THE STATE

Versus

NAISON TAKAWIRA ALLIAS MAREVANHEMA

IN THE HIGH COURT OF ZIMBABWE
DUBE-BANDA Jwith Assessors MrMatemba and MsBaye
GWERU 20 & 21 MAY 2021

Criminal Trial

Ndlovu, for the State
Chingwe, for the accused

DUBE-BANDA J: The accused is charged with the crime of murder as defined in section 47 of the Criminal Law (Codification and Reform) [Chapter 9:23]. It is alleged that on the 2nd February 2018, and at Village Mapiye, Chief Samambwa, Zhombe in the Midlands Province, accused unlawfully caused the death of Tariro Kambarami (deceased), by stabbing her with a spear several times on the head, chest and arms, intending to kill her or realising that there was a real or possibility that his conduct may cause her death and continued to engage in that conduct despite the risk or possibility.

The accused pleaded not guilty to the charge. He was legally represented throughout the trial. The State tendered an Outline of the State Case, which is before court and marked Annexure A. It shall not be necessary to repeat the entire contents of the state outline. It now forms part of the record. The accused tendered into the record an Outline of his Defence Case, which is before court and marked Annexure B.

The state produced a confirmed warned and cautioned statement recorded by the police on 18 December 2018. The statement was confirmed by a magistrate on the 4th January 2019. It is before court as Exhibit 1.The state tendered a post mortem report compiled by Dr S Pesanai, at United Bulawayo Hospitals on 5 February 2018. The report is before court and marked Exhibit 2. Following an examination on the remains of the deceased, the Pathologist concluded that the cause of death was: haemorrhagic shock; haemponeumothorax; stab wound chest; and assault.

The prosecutor sought and obtained admissions from the accused in terms of section 314 of the Criminal Procedure & Evidence Act [*Chapter 9:07*]. These related to the evidence

of certain witnesses as contained in the summary of the state case. That is, the evidence of Dr S Pesanai, who examined the remains of the deceased and recorded a post mortem report. The evidence of Lazarus Rumhungwe, a member of the Zimbabwe Republic Police (ZRP) stationed at Zhombe Police Station. He attended to the scene of crime. He saw the body of the deceased lying outside the yard in a pool of blood facing upwards. He observed that the body had a deep cut on the left side of the chest and a cut on the back side of the head. He failed to locate the accused. The evidence of Asedi Yasini, a member of the ZRP. On the 2nd February 2018, he ferried the body of the deceased to Kwekwe General Hospital mortuary. He again ferried the same body to United Bulawayo Hospitals for a post mortem examination. The body did not suffer any further injuries while under his care. The evidence of Tichaona Mabhunu, a member of the ZRP, and part of the investigating team in this case. He looked for the accused and failed to locate him. The evidence of Givemore Mutsinzwa, a member of the ZRP, and part of the investigating team in this matter. He, in the company of other members, on the 9th February 2019, arrested accused in Masvingo. Accused was asked about the weapon used in the commission of the crime, but it was not recovered. The evidence of Douglas Kapfumvuti and Willard Musiiwa, members of the ZRP, who recorded a statement from the accused. The statement was confirmed. The evidence of Sehliselo Khumalo, a member of the ZRP, stationed at Bulawayo Central Police Station. She received the body of the deceased and identified it to Dr. S Pesanai, who carried out a post mortem examination.

The state led oral testimony from two witnesses. We are going to summarise the evidence briefly.The first to testify was Leonard Mhosva. He resides at Village Ndumo, Chief Samambwa, Zhombe. He is a member of the Neighbourhood Watch Committee stationed at ZRP Zhombe. He knows the accused as a local person. He knew deceased during her lifetime as she stayed in the same neighbourhood. Witness says he has been resident in the area from 1987, he was born there and he still resides in the same area. He is not sure when deceased came to the area, but she has been in the neighbourhood for approximately 6 years. Deceased was staying with her son doing Grade 5. She was married, and the husband stayed at a place called Torwoord. The witness used to see the husband at the village. He told the court the name of the husband.

In his evidence in chief, this witness testified that on the 2nd February 2018, deceased made a report to him. As a result of the report he proceeded to the deceased homestead. He

was wearing his police uniform. When he got to the gate, he was confronted by accused who was carrying two long spears. The spears were made of iron, the first was 1.4 metres in length; diameter, he said it was the size of his two figures; it had a sharp end. The second spear was 1.6 metres in length; made of iron; diameter, narrower than the first spear, size of his one finger; it had a sharp end. He was first stabbed by the accused with a spear on his nose bridge. He was again stabbed on the stomach. He showed the court the scars from the stab wounds.

