

THE STATE

vs

WONDERFUL MANJORO

HIGH COURT OF ZIMBABWE

MAWADZE J.

MASVINGO, 7, 8, 17 October and 15TH November, 2019

Assessors

1. Mrs Chademana
2. Mr Mushuku

Criminal :- Trial within a trial

Ms M. Mutumhe for the state

Ms G. Bwanya for the accused

MAWADZE J: The accused who resides in Village 25, Chief Sengwe, Chiredzi is facing two counts.

In count 1 the accused is facing the charge of murder as defined in s 47(1) of the Criminal Law (Codification and Reform) Act [*Cap 9:23*] in that on 18 June 2015 at Gonowani Village, Headman Mpapa, Chiredzi the accused stabbed the now deceased Stephen Chikucha with an unknown sharp object in the chest causing his death.

In count 2 which relates to attempted murder defined in s 189 as read with s 47(1) of the Criminal Law (Codification and Reform) Act, [*Cap 9:23*] it is said that on 29 June 2015 at Murengwami Village, Headman Mpapa, Chief Sengwe, Chiredzi the accused attempted to kill Onias Chibhombise by stabbing him with an okapi knife in the neck.

The accused totally denies the charges in both counts. In fact the accused said he was unknown to both the now deceased in count 1 and the complainant in count 2. The accused

said he does not even know the alleged crime scenes in both counts. As regards count 2 of attempted murder the accused said at the time the alleged offence was committed he was at his residence with his parents and nowhere near the crime scene.

During the State case the prosecutor led evidence from Beauty Aleck in count 1, Onias Chimbombise complainant in count 2, Amos Chinherera in both counts 1 and 2. The evidence of John Makondo, Dr Tungamira Isaac Rukatya and Dr Mutengerere was admitted in terms of s 314 of the Criminal Procedure and Evidence, Act [*Cap 9:07*].

It was during the evidence of D/Assistant Inspector Victor Chinoni (D/Assistant Inspector Chinoni) that *Ms Mutumhe* for the State sought to produce the accused's unconfirmed warned and cautioned statement and *Ms Bwanya* for the accused objected. The basis of *Ms Bwanya's* objection was that the said unconfirmed warned and cautioned statement was inadmissible on the basis that it was improperly obtained. *Ms Mutumhe* submitted that she intended to rely on this statement in the prosecution case and proceeded to apply to conduct a trial within a trial. This judgment therefore solely concerns itself with a trial within a trial in order to determine the admissibility of the unconfirmed warned and cautioned statement made by the accused. This statement in issue was made during video recording. In order to determine its admissibility the court had to watch, in camera, the recorded video. The written statement was not obviously produced at this stage. Further, in view of the nature of the State case I decided to watch the video recording and make a determination in the absence of the learned assessors Messrs Mrs Chademana and Mr Mushuku.

During the trial within a trial the State led evidence from D/Assistant Inspector Victor Chinoni (D/Assistant Inspector Chinoni) who recorded the statement in issue, D/Sgt Thulisani Moyo who witnessed the recording of the warned and cautioned statement and D/Cst Benard Chimbeke who operated the video camera. The accused gave evidence.

Before dealing with the evidence led during the trial within a trial I shall briefly discuss the law in relation to unconfirmed extra curial statements and their admissibility.

THE LAW

The rights of an arrested and detained person are provided for inter alia in s 50; s 52(a) and s 70(3) of our Constitution. In brief s 50 of the Constitution provides for the rights of an arrested and detained person, section 52(2) (a) protects any person from all forms of violence whether from public or private sources. In terms of s 53 of the Constitution no person shall be subjected to physical or psychological torture, or to cruel or, inhuman or degrading treatment

of punishment. Section 70 deals with the rights of any person accused of any offence and specifically s 70(3) provides as follows:-

“(3) *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 interests.*”

Section 50(1) (c) of the Constitution requires that an accused person be treated humanely and with respect for their inherent dignity. In terms of s 50(4) (c) an accused person has a right not to be compelled to make a confession or an admission. All these are fundamental rights this court is enjoined to protect during criminal proceedings and as provided in s 86(3) of the Constitution. Some of these rights are non-derogatory rights and may not be limited or violated.

Section 256 of the Criminal Procedure and Evidence Act [*Cap 9:07*] deals with the admissibility of confessions or statements made by an accused person. It is important to note that this relates to either written, oral, tape, video recorded or statements made in other forms. See *S v Nkomo & Anor.* 1989(3) ZLR 124 F – 125 A. The essential requirements of admissibility of such an accused’s statement or confession is that it should have been made freely and voluntarily without the accused being unduly influenced thereto.

