

STATE
versus
STEPHEN ZIMOWA
and
TICHAONA SODA
and
ASSAN CHIKWANDA
and
CRISPEN SIBANDA
and
TENDAI JONGWE

HIGH COURT OF ZIMBABWE
TSANGA J
HARARE 2, 13, 14 February & 11 September 2017

Trial within a trial

A Masamha, for the State
S Chikatora, for 1st accused
F Chiwashira, for 2nd accused
W Chagwiza, for 3rd accused
O Kondongwe, for 4th accused

TSANGA J: This is a trial within a trial on the admissibility of indications made by four accused persons leading to the recovery of a fire arm purportedly used in the commission of a murder for which they stand trial. The Detective Inspector Nzirawa had been about to lead evidence of the indications which led to the recovery of the fire arm purportedly used in the commission of the murder. This was challenged by counsel for accused's 1, 2, 3, and 4 on the basis that the evidence of the said indications had been improperly obtained.

The central issue was whether the accused made indications to the police and whether those indications are admissible to the extent that they render the trial itself free and fair and in line with the Constitution. Evidence obtained in violation of the Constitution cannot be admissible. (See s 70 (3) The Constitution also guarantees freedom from torture and, cruel, inhuman and degrading treatment, (Section 53 of the Constitution).

The indications which the court must decide upon in this matter related to those undertaken by the police with the witnesses to Domboshawa/Chinamora in Kahari village on the 26th of July 2009 where they recovered the firearm. The four accused persons having denied making indications and that they did not have any knowledge pertaining to the recovery of the fire arm, namely an AK47 rifle underneath a bridge, a trial within a trial was held.

The state evidence on indications

To discharge the onus which rests upon the state, it relied on evidence of Detective Inspector Mr Tendai Nzirawa and Detective Assistant Inspector Anele Mphandla who narrated the events leading to the indications that resulted in the recovery of the fire arm. Upon the arrest of accused 1 in Epworth, he had stated to the police that it was accused 2 who knew where the fire arm was. The police had proceeded to Mbare where accused 1 had shown them accused's 2 house in Vito Street. They did not check on accused 2 on that day. They detained accused 1 at Avondale police station for the night. The following day they had gone back to accused 2's house where they had found accused 5. They had waited for accused number 2 to return as he was said to have spent the night there. He came at about midday and on enquiry of the where about of the fire arm the police officers were advised that it was with accused 3 and 4 in Epworth. They had proceeded to Epworth led by accused 2. They were told by accused 3 and 4 that the fire arm was in Kahari village in Domboshawa and that it had been taken there by accused 1, 3 and 4. They had thereafter proceeded to Avondale with accused 2, 3, 4, and 5 to book out accused 1 where he was detained and had proceeded to Kahari village with all five accused persons. At Kahari village the police officers had been taken to a bridge long Domboshawa road led by accused 1, 3, and 4. Accused 3 had pointed to them where the weapon an AK 47 serial no 2653 was hidden. It had no magazines and was wrapped in a school jacket and secured by a school tie. Upon recovery of the fire arm the officers had recorded the recovered firearm in his personal diary and accused 1, 3 and 4 had appended their signatures in that diary. The implications of the indications had been explained to the accused and they were agreeable to the indications that they had made.

On the various allegations by the four accused in which they denied making any indications and in particular the allegations that the accused 1 and 2 were in fact shot by the police to force them to make confessions, both police detectives highlighted that after the recoveries they had in fact been returned to Central Police Station and had been booked out

by another team for further recoveries of properties stolen from various places. Their evidence was that whilst indeed accused 1 and 2 were shot on that day it was not during the indications that they had made of the fire arm. Their understanding was that they had been shot whilst trying to escape whilst in the custody of a totally different team of detectives on other matters. They denied allegations that any of the four accused were assaulted or threatened by the team that led to the recovery of the firearm. Their evidence was that had it not been for the information of the 1st accused that led them to the 2nd accused, and, had it not been the information of the 2nd accused who revealed the 3rd and 4th accused as having the actual knowledge of the whereabouts of the fire arm, it would not have been recovered. In other words, the four accused were part of the chain in the discovery.

Examination of allegations by each accused against evidence led by the state

Stephen Zimowa 1st accused: The State's evidence in summary was that he had been instrumental in leading the police to accused 2 as part of the group. At the scene of recovery he had been the one, who together with accused 3 and 4 had led the police to the actual spot where the fire arm was hidden.

