

STATE
versus
PRITCHARD ZIMONDI

HIGH COURT OF ZIMBABWE
MWAYERA J
HARARE, 20- 23 May 2013, 25-28 Nov 2013,
8-9,14-16 April 2014, 18-19 December 2014

Assessors

Mr Gonzo
Mr Chogugudza

Criminal Trial

E Mavuto, for the State
N Mugiya, for the accused

MWAYERA J: The accused appeared before the court charged with murder of his girlfriend, now deceased, Monalisa Chinamona. The accused is alleged to have stabbed the deceased several times in the chest thereby killing her on 24 April 2012. In reaching at the disposition of this matter we have had due regard to the totality of the evidence presented before us by both State and defence counsel. We have also had regard to closing submissions and wish to express gratitude to both State and defence counsel for the closing submissions after evidence had been fully submitted. They filed their written submissions in assisting the court to come up with a disposition of the matter. Both State and defence counsel are officers of the court and it is common knowledge they appreciate the position of matters, the progression from commencement of trial to the finalization of the matter. The matter was postponed *sine die* for purposes of having those submissions filed and finally for judgment to be delivered.

The state and defence counsel will obviously be appreciative of the fact that the matter was slotted in for continuation at the time that this court had been assigned other duties in the family law section for purposes of having the matter finalized together with other criminal partly heard matters, the court slotted matters for hearing during vacation for adducement of evidence and for finalization in respect of those matters which would have reached maturity stage like in respect of this matter. Having indicated our gratitude to both State and defence counsel who are officers of the court, we expect that they played their respective roles as officers of the court to explain to the interested parties the delays occasioned in coming to the conclusion of the matter.

We now proceed with the judgment in respect of the matter where we have indicated that the accused is charged with murder of his girlfriend one Monalisa Chinomona. It is common knowledge that the deceased died as a result of hypovolemic shock due to perforated lung and heart due to stab wounds on the chest, that is not in dispute. It is also an undisputed fact that the accused and the deceased were lovers given the accused's plea of not guilty to the charge of murder which was proffered and preferred against him by the State and the defence outline which was proffered and tendered by the accused and also adopted as his evidence in chief. What is in dispute is whether or not it is the accused who stabbed the deceased with actual intention to cause her death or otherwise realising there was a real risk or possibility that his conduct might cause her death.

In support of the allegations, the State adduced evidence from twelve witnesses and also sought to rely on a number of exhibits which were tendered before this court. The defence led evidence from four witnesses inclusive of the accused person.

The version of the State was briefly that on the fateful day the deceased remained behind at the Chinomona residence while the brother one Tanyaradzwa Chinomona accompanied the mother Miriam Chinomona to work. Upon return at around 9:15 am Tanyaradzwa observed that the main door which upon their exit did not lock was now locked. After accessing spare keys through the window he entered and found the deceased lying on the bed with a knife stuck in the chest. Thereafter the matter was reported to the police and the accused was arrested whereupon he was found in possession of the deceased's panties and brassier and a bunch of keys to the Chinomona's residence.

The accused's version on the other hand was that he had a long love relationship with the deceased and that they were planning to marry each other. The three year love relationship was very cordial, marked with consistent visits and sleepovers at each other's place. The accused had an arrangement with the deceased. Keys to the deceased's Chinomona's residence were kept by the accused and so were the keys to the Zimondi's residence kept by the deceased. Further that they would live close at each other's respective houses for purposes of changing after the sleepovers. However, about two weeks before the deceased's death the two love birds experienced unpleasant problems over telephone messages, (sms) from one Vitalis to Monalisa the deceased. Upon questioning, the deceased revealed that this Vitalis was her former boyfriend who was insisting that the deceased should not dump him. A week before the death of the deceased, the two had agreed to stay the love affair until the deceased resolved her issues with Vitalis.

Some three days prior to the deceased's death the accused witnessed a serious commotion between the deceased and the said Vitalis at a place commonly known as "C" Junction in Chitungwiza. When this Vitalis turned to the accused, the accused had to actually flee for his life. At that stage Vitalis stated in vernacular, "*tirikuda kuona kuti achamuroora ndiani. Unofunga kuti wakangwara nhai, even iye akapusa futi.*" We want to see who will marry her, you think you are clever, even she is dull. I will deal with her. Although they communicated telephonically, the accused and deceased, that was the last time that the accused saw the deceased when she was alive only to learn of her death.

