateful day on 6 July 2014 around 03.00 hrs he had argued with the now deceased over her alleged infidelity and had

proceeded to pour petrol on to her which was contained in Exhibit 3 the red plastic container, set her alight and fled leaving the plastic container Exhibit 3.

Under cross examination Pepukai denied that the accused was assaulted by the police. He dismissed as untrue that any force was brought to bear upon the accused when he gave his statement or made indications.

In our view Pepukai's evidence is straightforward. He gave his evidence very well. The cross examination of Pepukai was feeble. Vague allegations of impropriety were made which allegations clearly lacked details or conviction. In the result, we found no basis to disbelieve Pepukai.

The accused's evidence

In his evidence the accused insisted that he was forced to sign a warned and cautioned statement authored by the police. Accused remained unclear on how he was assaulted in a bid to coerce him to sign that statement Exhibit 2.

The accused said thereafter Pepukai took him to the Magistrate's Court and warned him to ensure that the statement Exhibit 2 obtained through duress was to be confirmed. Due to fear he said he caused the confirmation of the statement Exhibit 2.

The accused said he was then taken for indications at the now deceased's homestead after a rehearsal of what he was to indicate. Again due to fear he complied.

The accused said the truth of the matter was that at the material time in July 2014 he was not staying with the now deceased. The accused maintained his *alibi* that on 6 July 2014 he was no longer in Zimbabwe as he had left for South Africa but could not provide evidence as to when he went to South Africa as he crossed the border illegally. The accused said it was his routine to go to South Africa to do piece jobs for some period and then return to Zimbabwe.

The accused insisted that Tamari falsely implicated him as the accused had terminated his love affair with Tamari. As regards the now deceased, the accused said he had been in love with the now deceased for 16 months after which he found her with a boyfriend on 29 June 2014. As a result, he said he terminated the affair with the now deceased. He said this explains why the now deceased falsely implicated him.

The accused conceded that he misled the Magistrates Court during confirmation proceedings of Exhibit 2 but attributed this to threats by the police. He denied that he fled to South Africa at the material time.

Analysis of evidence and findings by the court

The accused's version of events in this case is difficult to believe by all accounts. If accused is to be believed the now deceased who had another lover decided to commit suicide after accused found her with this other boyfriend. If the now deceased had decided to have multiple partners why would she be so irked by such a discovery by the accused to the extent that she would decide to take her own life! If accused is to be believed, he had simply walked away after ending his affair with the now deceased. In such a scenario is it therefore believable that the now deceased thereafter would look for petrol, pour it on herself and set herself alight in the middle of the night. Is it probable that the now deceased was so hurt by loss of the accused's affection to such an extent that she would decide to end her life in the most painful way by setting herself alight? The accused had walked out of her on 29 June 2014 and after a whole week she then decided to kill herself on 6 July, 2014? We find this to be improbable by all accounts. The motive for the now deceased to take her own life in such a painful way is clearly poorly thought out.

In terms of s 256(2) of the Criminal Procedure and Evidence Act [*Cap 9:07*] the accused confirmed warned and cautioned statement was properly produced in court. It provides as follows: -

“(2) a confession or statement confirmed in terms of subsection (3) of section one hundred and thirteen shall be received as evidence before any court upon its mere production by the prosecutor without further proof.”

The onus was on the accused to ensure that no probative value is placed by this court on that statement Exhibit 2. In our view the accused failed to show on a balance of probability that the statement Exhibit 2 was improperly made or obtained.

It may be useful to quote what the accused said in that confirmed warned and cautioned statement. He said;

“I admit the allegations. We had a misunderstanding after I found deceased with a boyfriend. It was second time finding her with a boyfriend. I got annoyed since I was also looking after her as we were staying together. This caused me to pour her petrol and burnt her.” (sic)

Indeed, some of the contents of that statement are confirmed by the accused himself. In his defence outline he said he caught the now deceased with a boyfriend which irked him. As per Cst Kunamira's evidence accused's mother told the police that indeed the accused was staying with now deceased. The only part accused therefore disputes relates to how he allegedly

fatally injured the now deceased. This jig saw puzzle is well resolved by Tamari's evidence which firmly puts the 5 litre plastic container of petrol Exhibit 3 in accused's possession.