It is beyond the scope of this judgment to discuss what is undue influence. I shall therefore limit myself to what the accused alleges was done to him to compel him, to give the warned and cautioned statement in issue. Suffice to mention that generally undue influence entails anything repugnant to fairness and the fundamental principles upon which our criminal justice system is based. These include *inter alia*, improper manner of questioning or interrogation which may be aggressive and unduly lengthy; unnecessary confrontation meant to bring pressure to bear upon an accused person; physical maltreatment or violations visited upon an accused person, or such threats; inducements like promised release from custody, special treatment, privileges or offers of reward or leniency and denial of rights like access to legal representation or presence of a guardian where juveniles are involved. Indeed the list is endless, and each case depends on its own facts.

It is trite that the onus is on the State to prove beyond reasonable doubt that the statement an accused person alleges was improperly made is admissible see *R v Jacobs* 1954 (2) SA 320 (A).

Lastly, I would hasten to point out that the nature of the statement, (that is whether confirmed or unconfirmed) and the nature of an accused person's challenge determines whether a trial within a trial is necessary. It should be borne in mind that a trial within a trial is held to establish a question of law, the admissibility of the challenged statement, and not a question of fact like whether an accused person made statement or not. The latter is a factual issue which can be resolved by leading evidence in the main trial to establish whether the accused made the statement or not see *S v Shezi* 1994 (1) SACR 575.

I now proceed to apply these principles in this case.

THE ACCUSED'S EVIDENCE

The unconfirmed extra curial statement the State seeks to rely upon is a written statement which the accused made during a video recording. The nature of the accused's challenge is that it was not made freely and voluntarily hence it is inadmissible.

It is common cause that an attempt was made by the police to have this statement confirmed at Chiredzi Magistrates Court and that it was not confirmed as a result of the accused's objections. What is critical to note however is that at the Magistrates Court the nature of the accused's objection or complainant in relation to this statement was that he had simply been "intimidated".

In his defence outline made during a trial within a trial the accused said he only made the statement after being physically violated or assaulted. He said threats of further assault were made if he did not accede to the police's demands to admit to the charges. The accused in that defence outline went on to narrate the sequence of events.

Firstly, the accused said he was assaulted by D/Assistant Inspector Chinoni and D/Sergeant Moyo on 2 July, 2015 at Chikombedzi Police Station before being taken for indications.

Secondly, the accused said the police details forced him to admit to the charges telling him that he had committed these offences for ritual purposes based on some alleged superstitious belief. The accused said he was forced to admit that he committed the offences in counts 1 and 2 in order to extract human blood from the victims under the superstitious belief that such human blood would heal his back pains.

Thirdly, he said at the alleged crime scenes in count 1 and count 2 he was further assaulted.

Fourth, the accused said in the morning when his statement was later recorded at ZRP Chiredzi, D/Assistant Inspector Chinoni and D/Sgt Moyo handcuffed him. Thereafter he was

forced to place his hands between his legs. A log was then put behind his elbows which log was suspended on two desks. While in that painful position the accused said the two police details assaulted him under the feet and on his buttocks. He said the assault continued until due to pain he admitted to the charges in both counts. The accused said that it was after this brutal assault which culminated in his admission and that the statement in issue was then video recorded.

I understand from this defence outline that the accused's contention is that this statement is inadmissible as it was improperly obtained contrary to the provisions of s 256 of the Criminal Procedure and Evidence Act [*Cap 9:07*]. Further, the accused is alleging that his constitutional rights were violated as he was compelled to make a confession or admission contrary to the provisions of s 50(4) (c) of the Constitution. Lastly, the accused is alleging that this statement is improperly obtained evidence contrary to the provisions of s 70(3) of the Constitution and that its admission would render this whole trial unfair and not in the interests of the proper administration of justice.

When the accused took the witness stand his version was as follows:-

He said after being detained at ZRP Chikombedzi he first met the four CID details from Chiredzi on 30 June 2015 when they took him from the cells and interrogated him about the two counts which he denied. Thereafter he said an identification parade relation to count 2 was conducted. He said his woes started soon after this identification parade. The accused said the CID details said that he, the accused, was wasting time denying the offences when in fact he had been identified during the identification parade.

