

THE STATE
versus
TONDERAI MAKUWAZA

HIGH COURT OF ZIMBABWE
MUZENDA J
MUTARE, 27 October 2020 and 3 November 2020

Criminal Trial

ASSESORS: 1. Mr Rajah
2. Mr Mudzinge

Ms *T.L. Katsiru*, for the State
Ms *M. Ndafa*, for the Accused

MUZENDA J: The accused is charged with Murder as defined in s 47 (1) (a) or (b) of The Criminal Law (Codification and Reform) Act, [*Chapter 9:23*]. The State alleges that on 18 October 2011 and at Chikande Homestead, Muranda Village, Chief Zimunya, Mutare, the accused unlawfully and with intent to kill or realising that there was a real risk or possibility that his conduct might cause death and continued to engage in that conduct despite the risk or possibility, assaulted Jesman Chikande several times all over her body using unknown object thereby inflicting injuries from which the said Jesman Chikande died.

The accused is denying the charges of murder. In his defence outline he admits making a confession to the effect that he had stolen some beasts and also that he had killed the deceased in the company of two accomplices for ritual purposes. However when he made these confessions he had been assaulted and only admitted so as to avoid further assaults from the villagers. He also stated that if he distanced himself from the confessions at court he was going to be further assaulted this time by the police. He made the confessions after being physically maltreated and further indicated that he attended the deceased's funeral, he does not know anything about the death of the deceased.

The facts of the State reveal that deceased and accused were related residing in the same village under Chief Zimunya, Mutare. Deceased was accused's grandmother. The State further alleges that on 18 October 2011 accused entered the deceased's thatched hut and assaulted her several times on her body, inflicting serious injuries from which deceased died. The accused

went to collect blood from deceased's body, fluid from her breast and some pubic hair from her body. On 19 October 2011 the body of the deceased was discovered by Esther Makiwa who informed the Neighbourhood Watch-Committee member about deceased's death.

Having heard the evidence of both the State and the defence, our view is that the following issues are for determination:-

- (i) ***Whether the accused freely and voluntarily, without undue influence having been brought to bear upon him to induce him to confess to the killing of the deceased?***
- (ii) ***Whether the accused's confession is admissible in evidence?***
- (iii) ***Whether the accused is criminally liable to the death of the deceased?***
- (iv) ***Whether the accused is guilty of murder with actual or constructive intent?***

The Law

Section 113 of the Criminal Procedure and Evidence Act¹, more particularly s 113 (3) (b) deals with confirmation proceedings in the Magistrate's Court.

Section 115 of the same Act goes on to deal with the consequences of failure by an accused to mention facts relevant to the allegation and that such failure may be used by the State as evidence against the accused.

Section 256 of the same Act provides for the admissibility of confessions and statements made by the accused, provided that it has been proved by the State that such confession and or statement was made freely and voluntarily by an accused without having been unduly influenced thereto. Such confession or statement shall be admissible in evidence against such an accused if tendered by the prosecutor, whether such statement or confession was made before or after his arrest or after committal and further whether reduced into writing or not.

Section 256 (2) further provides that a confession or statement confirmed in terms of subsection (3) of s 113 shall be received in evidence before any court upon its mere production by the prosecutor without further proof. However the proviso to the section is to the effect that the confession or statement shall not be used as evidence against accused if he proves that the statement was not made by him or was not made freely and voluntarily without his or her having been unduly influenced thereto.²

¹ Chapter 9:07

² See also the matter of Moffat Sibanda v The State SC 261/92. Tendayi Shakiwa v The State SC 78/87, S v Litsech 1963 (2) SA 471 (AD) and S v Mbambo 1975 (2) SA 549 (AD)

The confirmation value of the evidence of the words or conduct of an accused who has made a confession must be determined with regard to the particular circumstances of each case.³ The confirming evidence required by the State must be such as to corroborate the confession in a material respect to satisfy the court that it would be safe to rely on the confession as a whole in convicting the accused.⁴ It is also now settled at law that where a person points out a thing, the pointing out is his act and proves that he has knowledge of some fact relating to that thing.⁵

The Evidence

The deceased Jesman Chikande aged 73 years stayed alone. She was the grandmother of the accused. On 18 October 2011, Esther Makiwa, her daughter-in-law visited her at her home and deceased was of good health. On 19 October 2011, when the same witness returned to deceased's home to check on her, she discovered that she was dead. Her body was lying on the floor behind the door. With the aid of neighbours and using a torch light, the witness noted blood stains on the doorstep, blood on the wall close to the door, blood coming from the mouth, eyes and ears. She also observed a wound on the head and blood coming from it, she further noted that the deceased had defecated on herself.

