

THE STATE

Versus

BAMBANANI NDLOVU

IN THE HIGH COURT OF ZIMBABWE
KABASA J with Assessors Mr Damba and Mr Mabandla
BULAWAYO 30 MAY 2024

Criminal trial

D.E. Kanengoni, for the state
A. Dube with A. Kanda, for the accused

KABASA J: The accused appeared before us on a charge of murder as defined in section 47(1) of the Criminal Law (Codification and Reform) Act, [Chapter 9:23]. He pleaded not guilty to the charge.

The state alleges that on 20 August 2023 at around 2300 hours the accused arrived home and found the now deceased lying in bed with their 2 children, aged 5 and 2. An altercation ensued after the deceased wanted to know why the accused had come home late. The accused proceeded to assault the now deceased with booted feet and a knobkerrie before strangling her leading to her death. The accused subsequently left the area and was eventually arrested on 30 August 2023.

In his defence the accused did not deny strangling the now deceased. He however explained that after he arrived home on the night in question an altercation ensued whereupon the now deceased grabbed his testicles. He grabbed her by the throat in a bid to loosen her grip. He had no intention to kill her and so entreated the court to convict him of culpable homicide.

To prove its case the state produced into evidence the post-mortem report compiled by doctor Acosta. The doctor concluded that the cause of death was:-

Mechanic asphyxia

Neck vessels and trachea constriction

Strangulation

The doctor also observed the following marks of violence:- neck bone groove, line, suprahyoid, ascending oblique. Hemorrhagic trachea hyoid bone fracture, hemorrhagic infiltrate in the neck muscles. Congestion and tadieu spots in the lungs and pleura, hemorrhagic tongue and mouth and severe conjunctival injection.

The accused's confirmed warned and cautioned statement recorded on 31 August 2023 was also produced in evidence. In it he said:-

“My name is Bambanani Ndlovu. I reside at Sibhula. I admit to the allegations of killing the now deceased. I got to the homestead during the night at around 11 p.m. and my wife, Happiness Ngwenya asked me where I was coming from and I responded that I was coming from my parents' homestead. She said that I was telling lies. She then got hold of my testicles pulling me. I got hold of her neck and strangled her whilst trying to defend myself. It was an accident since I had no intention of killing her. I am sorry.”

The evidence of six witnesses was subsequently admitted in terms of section 314 of the Criminal Procedure and Evidence Act, Chapter 9:07. These witnesses are:-

Monica Ndlovu

Takudzwa Kasvau

Tawanda Madzivire

Zondiwe Bhebhe

Detective Constable Moyo and

Doctor Maibelys Gavila Acosta.

Of these 6 witnesses, the only evidence that was relevant to the events of 20 August 2023 was that of Monica Ndlovu, accused's mother. The accused called her to his home on the 21st August 2023 around 1700 hours and she proceeded to the couple's bedroom whilst inquiring on the whereabouts of the now deceased who she subsequently found lying on the floor, face down with her left arm stretched out. She was not showing any signs of life and on

asking the accused what had happened he said the now deceased had complained of stomach pains and had gone to seek help from a prophet. He had also left for work.

Evidence was then led from the accused's step-daughter, Kwandile Moyo. The gist of her testimony was that she was sleeping on the floor with her mother (the now deceased) and her young brother. The accused arrived home and shouted at her mother. He thereafter picked a knobkerrie and struck her on the knee. He proceeded to strangle her as he did so she was waving her hands in the air as she struggled. She did not wake up thereafter and the accused poured water on her to no avail.

This witness gave her evidence very well. Listening to her we got the distinct impression that she was merely relating what she knew to have happened. The criticism by defence counsel regarding the fact that she said the accused mopped blood from the floor and that under cross-examination she had said a knife was used to assault the now deceased did not dent the overall credibility of this witness. The post mortem referred to haemorrhagic tongue and mouth making it possible that the deceased may have spit out some blood. The young child was not asked to clarify on the aspect of the knife but her evidence was very clear that a knobkerrie was used to assault her mother.

