

THE STATE
versus
UMARY TECHU
and
BOTHWELL CHIKONDO
and
GUARDWELL CHIKONDO
and
JULIET MAREDZA

HIGH COURT OF ZIMBABWE
BERE J
MASVINGO CIRCUIT COURT, 12, 13, 16, 17, 18, 19, 20 & 21 February 2015

ASSESSORS : 1. Mr Gweru
2. Mr Mutomba

Criminal trial

T Chikwati, for the State
J Ruvengo, for the 1st accused
Ms L R Chivasa, for the 2nd accused
S Mutendi, for the 3rd accused
F Chirairo, for the 4th accused

BERE J: The four accused persons are charged with the offence of murder as defined in s 47 (1) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*].

The assault that claimed the deceased's life occurred on the night of 25th January 2013 at Ganye Village, Chief Bota, Zaka District.

The assault was quite a vicious one by any standard. On the night in question the deceased had retired to bed with her two grandchildren Mollen Zara and innocent Zara with whom she shared her bed with each of the children sleeping on either side of the bed.

As the three were fast asleep two assailants entered the bedroom whilst the third one guarded the entrance to the bedroom. To gain access to the bedroom one of the assailants had to break the door using what was thought to be an axe. Whilst inside one of the assailants struck the deceased several times resulting in the deceased sustaining deep cuts on the back

of her head, forehead, two cuts on her back and a deep cut on her right arm. Mollene Zara, one of the grandchildren alerted a neighbour who gave the two children shelter until the early hours of the 26th of January 2013 when other villagers gathered at the scene struggling to come to terms with the mishap. The three assailants disappeared into the night undetected.

The vicious assault on the deceased was never meant to spare her of her life. As fate would have it she died on her way to Ndanga Hospital at around 0630 hrs on 26 January 2013.

The post mortem examination carried out by Dr G Zimbwa at Masvingo General Hospital concluded that the deceased died of head injuries after confirming the various injuries earlier on highlighted. It is this offence that the four accused are being charged with.

The arrest of the accused was as a result of information allegedly supplied to the investigating officer in this case Inspector Manyore by the deceased's daughter Monica Zava.

The investigations that followed the tip given to Inspector Manyore culminated in the arrest of accused 1, 2, 3 and 4, with the first three accused persons having their warned and cautioned statements confirmed at Zaka provincial Magistrates Court on 13 February 2013. Not only were the three accused persons statements confirmed, but they also had their plea of unlawful entry into the deceased's bedroom at the material time recorded resulting in them being sentenced each to 18 months imprisonment 6 months of which were suspended on the usual conditions of good behaviour leaving them to serve each an effective sentence of 12 months imprisonment.

All the four accused persons denied murdering the deceased. At the trial the three accused persons who had their statements confirmed and their plea recorded stated that both the confirmation and recording of their plea was as a result of protracted assaults by Zaka Police led by the investigating officer Inspector Manyore who played a leading and more pronounced role in severely assaulting them and spoke through them at both confirmation and the recording of their plea. They also alleged threats by Zaka Police Prosecutor.

The fourth accused refused to have her incriminating statement confirmed but rather had her exculpatory statement was confirmed. Her confirmed statement reads as follows:

"I do not admit to the allegations of killing Lillian Mhizha by striking her with an axe twice on the head, twice on the back and once on the right arm. I do not even know how this woman died; I was asleep in my house in Taruvinga Village, Chief Bota, Zaka. I did not call my son in law Bothwell Chikondo on the 25th day of January 2013. I did not see these three people at my house on the day in question. Monica Zava who is my daughter in law did not tell me anything concerning being killed by her mother by means of witchcraft. Guardwell Chikondo, Umary Techu and Bothwell Chikondo were never sent by me that evening and I don't even know the person who sent them. In the evening of the 25th of January 2013 on a

Friday, the three did not leave my homestead. On the 26th of January 2013 being a Saturday at around 2am the three did not knock at my house, I was sleeping with my children namely: ; Hamard Techu, Shingirai Techu and Allie Techu. I did not ask for the axes and no axes were left at my homestead.”

