BRYN MUPAYIKI

versus

THE STATE

HIGH COURT OF ZIMBABWE

MAWADZE J

HARARE, 7, 12, 13, 16 October, 2, 3, 6 November 2015

& 18 March 2016

Assessors 1. Mr Chakuvinga

2. Mr Chiwanda

**Criminal Trial**

*D.H. Chesa,* for the State

*B. Museba,* for the accused

MAWADZE J: The accused in this rather bizarre and unusual case is charged with two counts of murder as defined in s 47 (1) of Criminal Law (Codification and Reform Act) [*Chapter 9:23*] arising from unrelated circumstances.

In count 1 the charge is that on 3 February 2013 at the corner of a road linking Chambara business Centre and the Harare to Masvingo highway in Chivhu the accused unlawfully and intentionally caused the death of MOSES TOPODZI by hitting him with a clenched fist and a concrete block in the head several times thereby inflicting injuries from which MOSES TOPODZI died.

In count 2 the charge is that on a date unknown to the Prosecutor but in April 2013 at Hampshire Farm eastern Featherstone in Chivhu the accused intending to kill MEHLULI DHLAMINI or realising that there was a real risk or possibility that his conduct may cause death and continued to engage in that conduct despite the risk or possibility, hit MEHLULI DHLAMINI on the jaws with fists and drowned him in a pool of water with three big stones tied around his body thereby killing him instantly.

The facts giving rise to count 1 are as follows:

The accused and the deceased MOSES TOPODZI (hereafter the 1st deceased) were paternal half-brothers and the 1st deceased was not staying with their father one Murambiwa Mupayiki as his mother was divorced. The accused was staying with their father and his mother. The 1st deceased was older to the accused.

It is common cause that on 3 February 2013 the 1st deceased met accused who was in the company of Justice Mukuya and Shepherd Shonhiwa as he was going to Mutangadura village from Nyamhere business centre. It is alleged that accused then lied to the 1st deceased that the 1st deceased was wanted at accused’s home to collect some clothes which had been bought for 1st deceased by their aunt and this caused the 1st deceased to proceed in the direction of accused’s home with the accused. It is stated that on the way the 1st deceased expressed his wish to join his family, that is his father and accused’s mother and that the accused did not like this development. At that stage the state alleges that the accused unexpectedly hit the 1st deceased with a clenched fist and the 1st deceased fell down unconscious. The accused is said to have proceeded to drag the 1st deceased for about 33 metres off the road they were using and picked a concrete kilometre peg which the accused used to strike the 1st deceased several times on the head until he died.

It is not issue that the 1st deceased’s body was only discovered by Annaniah Mupayiki some three days later on 6 February 2013 and the matter was reported to the police. The accused was subsequently arrested through police investigations. The State alleges that the accused thereafter made indications leading to the recovery of the concrete kilometre peg.

The post mortem was done on 1st deceased on 8 February 2013 by Dr Kanyemba who concluded that the 1st deceased died due to severe destructive head injury caused by a sharp object.

In count 2 it is alleged that on a date unknown to the prosecutor but in April 2013 the accused and the now deceased MEHLULI DHLAMINI (hereinafter the 2nd deceased) were on their way to Manyere area in Chivhu when they got near No 1043 Hampshire farm Featherstone when the accused hit the 2nd deceased with fists causing him to fall down. The accused is said to have dragged the 2nd deceased to a pool of water in a stream and submerged his body with three big stone after undressing him. The 2nd deceased’s floating and naked body was only discovered by one Fungai Musami on 28 April 2013 and a report was made to the police. A post mortem done by Dr Tasimbanashe Masamha shows that the 2nd deceased died due to head injury and cervical spine injury caused by assault. The 2nd deceased’s identity remained unknown for some time. It is the State case that the 2nd deceased’s clothes were later discovered by one Joyce Mudyiwa near the scene of crime and that this led to the establishment of the 2nd deceased’s identity.

In his defence in respect both counts 1 and 2 the accused denied that he killed both the 1st and 2nd deceased.

In respect of count 1 the accused said he indeed met the 1st deceased on 3 February 2013 as alleged and that he proceeded to Nyamhere business centre with the 1st deceased where he left the 1st deceased at the business centre and proceeded to his home. The accused denied killing the 1st deceased or taking his cell phone. In fact that accused said he was equally shocked when the 1st deceased’s body was discovered and that he also attended 1st deceased’s funeral.