The essence of the abuse he suffered which he outlined to the court before the state led its evidence was that he was shot three times by the police and prior to that had been continuously assaulted by the police detectives who were investigating the case so that he would admit that he was in possession of an AK 47 rifle. **He said he was told that if he did not tell the police where the gun was he was going to be killed.** He had been shown photos of others who had been killed on the basis that the same fate would visit him if he did not cooperate. More specifically, his assertion was that he was taken **at midnight** to a place near airport road and asked to confess pertaining to the offence where upon he refused. A gun was pointed at him and he covered only his face. It was whilst standing covering his face that he was shot three times. He fell down and lost consciousness. He had subsequently found himself at Harare Hospital under police guard. This happened on the 26th of July 2010 at midnight. He denied ever going for indications.

His evidence after the state witness had furnished detailing the process leading to the indications, was different in its detail from the gist of his earlier statements in which he outlined his complaints. Whereas he had told the court that what the police had sought from him was an admission of where the gun was, he now told the court that **on the 26th of July the police had taken him to Harare Central where they brought papers for him to sign and that is when they had told him that they had found him with a fire arm the previous**

day, which he disputed. Again, whereas he had said he had been taken at midnight to Airport road, his evidence after the police evidence was that it was around sunset that the armed police had put him in a white Isuzu and taken him behind the airport whilst he was tied to the back of the Isuzu. Regarding the signature on the indications his explanation was that he had signed at Harare Hospital so that the police would stop bothering him.

In cross examination by the State he said he had recognised Detective Nzirawa in court as among those who had shot him. However he did not put this to the detective when he was on the witness stand giving his evidence. In addition his explanation for not placing his records of the time he was admitted to hospital was that he is not the one who keeps the files and would have had to request these. Despite its significance, had not requested this information.

His evidence was not consistent and was now clearly tailored to suit the evidence that had been placed before the court by the State witnesses. This court therefore finds no reason to disbelieve the police witnesses who outlined very clearly how the 1st accused and others had been taken to Domboshawa / Chinamora that day. The court also finds that the first accused was not shot at the time that made indications relating to the recovery of the AK 47. He was shot whilst in the company of an entirely different set of detectives, on different indications as the State witnesses pointed out.

Tichaona Soda: As regards 2nd accused, the evidence of the police detectives was that whilst they had gone with him to Domboshava he had did not make any indications as regards the actual location of the firearm. However, as stated, it was him who had been instrumental in linking the police to 3rd and 4th accused persons and were it not for his revelations of those who knew where the fire arm was hidden, they would not have been able to find the AK47. Whilst he too was shot on that day, this was however certainly not during the recovery of the fire arm. According to the detectives he was in a fit condition at that time.

The 2nd accused also challenged admissibility of the indications on the basis that he had never gone for indications and that no information regarding indications had been ever obtained from him. His version was that on the night of 26th July he had been taken to Chinhamo just outside Chitungwiza and had been told to admit to the charge. He was shot by the police whose motive for so doing was to force him to admit to the charge, which he had refused to do. He thereafter lost consciousness and only came to in hospital. He sustained leg injuries which resulted in his hospitalisation for over a year.

In his evidence following that of the state, he denied knowing any of the accused including leading the police to the 3rd and 4th accused, which vital information had ultimately played a role in the recovery of the fire arm. He said he had only met them a year and some months after he had been shot. He said the police were lying about taking him to Chinamora in order to evade the fact that they had shot him as he wanted to sue them for the shooting. He had been in hand cuffs and leg irons and therefore could not have attempted to run away. He had also been handcuffed to a bar in the motor vehicle when they wanted to shoot him. He now added that when they arrived in Seke Chitungwiza and the police had started to beat him up in a bushy area. He had been shot because he had refused to confess to crimes that the police were forcing him to confess to.

From the evidence led by the state witnesses which this court had no reason to disbelieve, the recovery of the AK 47 had been in the afternoon and not at night. His evidence that he had not been to Chinamora was simply false. There had been no shooting in Chinamora. Also the second accused own evidence was that he had been shot in Chitungwiza. At the time the police were investigating a series of robberies and that there were different teams involved. Whilst the second accused had been shot, this had not been during the time when he had gone on indications for the recovery of the AK47. Whilst his role had been a passive one at the indications, there was also no doubt from the evidence led by the police that he was part of the group and that it was his evidence that had led to the arrest of those members who knew exactly where the firearm was located.

What this court found to be credible was that he had been shot well after he had returned from the recovery of the AK 47.

Assan Chikwanda the 3rd accused: The state's evidence was that they had carried a search at the house where the third accused stayed before going for the indications in Chinamora. He had been one of the three who had shown the detectives where the fire arm was in Chinamora. He had only been detained after the recovery of fire arm.

His version of the abuse prior to the state's evidence was that whilst in custody he had been threatened with shooting in the same manner that had befallen the 1st and 2nd accused. He did not lead the police to the recovery of the gun or any other recoveries. He was bundled in a car and driven to the scene of the robbery and forced to make indications and was directed on what to do. He said those who had assaulted him were officers from the homicide section. He also said the purpose of the assault was to extract a confession from him and to make him comply with the direction and instructions they were giving. In particular, he said

he was taken to the scene in Concession and made to confess and make indications on what had happened and where. These indications had been done on the 1st of August 2009.