A day before the deceased met her fate the two had planned to meet in town at lunch time the following day. The accused had obtained a pair of panties and brassier from his aunt who was in the business of selling those products so that he could give his girlfriend during the scheduled meeting.

On the morning of the fateful day, the accused left Chitungwiza in the company of his mother at around 6:30am. They parted ways in town while the mother proceeded to Mbare and the accused after collecting his certificates proceeded to Gweru. He left for Gweru just after 7 o'clock in the morning using a private vehicle he boarded at the showground in Harare. He arrived in Gweru at roughly around 10:00am and had to return so as to meet his appointment with the deceased at lunch time and also go to work thereafter at around 1600hrs. At 11:30am he

received a call from a person who identified himself as a policeman and asked his whereabouts, whereupon he revealed he was in Gweru but he would be back in Harare at about lunch time. The accused was a bit worried because the two texts he sends to the deceased on the day in question were without response. He had last communicated with her at 0730hrs though before he left for Gweru. At around 1340 hours he met the policeman who arrested him and took him to Chitungwiza. It was after the arrest that he learnt of the death of his lover and he suspected Vitalis who had earlier warned him as well as Monalisa. He suspected that Vitalis had accomplished his threats.

At the time of the arrest the accused was in possession of a brassier and panties, he intended to give to the deceased. He denied having been in Chitungwiza at around 9o'clock in the morning. Also communicating with the deceased's friend one Primerose Muteza about the death of Monalisa, he disputed that. He only saw Simbarashe Piyano soon after his arrest, he denied having murdered his girlfriend Monalisa.

State witnesses testified, Simbarashe Piyano a boyfriend to Primrose Mutize narrated how he contacted the accused after having been informed by the latter of the deceased's death. Upon calling the accused, the accused requested him to go and pick him from Francis flat near Allan Wilson School in Harare. He proceeded and observed that the accused had a dark colour jean and purple T-shirt and that the accused was holding a plastic paper bag. The witness told the court that the accused requested for some money indicating he was not ready to meet the police. It was then that they agreed they would wait for Primrose Mutize to bring in some money to assist the accused. The accused then entered his work complex and witness who was surprised why the accused was talking about not being ready to face the police and why accused wanted to go away when his girlfriend had died then drove to Harare Civil Court and alerted the police. It was upon his report that the police laid an ambush and arrested the accused when he came back from his work complex to join Simbarashe Piyano.

The witness's version of alerting the police was confirmed by Hensel Chikwati the arresting detail. Also worth noting is that the mention of accused wearing a purple T-shirt was confirmed and corroborated by Tanyaradzwa Chinomona and all the other State witnesses who indicated they saw the accused on the day in question. The witness was subjected to what one may term bruising cross examination by the defence counsel but he stood his ground. He clearly

showed he had no motive to fabricate. His relationship with the accused was basically because of the friendship between his girlfriend and Monalisa Chinomona the deceased. His reference to time when he got information from the girlfriend and when he met accused as being between 9am and 10am cannot take away his credibility for indeed he was under no obligation to be giving exact time or looking at time. He clearly made it clear in his testimony that he was giving an estimation as regards the time, it was in the morning. In fact estimation in respect of time tallied with other State witnesses' testimony in so far as events of the day in question were recounted.

Tanyaradzwa Chinomona a brother to the now deceased recounted how on the fateful day upon return from accompanying or escorting his mother to work found a dead body of his sister with several stab wounds and the knife stuck in the chest. He had to gain access after fishing the spare keys through the window since the main door was now locked although they had left it unlocked. Upon his observation he communicated with his mother, his sister's friend Primrose and notified the police. He testified that a bunch of keys to the house on a black leather holder was missing. He mentioned that that same day the accused was brought to Makoni police station and that he observed the accused was wearing a purple T-shirt and blue jeans. The witness stood his ground even during cross examination. He confirmed that the bunch of keys which was presented in court was their homestead keys per the leather holder which was attached thereto. His version was straight forward. More so his evidence on the issue of keys was acceptable given accused's own version that he kept the Chinomona residence keys.