In respect of count 2 the accused said he first met the 2nd deceased in Marange in November 2012 when they were both looking for diamonds and they became friends. In March 2013 the accused said he met the 2nd deceased at Mushayavanhu business centre in Gutu where the 2nd deceased asked accused to assist the 2nd deceased in finding buyers of the 2nd deceased’s diamonds. The accused said they agreed to go to South Africa to sell the diamonds. The accused said in April 2013 he was called by telephone to 2nd deceased’s rural home in Gutu in order to finalise their journey to South Africa and that the accused met the 2nd deceased’s sister at Chisheche business centre in Gutu who took him to 2nd deceased’s home as 2nd deceased had gone to Masvingo. The accused said the 2nd deceased returned home at night and the following day they both proceeded to Chivhu enroute to South Africa. While in Chivhu accused said he took the 2nd deceased to accused’s uncle’s house one Sydney Rwafa and that they late met accused’s friend Nyararai Magamu. The accused said he later went with 2nd deceased and Nyararai Magamu to cross road night club in Chivhu to drink beer that day where thereafter both accused and 2nd deceased took two prostitutes and separated after agreeing to later meet at the same night club at 0300 hrs. The accused said he returned to Sydney Rwafa’s house to collect his bag and went to the night club to meet 2nd deceased but found that the 2nd deceased was not there and that his cellphone was not reachable. The accused said he then left the night club and never met the 2nd deceased again. The accused said he only later learnt of 2nd deceased’s death after his arrest. Accused said when he failed to locate the 2nd deceased at the night club he proceeded to Chitungwiza and never tried to call the 2nd deceased again.

The accused in concluding his defence outline disowned both his confirmed warned and cautioned statements in respect of count 1 and 2 saying he was forced to sign them under threats of death and assault by police officers. The accused said he did not challenge the statements before the magistrate during confirmation proceedings for fear of being victimised by the police who had threatened to deal with him if he disowned the statements before the magistrate. The accused therefore said he challenges the admissibility of the statements.

During the trial the following exhibits were admitted by consent.

Exhibit 1: This is the post mortem report in respect of CTI in relation to the 1st deceased compiled by Dr Alice Kanyemba. Dr Alice Kanyemba also gave *viva voce* evidence which was not challenged. She made the following observations and findings:

1. that the 1st deceased’s body was decomposing with maggots
2. the 1st deceased had defensive wounds on the upper part of the arms which were consistent with the 1st deceased trying to block the blows inflicted on him with his arms.
3. that the 1st deceased had a stab wound on right clavicle and right axilla which was 15 cm deep, that is from collar bone to the armpit, which was possibly caused by a sharp object like a knife.
4. that the 1st deceased’s right eye ball was missing and that it had apparently been violently removed intentionally.
5. that there was a massive destruction of the 1st deceased’s head and face with the mandible (jaw) fractured into half and that severe force was used as the head was virtually crushed. Dr Kanyemba said a hard object like the concrete kilometre peg could have been used to crush 1st deceased’s head.
6. that the 1st deceased had bruises from the neck to the limbs both on his back and front.
7. Dr Kanyemba concluded that the 1st deceased’s death was caused by the destructive head injury. She was of the view that the concrete kilometre peg especially its sharp edge could inflict such injuries and that a sharp object like a knife was also used to inflict the stab wound.

It is clear that the 1st deceased did not die through natural causes but died a violent

and clearly painful death. Our finding is that the 1st deceased was attacked and sustained the fatal injuries.

Exhibit 10: This is a post mortem report in respect of the 2nd deceased which was compiled by Dr Masamha on 30 April 2013. The evidence of Dr Masamha was admitted in terms of s 314 of the Criminal Procedure and Evidence Act [*Chapter 9:07*]. The doctor made the following observations and findings in respect of the 2nd deceased:

1. that there were deep lacerations on the 2nd deceased’s scalp with the largest being 4 cm.
2. that there were multiple abrasions and friction bruises on the 2nd deceased’s chest, arms and lower limbs.
3. that the 2nd deceased had a fracture dislocation of the neck.
4. That the cause of the 2nd deceased was due to head and cervical spine injury caused by assault.

Again it is our finding that the 2nd deceased did not die through natural causes but was

violently attacked causing the fatal injuries.