The first accused person as well as the second accused person in their separate defence outlines admitted to having gone to the deceased homestead on the evening of 25th of January 2013 but both denied assaulting the deceased. The 1st accused alleged that he suspects that it was his wife Monica who assaulted her mother, the deceased, that evening, a position that was also supported by the 2nd accused person who stated that he had accompanied accused 1 and his wife to the deceased’s homestead that same evening.

The third accused denied ever having been to the deceased’s homestead on the 25th of January 2013 and gave a detailed account of how he spent the day until he retired to bed around 8 pm.

All the 4 accused persons in their defence outlines alleged that they were arrested on the 29th of January 2013 and that from that day until they were taken to court for initial remand they were subjected to severe assaults and threats by Inspector Manyore, the investigating officer.

They all said that it was these systematic, protracted and well orchestrated assaults that forced them to plead to the offence of unlawful entry and that these abuses further informed the confirmation proceedings of their statements on the 13th of February 2013.

There is one unfortunate development that happened in this case which I wish to highlight. It is clear that the investigations that led to this trial were as a direct result of information confided to Inspector Manyore by Monica Zava, the deceased’s daughter who is married to accused 1. The whole state case was primarily premised on the evidence of this woman. She was the foundation upon which the State case rested. For some reason, the court was informed of her unavailability on the date of trial thereby forcing the State Counsel to seek to expunge from the State summary anything attributed to her..

This witness’s whereabouts remained a mystery throughout this trial despite the accused persons having persistently demanded her presence from the moment they were arrested up until their prosecution. The investigating officer speculated on this witness’s mental state but could not proffer any meaningful explanation as to why he had not been able to verify her exact condition let alone bring her to court as a key State witness.

The absence of this witness severely compromised the State case and left the prosecution desperately clinging onto the accused’s confirmed warned and cautioned

statements and other circumstantial evidence given by Mollene Zava who had the misfortune of witnessing the assault of the deceased in very difficult circumstances.

THE EVIDENCE

The alleged murder weapons were produced by consent in these proceedings and they consisted of exhibit 5, being an axe weighing 2.39 kgs with a blade whose length is 11 centimetres, exhibit 6 being another axe weighing 1.01kgs with a blade 7cm in length. It was curious that there was an attempt by the defence to challenge these murder weapons as the trial unfolded.

Mollene Zava

The 13 year old testified on the horror of 25 January 2013 when she, and her grandmother, the deceased were attacked in their bedroom whilst they were fast asleep. The witness confirmed what appeared to her to be the use of axes in the attack.

Her evidence as accepted by the court was that although it was dark there were three people, two entered the bedroom where the witness and the deceased were sleeping whilst the third one remained by the door.

She said she saw two people close to their bed but she could not identify them as it was dark. But it was these two people inside the bedroom who attacked the deceased and herself with axes. She was injured on her hand during of the attack.

Throughout her cross-examination the witness maintained seeing two people who were attacking her and the deceased using axes. She was consistent in her testimony that she was unable to identify the assailants because it was dark.

To us this consistency in maintaining her inability to identify the assailants speaks volumes of her credibility. It shows to us that she was not singing anyone's song. She was giving us the events as she saw them. No one was speaking through her and we accept her evidence as well given despite the obvious shortcomings of that evidence. This is with specific reference to the identification of the perpetrators of this assault.

The young girl also gave us an insight into the allegations of witchcraft as against the deceased by accused 1, his wife Monica and the 4th accused person.

We accept the witness's evidence that at one point accused 1, his wife and accused 4 raised the issue of witchcraft with the deceased and that this might very well have been the cause of the deceased's untimely death.

In coming to this conclusion we are also informed by the evidence of Peter Guvanyi, although we feel that he may have exaggerated on the involvement of those who were not

mentioned in his recorded statement to the police. We take the same position on the evidence of Inspector Manyore on this point. Our position as informed by the witnesses who testified on this issue is that the accused number one and his wife were concerned by the deceased's possible involvement in witchcraft and how it was impacting on Monica. This is the furthest we can unravel from this piece of evidence.

The import of Peter Guvanyi's evidence was to demonstrate to the court that all did not seem to be well with accused's family and the deceased and that this may have been the reason why the deceased lost her life.

