THE STATE
versus
TENDAI HAPPINESS BWANYA

HIGH COURT OF ZIMBABWE
HUNGWE J
MUTARE, 13, 14, 16 & 22 June 2017

ASSESSORS: 1. Mr Magorokosho
2. Mr Chipere

Criminal Trial

J Chingwinyiso, for the State
Ms *S Dhlomo*, for the Accused

HUNGWE J: The accused, a 45 year old woman pleaded not guilty to a charge of murder as defined in s 47 (1) (a) or (b) of the Criminal Law (Codification and Reform) Act, [*Chapter 9:23*] ("the Criminal Law Code") . The State alleged that on 26 August 2016 at 318 Hobhouse 1, Mutare the accused unlawfully caused the death of Rumbidzai Ruth Ndoro, a 6 year old infant by assaulting her all over her body several times with unknown objects and inserting an unknown object into her vagina intending to kill her or realising that there was a real risk or possibility that her conduct might cause death and continued to engage in that conduct, despite the risk or possibility of death resulting from which Rumbidzai Ndoro died.

The six year-old child met her death from violence committed within the confines of her place of abode, the given address, in which she lived with her biological father, Richard Ndoro and her step-mother, the accused. In order to get a full appreciation of the basis upon which this court is asked to determine the issue of the guilt or otherwise of the accused it is necessary to set out the undisputed facts which both the State and defence agreed to.

On the day in question the accused had left her residence on the pretext that she would spend the weekend at Marymount Teacher's College. She would return on Sunday 28th August 2016. 26th August 2016 was a Friday.

Richard Ndoro, ("Ndoro"), the deceased's father, on his part left for Mbetsa Shopping Centre nearby. This was before accused left for Marymount. He later in the day received a text message on his mobile in which the accused advised that she was now leaving for Marymount. Ndoro decided to go back home to prepare supper for the child who was now alone. He found her playing with other children next door.

He called her and they both went indoors where he embarked upon the task of preparing supper for two. He was done preparing supper around 19h00 when the accused came back home unexpectedly. He asked what the reason for the change in her plans were. She explained to him that she was the only one prepared to put up for the night in the dormitory. She could not do so. She decided to return home. As to why she was in slip-ons, she said she has left her shoes at College. They all three had supper.

Around 19h30 Ndoro announced that she was going to meet up with a friend called Madiro at Magada Shopping Centre ("Magada"). This shopping Centre is further than Mbetsa Shopping Centre which is only ± 300m away. Up till that time the child had not complained of any discomfort or shown any signs that she was not well. He returned home around 21h15.

He found the main or front door locked from inside. He used the rear door to gain access into the house. Upon entry, the sight of his naked daughter in the corridor lying on the bare floor, writhing and groaning in pain, caught his attention. The accused who had opened the door for him was visibly upset. The accused explained to him that the child had exhibited signs of mental illness soon after he had left. She had told him that she has instructed the child to lock her bedroom door from inside before she left for Mbetsa to look for him. He had told her that he was proceeding to Magada Shopping Centre. She went on to explain to him that upon her return, after failing to locate him, she had met an unknown male person who appeared to be leaving their house. She suspected that this person had raped the child.

He went on to check on the child. He called out her name. The child did not respond but continued to groan in pain. Accused appeared to have been busy mopping blood from the corridor floor as evidenced by a wet mop head and bucket containing blood-tainted water. The child could not stand.

Ndoro went to call his neighbour Kingston Magaya to who he made a report. He then left to go and make a police report. At that time the accused discouraged him from going to Police. This raised his suspicion about what could have happened to his daughter. When he returned with a female police officer, Magaya had left. The child had now been wrapped in a blanket. The accused was wiping blood off the child's head. She laid her across her lap. The

police officer made observations at the scene. As a result of her observations, she ordered the accused to dress the child up so that they proceed to the Police Station. The child was conveyed to Mutare Provincial Hospital. Upon arrival at this hospital the child was pronounced dead.