Exhibit 2: (a) blue jean trousers

(b) blue stripped shirt

(c) grey bomber jacket

Exhibit 2 (a) to (c) are the clothes which belong to the 2nd deceased and were discovered in Hampshire farm by one Joyce Mudyiwa. It is important t note that when the 2nd deceased body was found it was naked and 2nd deceased was only wearing some pants and stockings. The same clothes where identified by the 2nd deceased’s cousin one Chipo Marongere as 2nd deceased’s clothes he was wearing on the day he left 2nd deceased’s home in rural Gutu with the accused. From the evidence led the 2nd deceased was given a pauper’s burial in Chivhu before his identity was established and his identity was only identified through exh 2 (a) to (c) well after his burial. The accused also confirmed that exh 2 (c) is similar to the jacket the 2nd deceased was wearing. There has been an attempt in the closing written submissions by the accused to challenge the identity of the person or body found in count 2. Our view is that there is clear and irrefutable evidence that it is the 2nd deceased as per exh 2 (a) to (c). There is therefore no objective basis to challenge the identity of the body found in count 2 as it is clearly linked to exh 2 (a) to (c).

Exhibit 3 (a) to (d) – These are big stones which were used to submerge the 2nd deceased’s body in pool of water in count 2.

Exhibit 4 (a) to (d) These are Zimpost Reports on the weights of the stones exh 3 (a) to (d) which are 23 kg, 20,5kg. 26 kg and 31 kg respectively. Our brief remark is that exh 3 (a) to (d) were sufficiently heavy stones to submerge 2nd deceased’s body into the water.

Exhibit 5: Sketch Plan in respect of count 1 : This sketch plan was drawn by Detective Assistant Inspector Mutsambi on the basis of indications purportedly made by the accused and one Annaniah Mapayiki who first discovered the 1st deceased’s body. The pertinent points on the sketch plan are as follows:

Point K: the place the accused allegedly indicated that he hit the 1st deceased along the road

they were using and that the accused also indicated the spoor he dragged the 1st deceased to point M in the bush.

Point N: the place accused allegedly indicated he picked the concrete kilometre peg used to

assault the 1st deceased.

Point A: the place the accused allegedly hit the 1st deceased with the concrete kilometre peg

picked out point K. This is the same place Annaniah later found the 1st deceased’s body.

Point C: is the place where Annaiah Mupayiki found the 1st deceased’s right shoe.

Point D: is the place the accused allegedly left the concrete kilometre peg after assaulting the

1st deceased and is some 30 cm from place 1st deceased’s body was found.

Exhibit 6 (a) is the concrete kilometre peg allegedly used to assault the 1st deceased and as per exh 6 (b) the Zimpost report it weighs 32 kg.

Exhibit 7 : Sketch Plan in respect of count 2: This sketch plan was drawn allegedly as per accused’s indications and indications by the State witness Fungai Musami. It shows the route the accused allegedly said he used with the 2nd deceased from the main road going to Rufu village and the following are salient points:

Point B: is the place the accused allegedly indicated that he assaulted the 2nd deceased with a

fist which is along a foot path and that thereafter accused indicated the route he used to drag the 2nd deceased from the foot path to a stream.

Point X: This is the place accused allegedly indicated he put the 2nd deceased’s body in the

stream and is the same point Fungai Musami indicated she discovered the 2nd deceased’s body.

Points D, E and F : are places accused allegedly indicated he picked some stones near the

stream which accused is said to have used to submerge the 2nd deceased’s body in a pool of water in stream.

Point G: is the place accused allegedly left the 2nd deceased’s clothes exh 2 (a) to (c) after

undressing the 2nd deceased.

Exhibit 8: It is the accused’s confirmed warned and cautioned statement in respect of count 1. It is written in Shona and in accused’s own handwriting. In that statement the accused explained how he met the 1st deceased and walked with him. The accused explains how he was angered by the 1st deceased’s revelation of 1st deceased’s intentions to join accused’s family and how the issue of the 1st deceased had caused problems between the accused’s mother and father in their marriage. The accused explains how he then hit the 1st deceased with a fist causing him to fall after which he took a concrete kilometre peg nearby and crushed the 1st deceased’s head. The accused then said he took 1st deceased’s blue cell phone which he later sold in Chivhu and that there is a person who saw him with the 1st deceased’s cell phone.

Exhibit 9: is accused’s confirmed warned and cautioned statement in respect of count 2 again in Shona and in accused’s own handwriting. In that statement accused explained how he left Gutu with the 2nd deceased going to Chivhu intending to sell the 2nd deceased’s diamonds. The accused explains how he spent the night in the night club with the 2nd deceased in Chivhu and that they later boarded a motor vehicle to accused’s Manyere Village after which they disembarked and walked towards accused’s village until they got to Joyce Mudyiwa’s Farm. The accused said at that farm he attacked the second deceased with a fist causing him to fall down after which he dragged him to a pool of water at nearby stream where he proceeded to undress the 2nd deceased so that he would not be easily identified. The accused said he then submerged the 2nd deceased’s body into the pool of water and that he took the second deceased’s cellphone and sold it in Chivhu.

