THE STATE
versus
EDSON MUKOHWA
and
PETER TABVIROONA
and
ELEMIGIO SHAMUYARIRA
and
KNOWELDGE MUKUKU
and
SIMBAI CHIDODO
and
CONRAD CHIPANGO

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 5, 6, 7, 8, 9, and 19 March 2018

Assessors 1. Mr Mhandu
2. Mr Mpofu

Criminal Trial: Application for Discharge at close of the State's case

H.M Muringani, for the State
R. J Gumbo, 1st , 2nd, 3rd , 4th and 6th Accused
N. Mugiya, for 5th Accused

CHITAPI J: The 6 accused persons were indicted for murder as defined in s 47 (1) (a) of the Criminal Law (Codification and Reform) Act, [*Chapter 9:23*]. The indictment alleged that "On 16 March 2014, the accused persons and the accomplices, unlawfully and intentionally caused the death of Jacob Zifingo by drowning him into 1-5 metres deep pool in Zisokwe River, Gomo Village in Madziwa." All the 6 accused persons pleaded not guilty. The indictment was woefully drafted for want of such material averments such as that, the accused persons acted jointly in the enterprise. There is also reference to accomplices whose names or whereabouts was not disclosed. This notwithstanding the omissions did not invalidate the charge nor was any exception to it raised by the defence counsels.

At the close of the State case counsels, for the accused persons applied in terms of s 198 (3) of the Criminal Procedure & Evidence Act, [*Chapter 9:07*] for the discharge of the

accused on the indictment and for the court to enter a verdict of not guilty and acquit the accused. Such applications are rare in the High Court. This is so because the procedure for trials in the High Court is that the summaries of the evidence of witnesses are filed before hand as well as the defence outlines if the accused elects to testify. The trial is not a cat and mouse game and unless witnesses turn hostile, it is not usual that a case which has no evidence to support the charge is brought in the High Court just for the sake of it. The High Court is a court with original jurisdiction to determine all cases civil and criminal except those excepted by the constitution. Additionally the High Court supervises and reviews decisions of all other courts subordinate to it. It acts as an appellate court in matters where an Act of Parliament confers it with appellate jurisdiction. This court decides constitutional matters except those where the constitution excludes the jurisdiction of the High Court. The High Court is therefore a superior court in the hierarchy of courts and it should not be called upon to sit and waste time and resources hearing a case which is doomed to predictable failure by acquittal of the accused from the outset. The court should not be called upon to sit and preside over a criminal matter wherein there is an improper motive by the State for mounting a prosecution or the prosecution is done because the State does not want to make the decision to decline to prosecute and leaves it to the court to make the obvious decision.

In this case, the court felt constrained to comment that its jurisdiction and process has been abused. The court was called upon to preside over a case in which the investigations were so poorly conducted by the police to the point that an injustice was done in circumstances where a life was lost. The police investigating officer conceded that there was interference with his investigations from superior powers above him and he perfunctorily carried out the investigations. For its part the State ought to have ordered a thorough investigation or reinvestigation of the case. The Prosecutor-General is constitutionally empowered in s 259 (11) to direct an investigation by the Commissioner General of Police on anything relating to an offence and the Commissioner General must comply with such directive. This avenue was not utilized in this case. The prosecutor half-heartedly announced to the court that he was closing the State case after leading unhelpful evidence. The prosecutor was wrong to do so. He should have exercised his discretion to withdraw the case after plea because there was just no evidence led to sustain the charge. He was clearly afraid to do so fearing for his job as he indicated.

Without laying blame on the prosecutor for the obvious reason that he appeared to be unsure whether to concede or not for fear of a black lash, the court nonetheless acknowledged that subsequent to the making of the application for discharge by the accused the prosecutor

dutifully and honourably conceded the application for discharge which however ought not to have been made because it was obvious what the decision of the court was going to be. The Prosecutor General is reminded of his independence of function as provided for in the constitution in s 260. His office should execute the prosecutorical functions without fear, favour, prejudice or bias. Prosecutions should be undertaken because there is sufficient reliable evidence to place before the court. Decisions to decline a prosecution or to withdraw it, hard and unpopular as they may be should be made and the court should not be used as a decision maker in unmeritorious prosecutions where an acquittal is a foregone conclusion before the case is called in court. Bringing a useless case before the court leads to the public losing confidence in the judicial criminal justice system because the complainants/victims and those who have suffered the loss of a loved one as in this case may wrongly conclude that the court is not sensitive to combating and punishing crime. Wrong motives are also likely to be attributed to the Courts when the courts are seen as letting guilty people free yet the true position is that a finding of guilt does not depend upon the fact that a person has been arrested and brought before the court on allegations of committing the crime charged but on evidence which is placed before the court. Such evidence is gathered by the police. Where police fail to gather evidence, then, no conviction can ensue since the procedure of prosecution is accusatorial whereby an accused has no onus to prove his innocence or to assist in investigations against himself. He has a right to remain silent, sit by and say "find the evidence if you dare." A paradigm shift on the part of the police and the Prosecutor General's office is required in regard to the issues I have ventilated.