It is in cross-examination that the court got to know the content of the report made by the deceased to this witness. State counsel avoided leading this witness to testify on the content of the report, as it would have been inadmissible hearsay evidence. Defence counsel, asked the witness to tell the court the nature of the report made to him by the deceased. This amounts to cross-examination on inadmissible evidence. In general, where inadmissible evidence is elicited by the cross examiner himself, it becomes admissible and may be used in the consideration of guilty. See: Pretorius JP *Cross-Examination in South African Law* (LexisNexis Butterworths 1997) 248-249). This is what occurred in this case. This witness then testified about the content of the report, being that accused had gone to the homestead of the deceased at night around 1 a.m. He violently broke the deceased's door. Assaulted deceased once with a metal bar. He took a cell phone belonging to the deceased. Deceased said all she wanted was her cell phone and that accused must never come to her residence again. This is the report this witness was following when he went to deceased homestead.

The second witness to give oral evidence is Rungano Mushangi. He resides at Village Mapiye, Chief Samambwa, Zhombe. He has been staying in this village from 1976 when he was born. He is now visually impaired. This disability afflicted him after the events he testified to. He knows the accused as he resides with his mother in the same village. He has known accused for a long time. He knew deceased during her lifetime as his neighbour. On the 2nd February 2018, during the afternoon, he was at his homestead, with two other persons. He heard someone calling out his name, he went outside to investigate. That is when he saw accused holding a blood stained spear and a jacket. Accused shouted that he had killed two dogs, pointing at the direction of deceased's homestead. This witness immediately proceeded to the deceased's homestead, which was close by. Upon arrival he saw deceased's body lying on the ground a few metres from her yard. There was blood all over. He then made plans that the matter be reported to the police.

In cross examination by defence counsel, he said accused stayed at the same village with his mother. He said it was not correct that accused stayed with the deceased. Asked whether deceased was accused's wife, he said he knew nothing about that. He says accused was four metres from him, when he announced that he has killed two dogs.

After the conclusion of the testimony of Rungano Mushangi, the prosecution closed its case.

Defence case

The accused elected to give evidence under oath. He testified that he resides at Village Mapiye, Chief Samambwa, Zhombe. He said before this tragic incident he was staying with his wife, the deceased. They have a child. He says on the fateful day, at around 10 O'clock in the morning he found his wife in a compromising position with one Leonard Mhosva (1st State witness). He testified that Leonard Mhosva then struck him (accused) with a metal bar on the back of his head. He realised that Leonard Mhosva, was a policeman, because of the uniform he was wearing. Although at that stage he was not putting on a trousers. After being hit with a metal bar, he says he left his homestead and his family, and eventually stayed with his father in Masvingo. He was only told by the police, a year later that his wife, i.e. deceased had died. He denied that he is the one who killed the deceased. He denied that he had a spear. He testified that the state witnesses are not telling the court the truth, they just want to put him in trouble.

After the testimony of the accused, the defence closed its case.

The law and analysis of evidence

In the evaluation of the evidential material this court will observe the following principles; evidence must be weighed in its totality; probabilities and inferences must be distinguished from conjecture and speculation. The court must sift truth from falsehood. There is no *onus* on the accused to prove the truthfulness of any explanation which he gives or to convince the court that he is innocent. Any reasonable doubt regarding his guilty must be afforded to the accused. See *S v Jochems* 1991 (1) SACR 208 (A), *S v Jaffer* 1988 (2) SA 84 (C), *S v Kubeka* 1982 (1) SA 534 (W) at 537 F-H.

We have had the opportunity of watching all the state witnesses as well as the accused when they testified in this court. We distinctly formed an impression that the state

witnesseswere truthful, honest and reliable as witnesses in this court. We can say here without any shadow of doubt that the state witnesses did not embellish their versions to disadvantage the accused herein. We have no reason to reject or disregard their testimonies. We accept it as representing the truth.

We distinctly formed an impression that the accused was not telling the truth to this court. There are so many inconsistencies and improbabilities in the accused's version that we can say without any fear of contradiction that he was an untruthful, unreliable and untrustworthy witness whose evidence cannot be relied on. His version of events is so improbable that it cannot be accepted as representing a true version of events in this case. For instance: he says he was married to the deceased, and he finds his wife in a compromising position, he is stabbed, then leaves his home and disappears until he is arrested a year later in Masvingo. He does not report the stabbing to the police. No one tells him about the death of his wife, until he is told by the police a year later. He says he has a child with deceased who was 5 years old. When pointed out to him in cross examination that the child could not be five years, because by his own version he tried to get a Form 1 place for the child, he makes a turn and says the child is 13 years. This turn could not help him, because he says he had known deceased for the past 6 years, so there could not be a 13 year old child from a relationship of such a duration. He runs away to Masvingo and does not even bother to check what happened to the child. By his own version, he leaves a stranger, i.e. Leonard Mhosva with his wife, and escapes to Masvingo. We find the accused's version to be false beyond a reasonable doubt.