Miriam Chinomona, the mother to the deceased gave a brief testimony. She confirmed the brassier and panties tendered in court belonged to the deceased her daughter and that the keys produced were part of keys to her homestead including the gate key even though some of the keys were no longer on the bunch which was produced per her observation in court and per her observation at the police station. She generally gave her evidence well.

Sharon Chinomona a sister to the deceased testified that she gave her sister the underwear which was produced as an exhibit in particular the panties commonly referred to as thong the purple and white one which was tendered as an exhibit. It was one of the three panties which she had received from her relative who was overseas and she identified that pant. She also identified the off-white floral bra as that of the deceased her sister and had a specific recollection of

advising her little sister now deceased not to buy light coloured underwears since she could not properly wash them and keep them clean and as such they would turn to fade off as regards the colouring because of the dirt which would remain there.

The witness told the court that the brassier and panties were not new, those which were produced in court. They had been used overtime. We must mention at this stage that indeed our observations of the exhibit, the brassier, the floral one off white which was produced in court and the panties, the purple as main colour and white were not new and the court observed on gusset in-between the center pad of the pant clearly showed discolouring of a pant which had been used. The brassier was clearly older in terms of usage as compared to the panties. We found nothing to criticize in the manner the witness testified and gave her evidence which was clear even under cross examination. Even upon looking at the photographs which were tendered as exhibits before the court, the body of Monalisa, the size of the brassier and the pant would be the likely size in respect of her body. That coincidence is certainly striking.

The fifth witness Hensel Chikwati, the arresting detail confirmed receiving information from Simbarashe Piyano. This was while he was at the Civil Court in the company of his colleagues Constable Sishaka. He followed up at the accused's workplace and found out that the accused was not on duty on the day in question. Upon returning outside he saw the accused entering into Simbarashe Piyano's vehicle which he followed and he effected arrest. He saw the underwear garments in accused's possession at the time of arrest and also a bunch of keys. According to him the bunch he saw had more keys than the bunch which was produced in court during the trial. After arresting the accused for suspected murder of his girlfriend he handed over the accused to Chitungwiza police station.

His evidence on what he did upon receiving report was straight forward but we cannot help but comment on the scantiness of evidence more so given he was the arresting detail for a serious murder allegation. The arresting detail did not remember the time he effected arrest. He is not an ordinary witness, he is a police officer who was effecting an arrest for a grave offence. He could have written in his notebook the time pertaining to the arrest. His approach given the gravity of the offence was casual and we cannot help but mention such shoddy approach is not acceptable. However, that approach and that failure to record the relevant time in his notebook does not cloud what he did and what he observed, that is the arresting and the recovery of the

exhibits, the underwears as well as the keys and his reaction upon receiving the report from Simbarashe Piyano. The witness generally did not seek to exaggerate his involvement in a bid to boost the State case. He gave a straight forward account of his involvements with the accused on the day in question.

Primrose Mutize a girlfriend to Simbarashe Piyano and friend to the now deceased also recounted how she got information about Monalisa's death from the accused although without details and also she recounted how she was later phoned by the deceased's brother Tanyaradzwa and notified of Monalisa's death. The witness phoned her boyfriend Simbarashe Piyano whom the accused had requested help from by being picked from town. All this was in the morning according to the witness between 10am and 11am. The witness maintained the accused and deceased were during the relevant time having problems over the accused's desire to be intimate sexually with the deceased while the deceased was not yet ready for sexual intimacy.

As far as she had communicated with the deceased and accused they had broke up their affair on 22 April 2012 and on 23 April 2012 accused had intimated, he would commit suicide if they maintained the break up. On 24 April 2012, she received information about the death of the deceased her friend from the accused. The witness did not know how deceased lost her life, but when she made enquiries with the accused, the accused told the witness that the deceased had stabbed herself in the neck. Her evidence in so far as communicating with the accused tallied to a greater extent on suggestion that accused was not yet ready in the morning to face the police and that he had mislead them by saying he was in Gweru yet he was in Harare. The witness stuck to her version during cross examination which we described as an excruciating cross examination from the defence counsel.

