

THE STATE
versus
TAMUNDE TOGA

HIGH COURT OF ZIMBABWE
MUSAKWA J WITH ASSESSORS
HARARE, 29, 30 AND 31 JANUARY 2014, 3 FEBRUARY 2014,
22 AND 29 APRIL 2014 AND 2 MAY 2014

A. Masamha, for the state
M. Mazanhi, for the accused

MUSAKWA J: The accused is facing a charge of murder. It is alleged that on 10 January 2012 and at Zinatsa village, Chief Svosve Marondera the accused unlawfully with intent to kill murdered Teckler Zamanja by striking her with a hoe on the head or realizing that there was a real risk or possibility that her conduct may cause death continued to engage in that conduct despite the risk or possibility.

Having pleaded not guilty and outlined her defence, the state in turn opened its case against the accused. Evidence was led from several witnesses. The state's case largely rested on the alleged confession made by the accused in the form of a warned and cautioned statement as well as indications. The admissibility of these statements was challenged by the defence. This resulted in a trial within a trial in which the court ruled against the admissibility of the extra-curial statements.

The facts of the matter can be summed up as follows. At the relevant time the accused resided with her eight year old son Phineas and the four year old deceased who was her granddaughter. She had taken custody of the deceased at the behest of her daughter and son in-law. Apparently the deceased's parents who resided in Chiredzi were of the view that schools were too far away when the time came for the deceased to attend school. At the time of the incident the accused had been residing with the deceased for two months.

On the fateful day the accused had woken up early in the morning and gone to the bush where she secured a log with which to tie on a troublesome bovine in order to subdue it. Thereafter she proceeded to Samuel Machekanyanga's home where she was allocated a portion of the field to weed for a fee. She went in the company of the deceased as there was no one with whom to leave her at home. Phineas had gone to attend church. At the field was a boy who had been allocated his own portion to weed.

Around 11 a.m. the accused, deceased and the boy were offered food by Samuel Machekanyanga's wife. In the process of feeding Samuel Machekanyanga enquired how the deceased had sustained a wound on the face. The accused claims she replied that the deceased could explain for herself whereupon the deceased engaged in a discussion with Samuel Machekanyanga in which she explained what happened. On the other hand Samuel Machekanyanga stated that the accused said on account of mischief the deceased had sustained the injury when she jumped from some structure being constructed at her home.

Thereafter the accused returned home in order to release her cattle for grazing. When she reached home she found Phineas who explained that there was no church on account of a funeral. The accused then instructed Phineas to drive the cattle to pastures. The deceased is said to have insisted on accompanying Phineas. The accused told them to join her at Samuel Machekanyanga's home upon their return.

It was whilst she was at Samuel Machekanyanga's home that the accused heard Phineas calling out that the deceased was no longer able to walk or talk. She responded by rushing to the borehole where Phineas was calling from. There on the sink she found the deceased whom she carried home. The accused claimed she asked Phineas as to what had happened. She was told that the deceased fell down as they returned from pastures. In the process Phineas had to carry her to the sink where he tried to revive her by pouring some water.

When the accused arrived home her father in-law and other villagers were already in attendance, having been attracted by her cries. Attempts were made to revive the deceased by pouring water. In this regard the accused mentioned her sister in-law, Alice Gororo as being at the forefront in the efforts. With no sign of life being noted on the deceased, the local neighbourhood watch member was notified and the matter was then reported to Marondera Police.

Prior to police involvement Alice Gororo, Samuel Machekanyanga and others took Phineas to the places where the incident had occurred. They observed a few drops of blood at the borehole sink. Phineas also showed them where he claimed the deceased had fallen down and vomited but nothing significant was noted. The scene was along a path which passes between some gardens.

Alice Gororo stated that the last person she saw in the company of the deceased was Phineas. This was when the two drove cattle to the pastures.

When Samuel Machekanyanga responded to wailing at the accused's home, he found the accused who explained that the deceased had died. The accused further explained that they had tried to revive the deceased. There was water under the body, suggesting it had been poured on the deceased. He also noticed that there was a fresh wound on the deceased's head and it had little blood. The accused further explained that the deceased had fallen at the borehole sink.