THE EVIDENCE

COUNT 1

In respect of count 1 the State led evidence from Justice Mukuya, Shepherd Shonhiwa, Ananiah Mupayiki, Philip Mutsambi Tawanda Padzura, Junior Mutamiri and Dr Alice Kanyemba. The evidence of Annaniah Mupayiki, Philip Mutsambi and Tawanda Padzura was admitted in terms of s 314 of the Criminal Procedure and Evidence Act [*Chapter 9:07*]. We have already dealt with the evidence of Dr Alice Kanyemba who compiled Exh 1 the post mortem report in respect of the first deceased.

We now briefly outline the evidence admitted in terms of s 314 of the Criminal Procedure and Evidence Act [*Chapter 9:07*].

ANNANIAH MUPAYIKI

His evidence is that on 6 February 2013 he was guarding birds in his fields when his dogs started to bark. He proceeded to the place where the dogs were and discovered the 1st deceased’s body. He then alerted the police.

PHILLIP MUTSAMBI

He is a member of ZRP CID Chivhu and attended the scene of crime where the 1st deceased’s body was discovered. He took the body to Chivhu Hospital and caused the post mortem to be done as per Exh 1.

TAWANDA PADZURA

He is also a member of ZRP CID Chivhu and assisted Phillip Mutsambi in attending to the scene of crime.

We now turn to *viva voce* evidence led in count 1.

JUSTICE MUKUYA

He testified that he was known to both the 1st deceased and the accused and that the 1st deceased worked at Mutagadura Village in the same village Justice Mukuya was also employed. He said on 3 February 2013 while he was in the company of Shepherd Shonhiwa he met the accused and 1st deceased and that accused introduced 1st deceased as his half-brother. He said he overheard accused telling the 1st deceased that the 1st deceased should go with the accused to accused’s home to collect some clothes. He then parted ways with the accused and 1st deceased.

SHEPHERD SHONHIWA

His testimony is the same as Justice Mukuya on how on 3 February 2013 they met the accused and 1st deceased.

The evidence of both Justice Mukuya and Shepherd Shonhiwa is not in issue. The accused admitted that he met the two while he was in the company of the 1st deceased and that the 1st deceased remained with the accused. Another part of evidence which accused seems to put in issue is that the two witnesses heard accused inviting the first deceased to go with him to accused’s home to collect some clothes. We find no reason why these two witnesses would fabricate that piece of evidence. It is not in issue that the accused was the last person seen in the company of the 1st deceased.

JUNIOR MUTAMIRI

She is a sister to accused’s father and both accused and 1st deceased regard her as an aunt. She explained that the 1st deceased grew up with his maternal relatives. Her evidence was that on 3 February 2013 the 1st deceased came to her flea market at a local business centre where she sold the 1st deceased a blue Nokia 5700 cellphone. She was later advised that the 1st deceased was missing. After some few days she was called to CID Chivhu where she positively identified the 1st deceased’s body whose head was decomposing. She managed to identify the 1st deceased with the clothes she had seen him wearing on 3 February 2013 especially the pair of farmer shoes and a belt she had sold to the 1st deceased. Junior Mutamiri said the accused who attended the burial of the 1st deceased never revealed that he had met the 1st deceased on 3 February 2013 to the relatives. She confirmed that she was aware of the plans by their family to have the 1st deceased join his paternal family which is accused’s family. The evidence of Junior Mutamiri is not contested and we accept it *in toto*.

TERERAI GWATIKWATI

He is a supervisor at Hamphsire Farm owned by Joyce Mudyiwa. He was known to the accused whom he said used to do piece jobs at this farm.

Tererai Gwatikwati (Tererai) said on 4 February 2013 at about 0700hrs he left the farm going to Chivhu when he met the accused. He said when he extended his hand to greet the accused the accused offered his left hand rather than right hand. He observed that the accused’s right hand was injured as accused had cut wound between the index and thumb fingers and that the hand was swollen. He said he enquired what had happened to accused’s hand and accused could only say something happened. Tererai said as he walked with accused the accused offered him a blue Nokia cellphone for sale but he had no money. Accused said he would dispose of the cellphone to raise money to go to Messina in South Africa. Tererai said the blue cellphone is not the cellphone accused used to possess as accused’s cellphone was silver in colour. As they walked Tererai said accused just remarked that a person had been killed in accused’s area and he gave no further details. They both boarded a lorry to Chivhu.