This case is concerned with factionalism in the Johanne Masowe Vadzidzi vaJesu religious sect. It is not necessary to detail all the evidence which was led in court. What emerged at the end of the testimonies and cross examination of witnesses Admore Chikwenya, the State's principal, witness and Matirera Chikonyora who are both members of the fragmented church was that the tragic death of the deceased was a result of religious factionalism.

The church founder referred to as Vadzidzi Vimbo was said to be under capture against his will by a faction which allegedly adopted what was referred to as Tianshe. The tianshe concept was described by Admore Chikwenya as encompassing the acceptance that members of the church could trade in tianshe products for monetary gain. The other faction to which Admore Chikwenya who hailed from Bulawayo and the deceased who hailed from Gwanda subscribed to was opposed to the Tianshee adaptation. This faction instead remained loyal to

the doctrine that success was dependent on prayer and that it was only through prayer that a convert of the church could be inspired to succeed in his or her life endeavours. The disagreements in the church became so deep rooted that it resulted in witch hunts within members.

The deceased was a victim of such a witch hunt where the opposing faction sought to pluck out dissenters to the new order of adopting Tianshee into the church practices. Admore Chikwenya gave evidence that him and the deceased were kidnapped from the main annual church gathering where the main sermon was being conducted including baptisms. The two were driven in a motor vehicle to some place along the same river from where the main sermons were being conducted. It was at some spot near Sisokwe the bridge that the deceased was taken into the water and dipped in a process which the investigating officer confirmed to have been acceptable in the church as a process of cleansing a church member who had errored.

The problem is that the witness Admore Chikwenya could not identify the kidnappers from the 6 accused persons on trial nor to testify as to who did what. On his part Admore Chikwenya remained under guard in the vehicle. His evidence on the identity of the kidnappers as properly conceded by the State counsel was inconclusive and so unreliable that no reasonable court could place reliance on it. The question is, why was it that a person could just be killed within the vicinity of an annual gathering of over 5000 people and police fail to gather evidence of what exactly transpired.

The investigating officer detective sergeant Makasi admitted the short comings and interference which faced him when he investigated the matter. He arrested the accused persons on the basis of information which at best was rumour. The police officer did not find direct evidence from any witness who could say he or she identified the 6 accused person as the ones who perpetrated the offence. The police did not carry out an identification parade which would have enabled witnesses to identify the perpetrators of the crime. The reason given by the police sergeant for not carrying out the identification parade was that witnesses were not forthcoming and were afraid of reprisals, perhaps from the church members or fractured leadership. Indications made at the scene were not helpful to the case.

When the court asked the police sergeant as to what difficulties he faced with what should have been a simple investigation, the police sergeant responded that there was a lot of interference with investigations. On one hand he faced interference from the church security team which was headed by an Army General, called Nyikayaramba. There were people from the church shrine who kept threatening witnesses. There was also political interference wherein

political leaders whom the police officer did not name wanted investigations wrapped up in no time which task the investigating officer found impossible. He said that, but for the interference and pressures brought to bear upon him, he could have properly investigated the case. The police sergeant said that he also faced interference from his boss, the Commissioner General, Mr Chihuri. The witness testified that he never got to the ground to do proper investigations and even witness statements were given to him after being recorded by other police details. The police sergeant presented a picture of a troubled investigator who otherwise had wanted to give his all and come up with a properly investigated case meeting his standards but was not given the chance to show his prowess through interference by powers above him. The practice of interfering with police investigations must be deprecated in the strongest extreme because the rule of law must be allowed to flourish if as a country we look to and wish for a protection, promotion and fulfilment of human and fundamental rights as enshrined in the constitution. Police officers must be non-partisan and professional. They should be allowed to carry out their functions without fear or favour as provided for in s 219 of the Constitution.

That said, the long and short of the tragedy of this case is that it was poorly investigated and perfunctorily so. The Criminal Procedural and Evidence Act, in the already referred to s 198 (3) mandates the court to enter a verdict of not guilty in favour of the accused if at the close of the State case, there is no evidence led that the accused committed the offence charged or any competent offence on which the accused could be convicted on the charge. From all the evidence led in court, there was no evidence which the court could rely on to find a *prima facie* case as having been established against al the accused person. The court has already commended the concession made by the prosecutor that he could not oppose the applications for discharge although under the circumstances the most appropriate step to take as already alluded to, would have been for him to throw in the towel and withdrawn the charges.

Under the circumstances, the hands of the courts are tied. It is required to pronounce a verdict, which is not that the accused are innocent but that they are not guilty. It is so ordered and the accused are set free.

National Prosecuting Authority, for the State
Gumbo & Associates, 1st – 4th and 6th accuseds' legal practitioners

Mugiya & Macharaga, 5th accused's legal practitioners