

THE STATE  
versus  
CHRISTOPHER FUNGANJERA

HIGH COURT OF ZIMBABWE  
ZHOU J  
HARARE, 8, 9, 10 & 11 March 2016

**Trial – within – a – trial**

*B. Murevanhema*, for the State  
*Miss R. Chibaya*, for the accused

ZHOU J: The accused person is appearing before this court charged with murder as defined in s 47 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. It is being alleged that on 29 September 2014 and along 19<sup>th</sup> Road, Glen View 3, Harare, the accused person unlawfully and intentionally caused the death of Stephen Chikanda by stabbing him using a knife three times on the chest, two times on the back, two times on the forearm and once on the left wrist. At the commencement of the trial the accused person, through his counsel, moved an amendment to his defence outline by inserting statements challenging the admissibility of indications which were video-recorded and subsequently transcribed, as well as the Form headed “**Indications and/or statements made at scenes**”. The basis of the objection to the production of the evidence of the indications, as outlined in the defence outline, was that the indications “were made as a result of a thorough beating by the police, and therefore induced by undue influence. The accused will state that he was subjected to a prolonged physical assault by the investigating officer.” In view of the objection to the production of the evidence of the indications the court, as it is enjoined to do, held a trial – within – a – trial in order to determine the admissibility of that evidence.

In seeking to prove that the indications were made by the accused person freely and voluntarily and without undue influence being brought to bear upon him the prosecution led evidence from four witnesses. These were Nyasha Makanyisa, Kudzai Learnmore Mafusire,

Trymore Chimbambo and Hector Rupiya. Nyasha Makanyisa is a Detective Constable in the Zimbabwe Republic Police based at the Criminal Investigations Department's Homicide section. His testimony was that on 2 October 2014 in the afternoon he was assigned to by the Officer-in-Charge CID Homicide to conduct indications in which the accused person would be involved. He booked the accused person out of the police cells and took him to his office. He then constituted a team of detectives who would assist him in the conducting of the indications. In addition to himself, the other detectives in the team were Detective Sergeant Muuya who was to drive the motor vehicle to be used during the indications, Detective Sergeants Mangwuwa and JanzaLimodzi were to provide security, while Detective Constable Rupiya was to be the interpreter. There was also Detective Constable Chimbambo who was to record the proceedings using a video camera. He administered a Warned and Cautioned Statement, which is the preamble of the form which was used to the accused person in respect of the indications while he was in office number 27. He explained to the accused person that he was not obliged to participate in the indications unless he was willing to freely and voluntarily take part. He stated that he advised the accused person of his right to legal representation but the accused person advised that he had no lawyer to represent him. He also introduced the other members of the team whose names have been stated above. He availed to the accused person a form which the accused person signed to confirm his willingness to participate in the indications and that he was making the indications freely and voluntarily. The accused person was also to sign, and did sign, the same form after completion of the indications to acknowledge that the indications were undertaken by him freely and voluntarily. The witness spoke to the accused person in the English language while Rupiya translated from English to Shona and vice versa. The accused person then gave him directions to 19<sup>th</sup> Road in Glen View 3. He stated that the accused person was secured in handcuffs and leg-irons. The accused person led the team to 19<sup>th</sup> Road, Glen View 3, Harare, where he stated that an altercation between him and the deceased had ensued as a consequence of which he stabbed the deceased. From that road the accused person then led the witness and the other officers to his residence, 4260 Glen View 3, Harare. At his residence the accused person indicated to the witness and the other officers a well in which he said that he had thrown the clothes which he had been wearing at the time that he had an altercation with and stabbed the deceased. A t-shirt and a pair of short trousers which were blood stained were recovered and retrieved from the well using a rope which had a hook. The witness denied that the accused person was assaulted by him or any of the other officers.

He stated that the investigating officer, Mafusire, was not part of the team attending to the accused's indications, but only joined them in the yard of the police station when they were leaving as he had some other business to attend to.