As indicated, we are not comfortable in accepting the witness's attempt to involve accused 4 and her husband in this dispute when in fact his own recorded statement did not include these averments. It is possible that these came as an after thought.

This is particularly so given the omission of this aspect of his evidence even in the recorded evidence of the investigating officer's self recorded statement. This aspect, if at all it was mentioned must have been so critical at the stage that investigations were initiated and statements recorded to the extent that no reasonable police officer could have omitted to mention it if indeed it had been disclosed to him. It is with this caution in mind that we think Peter Guvanyi's averments that the accused 4 revealed to him that she was being bewitched by the deceased must be looked at with guarded caution.

This is particularly so given the relationship between this witness and accused 4 as narrated by accused 4 though unfortunately this was only highlighted after the witness had been excused. We note that this alleged misunderstanding was never specifically put to Peter Guvanyi in cross-examination. But despite this, we have difficulties in just dismissing it. It is quite possible the two did not enjoy the best of relationships.

Inspector Manyore had the unenviable task of investigating this murder case.

The officer took us through his involvement in this case from the time of the arrest of the accused persons, recording and confirmation of their warned and cautioned statements right up to accused 1-3's recording of their plea of unlawful entry to the deceased's bedroom on the 25th of January 2013.

One of the difficulties posed by the inspector's testimony was that his initial investigations were anchored on the hearsay evidence of Monica Zava, the alleged source of critical information in this case. Our view is that there was no way this officer's testimony could have been conclusive and decisive without the evidence of Monica Zava. We say so

because of the inherent dangers of relying on hearsay evidence particularly in criminal proceedings.

Add to this, all the accused persons made serious allegations of assault by the investigating officer right from the time of their arrest up to the time their plea and confirmation proceedings were conducted on 13 February 2013.

Perhaps, before I deal in detail with this officer's evidence it will be necessary for me to restate the elementary approach which should guide police officers once they arrest any suspect without a warrant. It will be noted that the informing provision in this regard is s 32¹. The section reads as follows:

“32 Procedure after arrest without warrant

- (1) For the purpose of this section-
“court day” means any day except a Sunday or a public holiday.
- (2) Subject to subsections (3a) (3b) and (3c), a person arrested without warrant shall as soon as possible be brought to a police station or charge office and, if not released by reason that no charge is to be brought against him, may be detained for a period not exceeding forty-eight hours unless he is brought before a judge or magistrate upon a charge of any offence and his further detention is ordered by that judge or magistrate or a warrant for his further detention is obtained in terms of section thirty-three”

Section 33 of the same Act then speaks of how a warrant for further detention of an arrested person is obtained.

What is common cause in this case is that the accused persons, having been arrested on 29 January 2013 (this is despite the investigating officer's insistence that they were in fact arrested on the 26th of January 2013) the four accused persons were only taken to court on 4 February 2013 for initial remand.

The investigating officer first struggled to explain to us when he had arrested the accused persons and why he spent close to eight days with the accused in police custody if indeed his investigations were as straight forward as he projected to this court.

Even his recording colleague Constable Siziba could not even confirm with the court that indeed the accused persons were finally taken to court for initial remand on 4 February 2013.

Both officers' narration of events were conveniently not filled up with dates, when they executed their functions. It is most unusual that two police officers would fail to provide such basic information on such details.

Not only that, but both speculated on the existence of the formal warrant for the further detention of the accused persons. They promised to bring the document to court once

¹ Criminal procedure and Evidence Act, [Chapter 9:07]

they checked at the station but that was the last that we heard about that warrant. None was produced in court and our conclusion is that no such document existed. The accused persons must therefore have been unlawfully kept at the police station.

If this is the position, then it means that the accused persons were unlawfully kept at the police station in order to properly deal with them in the manner alleged by the accused persons themselves.

I wish to highlight at this stage that our new constitution has added more stringent requirements as regards the treatment of arrested accused persons in terms of s 50 thereof. These rights must not be taken lightly because they form part of our Fundamental Rights and Freedom as a people.

It is quite ironic that where we wanted to be furnished with specific dates covering what the investigating officer did, we had to lean on the accused persons. The accused persons turned out to be more reliable on dates than the two police officers.

When there is such a lacuna in the evidence of police officers the court naturally becomes more cautious in dealing with such evidence.