The doctor invited Ndoro to inspect his daughter's body. Ndoro observed several marks indicative of an assault with either a whip or a switch around the abdomen. There was a fresh head injury and another to the nose-bridge. Accused was detained over deceased's death the same night. Early in the morning accused's friend Gladys Nyabereka ("Nyabereka") arrived. She had instructions from the accused which she was implementing when Police arrived in a motor vehicle to announce that accused had escaped from lawful custody. They proceeded to Nyabereka's residence. Accused was found hiding away from Police. She was taken back to the station. Nyabereka had apparently been instructed to fetch some money from inside the accused's bedroom, disperse the mourners who were gathering and bring the accused fresh clothes to change into. Ndoro caught up with Nyabereka who was on her way to hand over the house keys and money to accused at the station.

When he caught up with her, Nyabereka advised him that when the accused arrived barefoot at her residence, she had briefed her about the death of her child. She also went on to tell her that Nyabereka was not to cry as this would attract the attention of the Police. She had then been instructed to proceed to fetch the money and lock up the house after dispensing the mourners. When Ndoro finally got home, his neighbour suggested that they inspect the premises. They immediately set upon the task. In the process they found items which may have been used to assault the deceased. These comprise the axe handle, the two black hose pipes and a broken feather duster piece.

Outside, they also noticed that there were wet clothes hung over the fowl run. These were the clothes which the deceased had been wearing the previous day. Exhibit 10 and 11. The possible assault weapons were inside the child's bedroom. When he last saw the axe the previous day, it was a single unit. Similarly, the feather duster shaft was not broken when he saw it two days before this incident. The two hose-pipes had been in that state for a while.

Both the accused and Ndoro agree that there were incidents in which accused would assault the child. Ndoro cautioned her not to use her hands. There was an incident in which the school authorities bought suspicion of child abuse to his attention. He had sent the accused to discuss it with the school authorities. Her version of this incident was that the child had told her that she had been pricked in foot by an object. He did not pay attention to

these. When the child was taken to the Police Station, she was still bleeding from her privates. The photographs taken by Police soon after the death confirm this fact. These photographs also confirm the assault marks which, Doctor Dozva testified were a day or two old when she carried out an examination post mortem.

Doctor Dozva testified that the injuries on the deceased were not accidental. She discounted the possibility that a fall by the deceased could have resulted in the type of injuries she observed on her head and face. She could not however discount sexual abuse since any assault on the private constitutes sexual abuse. She concluded that death was due to intracranial bleeding. She discounted the possibility of an accidental fall as the cause of such a fatal injury.

The accused gave a long narration of what she says happened. In brief she denied assaulting the deceased or casing her injuries from which she died.as to what happened between the time Ndoro left home around 19hrs30 and 21hrs 15 when he returned, the accused gave a rather illogical explanation. She said she parted company with the child as the child retired to her bed-room. Soon afterwards, she was alerted by sounds coming from the child's bedroom. She went to investigate. She found her experiencing difficulty in breathing. She went back to her bedroom after attending to her but was again attracted back to the bedroom by the same sounds. She then told the father that she was going to look for her father. She gave the child strict instructions to remain indoors whilst she was away. Upon her return from Mbetsa, she found the child lying in the open outside the house. She then used a switch to chastise her for disobeying instructions not to venture outside the house. It was then that the child told her that she had been raped by "John". As she tried to look for help, the child fell over the stoep and injured herself around the nose. She took her into the hose and lay her across her lap. Ndoro found them both in this position outside the house.

Between the two versions given by the deceased's father and her step-mother lies the truth. The only person who had the opportunity to have seen how the deceased met her death is the accused. However her account is so improbable that it did not move this court to believe it. In discounting the possibility of her version being true, we did not give undue weight to those inconsistencies which were obvious in her version. We accepted that it is not possible for an accused to give a flawless account. We were also aware of the temptation for the father to have exaggerated certain of his evidence so as to cast the accused in bad light. We were in the main satisfied that Ndoro's account accords more with the probabilities that the account given by the accused. We note that both the accused and Ndoro agree that the

child was in good health on the day in question. The events leading to the death of the deceased occurred between 19h30 when her father left the house and 21h15 when he returned home. In the one hour forty five minutes that he was away his daughter suffered fatal injuries which included a blow to the head leading to the cause of death by intracranial bleeding.