Kudzanai Learnmore Mafusire is the investigating officer. He first met the accused person on 2 October 2014 when the accused was brought to the CID offices. He recorded a warned and cautioned statement from the accused on that same day. He stated that he was not involved in the indications but merely boarded the motor vehicle which was going for the indications because he intended to go to the Magistrates Court using that vehicle after the indications to have a warrant for the further detention of the accused person issued as well as to have the accused's warned and cautioned statement confirmed. He never got out of the motor vehicle when they got to the scene. Even when they went to the accused's residence he remained outside the gate in the motor vehicle while those officers who were involved in the indications went inside the premises with the accused person. He was only handed the t-shirt and pair of shorts which were recovered during the indications when they were back at their CID offices. He denied ever assaulting or torturing the accused person. He was given a transcript of the indications by Detective Sergeant Makanyisa who had transcribed the video indications. He stated that the Magistrate declined to confirm the warned and cautioned statement which he had recorded from the accused person.

Trymore Chimbambo was the officer who was assigned to record the indications by the accused person on 2 October 2014. He started recording the indications from Harare Central Police Station. The witness used a video camera. He testified that when they got to Glen View 3 the accused person indicated the place where he stabbed the deceased as well as a dry well in which he had thrown his clothes. He put the video recordings on a DVD which he handed over to the Officer-in-Charge. He played the video recording on television in court.

The last witness for the prosecution was Hector Rupiya who was assigned to be the interpreter during the indications. He testified that Detective Constable Makanyisa read out the preamble in terms of which he warned the accused person about the indications, and also informed the accused person of his rights. He appended his signature on the document headed "Indications and/or Statements Made at Scenes" as a witness. That same document was signed by the accused and Makanyisa. His evidence as regards being directed to Glen View and 19<sup>th</sup> Road as well as what took place there was largely similar to that of the other witnesses who were involved with the indications, save that he stated that Mafusire was

seated at the back of the motor vehicle during the time that they went for the indications. He stated that Mafusire joined them in the motor vehicle when the motor vehicle was leaving Harare Central Police Station.

The accused person gave evidence himself and called no other witness. His full names are Christopher Tafadzwa Pfunganjera. His evidence was that he was arrested on 30 September 2015 and taken to Glen View Police Station. He was shown clothes which he confirmed as belonging to him. He was detained at the police station for one night. The following day he was taken to the CID Homicide offices but was returned to Glen View Police station on the same day. On 2 October he was again taken to CID Homicide offices where he was moved to different rooms as the officers were preparing some documents which he did not understand. He was then questioned about the events relating to the case. He told the officers that he had had a misunderstanding with the deceased who was his friend. He was taken to a room where his shoes were removed and used to assault him on his ears. The police officers who were there were insisting that he was not telling the complete story. The officers then tied an iron bar between his legs and kept him in that position for five to ten minutes. After that they placed the iron bar on a table together with the accused person. The accused person lay on the table with his head hanging in the air facing downwards and the officers further assaulted him. They took turns to assault him under his feet and on hands. A female police officer complained that the assailants would hurt the accused person. After the assaults they ordered the accused person to jump which he did. He was then taken to another room where he was advised that he would be taken for indications. He was supposed to state what he would have been instructed to say.

The accused named Mafusire, the investigating officer, as one of the officers who assaulted him. He did not know the names of the others who were involved in the assault but described them by the responsibilities which they performed on that day when they went for the indications. He specifically mentioned the officer who was putting questions to him in English during the indications, the one who was driving the motor vehicle, as well as the one who was interpreting. Nyasha Makanyisa was the one who led the indications and put questions to the accused person. From the evidence of the state Hector Rupiya is the one who was the interpreter while Detective Sergeant Muuya was driving the motor vehicle. He stated that a document was placed before him to sign after the camera had been switched on for recording. The only officer who did not assault him was the one who was recording the indications. Trymore Chimbambo was the officer who was recording the proceedings. The

