

THE STATE
versus
ENERGY HOME

HIGH COURT OF ZIMBABWE
BERE J
MASVINGO, 9 and 12 February 2015

ASSESORS: 1. Mr Gweru
2. Mr Matombo

Criminal Trial

T Chikwati, for the State
L Muvengeranwa, for the accused

BERE J: The stone that landed on the head of the deceased's head just above his right eye did so with devastating effect. The impact was so strong that it rendered the deceased motionless. It was that stone that took the deceased's life. As a court we did not have the privilege of seeing the murder weapon as an exhibit. It was a tragic single stone blow.

The facts in this case can be summarised as follows:- A married woman (Getrude), in Mhosva Village, under headman Chipindu, Chivi District decided to simultaneously have two extra-marital relationships. The result was a triangular love relationship involving her, the deceased and one Tichaona Maridzi who ought to have been jointly charged for the murder of the deceased with the accused in the present case.

On 13 February 2011 Getrude decided to go out with the deceased. Tichaona and the accused both of whom had been partaking of marulla beer met Getrude and the deceased at some secluded place in a compromising situation. From a short distance Tichaona asked the two love birds what they were doing. Before either Gertrude or the deceased could offer any response and without warning Tichaona picked up a stone and struck the deceased just above the right hand eye. It was this single stone throw that took the deceased's life. It is the deceased death which has caused this trial.

As fate would have it Tichaona made good his escape leaving the accused to stand trial alone in these proceedings.

The medical examination tendered by the State confirms that the deceased died due to a head injury.

Exhibit I, the confirmed warned and cautioned statement of the accused gave the court some insight into what happened in this case.

In denying the charge of murder preferred against him the accused denied any involvement in the murder of the deceased and spoke of himself having seen someone resembling a dead figure from a distance of about 60 metres whilst in the company of Tichaona. This dead figure turned out to be the deceased.

The accused also made an unsuccessful attempt to challenge the production of his confirmed warned and cautioned statement.

The State case was centred on the evidence of Getrude, Paddington, Aleck Zambuko, Tellme Ziyamba and the post-mortem report which informed the court as to the deceased's cause of death.

Getrude's evidence was simply to the effect that on the fateful day she was in the company of the deceased when she met the accused and Tichaona. Tichaona then questioned her what she was doing with the deceased. Before either of the two could proffer any explanation Tichaona picked up a stone and threw it on the deceased. It landed on the deceased's head and claimed his life. She panicked and ran away. Getrude further told the court that when the deceased's body was later recovered it was no longer at the scene of assault but was in a stream, in a pool of water about 600 metres away from the point Tichaona struck the deceased.

Getrude also gave the court some further insight into how Officer Aleck Zambuko interrogated her, Tichaona and the accused as prime suspects in the murder of the deceased. The witness indicated that Aleck Zambuko assaulted her with open hands forcing her to admit that she had been seen not at the spot she indicated to him as the spot of the assault but somewhere else. She said despite the assault she stuck to her story.

With a bit of reluctance and after probing by the Court Getrude admitted that she was in a triangular love relationship with the deceased and Tichaona.

Our unanimous assessment of the evidence of Getrude is that she was a truthful witness. Once she decided to tell the court what happened she did so truthfully. Her earlier

reluctance to divulge her intimate relationship with both the deceased and Tichaona was understandable given her marital status. We therefore found her credibility beyond reproach.

We were particularly impressed by the stance she took that the accused did not participate in the assault of the deceased. Her evidence therefore exonerated the accused in the assault itself. She projected the accused to have been an innocent bystander at the time of deceased's stoning by Tichaona. We accept her evidence in its entirety.

Paddington Warambwa (Paddington) gave evidence as the second State witness.

The witness largely confirmed aspects of the accused's story that on the day the accused lost his life both the accused and Tichaona had been drinking marulla beer and that they subsequently left together.

If accepted, as it should be, this would lend credence to Getrude's evidence that when Tichaona stoned the deceased, the accused was present although the latter did not take part in the assault.

Paddington further confirmed the accused's evidence concerning a dead person allegedly seen by the accused and Tichaona at Dinhe river. The witness said at around 1800 hours the accused and Tichaona reported to him at his homestead that they had seen a dead man and that his response was to advise them to report that to the headman. He later learnt that the body found in Dinhe river was in fact that of the deceased.

Of significance to his testimony was that when Tichaona and the accused reported to him about having seen the body of a dead person in Dinhe river both of them had wet clothes. This piece of Paddington's evidence squarely fits into the accused's confirmed warned and cautioned's statement which speaks to the accused and Tichaona ferrying the deceased's remains to the river in order for them to concoct this story about them having found a dead body by the river.

The witness was specific that the first person to tell him about a dead person at the river was Tichaona and that the accused confirmed that story to him.