Under cross-examination Tererai insisted that he had met accused on 4 February 2013 and that accused offered him to buy a blue cellphone. He dismissed the suggestion that he was fabricating evidence because of a dispute between accused and his employer Joyce Mudyiwa.

In our assessment Tererai gave his evidence very well and there is nothing we noted that he was fabricating evidence. He was not known to the 1st deceased. We therefore accept his evidence.

The value of Tererai’s evidence is a follows;

1. he met the accused on 4 February 2013 a day after the 1st deceased had been seen alive on 03 February 2013.
2. the accused had an injury on his right hand which was swollen and the accused was unable to explain the cause of that injury. The accused now disputes this piece of evidence.
3. the accused offered him a blue cellphone for sale and Junior Mutamiri had the previous day sold the 1st deceased a Nokia blue cellphone. The accused now disputes this evidence.
4. he denied that he had any reason to fabricate evidence against accused as he was not known to 1st deceased nor was he aware that 1st deceased had died.
5. the accused in an unsolicitated way revealed that a person had been killed in his village. By then the 1st deceased’s body had not been found.

COUNT 2

In respect of count 2 the State in support of its case led evidence from Chipo Marongere, Sydney Rwafa, Fungai Musami, Isaac Zawu, Joyce Mudyiwa, Jephius Gosha, Dzingirai Brighton Mazorodze and Doctor Tasimbanashe Masamha.

The evidence of Dr Masamha, Fungai Musami and Joyce Mudyiwa was admitted in terms of s 314 of the Criminal Procedure and Evidence Act [*Chapter 9:07*] and can be summarised as follows;

DR MASAMHA

He examined the 2nd deceased’s body and compiled the post mortem report Exh 10 on 28 April 2013 which we have already alluded to.

FUNGAI MUSAMI

Her testimony relates to the discovery of the 2nd deceased’s body on 28 April 2013. She said on 28 April 2013 she was in the company of her husband going to Manyere area when she decided to relieve herself in Hampshire Farm. She then discovered deceased’s body in a pool of water in a stream and the body was only dressed in pants and stockings. She reported this discovery to police and later made indications as per sketch plan Exh 7.

JOYCE MUDYIWA

She is the owner of Hampshire Farm where the 2nd deceased’s body was found in a stream on 28 April 2013 and police alerted her of this incident and took away the body. She confirmed that the body was naked. Joyce Mudyiwa said some 3 months later while walking in her farm she found some clothes Exh 2 (a) to (c), that is the faded blue jean trousers, the blue stripped shirt and the grey bomber jacket. She recalled that the deceased’s body had been found naked and alerted the police who collected the clothes. We have already commented how in our view Exh 2 (a) to (c) led to the identity of the 2nd deceased and we are not persuaded by accused’s belated attempts to put the identity of the 2nd deceased into issue. Further the accused consented to the admission of Joyce Mudyiwa’s evidence hence it is futile for the accused to later try to allege that there was bad blood between him and Joyce Mudyiwa and that Joyce Mudyiwa had put up Tererai to falsely implicate accused over some money accused owed Joyce Mudyiwa. If that was the case accused would have allowed Joyce Mudyiwa to testify in order to cross examine her on all those issues.

We now turn to *viva voce* evidence led on count 2.

CHIPO MARONGERE

She is the 2nd deceased’s cousin and was staying with the 2nd deceased in rural Gutu. She said sometime in April 2013 she met the accused at Chisheche business centre in Gutu and accused who was in police uniform introduced himself as a friend for 2nd deceased who was then single and 24 years old. She said accused said he had come to Gutu to take the 2nd deceased to South Africa where accused’s uncle wanted to employ the 2nd deceased. By then the 2nd deceased had gone to Masvingo. She said she believed accused was a police officer as accused was wearing a full police uniform being a blue trousers, grey shirt and brown shoes.

Chipo Marongere (Chipo) said 2nd deceased returned from Masvingo that night and spent night with accused and that the next morning 2nd deceased told her he was going to South Africa with accused and that he took his passport, a satchel bag in which he packed a trousers and shirt and left with the accused. Chipo said accused explained that they would proceed to Chivhu first where accused said his South African based uncle was and that the 2nd deceased would then drive accused’s uncle to South Africa.