accused stated that he was not given the opportunity to read the document. After signing the document he was asked to direct the officers to the scene, and he complied. When they were leaving the police station the camera was switched off and he was threatened with assault if he did not walk properly. He stated that he was not walking properly because his legs were swollen and painful. The camera was switched off during the drive to Glen View. He was supposed to state when they got to the scene that he had had a misunderstanding with the deceased, and had produced a knife and stabbed him. The camera was switched on when they got to Glen View. He is the one who led the officers to the place along 19<sup>th</sup> Road in Glen View 3 where the deceased had died as well as to his residence. He also showed them the well in which he had concealed the clothes which he was wearing on the day that the deceased died. After the indications at Glen View 3 they proceeded to the Magistrates Court at Rotten Row briefly after which they proceeded to Harare Central Police Station where he was ordered to wear his shoes. They then used a different motor vehicle to take him to the Magistrates Court again. The Magistrate refused to confirm the warned and cautioned statement of the accused person because of the injuries which he had observed on the accused. At that stage the accused person was being represented by a legal practitioner. The thrust of the witness's evidence was that the indications were not made freely and voluntarily but were induced by undue influence. The accused person stated, however, that notwithstanding the torture and assault he maintained his version of events. He also stated that when the police officers assaulted him they wanted him to admit that the clothes which they had with them prior to the indications were the clothes which he was wearing at the time that he had a misunderstanding which led to the death of the deceased. He, however, insisted, as he had told them prior to the assaults, that he had thrown the clothes which he was wearing on the day in question into a well at his residence. He stated that as a consequence of the undue influence exerted upon him two aspects of his statements during the indications were not correct but were planted upon him by the police officers. The first aspect related to the number of times that he stabbed the deceased in respect of which the police instructed him to state that he had stabbed the deceased three times in the chest. The second aspect related to the fact that the deceased person had been taken to Harare Hospital. He stated that he was not aware of the number of times he had stabbed the deceased person or that the deceased's body had been conveyed to Harare Hospital.

The right of an accused person to challenge evidence sought to be adduced by the state in criminal proceedings is enshrined in s 70 (1) (h) of the Constitution of Zimbabwe.

The purpose of the trial within a trial, in the context of the instant case, is to determine the admissibility of the evidence obtained through the indications in the light of the provisions of s 70 (3) of the Constitution as read with s(s) 256 and 258 of the Criminal Procedure and Evidence Act (*Chapter 9:07*). Section 70 (3) of the Constitution provides as follows:

“In any criminal trial, evidence that has been obtained in a manner that violates any provision of this Chapter must be excluded if the admission of the evidence would render the trial unfair or would otherwise be detrimental to the administration of justice or the public interest.”

Section 256 of the Criminal Procedure and Evidence Act deals with admissibility of confessions and statements made by an accused person. In subsection (1) the following is provided:

“Any confession of the commission of an offence and any statement which is proved to have been freely and voluntarily made by an accused person without his having been unduly influenced thereto shall be admissible in evidence against such accused person if tendered by the prosecutor, whether such confession or statement was made before or after his arrest, or after committal and whether reduced into writing or not.”

Section 258 of the same Act provides as follows:

- “(1) It shall be lawful to admit evidence of any fact otherwise admissible in evidence, notwithstanding that such fact has been discovered and come to the knowledge of the witness who gives evidence respecting it only in consequence of information given by the person under trial in any confession or statement which by law is not admissible in evidence against him on such trial, and notwithstanding that the fact has been discovered and come to the knowledge of the witness against the wish or will of the accused.
- (2) It shall be lawful to admit evidence that anything was pointed out by the person under trial or that any fact or thing was discovered in consequence of information given by such person notwithstanding that such pointing out or information forms part of a confession or statement which by law is not admissible against him on such trial.”

The remedy available to an accused person through a trial within a trial is wider in scope than just recourse for an aggrieved individual and the constitutional and legislative provisions cited above must be considered as occupying a central role in ensuring constitutional and judicial integrity of the criminal justice system as a whole, as well as promoting constitutional compliance in the police and prosecutorial services. See Currie and de Waal, *Bill of Rights Handbook* 5<sup>th</sup> ed p. 791. The essence of s 70 (3) of the Constitution is that once it has been established that the Declaration of Rights as contained in Chapter 4 of the Constitution has been unjustifiably infringed in obtaining evidence the court must exclude the evidence in question if its admission would (a) render the trial unfair; or (b) otherwise be

detrimental to the administration of justice or the public interest. It goes without saying that the admission of evidence that would render the trial unfair would necessarily be detrimental to the administration of justice or the public interest. *Currie & de Waal, (supra)*, at 792. The section clearly envisages that even where the admission of the evidence would not render the trial unfair its admission might nonetheless be detrimental to the administration of justice or the public interest. The section is clearly couched in peremptory terms insofar as it enjoins the court to exclude evidence once it has determined that its admission would render the trial unfair or otherwise be detrimental to the administration of justice or the public interest. See *S v Soci* 1998 (2) SACR 275(E), at 294f. But the court must exercise a value judgment in ascertaining whether there would be unfairness or detriment to the administration of justice or the public interest to warrant exclusion of the evidence. In that respect the court enjoys no discretion to exclude or not to exclude the evidence unless those conditions are not met. Put in other words, the court only has a discretion where the impugned evidence does not meet those conditions.

