THE STATE

Versus

MQHELISI SIBANDA

IN THE HIGH COURT OF ZIMBABWE
KABASA J with Assessors Mr P. M. Damba & Mr E. Mashingayidze
BULAWAYO 21 & 27 OCTOBER 2021

Criminal Trial

K. Jaravaza, with K. M. Nyoni for the state
A. Ncube for the accused

KABASA J: The accused is facing a charge of murder as defined in section 47 of the Criminal Law (Codification and Reform) Act, Chapter 9:23, in that on 26th May 2019 at house number 1018 Pelandaba high density suburb in Gwanda, he stabbed Soneni Mpofu once on the left eye and on her vagina with a sharp object intending to kill her or realizing that there is a risk or possibility that his conduct may cause the death of Soneni continued to engage in that conduct despite the risk or possibility. He pleaded not guilty to the charge.

The state alleges that on this day, the accused, who was aged 20 met the deceased who was a commercial sex worker and drank beer with her at Njula bar. This was around 23:00 hours and one Pretty Baloyi was with them. Pretty later left proceeding to Limelight Sports bar and the deceased in the company of the accused followed her there. They were together until 0100 hours when Pretty proceeded home leaving the accused and deceased together. Around 0200 hours Pretty was awakened by loud music which was being played in a taxi and on checking on the source, she saw the accused and deceased alighting from that taxi. The two came into the house and proceeded to the deceased's room. The deceased was not seen again until her body was discovered on 28th May 2019.

In denying the charge the accused explained in his defence outline that he met the deceased at Njula Bar and drank beer with her. They later proceeded to Limelight Bar where they continued drinking. Around 0130 hours he solicited for sexual favours from the deceased and agreed to go together to the deceased's residence. Pretty let them into the house and they proceeded to the deceased's room where they engaged in sexual intercourse. The deceased later received a phone call and left the room. He heard her talking to 2 men and they appeared to

be arguing as their voices grew louder as they came into the house. The 2 men confronted him whereupon he fled leaving the deceased quarrelling with the 2 men.

To prove its case the state produced, by consent, the following exhibits:

1. Post mortem report
2. Forensic DNA test certificate
3. Brown shoes, blue jeans and a green and white T-shirt

The accused, in his defence outline, had mentioned that he would object to the production of a confirmed warned and cautioned statement because he was confused and in a state of panic at the time of its making and confirmation. However in light of the provisions of section 256 (2) of the Criminal Procedure and Evidence Act, (Chapter 9:07) the confirmed statement was received in evidence.

The statements of 3 witnesses, Said Phiri, Victor Chinoni and Donald Chashaya was admitted in evidence in terms of section 314 of the Criminal Procedure and Evidence Act.

Evidence was thereafter led from two state witnesses, Pretty Baloyi and Sekai Mwale. Pretty's evidence was hardly challenged. The import of it was that she was with the deceased and accused on the night of 25th May 2019 from 9pm to around 2am when she left them going home. The deceased was her tenant and she had been so for close to a year. On this night she had introduced the accused as the man she was with that night. The two later came home and the deceased let herself into the house as she had keys for the main door and her room. They proceeded to the deceased's room and locked the door. She did not hear any noise whilst in her own room. The following day at around 11am she knocked on the deceased's door but did not get a response. On a Monday they smelt a bad odour but dismissed it as they had gone for 2 days without water. The bad odour persisted and she eventually forced open the deceased's window and observed her body lying face down on the bed. The police were later called and had to break the door down as the keys could not be located.

About a month later she spotted the accused at Njula Bar and caused his arrest.

Her evidence was straight forward and to the point. It was largely common cause as she was hardly cross-examined on it. We accepted it as reliable.

The second witness was one of the police officers who visited the scene. She observed blood stains on the mattress where the deceased had been lying. Her body had already been taken to the mortuary. She followed to the mortuary and the body was identified to her by the mortuary attendant. She observed a stab wound just above the left eye and on her vagina. The body was also bruised.

This witness explained that the deceased's room was adjacent to Pretty's, their doors were a metre apart.