Chipo said she never heard from the 2nd deceased again from April 2013. She said it was only some 8 months later in December 2013 when CID officers from Chivhu came to collect her and that in Chivhu she managed to identify Exh 2 (a) to (c) being the clothes 2nd deceased was wearing on the day he left for Chivhu with accused in April 2013 being the blue jean trousers, the blue stripped shirt and the grey bomber jacket. She was also able to identify the accused who had been arrested at CID Chivhu at an identification parade. Chipo said police later explained to her that her cousin the 2nd deceased had been found dead in Chivhu in April 2013 and that he had been given a pauper’s burial as his relatives were then not known.

Under cross examination Chipo said accused had said he was a police officer at Chivhu and that the 2nd deceased would leave with accused’s uncle for South Africa from Chivhu the very same day they left Gutu. She denied that the accused ever mentioned issue of selling diamonds in South Africa but that 2nd deceased was to work for accused’s uncle in South Africa. Chipo said she did not know how police located her.

Our view is that the police managed to locate Chipo on the basis of what accused revealed. The importance of Chipo’s evidence is that it establishes the identity of the 2nd deceased. Further Chipo’s evidence shows that the accused lied to Chipo about why he left with 2nd deceased and that he was police officer at Chivhu.

The evidence of Chipo is largely unchallenged. Accused admits that he went to Gutu in April 2013 and came to Chivhu with the 2nd deceased. The accused did not dispute that he was in police uniform. It has not been disputed that the 2nd deceased was last seen in the company of the accused. We therefore have no reason not to accept Chipo’s evidence.

SYDNEY RWAFA

He regards the accused a son to his brother and resides in Chivhu.

Sydney Rwafa said in April 2013 the accused arrived at his house in Chivhu with the 2nd deceased whom he introduced as his friend and that accused was in police uniform. He said accused and 2nd deceased then briefly left and came back with one Nyararai a friend of the accused and accused removed the police uniform and all the three of them left. He said at about 11pm accused scaled the gate of his house and he opened the door for him. He said accused was alone and he proceeded to put on the police uniform indicating that he was leaving for his rural home in Manyene. He said he never saw either 2nd deceased or accused again and only saw accused after his arrest. Sydney Rwafa said he knew accused as a member of neighbourhood watch committee.

Sydney Rwafa said he only learnt ofthe 2nd deceased’s death some three months later when he was able to identify to the police the green bomber jacket the 2nd deceased was wearing on day he saw him.

The evidence of Sydney Rwafa is also not challenged save for the time accused said he returned alone to Sydney Rwafa’s house which accused said was at about 0400hours and not 2300 hours. Again we find no reason why Sydney Rwafa would be so mistaken as to time accused returned alone and we will accept his evidence.

ISAAC ZAWU

He is a member of ZRP at Featherstone and said he knew accused as a local person and that accused was briefly a member of neighbourhood watch committee in 2013. He is the officer who attended to the scene of crime on 28 April 2013 when the second deceased body was found in Hampshire farm and made the following observations:

i). second deceased’s body was in a pool of water was surrounded by tall grass.

ii). second deceased’s body was lying facing downwards naked with only pants

and stockings.

iii). there were 4 large stoned exh 3 (a) to (d) whose weight is as per exh 4 (a) to

(d) which were placed by the second deceased’s body. He said it was clear to

him that the stones had been used to submerge the second deceased’s body into

the water.

iv) 2nd deceased’s body had injuries all over the body.

No useful questions were put to him in cross examination and his evidence is therefore not put in issue.

JEPHIAS GOSHA

At the material time he was a Detective Assistant Inspector but now he is a Detective Inspector. He is the investigating officer in both counts.

Detective Inspector Gosha said the police first made a breakthrough in these cases when they learnt that the first deceased was last seen with the accused from Justice Mukuya and Shepherd Shoniwa and that the first deceased was never seen again until when his body was discovered after about four days. He said their investigations led them to Junior Mutamiri who had sold the first deceased a blue nokia cell phone and Tererai to whom the accused had tried to sell the cellphone in issue. At that point the accused became their prime suspect but was nowhere to be found. He said through the efforts of one of accused’s relatives the accused was arrested in October 2013 in Botswana in connection with a separate case and was then taken to Gutu in connection with count 2. He said he later interviewed accused in respect of count 1 and that accused opted to give him a warned and cautioned statement exh 8 on 22 December 2013 and that accused made indications voluntarily as per sketch plan exh 5 in respect of count 1. Detective Inspector Gosha said accused opted to also make indications in respect of count 2 as per sketch plan exh 7. He said accused also gave a warned and cautioned statement in respect of count 2 and that both statements were confirmed at court.