The accused *in casu* alleges torture which is a violation of s 53 of the Constitution, which provides as follows: “No person may be subjected to physical or psychological torture or to cruel, inhuman or degrading treatment or punishment.” The facts alleged by the accused, if proved, would point to contravention of the above provision.

The accused person gave a graphic description of the torture and assaults inflicted upon him by the named and described police officers. Although he produced no medical report of his condition, he testified that he was given only medication to contain the pain at the remand prison. He also stated that the magistrate refused to confirm his warned and cautioned statement because of the injuries which he had as a result of the assault and torture. The State did nothing to disprove the assertions by the accused person, and certainly provided no evidence that the warned and cautioned statement was not confirmed on some other ground than that alleged by the accused person. The omission to provide any record of the confirmation proceedings was decidedly structured. In fact, when Kudzanai Learnmore Mafusire was asked why the magistrate refused to confirm the warned and cautioned statement by the accused person his response was that it was because of the involvement of a legal practitioner who had been engaged by relatives of the accused person as a result of him having explained to the accused person his rights. That response, coming from a law enforcement agent, is very unconvincing and lacks seriousness. The alleged perpetrators of the torture and assault on the accused persons were clearly identified. However, they all just

gave bare denials in standard language. For that reason, this court has no difficulty in finding that the accused person was indeed assaulted and tortured as he described. But that is not the end of the inquiry. The next question is whether the assaults and torture vitiated the indications in the sense that the accused person acted involuntarily when he went for the indications or was induced by those acts to make the indications. In the event that the indications were induced by the assaults, the court will consider whether the admission of the evidence obtained through the indications would render the trial unfair or would otherwise be inimical to the administration of justice or the public interest.

The accused person did not state that he was assaulted or tortured in order for him to agree to go for the indications. Rather, his evidence was that the police officers wanted him to admit that the clothes which were already in their possession before the indications and were in a plastic bag were the clothes which he was wearing on the day that the deceased was killed. The accused person's evidence is that he had told the police officers before they even assaulted him that that he had had a misunderstanding with the deceased person. He had also told them that the clothes which he was wearing on the day in question were not the set that the police had in their possession but that he had concealed those which he was wearing in a well at his residence. The assault and torture had no bearing on his decision to go for the indications or on what he indicated to the police. The question of the number of times which he stabbed the deceased person as well as where the deceased person's body was conveyed to after his death are not material. As for the number of times that the accused person stabbed the deceased it does not prejudice the accused person that he, according to his testimony, was being pressured to assert a lesser number of stabs than that alleged in the charge sheet and the outline of the state case. Also, the accused person pointed to the officers the well in which he had thrown the clothes which he was wearing at the time of his altercation with the deceased. Those clothes were retrieved from the well. In terms of s 258(2) of the Criminal Procedure and Evidence Act the evidence of that pointing out would be admissible. The scene of the crime and whereabouts of the clothes are facts which the accused person could only have known if he was connected to the offence charged. See *S v Ndlovu & Anor* 2005 (1) ZLR 349 (S).

Nothing turns on the fact that the accused was being asked questions during the indications. Most of his responses were what he had already told the police officers prior to that. As pointed out above, the answers which he gave to those questions asked were not planted upon him by the police officers.



In all the circumstances, the court comes to the conclusion that the indications were made by the accused person freely and voluntarily, and without undue influence being exerted upon him. Even if I had come to the conclusion that the indications were obtained in a manner that violates the Bill of Rights, I would still not have been convinced that the admission of the evidence obtained through the indications would render the trial unfair; or would otherwise be detrimental to the administration of justice or the public interest for the reasons I have already outlined, namely that the indications related to matters which the accused person had already told the police about before he was assaulted. The accused did not change his version as a result of the assaults. Further, the places and items identified by the accused during the indications are acknowledged in the defence outline and are consistent with the accused's version therein save for the number of times that he stabbed the deceased.

In the result, IT IS ORDERED THAT:

1. The indications made by the accused person on 2 October 2014 were not made in contravention of the Constitution, and were made freely and voluntarily and without the accused person being unduly influenced thereto.
2. The State is entitled to adduce and rely on the evidence obtained through the indications by the accused person made on 2 October 2014.

*National Prosecuting Authority*, legal practitioners for the State  
*Sawyer & Mkushi*, *pro deo* legal practitioners for the accused.