On 21 October 2011 Dr Mangena performed an autopsy on the body of the deceased and noted on her torso gross bruising of the whole body, he also detected evidence of nasal bleeding and the deceased sustained a hyper-mobile neck. He concluded that the cause of death was due to cervical spine fracture due to assault.

Between date of death of the now deceased up to January 2012 the police could not link the case to any suspect. In January 2012 the accused was arrested on allegations of stock theft by a member of the Neighbourhood Watch Committee stationed at Muromo Police Post, Mr Joseph Mukwawaya. On their way to the Police Post the accused made a confession about the death of the deceased and implicated Masimaba Matanga, Tengurayi Kapangwa and Moment Machigomora as his accomplices.

On 14 January 2012 at CID Mutare the accused made an extra-curial statement which was recorded from under warn and caution (exh 2). On 15 January 2012 he also took the police on indications at the scene of crime and his accompanying statements were also recorded at the scene (exh 3).

³ S v Litsedi *supra*

⁴ S v Litsedi *supra*

⁵ S v Mbambo *supra* at p 554 per GALGUT AJA

Bernard Mukandi, accused's brother in law met accused three weeks after the death of the now deceased, he approached the accused to enquire about the death of deceased. The accused narrated to him that Witness Chiripamberi who owns a grocery shop in the village had assigned accused together with Masimba Matanga, Tengurai Kapangwa and Moment Machigomora to get some body fluids and hair in return for payment. Accused confessed to the witness that he committed the murder of the now deceased as he needed some money.

Joseph Mukwawaya's evidence was to the effect that the accused on his own volunteered to tell the witness what he knew about the deceased's death. During his testimony he told the court that accused informed him that he witnessed the people who killed deceased but did not participate in the murder. Later during cross-examination by the defence counsel, the witness stated that accused confessed his presence at the scene of the crime but did not assault the deceased. The witness was asked to explain the contradiction between what he said in his statement to the police summarised on the State papers and his evidence in chief, specifically on whether accused confessed to him that he killed deceased or not. The witness stated that accused only told him that he knew the people who killed the deceased. The witness further explained that the contradictions may be due to the lapse of time.

The contradiction of this witness did not affect much of the State case for the reason that the State's fort did not lie on the unwritten confession of the accused to the witness but on the confirmed statement of the accused himself. However of great probative value of this witness' evidence is the initial confession of the accused about what caused the death of the now deceased which led to the arrest of the suspects. That break-through is solely attributable to the accused.

Exhibit 2, the extra-curial statement of the accused is extra-ordinarily lengthy and detailed, it reads as follows:-

“ACCUSED'S REPLY IN ENGLISH

I admit to the charge of killing my grandmother in the company of Tengurayi and Moment. Firstly, I wanted to sell gunpowder to Masimba and he told me he had no money and I should come the following night. On that day he then said escort me to Maocha homestead to look for dagga. Whilst on the way, we met Moment who returned with Masimba for a distance. Masimba returned and went to this homestead where we got the dagga and returned to Masimba's homestead. When I was leaving, Masimba escorted me and asked “With whom does your grandmother stay?” and I said “alone.” He told me that someone wanted to open a shop and grinding mill and that the same person was looking for an old woman who no longer conceive. I did not answer him and he told me that he was joking and we parted ways. In less than 2 weeks, Tengurayi came to my homestead asking for me and he was told that Tonderai was with people who was moulding bricks.

He came to where I was and enquired whether I knew where to find land mines. I told him that they could be found in Burma Valley Border there is somewhere I know and he gave me his

phone numbers so that I could call him the following morning. I arrived to Burma Valley and spent 2 weeks there and returned to Mururu intending to see Tengurayi.

I first arrived at Terrence's father's homestead who told me that Tengurayi had escorted a child to clinic. I then went past Masimba's homestead whilst he was at home. When I was about to leave he escorted me and on our way he said we were waiting for you over that issue we once discussed over my grandmother and said was joking. He said they were ready to do it and were willing to do it.