Detective Inspector Gosha said the police were keen to find accused’s motive in respect of both counts. In respect of count 1 he said accused said the first deceased was a half-brother who was about to join the accused’s family and that this was causing friction between accused’s parents. He said accused said he also wanted to take the first deceased’s cell phone and some cash the first deceased had in his possession. In respect of count 2 he said accused said the second deceased had R1 200, a piece of diamond and a passport which accused took and used the passport to go to Botswana.

Under cross examination Detective Inspector Gosha said the accused was very co-operative and revealed that he was worried by the offences in counts 1 and 2. He denied that any force was used to coerce accused to make warned and cautioned statements or to make indications.

In our view Detective Inspector Gosha gave a clear and coherent account on how the police made a breakthrough in these two cases. He was not shaken in cross examination. We assess him to be a credible witness.

DETECTIVE SGT DZINGIRAI BRIGHTON MAZORODZE : (D/SERGENT MAZORODZE)

His testimony was to the effect that the police had linked accused in respect of count 2 after they learnt from Sydney Rwafa that the second deceased was last seen in accused’s company. He then recorded accused’s warned and cautioned statement in count 2 and was present when accused made indications in both counts. He said initially when the second deceased’s body was found naked in Hampshire farm the police did not have any suspect and did not know the second deceased’s identity which they only established through the clothes later found near the scene of crime, exh 2 (a) to (c) through the second deceased’s cousin Chipo and Sydney Rwafa. In our view no useful questions were put to him and his evidence should be accepted.

THE ACCUSED’S EVIDENCE

The accused said he was arrested in Botswana in September 2013 in connection with a murder case of his girlfriend in Zimbabwe and that it was only in respect of that case that he was cooperative with the police and that this matter has since been finalized by my brother Bere J.

At the material time accused said he was a member of the Neighbourhood Watch Committee and that he would also go to Botswana to do piece jobs.

In respect of count 1, accused while admitting meeting the first deceased on 3 February 2013 insisted that he left the first deceased at Nyamhere Business Centre. He denied that he ever invited the 1st deceased to his home to collect some clothes and that he never saw the 1st deceased’s blue Nokia cell-phone. Accused said upon learning of the 1st deceased’s death on 8 February 2013, he attended the funeral and that as a family member he also went to see where the 1st deceased’s body was found and where a concrete kilometre peg was uprooted and possibly used to smash the 1st deceased’s head. The accused denied that the met Tererai on 4 February 2013 or that he tried to sell him a cell phone. Accused said Tererai was lying because he was put up to falsely implicate the accused by his employer Joyce Mudyiwa who was angry that the accused had not paid back US$25 which was change accused was to give Joyce Mudyiwa.

Accused vehemently denied that he killed the 1st deceased in count 1.

In respect of count 2 the accused explained how he first met the 2nd deceased in Marange in November 2012 and how they became friends always communicating on the telephone until their meeting in Gutu first in March 2013 at Mushayavanhu business centre where accused had visited his girlfriend and that the 2nd deceased wanted to sell some diamonds. The accused said he agreed to help the 2nd deceased to sell diamonds in South Africa since accused had his own diamonds. The accused confirmed his visit to the 2nd deceased’s rural home in April 2013 at the behest of the second deceased and meeting the 2nd deceased and meeting Chipo. The accused admitted that he indeed left Gutu with the 2nd deceased proceeding to Chivhu enroute to South Africa. In Chivhu he admitted going to Sydney Rwafa’s house and that the left with the second deceased.

The accused’s evidence is that he went to a night Club with the 2nd deceased after which each one of them engaged a prostitute and agreed to meet later at the night club but that the 2nd deceased did not come to the rendezvous. The accused confirmed that he went back to Sydney Rwafa’s house that night but disputed the time given by Sydney Rwafa. Thereafter accused said he left for Chitungwiza and that the 2nd deceased’s cell phone was unreachable. The accused said he never took the 2nd deceased towards his rural home and denied killing the 2nd deceased or robbing him of any money or diamonds or passport. The accused confirmed that the 2nd deceased was wearing a bomber jacket similar to exh 2 (c) on the day in question.