Detective Sergeant Terrence Muripa conducted a search on the accused at the directive of Assistant Inspector Mukandla. He recovered a, bunch of house keys with a black leather key holder, a ladies brassier and underwear pants which were not new. He in turn ordered Constable Shingirai Shonhiwa to book the recovered items in his notebook which was also tendered as an exhibit before the court with particular references to pp 8 to 9. This evidence was corroborated on all material aspects by Constable Shingira Shonhiwa and Assistant Inspector Muparirano. The exhibits were noted down in the notebook and they were also booked in the exhibit book. The police details were criticized at length by the defence counsel and to a great extent for the

shoddy investigation more so given the aspects which were pointed out by the defence counsel pertaining to the none upliftment of finger prints from the scene of crime even the knife which was imbedded in the chest of the body of the deceased.

Detective Sergeant Muparirano made it clear, he had no such directive. Given the expertise in the area the court is alive to the fact that there is a department charged with such attendance of scene and upliftment of fingerprints. To that extent therefore, the explanation that he had no such directive is acceptable in police procedure but indeed a loophole in the manner they carry out investigations. The interrogating details who testified confirmed recovery of the items which were tendered in court as exhibits and they did not seek to mislead the court by exaggerating on what they did not attend to.

The investigating officer Claudious Muparirano told the court that he received the report of murder at around 9:30 in the morning. He attended the scene and having been given accused as a suspect by the deceased's brother Tanyaradzwa, he visited the accused's homestead. The mother of the accused was at home, notified him that the accused had left home around 7am proceeding to work. The witness called the accused and accused answered him on the phone advising him that at 9.30 in the morning he was in Gweru. According to the witness, the finger prints experts attended the scene. To this end his evidence was to a greater extent countering the criticism as regards how investigations were carried out and alleged loophole by the defence. His explanation that they could not uplift fingerprints is understandable given this is a homestead and that the kitchen knife which was imbedded in Monalisa's body is a kitchen knife which was used in the Chinomona homestead. Given the multiplicity of the handlers the court takes judicial notice of fingerprints and handling would have impaired indeed the upliftment of specific fingerprints.

He recounted how he carried out investigations and how he called the Chinomonas and Wadzanai Murinda to the police station whereupon they identified the keys and the underwears which they said belonged to the deceased and which were tendered during trial as exhibits.

Wadzanai Murinda a cousin to the deceased who stayed with the deceased at the Chinomona's homestead also testified. She did not know how the deceased lost her life but her evidence was largely to confirm that the undergarments produced in court belonged to the deceased. She was familiar with same as she was involved in the packing of wardrobes and they

shared the same bedroom with Monalisa. Her evidence in respect of the undergarments that they belonged to Monalisa tallied with Monalisa's mother's evidence Miriam Chinomona and Sharon Monalisa's sister's evidence.

Kudzai Rusere a neighbour to both accused and deceased also testified. The witness was subjected to bruising and excruciating cross examination which boarded on character assassination. The witness's evidence was basically that accused was wearing a purple T-shirt and passed by the homestead on the day in question at the road and as was his usual routine when he passed they exchanged greetings. He outlined that on the day in question he saw the accused at around 9 in the morning and they exchanged the greetings. He did not know how the deceased met with her death. After the lengthy bruising cross examination by the defence counsel the defence counsel sought to have the witness and also officer Shonhiwa's evidence expunged from the record. This application was dismissed for want of merit.

Shonhiwa's evidence sought to be expunged on the basis that the typed version was said not to have much detail as was given in the oral evidence. The witness Rusere's evidence was sought to be expunged on the basis that he knew about a long hand statement and not the typed statement. There was no justification in imputing that the state had withheld information given the state relied only on the statement which they furnished to the defence. The witness's statements are reduced to writing, typed by the police. The police details also translate and interpret the vernacular version into English version, English being a second language. The differences on the details and specified on giving oral evidence and summary contained in the state is not a basis for throwing out a witness's evidence. The accused's rights are well protected by serving of the statements, state papers and cross examination by the defence counsel.