The accused confirmed pouring water on the deceased and that she did not wake up. He confirmed that the 4 of them, that is him, the now deceased, the witness and her young brother used to sleep in the same room. This confirmation showed that this child, young as she is, remembered the events of the night in question.

The now deceased died as a result of manual strangulation and this child testified to that. It can therefore not be said she was fantasizing.

In *S v Ncube* 2014 (2) ZLR 297 (H) TAKUVA J set out the dangers inherent in children's testimony and cited *S v Sibanda* S-55-94 a case in which the dangers were enumerated. These are:-

- a) children's memories are unreliable, particularly for detail.
- b) children are egocentric and not likely to consider the effect of their statements on others particularly school children;
- c) children are highly suggestible

- d) children have difficulty in distinguishing fact from fantasy
- e) children make false allegations, particularly of sexual assault and
- f) children do not understand the duty to tell the truth.

We have already shown that this witness's memory was good. The confirmation of part of the events of that night by the accused speaks to the reliability of the witness's memory.

The strangulation of a human being is not something that a child could possibly fantasize about. It is not something that a child is exposed to in her daily life for her to fantasize about such a horrific occurrence. This was a 5 year old child who was staying in the rural areas. There is no suggestion that she could have watched horror movies and so failed to differentiate between reality and fiction. In any event such strangulation was confirmed by the accused and also the post mortem report.

In *S v Musasa* 2002 (1) ZLR 280 (H) the court had this to say:-

“Psychological research has established that young children do not fantasize about being raped and other unusual, horrific occurrence but that their fantasies and play are characterized by their daily experiences.”

Whilst there is need for the court to exercise caution, the exercise of caution must never be allowed to displace the exercise of common sense. The strangulation occurred and there is evidence outside what the child had to say.

The incident occurred around 2300 hours, barely an hour before midnight. It is therefore not to be doubted that the witness, her mother and her young brother were already sleeping. We must say this witness's innocence was disarming. She recalled that her father had come from a beer drink and he first shouted at her mother. The accused confirmed he had been drinking although he was not drunk.

It was clear this child's intelligence is above average. She knew her father was in prison and the reason why he was in prison. This was not evidence which was rehearsed.

We were satisfied she was a credible witness whose evidence could be safely relied on.

In saying so we did not lose sight of the accused's story. In *R v Difford* 1937 AD 370 the court said the accused need not convince the court as to the truthfulness of his story.

Whatever explanation he gives no matter how improbable it may be, the court cannot dismiss it unless it has been shown to be not only improbable but beyond doubt false.

In his defence outline the accused painted a picture of one who was trying to defend himself. In his warned and cautioned statement he said the same story. It is important to note however that this incident occurred on 20 August 2023. The now deceased died that same night. The very following day around 1700 hours the accused called out to his mother insisting that she comes to his homestead. This shows he had spent almost the rest of the night of 20 August and most of the day of 21st August with the now deceased lying dead in that room. Asked what had happened he told a story of her having complained of stomach pains and thereafter visiting a prophet whilst he also left for work. This was his mother he was talking to and he therefore had the first opportunity to say what happened to his own mother. If indeed he had been acting in self-defence why was it difficult for him to simply say so?

It is not surprising that the story about the now deceased grabbing his testicles came after he was eventually accounted for having fled from his home. He had had time to think and find some seemingly plausible explanation for his conduct.

We are therefore not persuaded to conclude that because he repeated the story which he gave in his warned and cautioned statement it means there is truth in such a story.

His step-daughter was able to see what happened in that room and had her mother grabbed her father's testicles she would have innocently stated so. She did not because that did not happen. The accused did not tell his mother such a story because it did not happen and he had not yet found some scheming story and so attributed the now deceased's death to stomach pains and a visit to a prophet presumably to try and show the severity of the stomach pains.

He strangled the now deceased with such pressure that there was a bone fracture of the trachea. Such an injury dove tails with the witness's testimony that as her mother was being strangled, she was "waving her hands in the air." That would be what could be expected from one who is being strangled and consequently being deprived of air. How could she have possibly held on to the accused's testicles?

