

THE STATE
versus
FUNGAI OLIVER MURANDA

HIGH COURT OF ZIMBABWE
CHATUKUTA J

HARARE, 25, 26, 27 July 2011; 17 July 2015; 7 August 2015; 6, 20 October 2015; 24
November 2015; 13 October and 20 October 2017

Murder Trial

D.H Chesa, for the State
T. Mpofo, for the accused

CHATUKUTA J: The accused is facing a charge of contravening s 47 (1) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. The State alleged that on 14 December 2008, Moses Tsingano (the deceased), Tatenda Vheremu (Vheremu) and Blessing Mbumbira were arrested for unlawful entry and theft of a DVD player. They were taken to Chabwino Police Post, Juru, Goromonzi and handed over to the accused and other police officers who were on duty. The deceased and his alleged accomplices denied the charge. The deceased was assaulted by the accused and other officers under the feet and on the buttocks. The accused and one Alfa Nyarunga, a member of the neighbourhood watch committee, took the deceased and his accomplice to the suspects' homes to conduct a search for the DVD player. Nothing was recovered. The accused severely assaulted the deceased when they were proceeding back to Chabwino Police Post. The deceased died from the injuries sustained in the assault. Doctor Gonzalez examined the body and concluded in a post-mortem report that death was due to hypovolemic shock, haemothorax and haemoperitoneum, spleen laceration and pulmonary haemorrhage due to assault.

The accused denied the charge. He admitted in his defence outline that he assaulted the deceased as they proceeded back to Chabwino Police Post after the search. The deceased had sat down as he could no longer walk. In a bid to get him to reach the Police Post he hit him under his feet and on his buttocks with a button stick. The assault was innocuous. The deceased had been assaulted by other police details at the Police Post prior to going for search at

deceased's home. When they arrived at the Police Post, the deceased had a quarrel with a colleague and fell down twice. On the second fall, the deceased hit his head against a metal bench and vomited. The accused assumed that the cause of death was by choking and not as a result of the assault.

The State called five witnesses Alfa Nyarunga, Blessing Mbariro, Faina Tsingano Sixpence Konye and Tapiwa Charuma. The statement of Dadai Takawira was admitted into evidence in terms of s 314 of the Criminal Procedure and Evidence Act [*Chapter 9:07*] (the CP&E Act).

Alfa Nyarunga testified that he was a member of the neighbourhood watch committee attached to the Chabwino Police Post. He accompanied the accused, deceased and Vheremu to conduct a search for stolen DVD. The accused was in charge. The deceased and Vheremu were handcuffed together as they went for the search, during the search and on the return to the Police Post. Upon arriving at some tobacco barns at Chabwino Farm, the accused took the deceased and Vheremu into a barn. He stayed behind conversing with some woman. He subsequently entered into the barn and found the deceased and Vheremu lying on the ground still handcuffed together. The accused had removed his shirt and hung it on a door. He was holding a baton stick. The deceased and Vheremu had tears running down their cheeks. He formed the opinion that the two had been assaulted. The accused ordered the suspects to get up so as to proceed to the Police Post. As they walked, the deceased staggered and fell to the ground. The accused kicked the deceased in the stomach as he lay on the ground. The deceased struggled to get up and continued to stagger as if he was drunk. The witness parted ways with the accused and the duo before the Police Post.

Blessing Mbariro was the deceased's co-accused. He testified that he was the first to be arrested and brought to the Police Post. When the deceased was arrested and brought to the Police Post, he was assaulted by police officers who included the accused and the first witness (Nyarunga) with a baton stick on his buttocks and under the feet at the police station before proceeding for the search. He remained at the Police Post when the deceased and Vheremu were taken for the search. When deceased and Vheremu returned to the Police Post after the search, the accused ordered the deceased to jog. The deceased requested to be allowed to rest. The accused slapped the deceased who fell down and hit his head against a metal bench. The accused continued to assault him with a baton stick several times. The deceased did not make any movements or sound as he was being assaulted by the accused. He then vomited blood stained beer. Upon realising that the deceased was no longer responding, the accused poured

water on the deceased calling out his name. The accused attempted to resuscitate the deceased to no avail. The deceased was later taken to the clinic.

Faina Tsingano testified that she was the deceased's mother and resided with the deceased during his lifetime. On the date in issue, she was at home when the deceased and Vheremu were brought for the search. The two were handcuffed together. The accused was assaulting the deceased with a baton stick during the search, with Nyarunga urging him on. She pleaded with the accused not to assault deceased. After the search, she followed the group as it proceeded back to the Police Post. After a distance, she observed the accused entering into some tobacco barn with the deceased and Vheremu. Whilst the three were in the barn, she could hear some screams coming from the barn. The accused later emerged from the barn with the deceased and Vheremu. The deceased and Vheremu were still handcuffed together. The deceased was now walking with difficulties. She observed the deceased falling to the ground. The accused kicked the deceased severely as he lay on the ground. The deceased later stood up and staggered to the Police Post. At the Police Post she requested to be allowed to bring food for the deceased. When she returned with the food, she was advised that the deceased had passed on.