I returned to his home until 6. A child was sent to Tengurayi saying his father wanted him. Tengurayi arrived and we then set off towards the home of Moment. We arrived soon after Moment arrived at his homestead and he said he was coming from Mambwere. We went to grandmother's homestead and arrived around 7. We stayed behind in her field by the gum tree. Tengurayi is the one who arrived at the homestead first.

He forwarded to the wall of the house as he peeped he gestured with his hand to Masimba. When he rushed there the wind blew that is when Tengurayi got in and embraced grandmother. Masimba also got in and grabbed grandmother's mouth. Moment and I were standing at the door. Masimba said he had been bitten and Moment took two knives and got into the house and grabbed grandmother's mouth.

Tengurayi was the first to stab and she briefly remained silent. After a short time moved and said "Do I have to die!" Moment was quick to grab her mouth, Masimba then stabbed her for the second time on the throat and grandmother died. The first container was filled with blood and contents of her breast, the other container was filled with blood only while the other container was filled with pubic hair.

Moment pulled grandmother into the house for the door to close. The door was closed and we sat in the field to make sure that no one had heard. We got up and headed to Masimba home, we got there and left these things. I went to Tengurayi's home where I slept. Moment went to his home. Masimba slept at his home where the things were.

Early in the morning I left Tengurayi's homestead. He accompanied me and I went to my aunt's homestead. When I arrived she said "Uncle today you have come early is everything well." I said I had come from Masimba's home as I wanted to give her gunpowder and she said people you are playing with are not good. I heard that Tengurayi once visited home and mother complained bitterly, you should leave these people. I then left Chigodora on the way I met my brother-in-law and he said "I am going to grandmother's homestead I have received a message that grandmother passed away so" I accompanied him to the funeral. My brother-in-law arrived first at the funeral. When aunt went to our home, it was at that time I got to the funeral. Up until the time grandmother was buried my attendance at the funeral was erratic.

I then went to Masimba to collect my money and he said "come to collect part of the money after 2 days or 3 days." I later went to collect the balance. This helps me in saying the truth. I have nothing else to add but this is the truth."

The statement was confirmed by the Magistrate's Court at Mutare on 18 January 2012.

The sketch plan, exh 3, contains indications by the accused to the police detectives: point A indicates where accused and his alleged accomplices planned how to approach deceased's homestead as per accused's indications. Point B is where the four sat in a gum plantation observing deceased's monitoring Tengurayi Kapangwa who was standing at deceased's door. Point E is where Tengurayi Kapangwa stood observing deceased's

movements in her bedroom hut. Point F is where deceased was sitting before her death and where the assailants attacked and killed her. It is also the same place where blood was removed from deceased's neck, pubic hair was shaved, liquid/breast milk was extracted and placed in different containers as indicated by the accused to detectives. These indications were signed by the accused and on the date of trial, they were produced by consent as not being in dispute.

The foregoing recaps the summary of the evidence led by the State. The accused gave his evidence and stuck to his defence *precis*, Annexure B. The accused vehemently insisted that all the information detailed in his confirmed warned and cautioned statement was created, tailored and incepted into him by Joseph Mukwawaya, the member of the Neighbourhood Watch Committee. The State witness Mukwawaya introduced the matter concerning deceased's death to the accused and he also made accused to admit to both the stock theft and murder cases. He (accused) had been assaulted and more threats of assault were promised by the witness. Later in his evidence during cross-examination and clarification by the court, he admitted that some of, but not all, the information in his extra-curial statement was his, however he did not explain as to which information was not his. He added that the warned and cautioned statement as well as the indications were extracted from him as a result of assault by the police detectives. To him he knows nothing about the cause of death of the now deceased.

Submission by the parties before this court.

The State counsel, Ms *T.L. Katsiru*, submitted that the State witnesses gave evidence very well and they were hardly challenged on material aspects. She also submitted that there was never a question of intimidation nor the assault at the instance of Mukwawaya nor the police detectives. The confession by the accused, it was submitted by the State, was freely and voluntarily made, it was genuine and hence admissible. The State cited s 265 (1) of the Criminal Procedure and Evidence Act and urged the court to conclude that accused's confession is validly within the law and admissible before this court.⁶

The State further contended that the detailed content of accused's statement could only be given by a person who was involved in the commission of the offence. Accused knew what was wanted on the deceased, went to his grandmother's house, hid till no one could discern their presence at the scene, went inside the house and killed the now deceased, it was submitted. After killing the deceased, they collected blood fluid and pubic hair from deceased's body.