Rusere's evidence on the accused having been in Chitungwiza in the morning of the fateful day and also that accused was wearing a purple T-shirt tallied with most of the State witnesses versions and those who saw the accused on 24 April 2012. The criticism of the witness on the basis that he smoked dagga given his candidness about his habit of smoking clearly portrayed him as an ordinary location dweller who had no motive at all to spice his evidence. The fact that he admitted he had partaken of dagga when he came to court persuaded the court to an extent to agree with the defence that his evidence was not to be heavily relied on as it was accepted it was his habit every morning to partake of the dagga. To such an extent that it would

be accepted he would have been mistaken he would not even have paid attention to specific details as regards time when he exchanged greetings. The ordinary thing that remained lingering from his evidence is, he stayed in the same locality. He did not know how Monalisa met with her death. He would greet on daily basis the accused who will be on his way to work. But could not give with certainty what really transpired on the day in question. The evidence of the police detail, the oral evidence would of necessity have more detail depending with the mode of question and that cannot be expunged on the basis of it being different from the typed statement.

The state also other than relying on witnesses' evidence relied on photographs which were tendered as exhibits together with other exhibits inclusive of the post mortem report, the knife, the photographs depicting the stabbed body of the deceased. These were produced by consent. The photographs went a long way in confirming the doctor's finding on the post mortem report which was also tendered as an exhibit by consent before the court.

The defence on the other hand adduced evidence from witnesses as follows. The accused was the first to testify. He denied having killed his girlfriend and stood his ground that he suspected it was one Vitalis, a former boyfriend who had threatened the deceased and that it was him whom must have killed the deceased. He pointed out that on the morning in question he left Chitungwiza at 6 o'clock in the morning with his mother one Grace Zimondi and that they parted ways when he was proceeding to Gweru and his mother went to Mbare. His evidence on time of departure varied from his mother's version when she was approached by the police detail, she indicated that he had left in the morning at 7 o'clock in the morning proceeding to work. The evidence also differed from his mother on the assertion that he had gone to work yet the accused said on the day in question he left at 6 o'clock proceeding to Gweru. The accused oscillated from saying, he had Monalisa Chinomona's homestead keys as per the arrangement of sleepovers to saying the keys recovered from him were his own keys. To this end it was not clear whether he was disowning the keys on the basis that they were not the Chinomona's residence keys which he had been given and authorized to keep by Monalisa as lovers to saying the keys were his own keys. He also then told the court during testifying that the keys which were produced in the court were not the ones recovered from him.

The accused also gave different versions about his possession of the brassier and panties. On one hand he stated the clothing items were a present he had bought for his girlfriend. On

another breathe he stated they were samples which he obtained from his aunt Julian Chineka for purposes of showing to the deceased and finding out if she wanted items matching that description. Of interest here is Julian Chineka's version that the accused had bought the items for his girlfriend and that she had discouraged him from buying four to five pairs as he had intending to buy four to five pairs since he was not very sure of his girlfriend's correct size. This would remove the notion that the clothing items were a sample if he had bought them.

The accused's testimony of his movements from Chitungwiza to Gweru did not tally with his mother's version for example as regards the use of the taxi when they were in town. We will get back to this aspect.

The impression created was that the defence case was being woven as trial progressed. The accused in his defence outline gave a version that the key recovered from him were his keys, but in evidence in chief he disowned the keys while at the same time he painted the picture that the keys were the Chinomona's homestead keys which he had obtained by arrangement with the deceased who also had his own homestead keys. For the first time during the defence case, the accused raised a new issue that the deceased was pregnant for him. We must hasten to mention that such assertion was not supported medically per the post mortem report which was fairly detailed and produced before the court. It was devoid of such findings. Not that this would change the complexion of the matter, the question is not whether Monalisa was pregnant for the accused or was intimate with the accused and was pregnant for him, but the question is how did Monalisa meet with her demise.

The state witnesses in particular Simbarashe Piyano and Primrose Mutize had mentioned that accused and deceased were having problems on issues of intimacy and naturally the issue of pregnancy ought to have been raised with those witnesses if it was not coming in as an afterthought. Whatever it was meant for, the issue of pregnancy which came in as an afterthought in our view was viewed as a ploy to cloud the otherwise clear evidence.