The accused's version restricts this time frame to the thirty minutes that she said she had left the child alone when, as she said, she left her to look for the father after she noticed her unusual behaviour. She had left her inside the house but found her outside. She said she had left her between 8pm and 9pm. If Ndoro came back at 21h15 then this further restricts the time of occurance to sometime during that one hour window. But there are other events which the accused has not satisfactorily accounted for. As an example, the deceased was found lying naked in the corridor. How long did it take her to assess her condition and resolve to undress her? For how long had she been cleaning the corridor when Ndoro arrived? Why was she cleaning the house anywhere?

In our assessment, the accused had exhibited to the first responders, behaviour consistent with guilt rather than innocence. The fact that she lied in her evidence ought to be taken as corroborating other evidence upon which the court can rely on. We disbelieved her evidence that she had detected that the child had breathing difficulties which prompted her to leave the child unattended to go in search of her father. It is unlikely that having been left with the child, she would choose to leave the child alone without any help in an unsecured house. Were this the case, common sense would have caused her to seek help from her neighbours, if her condition demanded such help, before venturing into the night.

We do not believe that she saw a man walking away from the house on her return. We do not believe her when she said that the deceased was at that time outside. We do not believe the deceased told her that she had been raped by John. We do not believe that the child fell onto the stoep and injured herself. We do not believe that she had administered the herbal concoction to assist the child with her breathing problems when she was groaning and bleeding. Her version is just remotely probable. It is false. If, as she says, the child had claimed that she had been raped, she would not have dissuaded the father, Ndoro, from going to the Police. For her part, the accused would not have engaged in cleaning the house of any possible evidence if the deceased had made a report of rape to her. She would not have delayed reporting the rape by engaging in clearing the evidence of the crime which littered the corridor or soaked the clothes which the deceased had been wearing before raising alarm.

In our view the accused put up a false explanation because no one saw her assault the deceased. As such this case is purely based on circumstantial evidence.

Where direct evidence of a particular act or state of affairs is not available, one may, and indeed must, have resort to indirect means of establishing the facts. Since the direct evidence of a witness is open to all kinds of weaknesses of observation and recollection, evidence of a circumstantial nature may be less contestable and more easily relied on. To show that the accused had the means, the motive and the opportunity may go some way towards securing a conviction of an accused person. Put differently, circumstantial evidence raises a *prima facie* case against the accused which requires him or her to give an explanation. If his or her explanation is false, then conviction more often than not, must follow.

Where the conviction of an accused person depends upon circumstantial evidence from all the established facts, then the inference sought to be drawn must be consistent with all the proven facts and the facts should be such that they exclude every reasonable inference, save the one sought to be drawn. See *R* v *Blom* 1939 AD 288; *R* v *Edwards* 1949 S.R. 30; *S* v *Marange & Ors* 1991 (1) ZLR 244 (S).

In a criminal case such evidence must satisfy the following requirements:

(i) The circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;

(ii) Those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused;

(iii) The circumstances, taken cumulatively, should form a chain such that there is no escape from the conclusion that within all human probability the crime was committed by the accused and no-one else; and

(iv) The circumstantial evidence, in order to sustain a conviction, must be so complete and incapable of explanation of any other hypothesis than that of the guilt of the accused and such evidence should not only be consistent with the guilt of the accused but should also be inconsistent with his innocence.

Sir Alfred Wills in his book "*Wills Circumstantial Evidence*" (Chapter VI) lays down the following rules specially to be observed in the case of circumstantial evidence:

1. The facts alleged as a basis of any legal inference must be clearly proved and beyond reasonable doubt connected with the *factum probandum*;

2. The burden of proof is always on the party who assets the existence of any fact, which infers legal accountability;
3. In all cases, whether direct or circumstantial evidence, the best evidence must be adduced which the nature of the case admits;
4. In order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation, upon any other hypothesis than that of his guilt;
5. If there be any reasonable doubt the guilt of the accused, he is entitled, as of right, to be acquitted.

