

REPORTABLE (59)

KIZITO MUTSURE
v
THE STATE

SUPREME COURT OF ZIMBABWE
MAVANGIRA JA, UCHENA JA AND MAKONI JA
HARARE: 28 JANUARY 2020 & 20 MAY 2021

T. Mpofu with *T.L. Mapuranga* and *A. Rubaya*, for the appellant

T. Mapfuwa, for the respondent

MAVANGIRA JA:

1. This is an appeal against the conviction and sentence of the appellant by the High Court on a charge of murder.
2. The appellant was charged with murder as defined in s 47(1) of the Criminal Law (Codification and Reform) Act, [*Chapter 9:23*]. The allegation was that on 23 October 2011 at house number 221 Ephraim Blank Street, Chivhu, he unlawfully caused the death of Modester Chikaka by pouring paraffin over her body and setting her on fire causing severe burns all over her body, from which injuries she died on 26 October 2011.

3. The appellant pleaded not guilty to the charge alleging that the deceased had poured paraffin over her body and set herself alight. He was convicted after a full trial and sentenced to 13 years' imprisonment.

4. The State's case was based largely on circumstantial evidence. The State led evidence from three witnesses; Tawanda Miti (Miti), a police officer, his wife Nyasha Tsopotsa (Tsopotsa) and Sekai Guramatunhu (Guramatunhu), also a police officer. The evidence of Miti was to the effect that his wife and he shared the same residence with the deceased. They lived in adjoining rooms that shared the same veranda. Each room had its own entrance door from the common veranda. The deceased occupied one room at the furthest end. The witness, together with his wife and brother, occupied the next two rooms after the deceased's. The fourth door led into a common washroom and toilet. Behind the toilet was a water tap.

5. During the night in question, after having retired to bed, he was awoken by the screaming of a person calling out his name. He went out of his room and saw flames of fire inside the deceased's room. He next saw the appellant arriving on the veranda. He instructed the appellant to put out the fire that was burning in the deceased's room. He next saw the deceased coming from behind the residence in the direction of where the water tap was. He observed burn injuries on the deceased's body. The deceased said to the appellant words to the effect "Why did you not pour paraffin on yourself as well since you said that you wanted both of us to die?"

6. The deceased kept on saying this and went on to tell the witness that the appellant was in possession of the matches which he had used to set her ablaze after he had poured paraffin on her from a paraffin stove. The witness inquired from the appellant who told him that

the deceased had set herself ablaze. The witness gave instructions for the deceased to be wrapped in a cloth. He, in the company of his brother, drove the appellant and the deceased to Chivhu Police Station where the appellant was searched and the matches was found in his pocket. He thereafter drove the deceased to hospital.

7. The witness was found to be a honest, impressive and reliable witness in the assessment of the court *a quo*.
8. The second witness, Tsopotsa's evidence was to the effect that as they were asleep during the night of 23 October she heard the deceased screaming "mai wee ndofa" which was translated to mean "mother I am dying." Soon thereafter she heard the sound of a door being opened. She heard footsteps going to the backyard at the same time as the deceased yelled "Brandon's father!", a reference to the witness' husband. In response, her husband went out with her in tow. She saw the deceased standing by the doorway to the toilet. The half petticoat that the deceased was wearing had been burnt and was stuck to her body. She had burn injuries on her body. The appellant was standing by the deceased's doorway. The deceased accused the appellant of setting her alight and demanded that he finishes her off as he had been ill treating her for too long. The appellant, on the other hand, was saying that the deceased had burnt herself. The witness also saw smoke coming out of the deceased's room.
9. The witness was instructed by her husband to find something to wrap the deceased with as she was virtually naked. She took a sheet from the deceased's bed and wrapped her with it before her husband instructed the deceased to get into the vehicle so that they could proceed to the hospital. The appellant also boarded the same vehicle and they left.

10. As with Miti, the court *a quo* was impressed by the witness' demeanour. It found that her evidence was largely corroborative of that of Miti. The court *a quo* also noted that the witness' evidence that the deceased accused the appellant of persistent harassment and further said that the appellant ought to have finished her off was not disputed or challenged in cross examination. The court thus accepted that the deceased uttered the words testified to by the witness.

11. Sekai Guramatunhu was the State's third and last witness. On the night in question at around 2:00 or 3:00 am she was at the police station when Miti entered the charge office with the appellant. After Miti made a report to her she went outside to where Miti's vehicle was. Inside the vehicle was the deceased who was in pain. She observed the injuries that the deceased had sustained and suggested that she be ferried to the hospital. The appellant followed her to the vehicle and told her not to talk to the deceased as she had been burnt. She assumed that the appellant's utterance was because the deceased was in pain.

12. The defence applied for discharge at the end of the State case in terms of s 198 (3) of the Criminal Procedure and Evidence Act, [Chapter 9:07]. The State consented to the application. The court *a quo* had a different view and it dismissed the application on the basis that the evidence that the State had adduced raised a *prima facie* case that the appellant had to answer.