Each of the accused persons gave a graphic detail as to how they were severely assaulted during the time they were unlawfully detained at Zaka Police Station. They alleged that they were being separately assaulted by the police but one face that invariably appeared to have masterminded these assaults was Inspector Manyore who was reported to have made it very clear to accused 4 that they could not see Monica despite their insistence that they wanted to challenge her evidence in court.

Two significant startling revelations were made by the accused persons in this case.

The first is that after they had been subjected to further assaults on 12 February 2013, just before they were taken for their plea and confirmation they were specifically told by the Zaka police prosecutor that it was the established tradition that once brought to court no accused person was supposed to challenge his confirmation proceedings or deny the allegations.

According to the accused persons this simply helped to reinforce the threats issued to them by the investigating officer who had been subjecting them to persistent assaults and reminding them that when they got to court they should not change their statements.

The second disturbing revelation made in this court was by accused 2 who specifically stated that just before their plea was recorded followed by the confirmation

proceedings he pleaded with the confirming magistrate to give them an opportunity to confide in her in the absence of the police prosecutor.

According to accused 2, this request was shot down by the presiding magistrate who insisted that at court they operated as a team and that she could not entertain them in the absence of the prosecutor. From what accused 2 stated, it is clear that no further inquiry was done by the confirming magistrate to ascertain the accused's concerns. The accused said that if the magistrate had granted them the indulgence sought, they wanted to bring to her attention the issue of the assaults and threats to which they were being subjected to by the investigating officer and the police prosecutor.

In the absence of any evidence having been sought to rebut this by the State counsel, we are obliged to give the accused persons the benefit of doubt and accept that indeed, they made an abortive attempt to get assistance from the presiding Magistrate on 13 February 2013.

Let me hasten to say that as a court, we do not take lightly to allegations of violations of accused person's rights especially when that occurs when they are under unlawful detention as in this case, because when one's rights have been violated in such circumstances, his only recourse is to approach the courts for remedy. He may not have any other option open to him.

We are conscious that in this case we are dealing with confirmed warned and cautioned statements which are accepted as evidence upon their mere production by the State counsel. We are also alive to the fact that the enquiry is purely a factual one and that the accused persons must discharge the onus to have such confirmed statements disregarded.

Our simple view in this regard is that the unlawful detention of the accused persons in this case as evidenced by their being kept at Zaka Police Station must lend credence to their claims of having been perpetually subjected to assaults in varying degrees in order for them to admit what they had been denying from the time of their arrest until they eventually succumbed.

Further, a closer look at the statements concerned suggests that it was a statement made by one person. If our observation is correct, this would mean that the accused must be believed when they say they had no input into the statement but that after being assaulted they were forced to put their signatures on the statements.

The different roles they played according to their statements are understandable. These had to be tailor made by the maker of those statements Inspector Manyore in order to fit into the evidence of Mollen Zava.

Our final position is that it would be a traversity to the very basic concept of justice as perceived if these statements were to be accepted. There is overwhelming evidence to show that they were not freely and voluntarily made despite their confirmations.

We are also satisfied that even the plea recorded in respect of accused 1,2, and 3 was a reflection of the investigating officer speaking through the accused persons having brutally assaulted them and inspired sufficient fear in them to plead against their denials.

The confirmed statements having been rejected there is nothing that remains that would support a conviction of accused number 4. There is no evidence against her.

I may wish to add and say that even if this court had accepted the confirmed warned and cautioned statements they would still not have assisted the State in securing the conviction of accused 4 because of the clear and unambiguous provisions of s 259². See also *S v Kohlinfila Ouabe*³; *S v Strydon and Ors*⁴ and *S v Sibanda*⁵.

The focus must now shift to the rest of the three accused persons.

In their unsolicited defence outlines as well as their evidence in chief accused 1 and 2 admitted to having gone to the deceased's homestead on the night she was fatally assaulted. They said the third person was the 1st accused's wife who was wearing a pair of trousers. They both said accused 3 was not present. The accused 3 confirmed this in his defence outline and evidence in chief.

We will accept the story as given to us by the two accused persons and accused 3 himself, that the later did not go to the deceased's place.