⁶ State v Patrick Madhume HH-3/15 per HUNGWE J (as he then was)

Accused was paid for his involvement, the State moved the court to find accused guilty of murder with intent.

On the other hand, Ms *Ndafa* for the defence admitted that the warned and cautioned statement as well as its confirmation was done properly. However she argued that prior to that accused had been traumatised by earlier assaults and threats perpetrated on him by the police details. The defence added that from the confirmed statement before the court it should be established that accused had no actual intention to cause death of the deceased. She further submitted that, accused did not participate in the actual killing of his grandmother, though he is an accomplice. To the defence, accused watched the actual perpetrators committing the said crime. She went on to cite the case of *State v Magwada*.⁷ She then concluded by submitting that accused had no intent to commit the said offence. Whether actual or legal intention during the commission of the offence but rather failed to guard the possibility of the results thereof, the defence urged the court to find accused guilty of murder with constructive intent (legal intention).

The last portion of defence submission is not clear. On one hand it was submitted in the closing remarks on behalf of the accused that accused had neither actual nor legal intention to commit the offence, later in conclusion the defence urged the court to make a finding of accused's liability on the basis of constructive intent in contravention of s 47 (1) (b) of the Penal Code.

Application of law to the facts

1. *Whether the accused freely and voluntarily without undue influence having been brought to bear upon him to induce him to confess to the killing of the deceased?*

In its closing submissions (paragraph 9) the defence concedes that the warned and cautioned statement of the accused was recorded according to the legal confines and equally so, the confirmation proceedings. The concession is proper in our view because of the following aspects.

- (a) the length of the extra-curial statement is so extensively detailed, logically comprehensive and contains the entire background of the events leading to the death of the deceased. The statement of the accused even contained some of the facts that could not have been privy to Joseph Mukwawaya and such details generally show that the accused was at ease and well composed when he

⁷ 2002 (1) ZLR

narrated the events. As the last portion of his statement shows, such a confession would put his mind at rest, for he would feel he had spoken the truth. In the case of *Madhume supra* it was held that :

“If the accused remembers facts on his confession, the knowledge of which he could only have come by being connected with the crime, the mentioning of such facts of course, the most cogent evidence to show that the confession is genuine. But even if the accused may have been questioned by the police on the facts, that their mention still has considerable probative value. If an accused freely makes a long statement and all the known facts in their proper sequence onto this statement, this may often be sufficient on which to base its conclusion that the confession is genuine, even if the police might have previously have questioned the accused on the facts because unless the police put the actual words of the statement into the accused’s mouth, if his only knowledge of the true facts has come upon police questioning, he is hardly likely to present a coherent and convincing story into which all the known facts dovetail perfectly. A confession of such type will therefore prove its genuineness.”

This is what can be said in this case before us. Joseph Mukwawaya was not present when the accused’s detailed statement was recorded. The details in the statement of accused were never mentioned by Joseph Mukwawaya. Joseph Mukwawaya was not present during the indications by accused at the scene. The indications at the scene of the crime perfectly elaborates and confirms the essential components of the oral statements relating to the events leading to the death of the deceased and the extraction of the blood, breast fluid and pubic hair. The indications made by the accused aid substantively to conclude the question on this aspect. As crisply pointed out in the case of *Stephen Mhlobo v State supra*.⁸

“When a person points out a thing, the pointing out is his act and proves that he had knowledge of some fact relating to that thing.....
In my opinion s 245 (1) (later 218 (1)) our 243 (3), by itself did not make it clear that evidence of knowledge, on the part of the person under trial was admissible. But the enactment of subsection (2) has made it quite clear that such evidence is now admissible. In the case of the pointing out of a thing, the mere pointing out, which is the act of the person under trial himself, is sufficient by itself to prove his knowledge of the thing pointed out or of some fact connected with it.”