13. In its ruling the court *a quo* stated *inter alia*:

“In short the accused does not deny being in the company of the complainant (sic) at the time that this incident took place. The deceased ended up dead in circumstances where there were certain utterances which intended (sic) to lead to an inference that the accused may well have had something to do with this matter. It is only fair that the court

is placed in a position to get the whole story of what took place. The accused is the only person who was there who can give such story. That application is dismissed.”

14. The appellant’s evidence was to the following affect. The deceased was his second wife and had been so for five years. He had no children with her but had four children with his first wife. On 23 October 2011 he arrived at the place where the deceased was staying at about 1:00am. The deceased opened the door for him and they exchanged greetings. She went back to bed and he “sat on a chair which was next to the table and this table is located next to the bed.” He advised her that there were some issues that he wanted to talk to her about. She got out of bed and got dressed in a skirt and a blouse. She went and sat across the table opposite to where the appellant was seated.

15. When asked what sort of conversation he had with her he said:

“I then advised her that she was in the habit of going to the bars in my absence. I even went to tell her (sic) the names of the persons who had told me this information. These people were my relatives and were actually known to her. ... They are two of my brother’s sons. ... I then advised her that by going to the bars like what she was doing these young men were actually seeing them (sic) and as such was causing a lot of embarrassment. ... She was silent during the time that I was telling her that. But she suddenly got up and said that she was going to set herself alight. ... During the time that she was making that utterance she was actually making the way to the stove that was located next to the bed. ... It was a pram (primus) stove that normally uses paraffin. I had eventually bought that paraffin stove for use during the time that there will be no electricity. ... She suddenly got up, grabbed the stove and poured the paraffin on herself. ... She let go the stove and she quickly grabbed the matches. It was during the time that I quickly grab (sic) (grabbed) her by both hands as I was afraid that she might strike the matches. I then kept a firm grip on the hand holding the matches in order that she will not be able to lit (sic) (light) the matches. I took the matches from her and placed it in my pocket. ... I then asked her why she wanted to set herself on fire. ... She did not respond and she went back and sat on the chair and I sat back on my chair. I then asked her why she wanted to set herself on fire and that I was just reprimand(ing) her not that I no longer loved her. ... She did not reply. I then kept on telling her to desist from her behaviour and that I was going to continue maintaining her as I have (sic) been doing before. Thereafter she first remained silent. I then started to contact her aunt and her sisters unfortunately I failed to get through to them. I continued sitting down trying to cool her down whilst advising her to desist from her behaviour. It was after some time had lapsed whilst I was trying to contact her aunt and her young sister and I was failing to get through. So we sat for quite some time ... I was afraid to leave as I thought that maybe she might do something. It was after we had settled for quite some time that she might

have noticed that I was dozing as it was during the night that she took advantage because I just suddenly heard the sound of a chair being moved. When I got up she had already stood up and rushed to get another box of matches that I had not noticed.”

16. The appellant was asked how much time had elapsed between the time that she poured paraffin on herself and the time when she rushed to get another box of matches. His response was “I think about 30 minutes when I was talking to her.”

17. He proceeded to state as follows:
“When I heard the sound of the chair and I got up he (sic) (she) was already stood up (sic) and picked up the matches box (sic) and she then struck the matches. I also assumed that because of the time that we had spent after she had poured paraffin on herself that maybe it might have vapoured off. She actually directed the flame of the match on the bottom but it failed to catch and she put it under her arm and she then caught the fire. ... She then screamed whilst advancing towards me. ... She appeared she actually wanted to grab me by the neck, but she missed, then she grabbed me by one of my hand(s) on the upper arm. During the time she was now on fire. She actually held me in an indication that she did not want to let me go (sic). It was then that I also caught the fire such that I also suffered injuries. I realised that the fire was quite great and that my life was also in danger that is when I decided to open the door whilst she was still holding me. I then advised her that she had to go to the tap (tap) so that I put out the fire. She left hold of me as we were by the door and she was now in front. When we got to the tap I instructed her to kneel down, I opened the tap and there was now water that was being poured on her head (sic) and all the body. (my emphasis)

18. It is opportune to briefly digress at this stage and take note that in his confirmed warned and cautioned statement the appellant did not make any mention of having dozed off. He said that after setting herself on fire the deceased embraced him and he opened the door whilst she was so embracing him. He stated *inter alia*:

“She went and sat on a chair which she had been sitting on and I also sat on a chair. We spent about ten to fifteen minutes while I was questioning her about the story but she was not responding. Whilst I was sitting, Modester Chikaka got up from where she was seated and picked another matches (sic) and struck a matchstick before I got close to where she was and lit herself and embraced me whilst she was screaming. I opened the door while she was still embracing me and she was crying. When I opened the door, the fire burned heavily. She then ran to the tap (sic) where she poured some water on her. (sic) I followed her to the tap, (sic) helped her to extinguish the fire. I then went into the house to extinguish (the) fire which was burning there and that was when Modester Chikaka informed her neighbours that I had burned her. I did not want to dispute with her because it was a waste of time.”