The accused was a man of many words as evidenced by his defence outline and also the manner in which he testified. All this was raised to muddy waters in a bid to mislead the court on the chronological sequence of events of the day in question. Given the inconsistencies in accused's version and his defence witness's version the accused was generally viewed as a

shrewd, cunning witness bent on raising dust and smoke so as to mislead the court. His demeanor generally in court was not that of a candid person given the nature of allegations he is facing.

Grace Zimondi, the accused's mother who was seated in the court during the larger part of the trial hearing evidence did not assist the situation. In a bid to protect the child, the accused, she overstretched her testimony and in the process contradicted her son's account extensively much to the detriment of her son. Such discrepancies made the alleged Gweru trip dubious, hazy, viewed suspect or not undertaken at all. According to Grace Zimondi, when the accused hired a taxi to go to the showground area to catch a lift to Gweru, they were still together. This was obviously given by Grace Zimondi so as to buttress the fact that she really saw her child depart for Gweru. This flew in the face of the accused's version when they disembarked from a commuter omnibus or kombi from Chitungwiza they parted ways with the mother who headed for Mbare while the accused hired the taxi on his own, not that he went to the showground to board a lift to Gweru with his mother with the taxi and then the mother proceeded by the taxi to Mbare.

Grace's version is understandable given she is a mother and she wanted to vouch for her son's trip to Gweru hence her insistence that they boarded the taxi together and that she left the accused at the showground to catch the lift to Gweru. Grace Zimondi generally did not impress the court as a genuine witness. She unconvincingly in a comical manner painted a picture that accused and Monalisa the now deceased would sleep over at each other's respective homes with the parent's blessing of the cohabiting, so to speak.

Stabile Khumalo told the court that the accused came to Gweru on 24 April 2012 and that he gave her his educational certificates, professional certificates and letters from hospital. She wanted to facilitate a job for the accused and they met briefly in town. The witness made it clear the issue was discussed or the trial proceedings were discussed at the home. She was however very economical with information as she did not want to commit herself as regards the time she met with the accused for the obvious reason that there will be contradictions as regards when if at all accused was in Gweru or he was in Harare given the allegations accused faced. The witness did not commit herself on the time that they met and the time that they were together with the accused that again making the genuineness of the accused having undertaken a trip to Gweru porous. Her evidence was not only untruthful but unsatisfactory.

Julian Chinheka testified that she gave accused a sample of the panties and brassier and on another breath said she sold the clothing items to the accused for him to give to his girlfriend but discouraged him from buying the number that he intended. He required four to five pairs but he wanted to verify and confirm sizes first. It was therefore suspect if she sold these second hand underwears tendered in the court or she just gave a sample or was just vouching for a nephew in the same manner her sister had done vouching for her son. Given the relationship it is understandable but does not assist the defence case.

She, during her testimony despite all the odds, we emphasize was the only witness who testified that the brassier, the floral one, the off white one and the thong or underwear pants purple and white which was produced in court were new items. Indeed despite the odds because the items were with a magnifying glass clearly not new. The highly excitable witness did not impress the court as a candid witness at all, more so given her testimony that items which were clearly not new she claimed them to be new and that an explanation on documents said to have been given to the accused for onward transmission to Gweru differed from the evidence of Stabile Khumalo and the accused person.

The defence's story generally was marred with contradictions and inconsistencies. The incredible story of the defence was inconsistent with reality and proven facts. The alleged defence of alibi was laid bare and exposed as calculated to escape in the face of proved facts by the State. All State witnesses generally gave evidence well with no motivation of fabrication being depicted.

Having had regard to the totality of the evidence before the courts, the following observations are worth noting. It is clear the accused and the deceased were having a love affair. It is also common cause that at the relevant time the two were having a misunderstanding although different versions were given. The state witnesses say the accused was insisting on intimacy while the deceased was not ready and the defence's version being that the misunderstanding was over one Vitalis an ex-boyfriend of the deceased. Whatever the source of misunderstanding, it is a fact that there was a misunderstanding between the accused and the now deceased. It is also common cause that the deceased died on 24 April 2012 as a result of stab wounds. Further it cannot be disputed that on the morning of the day in question the accused was in Chitungwiza as per the state, defence witnesses inclusive of the accused person himself. The

accused was in the vicinity of the scene of the crime in the morning and the deceased was murdered in the morning of the day in question thus rebutting the defence of alibi, more so given the hazy and unconvincing statements by the witnesses who were to vouch for the accused having been in Gweru. The defence of alibi raised does not remove the aspect of the accused having been in Chitungwiza.