Samuel Machekanyanga further stated that he went to the sink with Phineas. He saw some drops of blood where it was said the deceased had fallen down. He queried whether this was all the blood and Phineas changed and told him the deceased had fallen down as they returned from where they had driven cattle. They walked for about a hundred metres and Phineas showed him the place where he claimed the deceased had fallen down. Samuel Machekanyanga asked what had caused the injuries as there were no stones or tree stumps. He was then shown a branch of a tree as the one that caused the injury. They then went back home where others had gathered.

This witness was of the impression that after eating at his home the accused and the deceased went back to the field. He did not know that they had returned to their home. It was after thirty minutes that he heard wailing at accused's home. He was not told how the accused and the deceased had moved from his home. In any event under cross-examination he conceded that he did not continue to observe them when they were supposed to have returned to the field. He did not observe her return to his home for the second time. When he went to accused's home he did not make a close observation of Phineas' clothing.

Samuel Machekanyanga, under cross-examination further explained that he knew Phineas as being clever. He was ready to answer questions he put to him and he did not cry or look shocked. As to why Phineas changed his version of events he said he thought the boy knew the truth but was unwilling to disclose. He further explained that he formed the impression that what Phineas explained might not have been his observations. Further queried on this aspect he stated that it could not have been easy for Phineas to carry the deceased to the sink given his age. He also explained that Phineas told him that as they walked along the path by the gardens the deceased tripped on a branch, fell down and started to vomit. He denied that there was a fence post in the vicinity.

Phineas Zinatsa is doing grade six. On account of his age he was warned to tell the truth. He testified in camera.

He explained that he had gone to church but there was no service. When he returned home he found the accused and the deceased there. They were told to drive cattle for grazing. The accused remained home as she intended to return where she had been working. On their way back the deceased fell down by a Mukute tree. He then carried her and placed her by the sink.

During the process of being led by the prosecutor the witness began to sob. He explained that he was afraid of the judicial officers (pointing at the judge and one of the assessors). Having been reassured by the court he composed himself and continued to testify. Taking into account the age of the witness and the nature of the case, it should have been apparent to the prosecution that there was need for the witness to testify at the victim friendly court.

The witness further explained that when the deceased fell she hit against a pole with her head. He then carried her to the borehole. She was still breathing when he carried her.

When it was apparent that the witness had departed from his statement to Police Mr *Masamha* applied to impeach him. He explained that the contents of the statement were dictated to him. The statement was later brought home and he was told to sign it. His father and the deceased's mother were present. Although it is indicated that the statement was recorded in the presence of Pardon Zinatsa, the father, it was co-signed by the sister, Tatenda Zinatsa. He said he signed the statement without appreciating the contents.

Going by the witness' answers regarding the statement it was apparent that he was disowning the contents. The state applied for him to be declared hostile. He was then cross-examined. Although he agreed with some contents of his statement, he disagreed with those portions that tend to incriminate the accused. He also claimed that he was threatened when his statement was recorded. He saw a firearm that was on a table where there were some jackets. He denied taking Alice Gororo and Samuel Machenyanga to the place where the deceased got injured. As to the conflicting versions he attributed it to accusations by locals that he had injured the deceased with the borehole lever. He further stated he never told anyone that the deceased fell at the borehole. He also denied telling Alice Gororo that the deceased tripped and fell on a branch. He also stated that as a result of carrying the deceased against his shoulder his clothes were stained. He did not change the clothes.

As to why he took the deceased to the borehole he stated that it was because there were people herding cattle nearby. Of the people he mentioned Paul Chikanga and Solomon. These were not adults. One was said to be in grade four and the other in grade six. He did

not think of alerting them as he had his mother in mind. When he eventually met his mother he did not tell her how the deceased had been injured. The mother did not ask questions as she was crying. As to how the deceased sustained the head injury he thought she struck against an iron post which had a sharp point. The deceased had remained behind. In running up to catch up with him she then fell down as described. He described the post as having been forty centimetres from the ground. He admitted this was the first time to describe the incident except that he had told the accused. As to why he did not tell the Police Officers, he said they told him to state what they dictated.

Under cross-examination by defence counsel, the witness gave further details that had not been stated before. For example, he stated that when the accused returned home and instructed him to drive cattle to graze she was in the company of Samuel Machekanyanga's wife. The deceased followed behind them. When he was told to drive the cattle the deceased had been told to remain but she ran after him.