19. The appellant further stated in his testimony before the court *a quo* that after putting out the fire he rushed towards the veranda where Miti gave him a bucket which had water in it and told him to put out a fire that was burning inside the deceased's room. Inside the room he saw something that was burning on the floor. It appeared to be a skirt and he poured water on it thereby putting out the fire. There was another fire burning at the spot where the deceased had poured paraffin on herself. After putting out the fire in the room he went outside and in his words he found the deceased "telling Miti and others that I had actually poured paraffin on her and set her on fire. But I actually denied that and advised that she had done that to herself. But after I had advised her that I am not the one who had poured paraffin on her, she then kept silent on that aspect."
20. The appellant was asked how many minutes elapsed between the time that he put out the fire on her at the tap and the time that he found her alleging to Miti and others that he had set her on fire. His answer was "I think the incident could have taken about five minutes." He stated that when she was making the allegation she was no longer on fire as he had doused it.
21. It was also the appellant's evidence that during the time that the deceased was on fire and was crying out he could not make out what she was saying.
22. Under cross examination the appellant said that the deceased called out to Miti after he had put out the fire that was burning her and as he was putting out the fire in her room. He said that the deceased only screamed out the words "oh mother I am dying" after he had put out the fire on her. He further said that the deceased was lying about everything that she was saying to Miti and the others. He accepted that the deceased did ask him

why he had not also burnt himself. He said that she was lying but he thought that it was no use arguing with her considering the state of her injuries at the time and his concern was to seek medical attention for her.

23. As to why he had not asked or caused the deceased to remove the clothes on which she had poured paraffin his response was that he did not think of it and that he thought the clothes would dry up. He also thought that the deceased made the utterances that she made against him in order to “fix” him because he had exposed her infidelity of being seen in bars with other men.
24. The court *a quo* convicted the appellant on the basis that the circumstantial evidence placed before it proved beyond reasonable doubt that he had committed the offence. It also found that the State witnesses were credible witnesses. It concluded that the utterances made by the deceased constituted *res gestae* and were admissible against the appellant. It was the court *a quo*'s view that the issue was whether it was the appellant who had poured paraffin on the deceased and set her ablaze resulting in the injuries from which she died and that the absence of a post mortem report was not fatal to the State case. It concluded that it was the appellant who had poured paraffin on the deceased and set her ablaze.
25. The appellant raised the following five grounds of appeal against his conviction and one against sentence:
 - “1. The Court *a quo* erred in coming to the conclusion that the State had proved beyond any reasonable doubt the appellant doused Modester Chikaka “the deceased” with the paraffin and set her alight in the absence of admissible evidence supporting that conclusion.
 2. The Court *a quo* lost its path in concluding that the deceased died from the fire in the absence of a post-mortem report supporting that finding.

3. The trial court erred in misapplying the doctrine of *res gestae* by admitting inadmissible hearsay evidence of the deceased in circumstances where the State had not satisfied the pre-requisites of such admissibility.
4. The Court *a quo* misapplied rules of circumstantial evidence and misdirected itself by making a finding that the appellant committed the *actus reus* of murder in the absence of any proved facts from which that inference could be drawn.
5. The Court *a quo* fell into error by summarily rejecting the appellant's defence as inherently improbable that it could not reasonably be said to be true in circumstances where the evidence before it supported such a defence.

AD SENTENCE

1. The Court *a quo* erred in imposing a disturbingly severe sentence in circumstances where the Court *a quo* had made (a) finding that appellant's mitigation was considerably weighty."

ISSUE TO BE DETERMINED

26. The issue to be determined is whether or not the State proved the appellant's guilt beyond reasonable doubt.
27. Mr *Mpofu*, for the appellant, based his oral submissions before us on five points. The first, which he indicated was not covered in his heads of argument, was that the court *a quo* proceeded under circumstances of an irregularity, the irregularity being that the summary of the State case contained allegations on which no evidence was led by the State, that such irregularity was designed to undermine the appellant's defence and colour the court's mind and that both these aims were achieved.
28. From the other four points that he said were covered in his heads of argument, the second point was that on the application of the proper legal test, it cannot be said that the defence put forward by the appellant in the court *a quo* was false and consequently worthy of the rejection by the court.
29. The third point was that the cause of death was not established in the court *a quo*.

30. The fourth point was that the court *a quo* irregularly admitted inadmissible hearsay evidence and went on to found its judgment on such inadmissible evidence.
31. The fifth and final point was that the requirements for a conviction based on circumstantial evidence were not met *a quo*.
32. With regard to the first point the contention was that the State made damning but false allegations against the appellant on which no evidence was led. Specific reference was made to paras 2, 3 and 4 of the Summary of the State case as reflected at p 2 of the record of proceedings. Mr *Mpofu* particularly highlighted para 3 which reads:

“The accused proceeded to take a paraffin stove which was in the room and poured the paraffin onto the deceased. He took a box of matches from his trousers pocket, lit one match stick and threw it on the deceased’s body setting her alight.”
33. It is my view that if the court *a quo* convicted the appellant purely on the basis of what is stated in the State Summary and not on the basis of the evidence that was placed before it, then it goes without saying that the conviction would be baseless and would not survive this appeal. If, as alleged, the court’s mind was “coloured” and the appellant’s defence “undermined” by the averments in the State Summary, such should be discernible from a reading of the court’s judgment as it would have no cogency on the basis of the evidence that was placed before it. In this regard I also take it that by the use of the word “coloured” the defence meant that the court *a quo* was unduly influenced in a negative manner to the prejudice of the appellant.
34. It is trite that an appeal to this Court is based on the record. It is also trite that an appellate court will not interfere with the decision of a trial court or tribunal unless the trial court

or tribunal fundamentally misdirected itself in arriving at its decision. It is trite that an appellate court will not lightly interfere with a trial court's factual findings.

35. It is common cause that the appellant's conviction was not based on direct evidence. There was only circumstantial evidence that was adduced before the court *a quo*. I might at this stage deal with and comment on the issue raised that the cause of the deceased's death was not established. On this aspect the court *a quo* stated:

"In reasoning that a *prima facie* case was established in relation to the main charge, I do so mindful of the defence argument that a post mortem report was not produced. I however considered that proof of death may arguably be established from the fact that no issue is taken by the accused to the allegation that the deceased died of burn injuries as alleged in the indictment."

36. In this regard para 3 of the appellant's Defence Outline is, in my view, pertinent. It reads in part:

"The accused will further state that the now deceased caused her own demise by pouring herself paraffin (sic) and setting herself alight." (the underlining is mine)

Significantly, the Defence Outline which is in response to the allegations in the State Summary, does not question or dispute the State's averment that "the deceased later died on 26 October 2011 from the injuries she had sustained." Notably, the death occurred on 26 October 2011, some three days after the deceased sustained the burn injuries. The differing assessments of plus or minus 35 per cent and 76 per cent respectively, as given by two different doctors with regard to the percentage degree of burns on the deceased, do not, in my view, impact negatively against the State case in the circumstances. The doctor who saw the deceased at Chivhu Hospital on 23 October 2011 at about 0300 hours observed that she had "large surface area burns of plus or minus 35% of body surface." The doctor who saw her on the following day at Harare Central Hospital at about 1020

hours observed “76 per cent open flame burns on torso, lower limbs and upper limbs and neck and ...”

This disposes of Mr *Mpofu*’s third point.

37. It must not be overlooked that the *onus* on the respondent was to prove its case against the appellant beyond reasonable doubt. Mr *Mpofu*’s second, fourth and fifth points revolve around the issues of the application of the evidential rules relating to *res gestae* and to circumstantial evidence. The circumstantial evidence is made up of different aspects of the events that took place as the incident unfolded. The deceased’s utterances the subject of the conflicting contentions regarding hearsay evidence with particular reference to *res gestae* form one of the weighty aspects, among others, that emerge from the evidence that was placed before the court *a quo*. The admissibility of the evidence of those utterances has been hotly contested by the Defence.

38. What clearly emerged from the evidence by the State witnesses, which evidence the trial court accepted, was that during the time that the deceased was on fire she called out “oh mother I am dying” and she also called out Miti’s name. Soon after the fire that was consuming her had been doused and as soon as she saw Miti who she had called out to, she told him (Miti) and the others who had come out that the appellant had poured paraffin on her and set her alight. The defence’s contention is that this was hearsay evidence of utterances that did not amount to a spontaneous exclamation of a statement at the time of the relevant event, which would at common law constitute *res gestae*. The submission was made that the deceased had had ample time for cogitation in the five minutes that elapsed from the time that she was burning, attempting to put out the fire, running to the tap and running back and then making the allegation, such that whatever

she said at that stage could not qualify as part of the *res gestae*. The argument was that the spontaneity requirement was not met.

39. Mr *Mapfuwa*, for the respondent, on the other hand submitted that the court *a quo* decided that the deceased's utterances were *res gestae* because she had screamed out and footsteps were heard by the first and second witnesses and that immediately upon returning from the water tap she had accused the appellant of having doused her with paraffin and set her on fire. He submitted that the court *a quo* cannot be faulted for its finding that the failure by the deceased to name the appellant at the time that she was burning cannot be held against her if regard is had to the fact that at the first opportunity when she was no longer on fire she named the appellant as the culprit. Furthermore, that this was in the presence of the appellant at the scene.

40. Mr *Mapfuwa* cited the case of *R v Andrews* [1987] 1 All ER 513 in support of his argument as regards spontaneity in cases involving *res gestae*. In his heads of argument he gave the following quote purportedly from the case but did not give the specific page at which it appears in the law report:

“the test used by the courts in determining spontaneity is not necessarily one of exact spontaneity that is defined with mathematical precision. It is sufficient to establish approximate or substantial spontaneity.”