Under cross-examination he admitted giving the story that the deceased had died after complaining of chest pains for 4 days and that she had difficulty in breathing. He gave that as

the cause of the deceased's death. How can one give three different explanations if indeed all he did was act in self-defence. Surely it does not require one to be schooled in law to know that defending oneself from an attack is behavior that is understandable. With such an innocent explanation why was he making up stories? The answer is obvious, he was being untruthful.

The defence of self is set out in section 253 of the Criminal Law Code, Chapter 9:23. The very first requirement is that there must be an unlawful attack. If indeed the now deceased had lunged at the accused's testicles merely because she was unhappy that he had come home late, such would have been an unlawful attack.

We have already demonstrated that this story is false. There was therefore no unlawful attack. In any event if the accused was in the habit of coming home late what was so different on this night to warrant the now deceased's actions?

Whatever it is that angered the accused, whether it was because he was asked why he had come home late or whatever it was, the fact is he was not defending himself when he strangled the now deceased.

Strangulation is a cruel way of depriving a human being of oxygen and with such deprivation the victim obviously struggles which she did from the testimony of the witness. The accused saw that she was in distress as a direct result of such strangulation but did not relent until she died. This conduct is unlike one who causes death through assaulting a victim where a blow may accidentally land on a delicate part of the body resulting in an unintended result. Strangulation requires one to grab another's throat and squeeze depriving them of air. It is purposeful and deliberate.

Did the accused desire to cause death and succeeded in doing so? (*S v Moyo* HB 19-17, *S v Tomasi* HH 217-16, *S v Mugwada* 202 (1) ZLR 547 (S) or did he realise that there was a real risk or possibility that his conduct may cause death but continued nonetheless despite such risk or possibility?

In *S v Mapfoche* S 84-21 the court said such distinction is insignificant. Murder is murder whether it is as per section 47(1)(a) or (b). So it is *in casu*.

In strangling the now deceased in the manner he did he realised the risk of causing death and did not relent resulting in deceased's death. It is therefore murder. The death was not due to negligence and so it is not culpable homicide but murder.

We are therefore satisfied the state proved its case beyond a reasonable doubt and accordingly find the accused guilty as charged.

Sentence

In assessing sentence we considered that you are a 30 year old first offender. You stand convicted of the murder of your wife through strangulation. You assisted by paying 5 head of cattle to the deceased's family. You also appear to regret your actions as you apologized in court.

You are likely to be affected both socially and psychologically as society will label you "that one who killed his wife". The taking of another's life is not anything that can be easily forgotten and so this death is likely to haunt you for a long time to come, more so given that it was through strangulation when you could see the now deceased gasp for air until she died.

At 30 you are relatively youthful.

In aggravation is the fact that you killed your 23 year old wife. Gender based violence is a scourge that appears not to be abating. A home should be a place of peace and love and a spouse ought not to lose their life at the hands of one who professes to love them. The very hands that were expected to nurture her took her life.

You committed this offence in full view of your 2 very young children. The 5 year old testified to the effect that the 2 year old was crying. These children are now being taken care of by the now deceased's brother and his wife.

Your father-in-law described their present circumstances as "poverty stricken." This is because the now deceased not only took care of the children but her parents as well.

You kept the deceased's body that night and the following day further traumatizing these young children. You also threatened the 5 year old against reporting as you would do to her what you had done to her mother.

Our Constitution provides that children ought to be protected from any form of abuse and enjoy family and parental care. You have deprived these young children of these fundamental rights.

Death by strangulation is painful and cruel.

The presumptive penalty for a contravention of section 47 is 15 years where there are mitigatory factors. We find no such mitigatory factors to justify the imposition of 15 years. The aggravating factors outweigh the mitigatory ones.

The manner in which you killed the deceased, the presence of the 2 young children, the keeping of her body in the house and attempts to lie as to what had killed her justifies a sentence of 20 years imprisonment.

You are accordingly sentenced to 20 years imprisonment.

National Prosecuting Authority, state's legal practitioners
Drau Law Chambers, accused's legal practitioners