The accused's conduct soon after this incident is inconsistent with his innocence. Suddenly the accused could not be located in his home area. By his own admission he had illegally crossed the border to South Africa. Conveniently he has no documents to show as to when he went to South Africa. Worse still he was in South Africa from 2014 to 2017, a period of 3 years only to return hoping the matter had died a natural death. Police had to raid his residence to arrest him. The *alibi* proffered by the accused is untruthful.

The nail in accused's coffin is the admissibility of a dying declaration.

In terms of s 254(1) of the Criminal Procedure and Evidence Act, [Cap 9:07] a dying declaration is admissible. It states as follows: -

“254(1) *A declaration made by any deceased person upon the apprehension of death shall be admissible or inadmissible in evidence in every case in which such declaration would be admissible or inadmissible in any similar case depending in the Supreme Court of Judicature in England.*”

This provision is explained by the reknown author John Reid Rowland in his book Criminal Procedure in Zimbabwe 1997 Edition at 18 -21 (e).

As per John Reid Rowland dying declarations are admissible in terms of our law (as per English law) when the following requirements are met;

- 1) the person who made the statement must be dead at the time of the trial. Indeed, the now deceased Violet Tohwechipi is now deceased. She is the one who made the statement to Rabson and Cst Kunamira implicating the accused.
- 2) the trial must be for the murder or culpable homicide of the dead person. *In casu*, the accused is facing the charge of murder.
- 3) the statement must relate to the cause of the declarant's death. As per Rabson and Cst Kunamira's evidence the statement by the now deceased implicated the accused in explaining why she was dying stating that it is the accused who had set her alight with petrol
- 4) at the time the declarant made the statement he or she must have been dangerously ill and have been without hope of recovery. Rabson explained that the now deceased was shouting that she was dying. Both Rabson and Cst Kunamira observed that the now deceased was virtually on her death bed. The now deceased herself therefore

pronounced that she was dying. She clearly had no hope of survival. Indeed, she died moments later.

- 5) the declarant must have been a competent witness. The now deceased was indeed a competent witness in terms of our law.

It is therefore clear that the now deceased's dying declaration fulfils all the requirements at law. It matters not that the statement is oral or not in writing for it to be admissible.

The now deceased clearly and without any ambiguity implicated the accused by name in relation to her cause of death. Her evidence is admissible.

The state case in our respectful view is unassailable. The threshold of evidential onus in a criminal matter is fully satisfied.

Our finding is that it is the accused who poured petrol on the now deceased and set her alight. The accused intended to kill the now deceased and indeed he achieved that desire. In the result, we find the accused guilty of murder with actual intent.

Verdict:

Guilty of contravening section 47(1)(a) of the Criminal Law (Codification and Reform) Act, [Cap 9:23] – murder with actual intent.

Sentence

It is not surprising that counsel for the accused was tongue tied to make any meaningful submissions in mitigation.

The callousness, cruelty and absolute lack of remorse you exhibited both in the commission of this offence and during the course of the trial is dumb founding. We are really shocked that one can totally lack any conscience to such an extent.

It is clear to you that the sanctity of human life means nothing to you. One wonders what really caused you to act in such an inhuman manner.

In our view the now deceased did not deserve to lose her life in such a cruel and painful manner.

What aggravates your moral blameworthiness is that you pre-planned to commit this offence. You had to acquire petrol all the way from Masvingo after which you kept it for some time. You had ample time to reflect on what you wanted to do and desist from such conduct. It is shocking that you had the temerity to pour petrol on a defenceless woman and set her alight. You turned away leaving her engulfed in flames to die painfully. As if that was not enough you have the guts to stand in court and allege that she committed suicide.

While this is in more probabilities a crime of passion it should be made clear to you and others of like mind that any person, especially women have a right to walk in and out of a love relationship without losing one's life. The now deceased who is herself an orphan did not deserve to die and also leaving her own child. A love relationship surely cannot be a question of life and death in our civilised society.

In your favour we considered that you are 40 years old with no family responsibilities. You are unemployed with no assets or savings. This is your first brush with the law but this would not meaningfully benefit you. Probably the only meaningful mitigatory factor is that you have been in custody for 25 months. However again you are responsible for the delay of 5 years in finalising this matter as you were a fugitive from justice for 3 years as you had fled to South Africa.

A proper assessment of the mitigatory and aggravating factors show that you do not deserve to leave the four corners of prison at all. While we may spare your own life we should impose the maximum possible sentence.

In the result, you are sentenced to imprisonment for life.

National Prosecuting Authority, counsel for the state

Mangwana & Partners, pro deo counsel for the accused