On their return the deceased stumbled and fell. As he walked ahead she again stumbled and fell for the second time. He looked back and saw her by the corner post. He said she cried and he asked what had happened. She was breathing faintly. He also stated that the other boys who were herding cattle could have heard them. As to why he placed the deceased on the sink he stated that it was to prevent her from being trampled by cattle when they came to the borehole.

The witness stated that he accompanied his father and other relatives to the scene where the deceased fell. He explained what took place and the grandfather understood. He denied any suggestion that he could have been coached by the accused on the day of the incident. He further explained that at the time the matter came for trial he was not residing with the accused. He confirmed taking the Police Officers to the scene and explaining what had happened. However, as he recounted events at the Police Station he claimed to have been interrupted. That is when he said they told him their own version. As to which version is true between his written statement and his oral testimony, he stated that his oral testimony was the truth.

The accused gave evidence which is along the lines as summarised. Under cross-examination she initially stated that she got to ask Phineas about the details of the incident after she had been released on bail. When she was further asked why this was different from her defence outline, she backtracked and said she did ask Phineas on the day of the incident although there was no opportunity to go into the details. The state's thrust in respect of this

aspect was to demonstrate that her disinterest in quizzing Phineas was indicative of a guilty mind on her part. The accused also explained how she got to stay with the deceased. There were no other minor children in her custody apart from the deceased and Phineas.

The state urged the court to find the accused guilty of contravening s 47 (1) (b) of the Criminal Law (Codification and Reform) Act [*Chap 9:23*]. Mr *Masamha* also submitted that even if there is no direct evidence, the matter should be decided on circumstantial evidence. Despite Phineas being declared a hostile witness Mr *Masamha* submitted that his evidence cannot be discarded entirely. Pressed on this submission he contended that the disowned statement can be relied upon. On this aspect Mr *Masamha* made vague reference to some case authority which he could not cite, which conduct does not find favour with the court. Counsel must always research thoroughly and be ready to assist a court with meaningful submissions.

On the other hand Mr *Mazani* submitted that the state had failed to prove the case beyond a reasonable doubt as there was no evidence incriminating the accused. He pointed out notwithstanding what is alleged in the indictment, no evidence was led on how the deceased sustained the multiple bruises noted in the post-mortem report. No evidence was led from neighbours regarding whether the accused used to abuse the deceased. He further submitted that Phineas' testimony cannot be relied upon as he claimed he was threatened by Police Officers.

It is not in dispute that there is no direct evidence linking accused to the allegations. We make a finding that the last person seen in the company of the deceased was Phineas as confirmed by Alice Gororo.

Phineas gave evidence that was adverse to the state. In this respect s 316 of the Criminal Procedure and Evidence Act [*Chap 9:07*] provides that:

“It shall be competent for any party in criminal proceedings to impeach or support the credibility of any witness called against or on behalf of that party in any manner and by any evidence in and by which, if the proceedings were before the Supreme Court of Judicature in England, the credibility of such witness might be impeached or supported by such party, and in no other manner and by no other evidence whatever:

Provided that any such party who has called a witness who has given evidence in any such proceedings, whether that witness is or is not, in the opinion of the judge or judicial officer presiding at such proceedings, adverse to the party calling him, may, after the said party or the said judge or judicial officer has asked the witness whether he has or has not previously made a statement with which his testimony in the said proceedings is inconsistent and after sufficient

particulars of the alleged previous statement to designate the occasion when it was made have been mentioned to the witness, prove that he previously made a statement with which his said testimony is inconsistent.”

I associate myself with GILLESPIE J in *S v Mazhambe and Ors* 1997 (2) ZLR 597 (H) when he observed that the procedure of impeaching a witness is expressed in unhelpful terms. Nonetheless, the learned judge proceeded to make the following comments at 591-

“The word "adverse" in this section does not merely mean "unfavourable". It means hostile. A party may not cross-examine his own witness unless the judge is of the opinion that he is hostile. A witness can only be considered adverse, or hostile, if he is shown to bear a "hostile animus towards the party calling him and so does not give his evidence fairly and with a desire to tell the truth". Where he is "not desirous of telling the truth to the court at the instance of the party calling him". A witness who refuses to testify may be treated as hostile. The discretion of the judge to grant or refuse leave to cross-examine is absolute.