It is not in dispute that the underwears and a bunch of keys were recovered from the accused on the same day the deceased was murdered. All the state witnesses who saw the accused on the day in question even to the exclusion of Rusere observed he had a purple T-shirt (exclusion on Rusere being on the alleged intake of dagga) That when viewed in conjunction with the accused's version that he was not at work on the day in question supports the State witnesses' version.

We are alive to the accused's version that he had a white shirt which none of the State witnesses whom we have said had no motive to fabricate and lie observed. The witness inclusive of the police details did not observe the white shirt. In any event the accused himself stated that he was not going to work on that day till 1600hrs. We find no motive on the part of the State witnesses to mislead as regards accused's attire. It is apparent from the evidence that the case is premised on direct and circumstantial evidence. The case of *R v Bloom* 1938 AD which was quoted with approval by UCHENA J in *S v Thambo* which counsel refer to in their submissions postulates the position that circumstantial evidence can only be used to draw an inference. If the inference sought to be drawn is the only reasonable one which can be drawn from the facts. It can only be used if the inference sought to be drawn is the only reasonable one which can be drawn from the facts. It must be supported by rational reasoning and analysis of proved facts. In other words the inference sought to be drawn must be consistent with all proven facts.

Given that it is a fact the accused and the deceased had a misunderstanding that the accused was in Chitungwiza on the morning of the fateful day, that a bunch of keys belonging to the Chinomona's homestead was recovered from the accused, that old or second hand underwears, (brassier and panties thong) belonging to the deceased were recovered from the accused on the day in question and that the deceased was found locked up and dead from stab wounds, the only reasonable inference that can be drawn is that the accused had a hand in the murder of the deceased especially when one looks closely at accused's inconsistent version. The

inference that the accused killed the deceased in the circumstances is consistent with the proved facts. Given the manner in which the deceased was stabbed and the parts of the body stabbed that is the neck and chest, one cannot fail to impute that the accused stabbed the deceased with a kitchen knife in the chest realizing that there was real risk or possibility that his conduct might cause the death but nonetheless persisted with his act or with his conduct.

In the premises basing on the evidence before the court, the state has managed to discharge the required onus and proved the case beyond reasonable doubt. By stabbing the deceased on the neck and chest several times in the manner in which the stab wounds were effected the accused realized the possibility of his conduct causing death and persisted with such conduct. He is accordingly found guilty of murder with constructive intent.

SENTENCE

The accused stands convicted of a grave offence of murder with constructive intention. He stabbed his girlfriend now deceased Monalisa Chinomona with a kitchen knife, the deceased who succumbed to hypovolemic shock due to stab wounds in the chest. Both the defence and State counsels addressed the court and agreed there are extenuating circumstances. Both alluded to the youthfulness of the accused at the time of the commission of the offence and also to the fact that the accused stands convicted of murder with constructive intention.

The *locus classicus* on extenuating circumstances *S v Mugwanda* case, *S v Siluli Sithole* and a plethora of other cases have clearly defined extenuating circumstances as circumstances reducing the moral blameworthiness of the accused albeit not the criminal liability of the accused. Indeed the factors ought to be considered cumulatively. We agree with both counsel's observations that there are indeed extenuating circumstances in the present case. The age of the accused at the time of the commission of the offence about 22 can certainly not be ignored.

The court take judicial notice of the fact that immature adults and mature adults react differently and behave differently faced with the same set of facts or scenarios. Immaturity of the accused on matters of emotions and love can therefore not be ignored when one considers the moral blameworthiness of the accused for purposes of sentence. We have taken the cumulative effect of the extenuating circumstances as highly mitigatory. The accused person even during trial per the court's observation depicted demeanor which displays youthfulness at play given his

playful oblivious stance during the serious trial. We will therefore take note of the fact that at time of commission of the offence, the accused was indeed an adult but an immature adult.

Also in mitigation is the fact that accused has not been given as a repeat offender at least no such submissions were made to the extent that it can be taken it is his first floutment of the law. The accused was given as a bread winner of his terminally ill mother. We cannot ignore such responsibility in our assessment of sentence.