It was his submission that the court *a quo* correctly observed that to fault the deceased for not mentioning the appellant's name at the time that she was on fire would be to take an armchair approach. It was also his submission that it is necessary to consider the totality of the evidence adduced and ascertain whether there was a break in the chain of events. He referred specifically to p 26 of the record where the following exchange took place between the defence counsel and the witness Miti during cross examination:

“Q. How many minutes lapsed from the time you heard the scream and the time that you then saw the now deceased coming from the tap direction? A. Judging from the events it could be less than a minute.”

I need to point out that in my reading of the judgment in *R v Andrews (supra)* I was unable to locate the quotation cited by Mr *Mapfuwa*.

41. I make note at this stage that Mr *Mpofu*'s comment on this English authority was that its full content was not captured in the excerpt quoted by Mr *Mapfuwa*. He submitted that the uncaptured aspects are firstly, that if a statement is made after the event, it ordinarily falls outside spontaneity. Secondly, if the statement is to be received in evidence there is a mandatory procedure to be followed in the Supreme Court of Judicature after which a preliminary ruling must be made by the judge. Thereafter, evidence of the statement can be given. He likened the procedure to a trial within a trial in which the court must deal with and answer what he referred to as the recurring question “At what stage did this end?” In *casu*, so he submitted, because the statement was said after the deceased had seen a third party, there are dangers that the deceased had had time for reflection.

42. In my reading of the *Andrews* judgment I was unable to locate the part of the report that specifically stipulated or referred to the procedure that he referred to and which he likened to the procedure of a trial within a trial (if I understood his submission correctly).

The facts in the *Andrews* matter as summarised in the headnote are as follows:

“The appellant and another man knocked on the door of the victim’s flat and when the victim opened it the appellant stabbed him in the chest and stomach with a knife and the two men then robbed the flat. The victim was found some minutes later. The police and they arrived very soon after. The victim, who was seriously wounded, told the police that he had been attacked by two men, gave the name of the appellant and the name and address of the other before becoming unconscious. He was then taken to hospital where he died two months later. At the trial of the appellant for murder the Crown sought to have the victim’s statement to the police admitted in evidence. The trial judge ruled the statement was admissible. The appellant was convicted of manslaughter. He appealed to the Court of Appeal, contending that the victim’s statement was inadmissible under the

rule against the admission of hearsay evidence. The appeal was dismissed and the appellant appealed to the House of Lords.

Held – Hearsay evidence of a statement made to a witness by the victim of an attack describing how he had received his injuries was admissible in evidence, as part of the *res gestae*, at the trial of the attacker if the statement was made in conditions which were sufficiently spontaneous and sufficiently contemporaneous with the event to preclude the possibility of concoction or distortion. In order for the victim’s statement to be sufficiently spontaneous to be admissible it had to be so closely associated with the event which excited the statement that the victim’s mind was still dominated by the event. If there was a special feature, eg malice, giving rise to the possibility of concoction or distortion the trial judge had to be satisfied that the circumstances were such that there was no possibility of concoction or distortion. However, the possibility of error in the facts narrated by the victim went to the weight to be attached to the statement by the jury and not to admissibility. Since the victim’s statement to the police was made by a seriously injured man in circumstances which were spontaneous and contemporaneous with the attack and there was no possibility of any concoction or fabrication of identification, the statement had been rightly admitted in evidence. The appeal would accordingly be dismissed. ... *Ratten v R* [1971] 3 All ER 801 applied. *R v Beddington* (1879) 14 Cox CC 341 overruled. (my emphasis)

43. I however found the following useful exposition by Lord WILBERFORCE in *Ratten v R*

[1971] 3 All ER 801 at p 807 a-e, (a case cited by Lord ACKNER in his speech):

“The person testifying to the words used is liable to cross-examination: the accused person ... can give his own account if different. There is no such difference in kind or substance between what was said and evidence of what was done (for example between evidence of what the victim said as to an attack and evidence that he (or she) was seen in a terrified state or was heard to shriek) as to require a total rejection of one and admission of the other.

The possibility of concoction or fabrication, where it exists, is on the other hand an entirely valid reason for exclusion, and is probably the real test which judges in fact apply. In their Lordships’ opinion this should be recognised and applied directly as the relevant test: the test should not be the uncertain one whether the making of the statement was in some sense part of the event or transaction. This may often be difficult to establish: such external matters as the time which elapses between the events and the speaking of the words (or vice versa), and differences in location being relevant factors but not, taken by themselves, decisive criteria. As regards statements made after the event it must be for the judge, by preliminary ruling, to satisfy himself that the statement was so clearly made in circumstances of spontaneity or involvement in the event that the possibility of concoction can be disregarded. Conversely, if he considers that the statement was made by way of narrative of a detached prior event so that the speaker was so disengaged from it as to be able to construct or adapt his account, he should exclude it. And the same must in principle be true of statements made before the event. The test should not be the uncertain one, whether the making of the statement should be regarded as part of the event or transaction. This may often be difficult to show. But if the drama leading up to the climax, has commenced and assumed such intensity and pressure that the utterance can safely be regarded as a true reflection of what was unrolling or actually happening, it ought to be received. The expression ‘*res gestae*’ may conveniently sum up these

criteria, but the reality of them must always be kept in mind: it is this that lies behind the best reasoned of the judges' rulings." (my emphasis)