In respect of the warned and cautioned statements in both counts the accused said the statements were authored by Police who then caused the accused to copy the statements in his own handwriting and sign them. The accused said he was severely assaulted by the police and forced to comply with the police’s demands at gun point and that he was forced to make indications in count 1 and 2 also at gun point. At the magistrates court accused said Detective Inspector Gosha told him not to disown the statements and threatened to deal with the accused if he did saying they would take him from remand prison. The accused said in fear he caused the magistrate to confirm the statements. The accused said the police were not honest witnesses because the only murder case he freely and voluntarily admitted to was the one he committed on 2 June 2013 for which he was convicted by Bere J on 2 October 2014.

Under cross examination accused seemed to change his version in respect of how the warned and cautioned statements were authored. The accused was now heard to say some of the words in the statements were his own he authored but some were authored by the police. The accused was not able to explain why the statements were coherent if they were authored by him and the police. In respect of count 2 the accused was not able to give an explanation as to why he did not look for the 2nd deceased whom he intended to go with to South Africa or check if the 2nd deceased was back in his rural home in Gutu. The accused said he had no explanation as to why the second deceased was found dead in the direction of accused’s rural home.

ANALYSIS OF EVIDENCE

We have already assessed the evidence of state witnesses and explained why we believed their testimony. We have also dealt with the probative value of each of the exhibits produced except for the confirmed warned and cautioned statements.

It would appear that the accused is challenging the admissibly of both confirmed warned and cautioned statements. The accused does not dispute the validity of the confirmation proceedings but alleges that the statements are not admissible on account of the fact that they were not made freely and voluntarily but as a result of undue influence and threats by the police. The onus in the circumstances rests with the accused to prove this fact. See *Criminal Procedure in Zimbabwe* by John Reid Rowland at 20 – 11 (b).

In our view the accused was not able to discharge this onus. This also relates to indications made by the accused in both counts. To start with the accused has not been consistent in explaining how these statements which are in Shona and his own handwriting were recorded. It is improbable that the police would allow accused to write his own words and at the same time insert their own words in the same statements. The warned and cautioned statements are not only long but coherent and detailed. Further most the issues in those statements are not disputed by the accused. Our view is that the accused is simply making a desperate effort from distancing himself from these statements as they are clearly incriminatory.

The state case also hinges on circumstantial evidence as there were no eye witnesses to the murder in both counts. It is now settled in our law that the court can return a verdict of guilty based solely on circumstantial evidence if the court is satisfied that the circumstantial as evidence preclude every reasonable inference of the innocence of the accused. See *S* v *Shonhiwa* 1987 (1) ZLR 215 (S); *S* v *Vhera* 2003 (1) ZLR 688 (H) at 680 C. The celebrated case of *R* v *Bloom* 1939 AD 188 at 202 – 203 outlines the important principles or rules of logic which govern the use of circumstantial evidence in a criminal matter. In a nutshell circumstantial evidence can only be used to draw an inference if such an inference sought to be drawn is the only reasonable one to be derived from the proved facts. In *casu* the following facts are found proved;

a) both the 1st and 2nd deceased did not die from natural causes as per post mortem reports exh 1 and 10. They were clearly murdered.

b) the accused in both counts was the last person to be seen in the company of

each of the 1st and 2nd deceased.

c) both the bodies of first and second deceased were found in the general

direction of accused’s rural home.

d) In respect of count 1 a day after 1st deceased death accused was seen with an injury on his right hand, was in possession of the 1st deceased’s blue Nokia

cell phone and seemed to be aware of the 1st deceased’s death before the 1st deceased’s body had been found.

e) In respect of count 2 the accused lied to Chipo why he was leaving with the 2nd deceased and after he allegedly parted ways with the 2nd deceased he never looked for him until his arrest. This is moreso after the accused had made all the effort to go to Gutu in police regalia to look for the 2nd deceased. The accused’s sudden loss of interest in the 2nd deceased is inexplicable.

It is our view that no other reasonable inference can be drawn from any of these facts proved other than that they all point to the accused’s guilty in respect of both counts. We are fortified in our finding by the accused’s confirmed warned and cautioned statements. When one considers all the facts proved and how the offences were committed, it is clear that the murder in both counts were premeditated.

We therefore find the accused guilty of contravening s 47 (1) (a) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] which relates to murder with actual intent in both count 1 and 2.

VERDICT:

Both counts: Guilty of contravening s 47 (1) (a) of the Criminal Law (codification and Reform Act) [*Chapter 9:23*] murder with actual intent.

*National Prosecuting Authority,* for the State

*Muzangaza Mandaza & Tomana,* accused’s legal practitioners