She too was hardly cross-examined. Her evidence on the injuries she observed on the deceased's body and the blood on the mattress remained intact.

The accused testified in his defence and reiterated that 2 men came to the house and he left the deceased with those 2 men. His evidence almost mirrored that of Pretty on the events preceding the discovery of the deceased's body.

He however went on to allege that he was afraid when he gave his warned and cautioned statement as he was threatened. The statement was confirmed but he was still in fear at the time of such confirmation.

Whilst in his defence outline the accused had objected to the production of his confirmed warned and cautioned statement on the basis that he was confused and in a state of panic when he made it and when it was confirmed, in his evidence he sought to portray that he was threatened to make the statement thereby bring into issue the aspect of whether such statement was made freely and voluntarily.

Where such a challenge is made the prosecutor may lead evidence in rebuttal if he or she thinks it necessary.

S256 (2) of the CPE Act provides that:

> "A confession or statement confirmed in terms of subsection (3) of section one hundred and thirteen shall be received in evidence before any court upon its mere production by the prosecution without further proof.

Provided that the confession or statement shall not be used as evidence against the accused if he proves that the statement was not made by him or was not made freely and voluntarily without his having been unduly influenced thereto and if after the accused has presented his defence to the indictment, summons or charge, the prosecutor considers it necessary to adduce further evidence in relation to the making of such confession or statement, he may re-open his case for that purpose."

The prosecutor did not consider it necessary and so did not seek to re-open his case in order to adduce further evidence in relation to the making of the statement. The prosecutor's decision is hardly surprising. This is so because it became very clear as the accused sought to give details of the supposed duress that this was a man who, with scheming hindsight, realized that whilst the statement was not a confession, what he had said therein actually worked against him as it was at variance with his defence outline.

He would have us believe that he was forced to essentially deny the charge. As at the time of the recording of the document the results of the DNA tests were not out. The certificate is stamped 13th December 2019 and the accused's statement was recorded on 25th June 2019. The police were therefore not aware at the time that the condom found in the deceased's room would have the accused's DNA on the inside, i.e. the semen and the deceased's DNA on the outside, pointing that it was the accused who had had sexual intercourse with her in that house.

Why then would the police force an accused to make a statement that was not a confession to the crime and which removed him from anywhere near the scene?

In seeking to show the extent of the alleged threats, the accused's mention of being put in a dark room, threats of being immersed in water did not make sense as he said all this was done so he would not change his statement. So he gave the statement and was then threatened not to change it? The threats were after the recording of the statement?

His untruthfulness became evident when in his defence outline there was no mention of any threat of any kind. It was also very telling that he sought to object to the production of the confirmed statement even before the commencement of the trial.

He said the people who threatened him were not there when the statement was confirmed but he was still in fear because he had been told that if he changed something would happen. The statement was confirmed in August 2019, about 2 months after it was recorded and about 4 months before the DNA test result was out. Why then would the police threaten a person not to change a statement which had not much value until the DNA results placed him in the deceased's room?

Sekai Mwale who testified in court witnessed the recording of the statement and yet not a single question was put to her with regards to these threats. The statement of Victor Chinoni was admitted in terms of s314 of the Code yet

he is the one who recorded the statement. If the allegations of threats and the statement having been given under duress were true, the defence would not have consented to the admission of Victor Chinoni's statement as such is done where the facts are not disputed.

The accused, as accurately observed by the state, was desirous to distance himself from this statement because he realized it caught him in a lie. There was absolutely no truth in his allegations of duress and he dismally failed to prove, albeit on a balance of probabilities, that the statement was not given freely and voluntarily. It would have been a sheer waste of time to call witnesses whose evidence had been admitted without issue to try and rebut the accused's cooked up story of threats and duress.

That said the statement will be used in evidence.

The case against the accused however hinges on circumstantial evidence. There was no direct evidence linking him to the offence. In *R* v *Blom* 1932 AD 202 WATERMEYER JA set out the 2 cardinal rules of logic the court must consider when dealing with circumstantial evidence.