In determining whether there has been proof beyond a reasonable doubt DUMBUTSHENA CJ in *S* v *Isolano* 1985 (1) ZLR 62 (SC) laid down the following proposition regarding proof beyond;

> "In my view the degree of proof required in a criminal case has been fulfilled. In *Miller v Minister of Pensions* [1947] 2 All ER 372 (KB) Lord Denning described that degree as follows:
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> > '….. and for that purpose the evidence must reach the same degree of cogency as is required in a criminal case before an accused person is found guilty. That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond any shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be disturbed with the sentence "of course it is possible but not in the least probable" the case is proved beyond a reasonable doubt, but nothing short of that will suffice.' ……."

It has been said that circumstantial evidence is to be considered as a chain, and each piece of evidence is a link in the chain, but that is not so, for then, if any one link breaks, the chain would fail. It is more like the case of a rope comprised of several cords. One strand of cord might be insufficient to sustain the weight, but three stranded together may be quite of sufficient strength. Thus it may be in circumstantial evidence. There may be a combination of circumstances, no one of which would raise reasonable suspicion or more than a mere suspicion; but the whole, taken together, may create a conclusion of guilt with as much certainty as human affairs can require or admit of.

Taking the whole mosaic of the evidence placed before this court by the State; the court must of necessity consider that evidence against the counter evidence advanced by the defence. As previously pointed out, in determining where the probabilities of a particular case lay the proper approach is not to consider each piece of evidence in isolation or to require that each fact giving rise to an inference be proved, beyond doubt. The proper approach is to

determine whether these facts upon which is built a circumstantial case has been proved as whole, beyond a reasonable doubt.

The defence proffered by the accused was a bare denial of the allegations of assault. Yet in her defence outline the admission is made that on the day of the commission of the crime specifically on the fateful night, she had assaulted the deceased for disregarding her clear instruction not to leave the bedroom. That the deceased was assaulted was confirmed in the post mortem examination report exh 9 and specifically in court by Doctor Dozva.

The array of possible murder weapons found in the deceased's bedroom consisting in the disassembled axe, the broken shaft of the feather duster and the rubber hoses, when considered in isolation, do not prove anything incriminating of the accused, if however considered in light of the fact that the injuries which caused the deceased's death occurred in the one hour forty-five minutes when the father left her with the step-mother. The inescapable conclusion is that, in light of the false explanation given by accused, it is only the accused who inflicted the injuries which resulted in the death of the deceased.

In the result she is found guilty of murder as defined in s 47 (1) (b) of the Criminal Law (Codification and Reform) Act, [*Chapter 9:23*].

REASONS FOR SENTENCE

In assessing an appropriate sentence I take into account the submissions made on your behalf by counsel. You are a first offender who was a student at a teacher's training college. You are also a mother of one child. You also contributed towards the funeral expenses of the deceased. The death of the child at your hands seriously traumatised you. All of these factors constitute some measure of mitigation and I sincerely believe you regretted the death of the deceased. Beyond this I am unable to find what else would mitigate the gravity of the crime you committed. I say this for the following reasons.

You were literally the deceased's mother in that you accepted the six-year old as your own child with whom you lived under the same roof with her biological father. Yet your treatment of this child was anything but motherly. The evidence show that you were in the habit of abusing the child. The father did not unfortunately act on the tale-tale signs of child abuse resulting in her tragic death. This child must have suffered a brutal, painful and agonising death. I say this because before her father left, she was healthy and happy around 19h30, but when he returned, barely two hours later, she had been so brutalised that she could not even talk. She could only groan in pain. A few hours later she passed on. You then chose to mislead the court as to what really happened by proffering instead an incredible story which attempted to implicate unknown people in the assault and subsequent death of the deceased.

Your behaviour epitomised the callous cold-blooded step-mother at whose hands the poor child died. This is a bad case of child abuse because it has resulted in the death of a child in the hands of someone she looked up to for protection as a child. The shocking injuries revealed by a medical examination just go to show that you are a naturally cruel human being who gives step-mothers everywhere a bad name. Your moral blameworthiness is clearly high. You deserve a lengthy custodial sentence and the following sentence will meet the justice of this case.

23 years imprisonment

National Prosecuting Authority, State's legal practitioners
Mutungura & Partners, accused's legal practitioners