The accused said he was then physically violated as follows;

- (a) At ZRP Chikombedzi he said D/Assistant Inspector Chinoni and D/Sgt Moyo hit him about twenty times under the feet after which they drove him to Chiredzi police station
- (b) The next morning at ZRP Chiredzi he was taken from the police cells and questioned about the two offences which he denied. He was again hit under the feet by D/Assistant Inspector Chinoni and detained. Later that day he was taken for indications.
- (c) During indications at the alleged crime scenes he said D/Assistant Inspector Chinoni pulled out a firearm threatening to shoot him if he persisted in denying the offences and had to be restrained by D/Sergeant Moyo. At the alleged crime scenes both D/Assistant Inspector Chinoni and D/Sergeant Moyo narrated to him how the

offences in both counts were committed after which he was forced to recite that account as he was video recorded. Thereafter he was taken to his home in order to recover the knife used in the alleged commission of the offense and a brown jacket they alleged he was wearing despite that he had no such items. They returned to ZRP Chiredzi.

- (d) The next day at ZRP Chiredzi on 3 July, 2015 he was taken from the police cells and again asked about the offence which he denied. He was then handcuffed and positioned in the manner already explained in his defence outline after which both D/Assistant Inspector Chinoni and D/Sergeant Moyo severely assaulted him until he admitted to both charges. Thereafter he was questioned and forced to narrate how he allegedly committed the offences without any video recording being made in the manner police had told him. He complied.
- (e) After such compliance the video recording of the warned and cautioned statement played in court was then done. Accused said he simply repeated what he police had told him to say. Thereafter he was taken to court for confirmation proceedings.
- (f) The accused said at court he naturally disowned the statement improperly obtained and showed the presiding Magistrate the injuries on his swollen hands caused by the handcuffs and also revealed that his feet were painful. The statement was not confirmed.

THE STATE'S EVIDENCE

The state led evidence from three CID details, D/Assistant Inspector Chinoni who recorded the statement, D/Sergeant Moyo who witnessed the recording of the statement and D/Cst Bernard Chimbeke who took the video or recorded the proceedings on the video.

1. D/Cst Benard Chimbeke (D/Cst Chimbeke)

D/Cst Chimbeke said his task was to simply capture the proceedings of the recording of the warned and cautioned statement on the video. He disputed that any pressure or force as brought to bear upon the accused. He said the accused was never intimidated, assaulted or forced to give the statement. He was also part of the CID details who took accused from ZRP Chikombedzi to Chiredzi a distance of about 120 km. No useful questions were put to him in cross examination.

2. D/Sgt Thulisani Moyo (D/Sgt Moyo)

D/Sgt Moyo is the investigating officer in both counts but his role in respect of the statement was to witness its recording in writing and on video. He said after accused's rights

were explained the accused whom he described as very co-operative elected to give a statement. He too denied that the accused was intimidated, forced, assaulted or threatened to give the statement. D/Sgt Moyo dismissed accused's allegations of impropriety as false.

Under cross examination D/Sgt Moyo said he only later learnt that the accused had disowned the statement at court during confirmation proceedings alleging what accused called "police intimidation". He said they could not record accused's warned and cautioned statement at ZRP Chikombedzi where they went to collect the accused as they had no video camera. He said the accused at ZRP Chikombedzi initially denied the charges but changed his version later at ZRP Chiredzi.

3. D/Ass Insp Victor Chinoni (D/Ass Insp Chinoni)

D/Ass Insp Chinoni is the detail who recorded the accused's statement and is implicated by the accused.

D/Ass Insp Chinoni said he is part of CID details who took accused from ZRP Chikombedzi to ZRP Chiredzi. At Chiredzi both D/Sgt Moyo and D/Cst Chimbeke witnessed the recording of the warned and cautioned statement. He said he properly warned accused of his rights and accused gave his statement freely and voluntarily. Thereafter the accused read the statement and signed it. He disputed that the accused was coerced, forced or assaulted.

Under cross examination D/Ass Insp Chinoni explained that there are two discs, one for the recording of warned and cautioned statement and the other for indications which indications were not part of the trial within a trial. He said he is not part of the police details who took accused to court for confirmation proceedings.

D/Ass Insp Chinoni said after accused disowned the warned and cautioned statement at court alleging intimidation, he had to play the video recording to the Officer in Charge CID to show how he recorded the statement which was typed electronically and video recorded.

I noted that D/Ass Insp Chinoni was a very impressive witness. Besides being an eloquent speaker, his attention to detail and knowledge of his work is excellent. The professionalism he exhibited in recording the warned and cautioned statement as seen on the video is commendable. Indeed *Ms Bwanya* understandably found it difficult to cross examine him, let alone to make any inroads into his evidence.

On the other hand the accused impressed me also as a soft, smooth and eloquent speaker. His unassuming demeanour may be misleading. Be that as it may this matter cannot be determined on eloquence alone.