In passing sentence the court will not lose sight of the pre-trial and during trial, incarceration period. The court is alive to the fact that prison life is not easy for the obvious infringement of dignity and freedom. Further we are alive to the fact that from the time of commission of the offence, that is 24 April 2012, the accused has today suffered anxiety over uncertainty as regards his fate with a murder charge hovering over his head. The period of suspense is certainly traumatic and the situation s worsened by incarceration.

In passing sentence then, the pre-sentence time of incarceration will be taken as part of punishment already served and suffered. The defence counsel also submitted that the accused is remorseful for the death of his girlfriend.

In our endeavor to reach at any appropriate sentence we have also taken note of submissions by the State counsel in aggravation. It is correct going by the weapon used, a sharp about 30cm long kitchen knife, aimed at the chest and the number of stabbed wounds that the murder was callous, ruthless, brutal and cruel. When someone stabbed the chest with a dangerous weapon like a knife he gives the other person no chance to survive.

Further in aggravation is the fact that precious human life was lost at a tender age of 20 and that precious human life was lost unnecessarily. The court will not lose sight of the sanctity of human life. Our constitution, Zimbabwe Constitution amendment number 20 Act 2013 clearly recognizes the right to life. Section 48 (1) reads, "Everyone has a right to life." This clearly presupposes no one has a right to wilinilly take away the life of another. The accused has no better rights than the victim, the deceased and he ought to be punished for his transgression of the law. In other words as an offender, the accused has no right not to suffer for the offence he committed or he has no right not to be punished for the offence he committed.

It is in aggravation that the deceased a 20 year old was robbed of life at the prime stage and stopped from living life to its fullness. The lost human life can never be replaced. In any

event no amount of compensation can bring back lost life. In assessing an appropriate sentence, the court has taken into consideration the totality of mitigatory factors and sought to weigh them *vis-a-vis* the aggravatory factors at the same time seeking to strike a balance on the nature of the offence, murder with constructive intent and the offender, his personal circumstances and societal interest, that justice must not only be done but must be seen to be done. The accused, a youthful, immature adult stands convicted of a brutal murder of a young girl. Society on the other hand requires protection from dangerous criminals and in fact the society looks up to the courts to do justice not condone crime in a manner which would intrigue society into losing confidence in the whole justice delivery system.

The accused by unnecessarily resorting to violence as a way of resolving a dispute acted in a barbaric manner occasioning the death of the deceased. Sacred human blood was lost and the court frowns at such violent criminal conduct. We should show displeasure at such violent conduct leading to loss of life by the corresponding sentences imposed. The offence was observed correctly by both counsel as an offence deserving of removal of accused from the community. The State and defence counsel did not agree as regards the period of removal.

However, given the accused's age at the time of commission of the offence, 22 and even now 24 at the time of sentence, it is our considered view that the sentence to be imposed to a relatively young man or young offender should not be that we should break him. There is room for the accused given his age to turn and be a better citizen in the country. It is mainly with the consideration of the accused's tender age at the time of commission of the offence that we will not consider life imprisonment as appropriate in the present circumstances, but we will consider a lengthy imprisonment term.

In a civilized society, it is societal expectation that punishment should be blended with a measure of mercy and it is with that in mind that we are not persuaded to consider life imprisonment as the appropriate sentence. We will not suspend any portion of the prison term that we will impose. In our view that will be to encourage a violation of a fundamental human right to life. In any event s 358 of Criminal Procedure and Evidence Act (*Chapter 9:07*), on powers of the court to postpone or suspend sentence outlaws suspension of sentences on murder. It is for obvious reasons that there will be no suspension of a sentence on an accused who has been convicted of murder with constructive intention.

As earlier mentioned the sentence imposed is after assessment of all mitigatory and aggravatory factors in the case. Given the nature of the murder, conviction, the personal circumstances of the offender, the societal interest, it is in our view deemed appropriate that the imprisonment sentence will meet the justice of the case.

You are accordingly sentenced as follows, 18 years imprisonment.

National Prosecuting Authority, State's legal representatives
Mugiya & Macharaga Legal Chambers, accused's legal practitioners