

THE STATE
versus
FORBES CHIMUSORO
and
GIFT DZVUKE
and
NOMORE CHEMAMBO

HIGH COURT OF ZIMBABWE
MWAYERA J
HARARE, 4, 5, 6 November 2013, 20, 23 March 2015 and 4 August 2015

Assessors: 1. Mr E. N. Barwa
 2. Mr A. H. Mhandu

Criminal Trial

MS P Chikangaise, for the State
Z Kajakoto, for all the three accused

MWAYERA J: The three accused pleaded not guilty and proffered defences to a charge of murder as defined in s 47 of the Criminal Law (Codification and Reform Act) [*Chapter 9:23*]. It is the state's contention that on 3 January 2012 at Mukaradzi Gold Panning site Mt Darwin the deceased who was drinking beer in the company of one Memory Chikanda had a misunderstanding with the first accused Forbes Chimusoro. A fracas ensued resulting in accused two and three joining in. The third accused and one or more or all of them assaulted the now deceased Fidelis Namichila using a sjambok, stick and blunt object all over the body and forehead. They then threw the deceased in disused mine shaft. The accused are alleged to have caused injury on the deceased which occasioned his death. According to Doctor Mapiye who compiled the post mortem report which was produced as exh 1 the cause of death was depressed skull fracture following severe blunt trauma to the left skull.

The state adduced evidence from five witnesses while the accused proffered defences to the effect that they did not commit the offence since they were nowhere near the scene of crime on the night in question. They suggested that they were generally implicated because they are gold panners. They denied ever assaulting the deceased and suggested that the deceased who was a gold panner and alcoholic might have, in his drunken state fallen into the disused pit of mine shaft and met his demise.

From the state and defence evidence it is apparent that all the three accused worked at Mukaradzi mining site as gold panners. All the three accused and civilian state witnesses were known to each one prior to his offence. It is common cause that the incident occurred at night during a beer drink. Further, it cannot be disputed that after the incident of the fracas deceased lost his life. Given the defences raised by the accused that they were nowhere near the scene the court has to determine from the evidence adduced the veracity or otherwise of the assertion. The court has to come up with a deduction whether or not the accused persons had the requisite *mens rea ad actus reus* to cause the death of the deceased.

It was clear from state witnesses Luckson Kwendambairi Chiweshe that accused two and three were within the vicinity of crime. The witness recounted how accused two and three assaulted and the now deceased. The witness also told the court how Raphael Chemambo and the state witness was part and parcel of the group. He told the court that the group did not want anyone torching to give light at the scene. This witness's evidence was corroborated to a great extent by Bruce Chinhaire in so far as diamond wire was used to assault the deceased and in so far as Raphael Chemambo was also participating in the violent attacks. It was clear from the state witnesses inclusive of Luckson Jonga, Raphael Chemambo, Police detail Collen Saini (Per investigations) that the accused who are known to each other and relatives by marriage. After the murder they were accompanied to a traditional healer to seek cleansing because of the murder allegations. It was also clear that the altercation which occurred was over one Memory Chikanda who was a common girlfriend for both the first accused and the deceased. It is worth nothing that Raphael Chemambo who accompanied the accused to the traditional healer was also fingered as having participated in assaulting the deceased. He on the face of it appeared to be an accomplice witness. His evidence was accordingly treated with caution. His version of involvement of the three accused persons was however corroborated by not only the state witness but the accused

persons during examination. What prominently came out from all the evidence is that he was at the scene of crime and even if he could be viewed as a “*socius criminis*” he cannot be ruled out as capable of narrating and recalling what happened on the day in question. *State v Chohan* 1981 (2) ZLR 237 SC makes it clear accomplice witness evidence has to be treated with caution and that there is need to call for corroboration. The case by no means suggests the evidence should be discarded or disregarded.

It can be discerned from the versions of the state witnesses that all the three accused were in the vicinity of the crime, it is appreciated the witnesses observed with some minor variations on detail as regard mode of assault and assailants. However, what is clear is that it was more than the three accused who assaulted the deceased and that the gang discouraged light of torches thus precluding accurate visualization of sequence of events. What cannot be disputed though is the fact that all the accused as given by some of the state witnesses and Raphael Chemambo were at the scene. The omission of detail and specification of assault given the circumstance of occurrence at a beer drink at night plus existence of a crowd is understandable and by no chance excludes participation of the three accused.

What comes up prominently is the defence of *alibi* as given by all the accused person. As correctly observed by defence counsel the *onus* to disprove the *alibi* defence lies with the state. The accused who raises the defence of *alibi* must of necessitate disclose the defence fully so that the defence is properly investigated. The first accused’s version that he was at his home area which is within the same area of crime when viewed in conjunction with the source of misunderstanding over the stated girlfriend Memory Chikanda and that the first accused was seen at the scene of crime by some of the state witnesses and that he did not adduce evidence to show he was away squarely places him at the centre of the scene. The second accused’s defence of *alibi* was exposed when it become abundantly clear that he was not in police custody on 3 January 2012 at night when the offence was allegedly committed. Further witnesses saw him participate in the assault of the deceased. As for the third accused this defence of *alibi* was exposed as just a bald assertion given all the civilian state witnesses saw him at the scene. In fact he also like the other two accused did not fully disclose the *alibi* or not call in evidence to confirm the *alibi*. This stance by all the three accused corroborated the state’s asserting that the three were at the scene of crime and the circumstances and the evidence disproved their defenses

of *alibi*. I am alive to the fact that no *onus* lies on the accused to convince the court of the truth of any explanation he gives and am equally alive to the fact that the state has to prove its case beyond reasonable doubt.

In the present case given the fact that the undisclosed defence of alibi has been disproved, the court is left to grapple with whether or not the state has discharged the required onus given the murder allegations. It is apparent that the three accused together with others had a misunderstanding with the now deceased over a woman.

As clearly discerned from the evidence the gang acting with common purpose subjected the now deceased to assault and they did not want any intervention as they sought to attack anyone who tried to light up the place. The deceased was thrown into an abandoned mine shaft and his body was later retrieved with injuries. From the wording of s 47 of the criminal law codification reform act any person who causes the death another person by intending to kill the other person or **realizing that there is real risk or possibility that his or her conduct may cause death and continues to engage in that conduct despite the risk or possibility shall be guilty of murder**. The state was shown beyond reasonable doubt that the accused persons assaulted and threw the deceased in a shaft and persisted with their conduct despite the risk or possibility of causing death. The accused persons are accordingly found guilty of murder as defined in s 47 (1) (b) of the criminal law (codification) and Reform Act [*Chapter 9:23*].

National Prosecuting Authority, State counsel legal practitioners
Kajojoto & Company, accused's legal practitioners