The two accused persons, accused 1 and accused 2 desperately tried to minimise the roles they played in the assault that took the deceased's life.

Fortunately for the court, we have to lean on the evidence of Mollen Zava. Mollen Zava said to our satisfaction that she saw two people in their bedroom who were attacking them with axes and that the third one was by the door.

² Criminal Procedure and Evidence Act [Chapter 9:07]

³ 1939 AD 255 at 269

⁴ 1980 ZLR 364 (A) at 366 A

⁵ 1992 (2) ZLR 438 Z

We accept the evidence of Mollen Zava that there were three assailants. We make a specific finding that these three people who were at the deceased's place must have been accused 1, 2 and possibly Monica.

We accept that these people despite participating in different ways had a common objective. That common objective was to kill the deceased. We have come to this conclusion because of the manner in which the deceased was attacked.

We do not accept the accused 2's story that he had remained 80-100 metres away from the deceased's place.

We reject that for basically two reasons.

Firstly, it would have killed the whole objective of him having accompanied the accused and his wife, Monica to the deceased's place.

Secondly, and more importantly if the accused was that far away from the deceased's house Mollen would not have seen three people. The accused person (accused 2) must have been the third person seen at the deceased's homestead. It is quite possible he participated in the actual assault of the deceased.

Even if he did not, there is overwhelming evidence that he was acting in common purpose with accused 1 as informed by his own evidence which was clearly tailor made to reduce his moral culpability.

We do not accept the murder weapons were recovered in the manner urged upon us by the defence.

Despite our criticism of the manner in which the police officers unlawfully detained the accused persons, we are satisfied that their evidence as regards the recovery of the murder weapons and the farmer shoes is beyond reproach.

If accused 2 was innocent, he would have had no reason to hide his farmer shoes from his homestead where they were subsequently recovered upon his indication to the police. If his association with accused 1 and his wife was innocent as he would want this court to believe, he would have had no reason to hide his farmer shoes.

Given the nature of the assault in this case, taking into account the accepted murder weapons and the manner of the deceased's assault the verdict can only be one. A verdict of murder with actual intent is the appropriate verdict.

Accused 3 and 4 - Not guilty and acquitted

Accused 1 and 2 - Guilty of murder with actual intent

EXTENUATION

The evidence of Mollen Zava, Lynette Rambanepasi and Peter Guvanyi inform us that the people of the area where this murder occurred generally believe in witchcraft and that it is a very strong belief system within that community. Youthfulness has always been accepted as extenuation.

Despite their disparity in age we are satisfied that these accused were influenced by youthfulness and immaturity. Extenuation does exist in this case.

SENTENCE

In our approach to sentence we are enjoined to consider the following factors in both aggravation and mitigation.

Both accused have clearly heavy family responsibilities in that they are principal breadwinners for their respective young and extended families.

Both are fairly youthful offenders despite their disparity in age. We accept that offenders must not be punished to the extent of breaking them. The sentence imposed must still give them hope for a normal life beyond this sentence.

It is highly mitigatory that the accused appear to have been affected by this strong belief in witchcraft which appears to be prevalent in their area.

Both are first offenders and have spent 2 years in remand prison awaiting the outcome of this trial.

In aggravation the court is concerned that the accused committed this serious offence in the most callous manner and that in the process of dealing with the deceased they did put the lives of her grandchildren Mollen and Innocent at great risk. Mollen was innocently injured in the process for having done nothing but to sleep with her grandmother, the deceased.

The weapons used showed the accused's unmistakable resolve to end the deceased's life and the attack must have subjected her to excruciating pain before she succumbed to death.

Whenever death occurs, as a court we have the duty to remind society that murder is one of the most serious offences because it involves the taking away of human life and as a court we have a duty to protect the sanctity of human life because once lost it cannot be recovered.

The offence was well planned as evidenced by the timing and the distance covered to commit it.

Each accused is sentenced to undergo 18 years imprisonment

National Prosecuting Authority, for the State

Ruvengo, Maboke, 1st accused's legal practitioners

Legal Resources Foundation, 2nd accused's legal practitioners

Mutendi & Shumba, 3rd accused's legal practitioners

Saratogo Makausi Law Chambers, 4th accused's legal practitioners