In his evidence in chief, he told the court that upon his arrest at his house he had been assaulted by the two police officers who effected the arrest. They had assaulted him whilst he lay down and had struck him on his back and on his shoulders. Up to this day he said he still has blood clotted in his elbow and suffers pain in his shoulder. He denied that a pistol had been recovered at this house at the time of his arrest. He denied that from his house he had been taken to Avondale police station to pick up the 1st accused before going to Chinamora. He had only met the first accused at maximum prison. The only person he knew was the 4th accused who was his landlord's son. He had signed papers at Harare Central where he had been tortured because the police wanted him to sign and admit to committing various offences throughout Harare. He had thereafter been taken to Concession to the scene of the crime despite the fact that he did not know the area. The police had had to switch off their video recording because he did not know the area. He had signed to safe guard his life.

The firearm which was before the court was the cogent piece of evidence that lent credence to the police version that the 1st 3rd and 4th accused had led to the recovery of that AK 47. If the police already had the AK47 having recovered it from elsewhere why would they have needed to take him for indications to recover that same weapon since they would have presumably have known whom they had recovered it from. It could only be the three accused persons under the circumstances described by the police detectives who had helped unearth the AK 47.

The fourth accused **Crispen Sibanda**: Detective Nziwara said the fourth accused person in particular had been very co-operative from the onset and had been urging others to cooperate with the police. From his recollection none of the accused had complained of any assault or ill-treatment at the time of the indications of the fire arm.

This accused person also alleged prior to the State's evidence, that he had been assaulted by police officers on the day he was arrested. He said they had hit him with a log on his head. He had a black out and lost his memory temporarily until he woke up at Rhodesville police station. Whilst in custody he was further assaulted with an iron bar for the purpose of extracting confessions and admissions to robbery allegations. He equally denied ever being taken to Chinamora for indications and maintained that the assaults upon him were to induce him to admit to fabricate indications by the police which he said he had never been taken to. He said he had sustained some injuries at the time on his legs and arms and that he had been

denied medical attention on the basis of shortage of basic commodities. As such he had no medical reports or any injuries.

Ultimately what was discovered was the AK 47. If the police knew where it was there would again have been no need to take the accused persons. As the State has argued their pointing out showed they had knowledge of the thing. See *S v Nkomo* 1989(3) ZLR 117 (SC); *Nkanyezi Moyo v The State* SC 65/13. Furthermore evidence of a pointing out is “lawful” as contemplated by s 258(2) of the Criminal Procedure and Evidence Act [*Chapter 9: 07*]

Overall Analysis

The accused were not being candid with the court in denying that they were ever taken from indications. None of them proffered any explanation as to how the police had then in fact recovered the weapon in question. There was no collusion by the police in their evidence to frame any of the accused persons. Those who had not participated actively in the actual recovery were clearly stated. If indeed they wanted to frame them they would have framed all of them. To discredit the version of the police who gave evidence that the 1st and 2nd accused had not been shot at the time of recovery of the AK 47, their claim that the accused were being investigated by various teams for different robberies would have to have been false. There was nothing in the evidence that was found to be untrue about this. It is accepted by this court that the 1st and 2nd accused were certainly not shot during the recovery of the AK47. Whilst they were indeed shot on the 26th of July 2009, their shooting had nothing to do with the recovery of the fire arm which they had already been recovered.

It is further accepted by this court that 2nd accused was instrumental in leading the police to the 3rd and 4th accused who knew about the exact location of that fire arm. It is accepted that without this crucial piece of information the fire arm would not have been recovered. It is accepted the 1st, 3rd and 4th accused were the ones who then led police to the actual recovery of the fire arm. There is no way the police would have known where to find the fire arm and therefore the reasonable inference is that they were led there by the accused. There is nothing that would render the trial unfair or that would be detrimental to the administration of justice or the public interest in admitting the evidence leading to the recovery of the fire arm.

The court accordingly makes the following ruling:

1. The indications made by the accused persons on the 26th of July 2009 were not made in contravention of the Constitution and were made freely and voluntarily without accused persons being duly influenced.
2. The State is entitled to rely on evidence of the indications made on 26th July 2009.

Having made the above ruling the State must now set the matter down for finalisation of the hearing.

Rubaya & Chatambudza, 1st accused's legal practitioners (pro-deo)

Kanoti and Partners, 2nd accused's legal practitioners (pro-deo)

Kwenda & Chagwiza, 3rd accused's legal practitioners (pro-deo)

Dube Manikai and Hwacha, 4th accused's legal practitioners (pro-deo)