**MIKE MATANGA**

v

**THE STATE**

**SUPREME COURT OF ZIMBABWE**

**HARARE,** FEBRUARY 26 & MARCH 9, 2015

The applicant in person

*F Kachidza*, for the respondent

Before **MALABA DCJ,** in Chambers**.**

This is an application for bail pending determination of an application for extension of time within which to seek leave to appeal against a conviction for murder with constructive intent for which the applicant is serving a sentence of 15 years imprisonment.

The application has no merit for the reasons stated below. The applicant was charged with murder. It was alleged that between 11 and 12 May 2005 at No. 16 New Camp Zimbabwe Republic Police, Highfields, the applicant killed one Bernadette Musiyarira who was his wife. The allegations were that the applicant struck the deceased on the occipital region of the head with an iron bar causing a fracture of the skull, leading to intracranial hemorrhage which caused her death.

The facts show that the deceased and the applicant had an acrimonious and violent relationship characterized by assaults on her by the applicant. The assaults took place at their Chadcombe home until the deceased left the home to reside at No. 16 ZRP Single Quarters, Highfield, Harare. Upon separation the deceased obtained a peace order against the applicant at the Magistrates Court. The applicant had also filed for a divorce in March 2005. The evidence showed that the deceased was alive at 1950hours on 11 May 2005 because she paid a visit to her friend Patricia Shumba who also resided at the camp at about that time.

On 17 May 2005 the deceased’s body was found in a monarch bag which had been retrieved by the police sub-aqua unit from Epworth Quarry Dam. The monarch bag had been sighted by people who were quarrying stone by the side of the dam. The doctor who carried out the post-mortem examination on 20 May 2005 on the remains of the deceased found that she had been placed in the monarch bag in a crouching position. There were two blood soaked towels that were tied over the wound on the back of the head. There was also a shoe lace which had been used to tie the neck suggesting strangulation. The postmortem examination revealed a 10centimetre long fracture on the back of the skull which the doctor concluded led to intracranial hemorrhage. The doctor who gave evidence in the High Court said that severe force was used.

Ketty Ndebele who was on duty at Machipisa BP Service Station said in the early hours of 12 May 2005, the applicant came to the Service Station and knocked at the office asking her to open the door for him. She was reluctant to open for a stranger at that time of the night. The applicant showed her a Police Identity Card. She said she opened the door for him. This was between 01.00a.m. and 02:00a.m. The applicant told her that he was on transfer from Highfields Police Station to another post and wanted to leave a black plastic bag at the service station whilst he returned to the camp to collect more of his property. She said the applicant went away and came back dragging a monarch bag that looked heavy. He said the bag contained sugar and left it at the service station. The applicant went away saying that he was going to find a taxi. He came back in a blue Mazda 323 motor vehicle. The applicant loaded the monarch bag and the black plastic bag into the motor vehicle before being driven away

In a confirmed warned and cautioned statement the applicant admitted killing the deceased and gave details as to why and how he did so. He alleged that he got to the deceased’s living quarters and picked a quarrel with her over a cellphone call she had received whilst sitting on her bed. When he checked the call he found that it was from a man called Chidembo with whom the deceased was having a love affair. The applicant said that he took an iron bar and struck the deceased on the back of the head. She lay still. He said he went out looking for help to take the deceased to hospital. He got someone who drove to the gate to the police camp.

The applicant said he went to the room where he had left the deceased and found her lying still. When he went back to get the person who had agreed to offer assistance he found him gone. He went back to the quarters. It was then that he got worried about what to do with the body. He said that he thought of putting the body of the deceased in the wardrobe but feared that the body would decompose and exude a warning smell. He then conceived the idea of putting the body in a monarch bag in a crouching position. He put the body into the bag but before he could seal it he noticed the head was moving from one side to the other. There was noise coming from the stomach suggesting that the deceased could still be alive. He took a shoe lace and tied it round the deceased’s neck.

According to the applicant, he collected the items that were blood stained, including the iron bar and put them in a black plastic. He left the parcel at Machipisa BP Service Station. He said he went back and collected the monarch bag with the deceased’s body and left it at the Service Station where he lied to Ketty Ndebele that it contained sugar. The applicant hired a blue Madza 323 motor vehicle from Machipisa shopping centre. He went back to the service station where he collected the body of the deceased in the monarch bag before asking the driver to drive him to his Chadcombe home. He also told the taxi driver that the bag contained some sugar.