Hence the evidence of pointing out is admissible and it will suffice if it is discovered, as a result of an actual physical pointing out, that the accused had knowledge of some fact relevant to his guilt.⁹ We have no hesitation to conclude that the confession and indications were properly and procedurally obtained by the State agencies and the accused freely and voluntarily made the statements, orally and mute, and both are admissible before the court. In any case as already ruled, herein above the defence consented to their production in court.

⁸ At p 11 of the cyclostyled judgment

⁹ Op at p 11

(b) Whether the accused is criminally liable to the death of the deceased?

This question is now settled given the concession made by the defence.¹⁰ The accused participated in the planning of the ritual murder. On two occasions he discussed the matter with his accomplices, he knew the purpose of the killing. On the day in question he moved from one place to another collecting the accomplices on route to the scene. Upon arrival the accused participated throughout in hiding, keeping watch and actively contributed to both the killing and collection of the blood fluid and hair.

In the case of *Bhasikoro Mubaiwa (2) Limakio Mubaiwa v The State*¹¹ it was crisply summarised as follows on the doctrine of common purpose:

“These cases made it clear that

1. Each individual in a common purpose is to be judged on his own *mens rea*.
2. The *actus reus* of the accused, on which his criminal responsibility for the murder is founded, consists, not necessarily in an act which is causally linked with the death of the deceased, but solely in an act by which he associates himself with the common purpose to kill.”

The accused was fully aware that for one to collect blood, fluid and hair from the deceased, the perpetrators would have to kill the deceased person first. As to who among the four accused was to do the act is in this case irrelevant in our view. The penultimate objective was to collect the blood, the fluid and hair for rituals. We have no doubt that the accused is liable to the death of the deceased. What is of importance is whether the accused had the necessary *mens rea* to kill the deceased?

(c) Whether the accused is guilty of murder with actual or constructive intent?

In this case of *Obert Tabagwisa Dube v The State*¹² it was clearly stated by the Learned Judge of Appeal:

“If accused with knowledge of the likely consequences exhibits an attitude of mind towards a particular consequence, then he may be taken to have done so reckless of the fact that it would result in the completed crime. I am fortified in my view of the matter by the statement of the Learned Law Lord which appears at p 200 h of the report:

‘The bounds are presently set requiring proof of specific intent, a decision to bring about, in so far as it lies within the accused’s power, the commission of the offense which it is alleged the accused attempted to commit no matter whether the accused desired the consequences of the act or not.’”

¹⁰ Paragraph 13 of the closing submissions.

¹¹ SC 223/92 per MC NALLY on p 9 of the cyclostyled judgment

¹² SC 225/92 per KORSAR JA at p 9.

The above case was however dealing with attempted murder. In my view the law equally applies to a case of murder as in this matter. The accused in this case in collusion with his co-accused deliberately set upon to kill in order to get the person's blood, fluid and pubic hair for ritual purposes for a fee. The accused's own confession and indications the likely consequence of death ensuing from the *actus reus* of the accused is patently obvious and predictable. The accused and his co-perpetrators could not have drained blood and fluid from a live person. The intended action of the collection of blood and fluid could only have been done after the killing of the now deceased. In our view the question of intention is clearly inferred and obvious from the preplanning, execution and completion of the intended murder. We therefore do not hesitate to find accused guilty of murder with actual intent in contravention of s 47 (1) (a) of the Criminal Law (Codification and Reform) Act, [*Chapter 9:23*]

Sentence

In assessing the appropriate sentence, the court takes into consideration the mitigatory and aggravating features submitted by both counsel. Accused was aged 21 years at the time of the commission of this offence and hence a youthful offender. The offence was committed in 2011, nine years ago. If the accused was tried earlier he could have served a substantial period of his sentence. The court will take this aspect as being in favour of the accused.

However the court will not lose sight of the fact that a life was lost due to the greed of the accused for money worse in a ritually motivated murder. Accused was paid money for his role presumably by the businessman. Society abhors this type of murder actuated by the desire to be rich. Business people must be encouraged to learn modern ways of making profit than to use the evil belief that human blood is the clue to be rich. The accused is lucky that he was but 21 years old otherwise he would have been sentenced to death in the circumstances.

Having looked cumulatively at all the circumstances of this matter, the accused is sentenced as follows:

20 years imprisonment.