Sixpence Konye was the deceased's father-in-law. He was not present during the search. He however joined the group as it proceeded to the Police Post after the search. He observed Faina Tsingano standing near the barns. She told him that the accused had taken the deceased and Vheremu into the barn. He heard someone screaming from the barn. He later observed the accused, Nyarunga, deceased and Vheremu emerging from the barn. The deceased fell to the ground and the accused kicked him. The deceased and Vheremu were handcuffed together. The deceased had to be assisted to stand. He was now walking with difficulties. The witness parted ways with the group before arrival at the Police Post.

Tapiwa Charuma was a member of the neighbourhood watch committee also based at Chabwino Police Post. Before he testified, Mr *Chesa* warned the court that the witness was an accomplice, having been arrested for the same offence. The witness testified that he was at the Police Post when the deceased and accomplices were arrested. The accused was in charge of the interrogations of the deceased and accomplices. He observed the assault by the accused and Nyarunga on the deceased before the search. The deceased was assaulted under the feet and on the buttocks. When the deceased and Vheremu went for the search, he remained at the Police Post with the other suspect, Blessing Mbariro. When the deceased returned to the Police Post, he observed that he was staggering and drooling. The deceased's gait had changed from the

time he left for the search. He could not walk unaided and was leaning on Vheremu for support. The accused removed the handcuffs and ordered the deceased and Vheremu to jog. Vheremu was able to do so but the deceased failed. The accused slapped the deceased. The deceased fell down and as he fell he hit his head on a metal bench. The accused helped the deceased to sit in a chair and continued interrogating him despite the fact that the deceased was not responding. The accused took the deceased outside the Police Post. The witness left the Police Post for home at that stage. He denied ever assaulting the deceased and that he pushed the deceased to the floor resulting in the deceased hitting his head on the metal bench as stated by the accused in his defence outline.

Nothing much turned on the evidence of Dadai Takawira. He is a nurse at Joseph Clinic. He was on duty when the deceased was brought to the clinic. He examined the deceased and observed that he had already passed on. He did not accept the body at the clinic.

The State sought to produce the post mortem report. The accused objected to the production of the report. The accused queried the factual findings of the pathologist as to the cause of death. It was submitted that that the accused only assaulted the deceased on the soles of his feet and buttocks. There was no nexus between that assault and the cause of death. Further, it was submitted that the deceased died of choking on his own vomit. Given the objection, the State was required to produce the post mortem report be produced through the pathologist.

The matter was postponed to 27 July 2011 to enable the State to call Dr Gonzalez who was the pathologist. Dr Gonzalez, had returned to his home country, Cuba. The matter was set down on numerous occasions for continuation to no avail. On 6 October 2015, Mr *Chesa* submitted that all efforts to secure the doctor's attendance had failed. He further submitted that, given the objection by the accused, the State had decided accept the accused's defence that he had only assaulted the deceased on the buttocks and under the feet. The State submitted that the accused be found guilty of contravening s 89(1) of the Criminal Law.

I queried the decision of the State and directed Mr *Mpofu* and Mr *Chesa* to address me on the applicability of the provisions of s 278 of the CP&E Act in light of the difficulties the State was encountering to obtain Doctor Gonzalez's attendance. Section 278 provides for the admissibility of affidavits in certain circumstances.

Mr *Mpofu* submitted that the opposition raised by the accused to the production of the post mortem report was on the factual findings by the pathologist as to the cause of death. The assault by the accused was innocuous and could not have resulted in death. It was further

submitted that the parties had engaged and agreed that the issue between them was not the law on the admissibility of expert evidence contained in an affidavit. It was the factual findings made by the pathologist which the accused wanted to test in cross examination necessitating the appearance in court of not any other expert but the pathologist who deposed to the affidavit. The State was entitled at law to close its case and its decision to do so was absolute. In support of its proposition, the accused referred the court to the case of *S v Chari* 1998 (1) ZLR 180 (HC).

Regarding the applicability of s 278 of the CP&E Act, Mr *Mpofu* submitted that the court can, under subs 5 allow the state to call the evidence of another pathologist other than the one who conducted the post-mortem only to explain and assist the court with statements contained in the report. The statements envisaged would be words and phrases used in the report.