ANALYSIS OF EVIDENCE AND FINDINGS MADE

I had the opportunity to view the video recording of the warned and cautioned statement, I did note that throughout the recording the accused was allowed to tell his story, presumably in his own words without any interruptions see *R v Shaube-Kuffler* 1969 RLR 78 (A). The accused's narration of events is detailed and lengthy. In the circumstances it is highly improbable that all that detail were words put in accused's mouth which he memorised. It is precisely for this reason that I had to watch the video recording of the statement. I had a keen interest to observe if there were any signs that the statement was improperly obtained or not made freely and voluntarily. At this stage I was not worried much about the contents of the statements *per se* but to assess the accused's demeanour. I however noted that the statement is detailed. While the statement is incriminatory it is also exculpatory in that the accused emphasised that he had no intention to kill any of the victims.

Turning to the video recording I noted the following:-

- (1) The accused's rights were well explained and the accused listened attentively. The accused who then elected to give the statement was allowed to give an uninterrupted account and D/Ass Insp Chinoni only sought clarifications after the accused finished his explanation. As already said the statement is quite lengthy
- (2) The accused gave a coherent, free flowing account in Shona
- (3) Before even giving the statement the accused sought clarification from D/Ass Insp Chinoni on where to start and he was allowed to start from wherever he believed was relevant
- (4) As the accused gave the statement he was seated on a chair. Despite that his hands were handcuffed the accused was gesturing using hands to emphasize whatever he was explaining. He commenced his account from the time he said he was in South Africa in order to give background information for his alleged conduct
- (5) The accused articulated the dates, time, manner and how he met the alleged victims
- (6) As the accused gave the statement he did not exhibit any signs of discomfort and was not fidgeting but seemed alive as to the serious nature of the proceedings
- (7) D/Ass Insp Chinoni only sought details or clarifications arising from the accused's own explanation, for example if accused knew the deceased or complainant before, or the description of the knife allegedly used and its owner

- (8) After the statement had been typed/recorded the accused was given the statement to read it himself. I noted that the accused took his time reading the statement to himself as shown by the movement of his lips. He held the statement with both hands. The concentration exerted in reading the statement by the accused was evident as he moved from one page to the other
- (9) After confirming the correctness of the statement the accused was asked to sign and he inquired why he should sign after which D/Ass Insp Chinoni explained the purpose of signing and thereafter he signed.
- (10) The video ends with accused proceeding to make indications which are not subject of this hearing. However I observed that accused at the alleged scenes of crime walked without any difficulty.

A proper analysis of accused's evidence shows that the accused was not consistent in his outline of version of events. The alleged assault twenty times under the feet, the threats made with a firearm and the alleged rehearsal of events were all not part of accused's defence outline. Further all these issues accused later said in his evidence were not put to D/Ass Insp Chinoni or D/Sgt Moyo in cross examination.

It is difficult in the circumstances to accept that this statement was foisted on the accused. As the accused explained the gestures he made were his own. The accused admitted that the questions he asked were also his own meant to safeguard his rights.

The alleged gaps in the video referred to by Ms Bwanya are difficult to appreciate in light of the explanation by D/Ass Insp Chinoni and that accused's alleged indications are not before the court.

After a careful analysis of the evidence I find nothing to suggest that the accused was swayed by any external impulses or that any form of pressure was improperly brought to bear upon him to cause him to give the warned and cautioned statement. There is nothing to negative his freedom of volition. This explains why even before the Magistrate who declined to confirm the statement the accused only alleged "intimidation" not the physical violence he now outlined in an inconsistent manner before this court. If accused had been assaulted as he alleges he would have said so to the Magistrate. I am not persuaded by accused's evidence that the very Magistrate who declined to confirm his statement would fail to properly record the alleged impropriety accused alleged to him or her let alone to fail to note the injuries the accused exhibited to the Magistrate. It is incredible to suggest that the Magistrate ignored all that as accused now alleged.

I am satisfied that the State has discharged the evidential onus thrust upon it as regards the admissibility of the accused's unconfirmed warned and cautioned statement. It has been proved beyond reasonable doubt that the accused made the statement freely and voluntarily without being improperly influenced thereto. After making this finding I have no discretion to exclude accused's warned and cautioned statement.

In the result, it is my finding that the accused's unconfirmed warned and cautioned statement is admissible.

Accordingly, the accused's warned and cautioned statement is admitted as Exhibit 5 which includes both the written statement and the accompanying video recording of that statement.

National Prosecuting Authority, counsel for the State
Chihambakwe Law Chambers, pro deo counsel for the accused