44. His Lordship also referred to the case of *O'Hara v Central SMT Co* 1941 SC 363 where at p 381 the Lord President (Lord Normand) said that "there must be close association: the words should be at least *de recenti* and not after an interval which would allow time for reflection and concocting a story." He further quoted Lord Fleming who at p 386 said: "Obviously statements made after there has been time for deliberation are not likely to be entirely spontaneous, and may, indeed, be made for the express purpose of concealing the truth." (my emphasis)

45. He further pertinently states at p 808 f-g:

"These authorities show that there is ample support for the principle that hearsay evidence may be admitted if the statement providing it is made in such conditions (always being those of approximate but not exact contemporaneity) of involvement or pressure as to exclude the possibility of concoction or distortion to the advantage of the maker or the disadvantage of the accused." (my emphasis)

And, at p 809 b:

"Facts differ so greatly that it is impossible to lay down any precise general rule: it is difficult to imagine a case where there is no evidence at all of connection between statement and principal event other than the statement itself, but **whether this is sufficiently shown must be a matter for the trial judge.** Their Lordships would be disposed to agree that, amongst other things, he may take the statement itself into account." (my emphasis)

Finally, at p 808 d he stated as follows:

"... In an earlier case in the High Court (*Brown v R* (1913) 17 CLR 570) where evidence was excluded, Isaacs and Powers JJ in their joint judgment (at 597) put the exclusion on the ground that it was a mere narration respecting a concluded event, a narration not naturally or spontaneously emanating from or growing out of the main narration but arising as an independent and additional transaction." (my emphasis)

46. In **Principles of Evidence** 4 ed (Juta) the learned authors *Schwikkard and van der Merwe*, under the heading "*Res gestae* statements" state that the phrase *res gestae* does not lend itself to any meaningful translation but that the phrase has developed a meaning

in the law of evidence and is succinctly stated by Choo (in **Evidence** (2012) 292) as follows:

“Evidence of facts may be admissible as part of the *res gestae* if these facts are so closely connected in time, place and circumstances with some transaction which is at issue that they can be said to form part of that transaction.”

Under the subheading “Spontaneous statements” the learned authors state that the reasoning behind the admission of spontaneous statements was that despite their hearsay nature, they are the product of an instinctive response and therefore less likely to be an invention or deliberate distortion. Furthermore, for the statement to be regarded as spontaneous it must be so closely linked to the event which gave rise to it that the presiding officer is able to conclude that the “event” dominated the mind of the declarant at the time of uttering the statement.

47. The learned authors further refer to the case of *S v Tuge* 1966 (4) SA 565 (A) wherein “[T]he court held that the following conditions needed to exist for a *res gestae* statement to be admitted into evidence: (a) ‘the original speaker must be shown to be unavailable as a witness’; (b) ‘there must have been an occurrence which produced a stress of nervous excitement’; (c) ‘the statement must have been made whilst the stress was still “so operative on the speaker that his reflective powers may be assumed to have been in abeyance”’; (d) ‘the statement must not amount to a reconstruction of a past event’”
48. Against the above backdrop of the position of the law relating to *res gestae* I am unable to find fault with the manner in which the court *a quo* dealt with the issue of *res gestae* when it stated as follows:

“*Res gestae* should be applied taking into account the circumstances of each case. In casu, the undisputed evidence was that the deceased screamed out and footsteps were heard proceeding to the tap and immediately on returning from the tap, the deceased made the

accusation that the cause of the fiasco was the accused. To hold as argued by the defence, that the deceased should have exclaimed that the accused (by name) had burnt her at the time of the burning would be to adopt an armchair approach. The deceased named the accused at the first opportune time after she was no longer on fire. It cannot be said that there was no spontaneity in the exclamation.”

49. As with any other matter, each case must be decided on its own merits. *In casu*, on a view of the evidence adduced before the trial court and on a consideration of the manner in which the events unfolded as well as the time frame within which it all happened, the court *a quo* cannot be faulted when it stated that “(I)t cannot be said that there was no spontaneity in the exclamation.” As commented by Lord Wilberforce at p 806 h-j:

“The reason why this is so” (that is the application of different standards to the admissibility of the hearsay statement) “is that concentration tends to be focused on the opaque or at least imprecise Latin phrase rather than on the basic reason for excluding the type of evidence which this group of cases is concerned with. There is no doubt what this reason is: it is twofold. The first is that there may be uncertainty as to the exact words used because of their transmission through the evidence of another person than the speaker. The second is because of the risk of concoction of false evidence by persons who have been the victim of assault or accident.”