Mr *Chesa* submitted that the court was only bound by the decision of the State where the State unequivocally withdrew charges against the accused. The State had not withdrawn charges but had opted for a lesser charge given the challenge by the accused to the production of the post mortem report and the difficulty it had encountered to secure Doctor Gonzalez's attendance. He submitted that the State was settling for the lesser charge relying on *Muchawaya & Anor v S* SC 101/96 where it was held that an accused can be convicted only on what he admitted. The challenge by the accused to the production of the post mortem report related to allegations of dereliction of duty by the pathologist and such could only be answered by the pathologist who prepared the post mortem report. The State was enjoined to properly produce a document and it was of the view that the only proper way was to produce the report through Dr Gonzalez. In support of its submission, it referred to *S v Hamadziripi* 1984 (1) ZLR (H) 318. Whilst accepting that the State witnesses identified the accused with the assaults on the deceased, Mr *Chesa* submitted their evidence was inadequate because of the relationship between some of the witnesses and the deceased, and that some of the witnesses could have been accomplices.

Arising from the submissions by the parties, I perceive that there are two issues for determination. The first question for determination is whether or not the decision by the State to close its case and accept a lesser plea is absolute and the court is bound by that decision. The second question is whether or not the State can produce a post-mortem report in the absence of the pathologist.

As rightly observed by the State, the court is not bound by the decision of the State, unless the State unequivocally withdraws the charges against the accused and it is clear that there is no evidence placed before the court establishing that the accused committed the offence. The evidence required at the close of a state case is that the court may convict the accused of the offence charged.

In establishing whether or not the accused committed the offence charged, the court must consider if:-

- (a) there is no evidence to prove an essential element of the offence;
- (b) there is no evidence on which a reasonable court, acting carefully, might properly convict;
- (c) the evidence adduced on behalf of the State is so manifestly unreliable that no reasonable court could safely act on it.

(See *S v Kachipare* 1998 (2) ZLR 271 at 276C-277A)

The elements for the offence for murder as set out in s 47(1) of the Criminal Law Code are that the accused must have caused the death of Moses Tsingano, intentionally or realising that there is a real risk or possibility that his or her conduct may cause death, continues to engage in that conduct despite the risk or possibility.

The following evidence has been placed before the court:

1. following his arrest, the deceased was assaulted at the Police Post by the accused and other officers under the feet and on the buttocks with a button stick;
2. the deceased was continually assaulted at his home by the accused during the search for the DVD;
3. the accused took the deceased into a barn from where screams were heard;
4. after emerging from the barn, the deceased, who had been walking on his own was staggering;
5. deceased collapsed on the way to the Police Post and the accused kicked him in the stomach or back;
6. during the entire period that the deceased left the Police Post for the search and returned to the Police Post, he was handcuffed to Vheremu;
7. the deceased was during this period and at all times in the company of the accused;
8. as the deceased approached the Police Post from the search, he could no longer walk on his own and was being supported by Vheremu;

9. upon arrival at the Police Post, the accused ordered the deceased to jog despite the condition of the deceased and when he failed to do so, the accused slapped him in the face causing the deceased to fall and hit his head on a metal bench;
10. the accused continued to interrogate the deceased at the Police Post despite the fact that the deceased was no longer responding;
11. the accused attempted to render first aid to the deceased to no avail and only then did he take the deceased to the nearest clinic at around 2100 hours where he was pronounced dead upon arrival;
12. on 18 December 2008, a post mortem report was prepared by Doctor Gonzalez who concluded that the cause of death as hypovolemic shock, haemothorax and haemoperitoneum, spleen laceration and pulmonary haemorrhage due to assault.

What appears from the above facts is that the deceased was severely assaulted whilst in police custody. The assault was callous and protracted. The accused was identified as one of the assailants, if not the main assailant. The assault on the deceased's feet and buttocks is said to have been administered before the search and not after the search as alleged by the accused in his defence outline. The deceased was able to walk on his own all the way to his home up to the barns and only failed to do so after emerging from the barn when he exhibited difficulties in walking and had to be supported by Vheremu. Despite these difficulties, the deceased was not taken to any medical institution for attention. During the last moments of his life he was interrogated and assaulted by the accused and did not respond to the interrogation and the assault. He was taken to a clinic where he was pronounced dead. The deceased was with the accused throughout the entire period. A post mortem report was prepared by a doctor stating the cause of death as being linked to an assault.

The state has in my view been able to provide evidence implicating the accused in the alleged murder. It is clear from the above that the State has placed before the court *prima facie* evidence to prove essential elements of the murder and the court might properly convict the accused on that evidence. The assault on the deceased was not as innocuous as the accused sought to portray. Evidence establishes a vicious and persistent assault by the accused on the deceased pointing to serious injuries.