Whilst generally Paddington's story was both coherent and had rings of truth in it we do not accept his evidence with regards to him having seen stab wounds on the deceased's chest and surrounding areas. This piece of evidence was an exaggeration by the witness because of all the witnesses who came into contact with and examined the deceased's remains, he is the only one who saw these wounds. His evidence to this effect must have been misleading and we do not accept it.

Aleck Zambuko, a Zimbabwe Republic Police Officer who was tasked to investigate this offence dealt with the recording of the accused's warned and cautioned statement. He explained how this was recorded and explained, contrary to the accused's explanation that he was assaulted in the process, that no assaults were perpetrated against the accused person.

The distorted manner in which the accused projected himself did not support his own story. I will come back to deal with this aspect when I deal with the evidence of the accused person.

A closer look at the accused's confirmed warned and cautioned statement shows that the statement was largely exculpatory as against him with regards to the murder charge which was the focal point at the time the statement was recorded. Why would the investigating officer have assaulted the accused in order to extract from him a statement which was putting the accused away from the commission of the offence? As a court we did not find any weight in the assault allegations as put forward by the accused.

Aleck gave his evidence generally well but his evidence was dented by the allegations of assault levelled against him by Getrude whose evidence we found to have been well given. It is these allegations of assault which the defence sought to exploit in support of the story of assault put forward by the accused person at the time his confirmed warned and cautioned statement was recorded.

Our position is that the evidence of the officer should be accepted for what it is despite the criticism levelled against it by the defence and so is the evidence of Tellone Ziyamba.

The accused was the sole witness for the defence and the thrust of his defence was to deny ever being present at the spot where Tichaona assaulted the deceased with a stone. Further he also sought to challenge his own confirmed warned and cautioned statement by alleging that it was extracted from him by force.

The misfortune of his challenge is that the accused forgot that this statement had been confirmed and that in his challenge, he had nothing negative to say about the manner in which the statement was confirmed. In fact his evidence was that he had no qualms with the way the confirmation proceedings were conducted.

We had difficulties in accepting the allegations of assault as levelled against the recording detail. We took this position for basically three reasons.

Firstly, the accused did not take the court into his confidence when he presented a jungled explanation as regards the specific details of the assault. In his defence outline he gave a log and iron rod as weapons of the assault. In his evidence in chief he restricted his evidence to the use of a log.

Even if we were to accept that he was assaulted in the manner he alleges we find it highly improbable that he would have failed to disclose this to the presiding magistrate when he presented himself for confirmation proceedings three days after the alleged assaults. Even if the accused had failed to disclose the assault to the presiding magistrate, the nature of the assaults as projected by the accused could not have escaped the attention of the magistrate.

Secondly, our view is that there must have been external or extrinsic evidence confirming the assault by the time the accused presented himself to court for confirmation proceedings. There was none.

Thirdly and more importantly, we note that at the time the accused's statement was recorded, the principal charge was one of murder. Our view is that if any force was used against the accused with a view to force him to accept the allegations, then the statement should have been incriminatory of him as opposed to exonerating him.

It was for these reasons that we felt comfortable to accept the accused's confirmed warned and cautioned statement as representing the truth of what happened. We are satisfied that in that statement the accused freely spoke his mind.

At the end of this trial, we were unanimously agreed that the evidence tendered by the State and the defence could not support a conviction of the crime of murder by the accused person.

The focus shifted to any other possible and competent verdict.

In both their main and supplementary submissions the State and the Defence have presented two diametrically opposed positions to the court.

The State, leaning on the provisions of Part II, Sections 205 – 212 of the Code¹ and also informed by the decision of my brother Uchena J in *S v Choruma and Another*², *R v Guni and Others*³ and *S v Jonathan Fn Andere*⁴ urged the court to find the accused guilty of being an accessory after the fact.

The defence on the other hand argued that the accused be acquitted as there was no evidence to support any conviction.

It was argued by the defence that the nearest there could be was a violation of s 184 of

the Code, but that even though the evidence did not support such a charge.

Our unanimous position as a court is that the evidence that we found to have been proved in this case is that the accused, as per his warned and cautioned statement looked at in conjunction with the evidence of Getrude and Paddington, assisted in concealing the circumstances leading to the death of the deceased.

Our position is informed by the following pieces of evidence.

Firstly, we accept the evidence of Getrude that the accused witnessed the deceased being stoned to death by Tichaona Maridzi.

Secondly, we also accept the evidence of Paddington that the accused confirmed the story told by Tichaona that the two of them had seen the remains of a dead person at Dinhe river and that when these two made this report to Paddington their clothes were wet.

Thirdly and finally, we accept the elaborate explanation given by the accused person in his confirmed, warned and cautioned statement, as regards his involvement in this case.