50. As to the actual words used by the deceased, the court *a quo* cannot be faulted for believing the State witnesses. The appellant did not dispute the evidence of the State witnesses as to what was uttered whilst the witnesses were still in their room. He would naturally not have been able to challenge the witnesses as his evidence was that he could not make out what the deceased was saying as she was screaming. The witnesses said that they were awoken by the deceased’s screaming out “oh mother I am dying!” as well as calling out to the first witness by the deceased. Further, the appellant did not dispute that the deceased uttered the words attributed to her by the witnesses after she came back from the tap at the back of the rooms and soon after the fire on her had been extinguished. The deceased had burn injuries and as a result her undergarment was sticking onto her body. It is at that stage in the unfolding drama that the deceased said that the appellant

had poured paraffin on her and set her alight and that he had the match box on him. As it turned out the box of matches was recovered from the appellant when he was subjected to a bodily search by the police, *albeit* he had a different explanation for his possession of it. The deceased also asked why the appellant had not also poured paraffin on himself as he had said that he wanted both of them to die. According to Tsopotsa she also said to the appellant that he should finish her off as he had been tormenting or ill-treating her for a long time.

51. There is another consideration that buttresses the court *a quo*'s assessment of the evidence that was placed before it. Notably, it was the appellant's stance that all that the deceased said in the presence of the State witnesses were all lies. By implication, the appellant's contention was that the deceased deliberately concocted a false story, to his disadvantage. It was thus the defence's argument that the said utterances ought not to have been accepted or admitted as part of the *res gestae*. On this aspect the trial court dispelled the risk of concoction on the view that to hold otherwise would be to adopt or take an armchair approach. I find no misdirection by the court *a quo* in this regard on a view of the evidence that was placed before it.

52. The citation by the defence of the case of *Thompson v Trevanion* (1693) Skin 402 ER 179 does not in my view establish any misdirection by the trial court in this regard. I say so for the reason, as already stated earlier, that it is trite that each case must be determined on its own merits. In the appellant's heads of argument the following statement by HOLT CJ in the cited case is quoted:

“What the wife said immediate upon the hurt received, and before she had time to devise or contrive anything for her own advantage might be given in evidence.”

53. The court was alive to the fact that it was dealing with circumstantial evidence there being no independent witness to testify as to how the deceased ended up in flames. It rightly drew the applicable legal principles as espoused in *R v Blom* 1939 AD 188 and followed in *Zacharia Amos Simango v S* SC 42/14, *Abraham Mbovora v S* SC 75/14. The two cardinal rules on circumstantial evidence have been stated to be:

- “1. The inference to be drawn must be consistent with all the proven facts –
2. The proven facts should be such that they exclude every possible inference from them save the one to be drawn.”

54. The court isolated the issue that needed to be answered by the circumstantial evidence, viz, “whether or not the deceased poured paraffin upon and burnt herself or it was the accused who set her alight after pouring paraffin on her.”

55. On the evidence that was placed before the trial court there are certain baseline facts that stand out. The appellant was the only person with the deceased in her room when she called out the first witness’ name and screamed. The deceased did not call for assistance from the appellant, whether on the appellant’s evidence or on the evidence of the State witnesses. She called out to Miti. The appellant himself, a frequent visitor to the premises according to the evidence of the State witnesses, did not call out for help from the deceased’s neighbours who he must have known to be in their own rooms. Thereafter the deceased pointed to the appellant as the person who had doused her with paraffin and set her on fire. Another notable aspect is that the appellant said that the deceased got dressed in a skirt and blouse when he indicated that he wanted to have a discussion with her. But when the deceased was seen by her neighbours when they reacted to her distress call she was observed wearing only a petticoat that was now stuck to her body due to the burning. There was no explanation by the appellant as to how the skirt that he found burning on the floor after he came back to the room had got there.

In the circumstances, I find no misdirection on the part of the court *a quo* when it found as follows:-

“... The complainant was heard screaming and calling out to neighbours. She did not call out to the accused person. If indeed the deceased had burnt herself and the accused had nothing to do with it, assuming that she was crying out for help because of pain, she would have been expected to call out to the person who was nearest to and in her presence to assist her or come to her aide (sic). It was most improbable that the deceased would in the process of seeking assistance have reached for people far away from her.”

56. The court *a quo* correctly noted that the appellant came to visit the deceased in the dead of night and that he had a grievance that he wanted to raise with her about her reported behaviour. It was the trial court’s finding that the appellant must have been incensed and that his interrogation of the deceased was unlikely to have been amicable as he wanted the court to believe. The trial court found the appellant’s narration of events as regards the deceased’s reaction to his questions to be “illogical and improbable to a point that it can safely be said not to have happened.” The court found it to be improbable that after she was asked as to why she went to bars in the absence of the appellant, she responded by pouring paraffin on herself and setting herself alight. I find no misdirection in this finding by the court *a quo*.

57. In assessing the sufficiency of the circumstantial evidence that was placed before it, the court *a quo* drew guidance from firstly, the cases of *R v Sibanda & Others* 1965 (4) SA 241 (R.A.) where at p 246 BEADLE CJ, dealing with circumstantial evidence, stated as follows:

“The degree of certainty with which the individual facts must be proved in criminal cases must always depend on the probative value of the individual facts themselves. Generally speaking, when a large number of facts taken together, point to the guilt of an accused, it is not necessary that each fact should be taken in isolation and its existence proved beyond a reasonable doubt. It is sufficient if there are reasonable grounds for taking these facts into consideration and all the facts, taken together prove the guilt of an accused beyond a reasonable doubt.”