To ensure that the driver believed that the bag contained sugar, the applicant said he took some sugar from the house and gave it to the taxi driver. He told the taxi driver that he wanted to take the bag with sugar to his in laws. He was driven to a spot near the Epworth Quarry Dam where he left the driver in the car and took the monarch bag with the deceased’s body. The applicant said he threw the bag into the dam and went back home with the driver. The applicant made indications which were consistent with the story he narrated in the warned and cautioned statement.

The warned and cautioned statement was confirmed by a magistrate in proceedings in which the applicant indicated that he had made the statement freely and voluntarily without any undue influence having been brought to bear on him. The State also had a forensic scientist visit the scene of the crime on 18 May 2005. The forensic scientist found pillows, tissue papers, a bed cover, a sheet and a piece of cushion which were blood stained. The items were taken. A blood sample was later taken from the applicant who was found to belong to an ABO blood group. The tests showed that a continental pillow, one standard floral sheet and a pink comforter contained blood stains from an ABA blood group person whilst blood stains on a towel, tissue paper and cushion were found to have originated from an ABO blood group person which was the applicant’s blood group. Having considered all the evidence, the High Court convicted the applicant of murder with constructive intent to kill the deceased.

The question for determination is whether, in light of the evidence, there are prospects of success in the application for extension of time within which to seek leave to appeal against conviction justifying the granting of the application for bail. The onus rests on the applicant to show that the appeal against conviction is likely than not to succeed.

The applicant has made the application in terms of s 123 (1) of the Criminal Procedure and Evidence Act [*Chapter 9*] which provides:

“**123 Power to admit to bail pending appeal or review**

(1) Subject to this section, a person may be admitted to bail or have his conditions of bail altered—

(*a*) in the case of a person who has been convicted and sentenced or sentenced by the High Court and who applies for bail—

(i) pending the determination by the Supreme Court of his appeal; or

(ii) pending the determination of an application for leave to appeal or for an extension of time within which to apply for such leave,by a judge of the Supreme Court or the High Court” (My underlining).

The applicant alleges that the High Court ought to have found that his warned and cautioned statement was not made freely and voluntarily. A close analysis of the evidence shows that the applicant’s case was that the contents of the warned and cautioned statement were not his. The allegation was that the statement was a dictation by the police which he was made to write down. He said the statement was worded with the view of securing sympathy from the court so that he would be convicted of culpable homicide. The question was therefore not whether the warned and cautioned statement was made freely and voluntarily, which is a question of law. The question was whether the contents of the statement originated from the applicant or from the police involved in the investigation of the case. That was a question of fact.

The High Court correctly found as a fact that the statement was made by the applicant. The applicant revealed detailed information on the circumstances surrounding the death of the deceased which could only have been known by a person who was with the deceased at the time she died. There would have been no reason for the applicant talking about thinking of disposing of the body by putting it in the wardrobe or placing it under the bed if he was not involved in killing of the deceased.

The applicant went further to reveal that he went to Machipisa BP Service Station. In the warned and cautioned statement he narrated the sequence of events that was corroborated by Ketty Ndebele. The evidence of Ketty placed him at the Service Station between 1a.m. and 2a.m. on 12 May 2005. In light of the evidence, it is clear that the argument by the applicant that the High Court ought to have found the allegation in the defence outline that he was at the service station on an unspecified day before 10 May 2005 constituted an *alibi* is baseless. What he said did not amount to an *alibi*. An *alibi* is a statement of defence to the effect that a person accused of a crime was at a specific place different from the crime scene at the time the crime was being committed. The applicant did not say where he was at the time the murder of the deceased was committed which would have been between 1950hours on 11 May and 2am on 12May 2005.

When the applicant made indications at the Service Station on 19 May 2005 where he said he met Ketty Ndebele he did so as confirmation of the admission of the fact that he had taken the monarch bag containing the deceased’s body there. Ketty said she only met the applicant on two occasions on 12May when he brought the monarch bag and 19May when he came with the police for indications. The applicant did not challenge the forensic evidence which linked him to the blood stains on the towel, tissue paper and the cushion. That evidence clearly showed that he was likely than not to have been the killer.

The applicant has sought to challenge the reliability of the post-mortem examination results because of the error in the report to the effect that it was sworn to before the commissioner of oath on 6March 2005. The doctor gave evidence to the effect that he carried out the post mortem examination on 20 May 2005 and that the date recorded as the date of deposition to the affidavit was a typographical error. The document itself shows that the post mortem examination was carried out on 20May 2005.

The evidence adduced proved that the crime of murder was committed. It established beyond reasonable doubt that the applicant was the perpetrator of the crime. There are no prospects of success in the application for extension of time within which to seek leave to appeal against conviction. The application for bail pending application for extension of time within which to appeal is without merit. It is dismissed.

***National Prosecuting Authority****,* respondent’s legal practitioners