The accused's actions as accepted by the court would then trigger the application of the provisions of section 206 of the Code which are framed as follows:-

“206 Assistance after commission of crime

Any person, other than an actual perpetrator of a crime, who –

- (a) Knowing that an actual perpetrator has committed a crime, or renders to the actual perpetrator any assistance which enables that actual perpetrator to conceal the crime or to evade justice or which in any other way associates the person rendering the assistance with the crime after it has been committed, shall be guilty of being an accessory to the crime concerned”.

My brother Uchena J., in the case of *S v Choruma and Another* (Supra) lucidly dealt with the interpretation and implications of this Section even where the actual perpetrator has escaped conviction. I have no wish to spoil his interpretation of this section save to associate myself with his view of the law.

The defence, borrowing from my remarks during submissions in court crystallised the issues well in their supplementary heads of argument as follows:-

“ISSUES

1. Can the accused be convicted as an accessory after the fact where the actual perpetrator has not been convicted.
2. If so, to what offence is he an accessory to and to what sentence is he liable.
3. If not, can he be convicted of trying to defeat the course of justice”.

To my mind, the concerns raised by the defence are to find answers in the above-cited s 206 of the Code and s 207 which I wish to repeat hereunder:-

“207 Unavailable defences for accessories

- (ii) A person may be found guilty as an accessory to a crime even if –
- (a) the person lacks capacity to commit the crime committed by the actual perpetrator, or
 - (b) the person is only aware of the fact that the conduct of the actual perpetrator is unlawful but unaware of the nature of the crime committed by the actual perpetrator or the manner in which it was committed,
 - (c) the actual perpetrator is unaware of any assistance rendered by the person, or
 - (d) the assistance the person renders does not in fact enable the actual perpetrator to conceal the crime or evade justice”.(my emphasis)

The import of these two sections read in conjunction is to the effect that even where the actual perpetrator has evaded justice, or is not even brought to court this would not render any defence to any accessory because as the section explicitly puts it, these are no defences at all.

Where the actual perpetrator has evaded justice as alluded to in s 206 (*supra*), it is not possible to prosecute that person as what has happened in this case but that is not a sound ground for exonerating an accessory.

If we have regard to sections 206 and 207 (*supra*) then the defence will be on slippery ground. The position adopted by the defence would not be sound at law.

Need I say, this same position was lucidly and carefully dealt with by my brother Uchena J in *S v Choruma and Another (Supra)* at pp 11 – 13. I can only do justice to that judgment by associating myself with the sound reasoning therein.

We are not persuaded to go so far as to accede to the defence’s position that there is no evidence in this case linking the accused to the commission of a crime as an accessory or even to consider invoking the provisions of s184 of the Code as urged upon us by the defence. We are satisfied beyond doubt that that approach would not do justice to the facts proved in this case and the overwhelming evidence against the accused person as an accessory after the fact of murder as a charge which had been preferred against the principal perpetrator Tichaona Maridzi.

Consequently we are unanimously agreed that the accused be found guilty as an accessory to the crime of murder.

Sentence

In our effort to arrive at what we consider to be an appropriate sentence we have considered the following factors in mitigation and aggravation:

At the time the accused committed this offence he was barely 22 years old and in that

regard a youthful offender.

The accused is married and, from the submission made by his counsel he has fairly heavy family responsibilities stretching from his immediate family to his extended family. The need to treat first offenders with lenience will not escape our mind.

Of further significance is the fact that the accused must have been drunk on the date in question, having been drinking marula intoxicant with Tichaona from about 11 a.m. to 4 p.m. on the day of the deceased's murder.

From the accused's warned and cautioned statement, which informs us of his exact involvement in this case it is clear to us that the accused was persuaded by Tichaona, the principal perpetrator to render the assistance and to this extend the accused appears to have been a circumstantial offender who instinctively rendered assistance upon invitation to do so by Tichaona who was a mature person and about 5 years older than the accused at the time.

It is significant to note that although the principal perpetrator escaped prosecution the accused decided to face the consequences of his conduct by awaiting the outcome of this trial.

For these reasons the accused must be rewarded.

In aggravation we do accept the seriousness of these allegations.

The conduct of concealing an offence like the one which the principal perpetrator was being investigated cannot be taken lightly.

Despite his full knowledge of how the perpetrator had stoned the deceased to death, the accused was willing to hide the truth and mislead both the villagers and the police who were investigating this matter.

Our people must learn to conduct themselves responsibly when such a misfortune occurs. They must desist from the temptation to aid and abet real perpetrators.

SENTENCE: 8 years imprisonment 2 years of which is suspended for 5 years on condition the accused does not within that period commit any offence involving a violation of any section under part II of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] and for which upon conviction he will be sentenced to a term of imprisonment without the option of a fine.

*National Prosecuting Authority, for the State
Legal Aid Directorate, accused's legal practitioners*