58. It also referred to *S v Chabalala* 2003 (1) SACR 134 (SCA) in which at para 15 the following is stated:

“The correct approach is to weigh up all the elements which point towards the guilt of the accused against all those which are indicative of his innocence, taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and having done so, to decide whether the balance weighs so heavily in favour of the state as to exclude any reasonable doubt about the accused’s guilt. The result may prove that one scrap of evidence or one defect in the case for either party (such as the failure to call a material witness concerning an identification parade) was decisive but that can only be an *ex-post facto* determination and a trial court (and counsel) should avoid the temptation to latch on to one (apparently) obvious aspect without assessing it within the context of the full picture presented in evidence. once that approach is applied to the evidence in the present matter, the solution becomes clear.” (my emphasis)

59. The findings made by the court *a quo* must be viewed against the trite position at law that as the trial court, it had the advantage of seeing and hearing the witnesses as they testified to the events of the night in question. That is an advantage that an appellate court does not have. An appellate court hears an appeal on the record and cannot disregard findings made *a quo* unless a reading of the record patently does not support such findings. There is no patent misdirection in the findings of the court *a quo* discernible on a reading of the record.

60. The court *a quo*’s finding on the appellant’s demeanour as a witness has an important bearing on the determination of his guilt by the court, particularly in circumstances where the court had found that the State had established a *prima facie case* against him and that he had to be put on his defence. Commenting on the appellant’s demeanour the court *a quo* stated:

“... he showed some degree of annoyance and irritability when giving evidence and answers in cross examination. The court got the impression that the accused considered the trial and his being asked to give an account of events as an unnecessary bother. He appeared not to be a concerned person with the proceedings yet the victim was his second wife as *per* his testimony. The accused’s demeanour was adjudged not to be impressive.

61. This finding on the appellant's demeanour by the court *a quo* is supported and borne out by a reading of the appellant's Confirmed Warned and Cautioned statement, his Defence Outline and his testimony in court both in chief and in cross examination. In the Warned and Cautioned statement, he said that after she had set herself alight the deceased embraced him and he opened the door while she was still embracing him. When he opened the door the fire "burned heavily" and she ran to the tap where "she poured some water on her" and he followed her and helped her to extinguish the fire. In his Defence Outline he said that after setting herself on fire the deceased "sought to embrace him intending to cause harm to him but he managed to slip away going out of the room." He said that he also assisted the deceased to put out the fire by pouring some water on her at the water tap. In his evidence before the court *a quo* he said that the deceased wanted to grab him by the neck but she missed and grabbed hold of the upper arm of one hand. He further stated that she got,

"hold of me in an indication that she did not want to let me go. It was then that I also caught the fire such that I also suffered injuries. I realised that the fire was quite great and that my life was also in danger that is when I decided to open the door whilst she was still holding me. I then advised her that she had to go to the tap so that I put out the fire. She get hold of me as we were by the door and she was now in front. When we got to the tap I instructed her to kneel down, I opened the tap and there was now water that was being poured on her head and all the body."

62. The discrepancies in the extra curial statement, the defence outline and the evidence in court in the respect highlighted above cannot be missed. Significantly, the unexplained discrepancies relate to a stage in the unfolding events that only he could give clear evidence on. He did not.

In the circumstances, I find no misdirection or error in the court *a quo*'s assessment of the appellant's demeanour.

63. The issue that has been raised in relation to the rejection of the appellant's defence by the court *a quo* must not be considered in isolation. The court was obliged, as it rightly noted, to consider the totality of the evidence before it. Its reliance on the case of *S v Isolano* 1985 (2) ZLR 62 (SC) in this regard cannot be faulted. Therein LORD DENNING was quoted when he stated as follows in *Miller v Minister of Pensions* [1947] All ER 372 (KB):

“... the evidence must reach the same degree of cogency as is required in a criminal case before an accused person is found guilty. The degree is well settled. It need not reach certainty but it must carry a high degree of probability. Proof beyond a reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course it is possible, but not in the least probable, the case is proved beyond reasonable doubt, but nothing short of this will suffice.”

64. The court *a quo* found that on a consideration of the evidence before it and having derived guidance from the authorities, the State had proved the appellant's guilt beyond reasonable doubt and it therefore convicted him of murder with constructive intent.

65. In the absence of misdirection by the trial court there is no basis for this court to interfere with the conviction.

66. No submissions having been made in relation to sentence, this will be taken as a concession that the appeal against sentence has no merit. No basis has been established for interference with the same.

67. Consequently, it is thus found that there is no merit in this appeal. It is accordingly ordered as follows:

The appeal be and is hereby dismissed in its entirety.

UCHENA JA I agree

MAKONI JA I agree

Rubaya and Chatambudza, appellant's legal practitioners

National Prosecuting Authority, respondent's legal practitioners