We find that the accused's evidence that the deceased was his wife to be false. He might have had a relationship with the deceased, but she was not his wife. Deceased was married to someone else. The evidence that he was struck by Leonard Mhosva is false. The evidence that he found deceased with Leonard Mhosva in a compromising position is false. Accused was merely peddling falsehoods in this court. We factor his falsehoods in deciding this case. See: *S* v *Mtsweni* 1985 1 SA 590 (A), where the court said a false statement by an accused can be used in drawing an inference of guilty from other reliable evidence. See: Schwikkard PJ *Principles of Evidence* (2nd edition Juta 2002) 503-504.

We find the following facts to be common cause in this case: deceased died on the 2nd February 2018. The Pathologist who conducted a post mortem report observed multiple

abrassions on the face, chest, forearm and arms, and stab wound on the body of the deceased. The Pathologist concluded that the cause of death was: haemorrhagic shock; haemponeumothorax; stab wound chest; and assault.

There is no direct evidence about the person who inflicted the injuries, which caused the death of the deceased. The State's case against the accused is entirely built upon circumstantial evidence. Much has been said and written about circumstantial evidence and how it should be evaluated by the courts. In *R* v *Blom 1939 AD188, 202-3* the court referred to what it called the "two cardinal rules of logic" to be applied when deciding the proper inference to be drawn from circumstantial facts. Those "rules" are explained as follows:

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.

These "two cardinal rules of logic" have become embedded in our jurisprudence. In endeavouring to apply the "rules" to the evidence before it, a court should be careful not to fractionalise the process by applying the rules of logic in compartments. As in all cases of inferential reasoning any inference to be drawn, can only be done by considering all the relevant evidence as a whole. In *R* v *de Villiers, 1944AD 493, 508*, the court said, the test is not whether each proved fact excludes all other inferences, but whether the facts considered as a whole, did so.

Circumstantial evidence in itself may at times furnish direct proof of issues in question. In *S v Reddy* 1996 (2) SCR 1 (A) the court held among others that circumstantial evidence is not necessarily weaker than direct evidence. That in certain circumstances it may even be stronger or of more value than direct evidence. Inferences to be drawn when circumstantial evidence is utilised must be carefully distinguished from conjecture or speculation. If there are no positive proven facts from which the inference can be made, the

method of inference falls away and what is left is mere speculation or conjecture. See: *Caswell v Powell Duffryn Association Collieries Ltd* 1940 AC 152 at 169 per Lord Wright.

In order to decide whether the State has proved its case beyond reasonable doubt based on circumstantial evidence, the court needs to take into account the cumulative effect of the evidence before it as a whole. It is impermissible and an incorrect approach to consider the evidence piecemeal. See *S v Snyman*1968 (2) SA 582 (A) at 589F, *S v Hassim*1973 (3) SA 443 (A) at 457H, *S v Zuma* 2006 (2) SACR 191 (W) at 209B-I. The court must also not only apply its mind to the merits and demerits of the State and defence witnesses but also to the probabilities of the case. Such probabilities should also be tested against the proven facts that are common cause. See: *S v Abrahams* 1979 (1) SA 203 (A); *S v Mhlongo*1991 (4) SACR 207 (A); *S v Guess* 1976 (4) SA 715 (A); *S v Trainor* 2003 (1) SACR 35 (SCA).

In casu, the first inquiry is simply this; what are the proved facts? We find the following facts proved: we have pointed out that the deceased died a violent death, as shown by the post mortem report. Deceased made a report to Leonard Mhosva, (first witness) a member of a member of the Neighbourhood Watch Committee stationed at ZRP Zhombe, and concluded by saying she does not want accused to come to her homestead again. On the 2nd February 2018, Leonard Mhosva, reacted to the report and proceeded to the homestead of the deceased. Upon arrival at the homestead of the deceased, Leonard Mhosva saw accused carrying two spears. The deceased stabbed him with a spear. Leonard Mhozva disarmed accused of one spear. Accused remained with one spear in his possession. After being stabbed Leonard Mhosva escaped from the scene. On the same date, accused was seen by RunganoMushangi (second state witness), holding a blood stained spear and a jacket. Accused had one spear. Accused shouted that he had killed two dogs, pointing at the direction of deceased's homestead. This witness immediately proceeded to the deceased's homestead, which was close by. Upon arrival he saw deceased's body lying on the ground a few metres from her yard. There was blood all over. After the incident, accused left the village. He was only accounted for on the 9th February 2019, a year after the event. We find that he escaped and hid in Masvingo, to escape being held accountable for his deed. We conclude that the proved facts exclude every reasonable inference from them save that it is the accused who stabbed deceased with a spear causing her death.