These are:

"1. The inference sought to be drawn must be consistent with all the proved facts. If it is not then the inference cannot be drawn.
2. The proved facts should be such that they exclude every reasonable inference from them save the one sought 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." (*S* v *Arthur Kazangarare* HB-9-16; *Moyo* v *The State* SC-65-13; *State* v *Marange and Others* 1991 (1) ZLR 244 (S) and *S* v *Shoniwa* 1987 (1) ZLR 215). That said, what are the proved facts in this case?

These are:

1. The deceased was with the accused on the night of 25th May 2019. They were together for close to 5 hours.
2. The deceased introduced the accused to her landlady Pretty as the man she was with for that night. No other man joined them at any time throughout those 5 hours.
3. An organization called "Sisters" had impressed it on these ladies who are into the world oldest profession to always know who their friend

was with and Pretty took note of the accused when the deceased introduced him to her.

4. Pretty was not drinking beer that night and later left the two, i.e. the accused and deceased as she proceeded home, the same house where deceased was a tenant.
5. Later that night or early hours of the following morning rather, the accused and deceased followed to Pretty's house, the 2 talked briefly to Pretty as deceased was telling her that she had wanted to buy chips for her but the accused had stopped her from doing so.
6. The deceased unlocked her room and the accused went in first before she followed and locked the door from inside.
7. The accused had sexual intercourse with the deceased which was the sole reason he had gone with her to her house for the "short time" sexual escapade.
8. Only the accused left that room alive as the deceased was found dead on 28th May 2019, about 2 days later. No one else had gone into that room before the discovery of the body.
9. The door to the deceased's room was locked and the police had to use an axe to break through. There was no key in the keyhole and it was never found.
10. Pretty did not hear any noise coming from the deceased's room at the time she was entertaining the accused or any time thereafter.
11. The deceased's body had stab wounds on the left eye and the vagina.
12. Due to advanced state of decomposition the doctor who examined the body was unable to ascertain the cause of death. The body had superficial burns on the neck, both upper and lower limbs, chest and chin and scalp hematoma on the parietal region.
13. Upon his arrest, about a month later, the accused gave a warned and cautioned statement to the police. In it he said:

> "I deny the allegations of killing the deceased. I last saw the deceased person in town while I was with my friends, Innocent and Zozo. I was in the company of Zozo on the day we met the deceased at around nine in the evening. The deceased had been in the company of certain ladies who were many in number at Njula bar where she was drinking beer. We eventually drank beer together with some ladies until the bar closed. We ended up going to Limelight Bar. We were still drinking thereat when certain two young men came at the time we were seated with the deceased and Zozo and they asked me as to why I was with the deceased and also

> asked me who she was to me. They then took her and went away with her. I remained drinking in the bar until closing time in the morning at around 3:30 hours …"

From these facts can it be said the only reasonable inference to be drawn therefrom is that it was the accused who killed the deceased?

We must state at this juncture that the fact that the cause of death could not be ascertained does not change the complexion of the case. There is nothing to suggest that the deceased died of natural causes. She met her death at the hands of someone. The identity of that someone is what we have to resolve.

We were satisfied that no one else came to the house between the time the accused and deceased entered her room to the time of the discovery of her body. The accused sought to backtrack and suggest that those 2 phantom men were not making noise and so Pretty would not have heard them.

We say he backtracked because he initially said there was an argument between the deceased and these 2 men. People arguing would not speak in hushed tones, more so as evidence showed that the deceased was drunk.

If all they had was a "short time sexual encounter", Pretty was not drinking that night and given the distance between the door to her room and the deceased's she would surely have heard the argument.

It would appear the accused had an answer for everything because he then sought to suggest that Pretty would not have heard as she was drunk and so had probably fallen asleep. He had forgotten that earlier on he had accepted that Pretty was not drinking beer that night and she was not drunk.

We are alive to the fact that even when the accused left Pretty did not hear him leave. But we do not know when the accused left and a person sneaking out does so stealthy in a manner that ensures that they do not make any noise. These 2 men would not have sneaked in as they were disgruntled people if we are to go by the accused's tale.