Having been so impeached Phineas was clearly hostile. The purpose of cross-examining a hostile witness by a party calling him is to neutralise the adverse testimony of such witness. Again I refer to GILLESPIE J in *S v Mazhambe and Ors* (*supra*) in which at 593-594 he had this to say-

“The purpose of proving a prior inconsistent statement is to neutralize the effect of the unexpectedly adverse testimony. The statement does not itself become evidence. The contents of the statement cannot be relied upon as evidence. If the witness who has already departed from the statement nevertheless on confrontation admits the truth of the statement and adheres to it, in the sense of repeating it in evidence, then the court may act on that oral evidence, although not on the previous statement. The weight of any such evidence will of course usually be substantially affected by the equivocation of the witness. Conversely, the fact that a witness has had his credibility impeached by production of a previous inconsistent statement does not mean that his evidence, adverse to the party calling him, must necessarily be rejected. It remains evidence given in court and must be properly examined and a judicial determination reached as to whether or not to accept it. In particular, the explanation for the giving of the prior statement may be such that the credibility of the evidence actually given in court cannot be discounted.

Similarly, where the court goes further and declares the witness hostile. The adverse evidence is effectively neutralized as evidence led by the party against itself. It is not, however, ipso facto to be disregarded. The evidence given by that witness, both under cross-examination by the party calling him and otherwise, may be considered and accepted or rejected in whole or in part depending upon the weight to be attached to it.”

Therefore, contrary to Mr *Masamha's* submission, no reliance can be placed on the statement attributed to Phineas. This is because in his testimony he refused to associate with the portions that are not favourable to the accused. I am further fortified on this aspect by the remarks of LEWIS J in *R v Twetison* 1964 RLR 147 in which at 148-149 he had this to say-

“There may well be cases where a previous inconsistent statement does not operate against the acceptance of the evidence of that witness. For example, a crown witness may give evidence on oath in chief implicating the accused and he may then be cross-examined by the accused to the effect that he had made a statement to the Police some time previously exonerating the accused. He may then say:

“Yes, I admit having said that but I was acting through fear at the time I told that to the Police. Now that I am in the court and I am under oath, I am telling the truth and what I have told the court is the truth.”

In such circumstances in an appropriate case, it would be proper to accept the evidence of such a witness as truthful and convict on it despite the previous inconsistent statement. In such a case, of course, there is no question of the crown impeaching the credit of its own witness, and the evidence implicating the accused is evidence on oath in court at the trial. But, as I have pointed out, the reverse cannot apply, if the witness in his or her evidence on oath in court gives evidence unfavourable to the crown. The mere fact that she has made a previous statement favourable to the crown extra-judicially cannot be taken into account in convicting the accused: it can only be used to neutralise the unfavourable evidence.”

Having cited the above authorities, I come to the conclusion that nothing can be salvaged from Phineas' testimony on account of his hostility and inconsistencies. I may also remark in passing that the inconsistent statement does not appear to have been recorded properly. It was irregular to cause Phineas' sister to sign it as a witness when it was not recorded in her presence.

Coming to circumstantial evidence, such evidence must always be viewed narrowly. As was held by KORSAN JA in *S v Marange and Ors* 1991 (1) ZLR 244 (SC) at 249-

“Lord Normand observed in *Teper v R* [1952] AC 480 at 489 that:

"Circumstantial evidence may sometimes be conclusive, but it must always be narrowly examined, if only because evidence of this kind may be fabricated to cast doubt on another. Joseph commanded the steward of his house, 'put my cup, the silver cup, in the sacks' "mouth of the youngest," and when the cup was found there Benjamin's brethren too hastily assumed that he must have stolen it. It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference."

As it has been accepted that Phineas was the last person to be seen in deceased's company, how can the resultant death be attributed to the accused? The indictment alleges that the accused killed the deceased by striking her on the head with a hoe. However, the post-mortem report makes reference to multiple bruises all over the body as well as a wound on the right side of the head. No evidence was led on the probable cause of the bruises as well as the head wound. How can it be inferred that the injuries were caused by the accused when the last person seen in the deceased's company was Phineas? It is also significant to note that the post-mortem report noted that the deceased's clothes were dirty? No evidence was led on what could have soiled the clothes. Can it not be inferred that Phineas might have had something to do with the dirty clothes as he carried the deceased to the borehole?

The totality of the evidence is that it is unsafe to infer that the accused caused the deceased's death. In the result the accused is found not guilty and acquitted.

Tadiwa & Associates, accused's legal practitioners
Prosecutor-General's Office, legal practitioners for the state