In our view, against the background of all the evidence, the accused's version is so improbable that it cannot be said to be reasonably possibly true. The evidence of Leonard Mhosva and Rungano Mushangi is credible and is accepted. His evidence, on the other hand, is rejected as false. From the totality of the evidence led herein, inclusive of the accused's false version. We find that the state proved its case beyond reasonable doubt.

Mr *Ndlovu*, counsel for the State, invited this court to find accused guilty of murder in terms of section 47(1)(a) of the Criminal Law (Codification and Reform Act) [Chapter 9:23]. For this court to return a verdict of murder with actual intent, we must be satisfied that the accused desired death, and that death was his aim and object or death was not his aim and object but in process of stabbing the deceased he foresaw death as a substantially certain result of that activity andproceeded regardless as to whether death ensues. See: *S* v *Mugwanda* SC 215/01. Accused used a spear, a lethal weapon. He stabbed the deceased many times, including in the chest. The stabbing caused multiple abrassions on the face, chest, forearm and arms. Furthermore there is a stab wound of 10 cm deep on the chest. Again, he told the second witness that he had killed two dogs. The deceased must have died instantly, because when Rungano Mushangi went to check he found her dead. We are satisfied on the evidence before us, that the accused is guilty of murder with actual intent.

Verdict

Having carefully weighed the evidence adduced as a whole in this trial: the accused is found guilty of murder with actual intent as defined in terms section 47 (1) (a) of the Criminal Law (Codification & Reform Act) [*Chapter 9:23*].

Sentence

It is firmly established that in determining upon an appropriate sentence a court should have regard to the nature of the crime the accused has committed, the interests of the community and the individual circumstances of the accused. These considerations are commonly referred to as the '*Zinn triad*' after the often quoted decision of the Appellate Division that authoritatively confirmed them to be the relevant compass points. See:*S v Zinn* 1969 (2) SA 537 (A).

The accused did not lead evidence in mitigation of sentence. He placed the following personal circumstances before the court through the medium of his legal practitioner. Accused is 37 years old. He was 34 years old at the time of the commission of this offence. He survives on vending and piece jobs. He has 8 head of cattle and 13 goats. He is a first offender and has been in pre-trial incarceration for a period of 2 years and 3 months. The court must weigh these mitigating features against the aggravating factors and the interests of justice.

However, we note that the accused committed a barbaric act of mindless brutality directed at a helpless and vulnerable woman. That the injuries inflicted by the accused were severe is borne out by the post-mortem report. We factor into the equation the following factors: accused stabbed deceased many times with a spear. A spear is a lethal weapon. Directed some stabs on the chest. Left the body of the deceased in an open area. Boasted that he has killed a dog.

Her only crime was to report accused to a member of the Neighbourhood Watch Committee, that accused came to her home at night, around 1 a.m. damaged the door, and took her cell phone. She did not want accused to come to her home again. For this, she paid with her life. The interests of society are significantly implicated in a case such as this that involves violence of an extremely serious degree against a woman. As violence against woman generally is *prevalent*, society is entitled to expect of courts to impose sentences that send a message clearly that violence against the weak and vulnerable in our society will not be tolerated.

The evidence shows that an extraordinary degree of violence was deployed against a defenceless human being. The violence that preceded the killing of the deceased was such as to place this crime in the category of the most serious. It is difficult to conceive what the victim experienced in her last moments.What a horrible way to end the life of another human being. This court must say it, and say it strongly that such conduct will not be tolerated. This court has taken a stand, and it will continue taking a stand, against this wanton violence and destruction of life. Such conduct must be answered with appropriate punishment. The moral blameworthiness of the accused is very high. See: *S v Enock Sibanda* HB 151/20.

There is no mathematical formula in sentencing. The personal circumstances of the accused and all that has been said on his behalf should enjoy appropriate consideration in coming up with an appropriate sentence. A balanced approach is required. It is a balancing act.

After taking all factors in to account, we find that the following sentence will meet the justice of this case:

Accused is sentenced to 25 years imprisonment.

National Prosecuting Authority, state's legal practitioners
Hore and Partners, accused's legal practitioners