It therefore cannot be said just as Pretty did not hear accused leave she also did not hear these 2 men. These 2 men are supposed to have arrived after this "short time" as the accused was wearing his pants. The short time followed after Pretty's conversation with the deceased and so she could not have gone into a deep slumber in such a short period of time.

We were satisfied these 2 men were from the figment of accused's imagination and they were manufactured as a ploy to try and mislead the court into thinking that someone else could have killed the deceased. It was not lost on us that, when it suited him, the accused had said he remained behind with 2 men who are his friends when deceased went home. Now that he was caught in a lie, he then, with a scheming mind, imported these 2 men to the deceased's home because that is what now suited his purpose.

The accused's lack of truthfulness in seeking to remove himself from the scene in his confirmed warned and cautioned statement and then seeking to disown it after realizing that evidence of his presence in the deceased's room was insurmountable stripped him of the little credibility he had.

Mr Ncube sought to argue that people tend to react differently under such situations and so the lie the accused told in his statement should not be held against him. The point is the accused was not arrested soon after the incident occurred. He was accounted for almost a month later. Why panic and tell an untruth, especially when such untruth was not an admission but a calculated story meant to divert attention from him.

In that month that it took to get him arrested he was already thinking and scheming on what to say and so mentioned that he was with Zozo and Innocent unaware of the scientific evidence that would expose his lie. He also sought to explain that he left in haste and that is why he left the condom which provided the scientific evidence that placed him in the deceased's room. Nothing could be further from the truth. He obviously had no clue that the semen in the used condom would provide a DNA profile which would place him in the deceased's room. He therefore carelessly discarded that condom in that room blissfully unaware of the evidence it would provide.

We got the distinct impression that the accused probably with some coaching by "inmate lawyers" was bent on thinking every conceivable lie he could possibly come up with in a desperate bid to escape the consequences of his actions. His story was shown to be beyond doubt false. (*R* v *Difford* 1937 AD 370)

We are therefore satisfied that the only reasonable inference that can be drawn from these proved facts is that it was the accused who killed the deceased. Due to his lack of truthfulness, the reason for the killing will remain with him.

Was the killing done with actual intent to kill? Unfortunately the accused has not allowed us to appreciate the circumstances which led to the killing.

However, given the background facts, the fact that the 2 had been drinking together, agreed to have sexual intercourse and went home together for that purpose, we are unable to say the accused set out to kill and his aim and object was to kill and he achieved it. (*S* v *Herold Moyo* HB-19-17; *S* v *Jealous Tomasi* HH-217-16 and *S* v *Mugwanda* 2002 (1) ZLR 547 (S)).

He however must have realized, as he conducted himself in the manner which caused the deceased's death, that there was a real risk or possibility that his conduct may cause the death of the deceased but continued nonetheless despite that risk or possibility.

We are therefore satisfied that the state has proved its case beyond a reasonable doubt and the accused is accordingly found guilty of murder as defined in section 47 (1) (b) of the Criminal Law (Codification and Reform) Act, Chapter 9:23.

Sentence

In assessing sentence the court will consider that you are a youthful first offender. You have spent 2 years on pre-trial incarceration. The anxiety which comes with awaiting to hear your fate cannot be underestimated.

You will live with the stigma of having taken a life. That burden is in itself some form of punishment for a youthful offender.

In aggravation is the fact that a life was needlessly lost. You locked the deceased in this room, making sure no one saw her until her body was decomposing. That shows utter disrespect for another human being. No one should lose their life at the hands of another. The sanctity of life ought to be respected. You showed no contrition and were determined to fight to the bitter end.

That said, the immaturity of youth makes it odious to impose on you a sentence that would otherwise be appropriate for a mature and older offender. (*S* v *Zaranyika & Others* 1995 (1) ZLR 270 (H).

Youthfulness will work in your favour. (S v *Muyambo* HMT-23-21)

The punishment should fit the offender, the offence, be fair to society and be blended with a measure of mercy. (*S* v *Sparks & Anor* 1972 (3) SA 396; *S* v *Chamunorwa* HH-160-93)

Accordingly, you are sentenced to 18 years imprisonment.

National Prosecuting Authority, state's legal practitioners
R. Ndlovu & Co., accused's legal practitioners