I was constrained, in view of the evidence adduced and the submissions by the State filed on 20 November 2011, to understand the State's acceptance that the accused be found

guilty of contravening s 89 (1) of the Criminal Law Code. At paragraph 10 and 11 of the submission, the State submitted as follows:

“10 The State also had regard to the evidence of Alpha Nyarunga, a member of the neighbourhood watch committee attached at the Chabwino Police Base, Faina Tsingano who was related to the deceased, and lived with him, Blessing Mbariro, also a suspect in the same case, Sixpence Konye, deceased’s father-in-law and Tapiwa Charuma, another member of the neighbourhood watch committee based at Chabwino Police Base. All these witnesses identified accused with the assaults on the deceased though most of them did not show an innocent disposition in giving their evidence.

11 The circumstances of the case are such that it cannot be completely disregarded the roles played by other police officers and neighbourhood watch committee members in the assaults. Accused’s behaviour despite trying to paint a picture that his contribution towards the assaults was minimal is culpable.”

Firstly, the State accepted that evidence of the state witnesses pointed to the accused as the assailant, although the state counsel had some reservations about the evidence. Secondly, it accepted that the assault by the accused on the deceased was not as innocent as the accused sought to portray. It is therefore difficult to understand why then, the State would accept a leer charge.

It is necessary to comment on the decision of the State to seek to disregard the evidence of the State witnesses. Having placed the evidence before the court, and wishing not to withdraw the charges, it was the discretion of the court to assess the evidence and the credibility of the witnesses. The court is mindful of the relationships of the witnesses and the deceased, but found most of the witnesses to be credible and that they corroborated each other in material respects contrary to the State’s view. The conduct of the State, in my view, amounted to usurping the court’s discretion to assess the evidence. Whilst it is the prerogative of the State to commence proceedings and withdraw proceedings, it cannot, where after placing evidence before the court and deciding to still proceed, determine the credibility of the witnesses and the adequacy of the evidence. It would be a travesty of justice for the court to disregard the evidence solely on the views of the State particularly where the evidence is clearly at variance with the accused’s defence

Mr *Mpofu* submitted that following the state’s closure of the State case, and the concession that it could not establish a nexus between the assault by the accused and the cause of death, the court was left with only one option: to find the accused guilty of either culpable homicide or assault. He referred to *S v Chari*. Reference by the accused to that case is in my view misplaced as the State in that case had withdrawn and not closed its case. The accused in

that case, had been charged with contravening s 3 of the Criminal Law Amendment Act [*Chapter 9:05*] (now s 70 of the Criminal Code). One of the essential elements of the offence was that the complainant must have been below 16 years of age. The court found that element not to have been established. BLACKIE J observed at 180 E-G:

“The girl was called to give evidence. She did not know when she was born but said she guessed she might have been 14 at the time of the offence. The prosecutor tendered an affidavit in which the girl's age was estimated. The accused objected to the production of that affidavit. The prosecutor withdrew it. The accused did not cross-examine the girl. The prosecutor called no further evidence. He told the trial magistrate that he wished to withdraw the charge against the accused.”

Despite the above evidence, the court refused to accept the withdrawal basing its decision on the fact that the complainant appeared to be underage. The accused referred to the following observations by BLACKIE J at 181 D-E that:

“The function of a judicial officer is to determine the guilt or innocence of the accused on the evidence, which is presented against him by the prosecutor. It is not for the magistrate to search out and supplement that evidence even if he believes that the accused may be guilty and that the necessary evidence is available and, if properly presented, will result in the conviction of the accused. If the trial magistrate believes that, he can and should tell the prosecutor so in court and, if need be, complain to the prosecutor's superior. But if the prosecutor persists in the withdrawal of the case, the trial magistrate must accept that decision. For him to believe as he did in this case is a grave error.”

There are two distinguishing factors between the present matter and the *Chari* case. The first is that, in the *Chari*'s case, the State had decided to withdraw the charges and consequently the facts that had been presented to the court would cease to be before the court. In the present matter, the State chose to close its case. Consequently, the evidence adduced is still before the court. Secondly, the evidence in *S v Chari* was clearly inadequate and did not establish the essential element of the offence that the complainant was below 16 years of age. No reasonable court could have been expected in that case to convict the accused. The evidence before this court, as observed earlier, establishes the essential elements of the offence of murder. It is therefore not correct for the accused to submit that the state's decision to close its case is absolute.

Turning to the second question for determination, that is the applicability of s 278 of the CP&E Act, the relevant subsections of 278 are subss 5, 11 and 12 which provide as follows:

- “(5) In any criminal proceedings in which the physical condition or identity of a deceased person or dead body while such person or dead body was in or at a hospital, nursing-

home, ambulance or mortuary, is relevant to the issue, a document purporting to be an affidavit made by a person who in that affidavit states that he is or was employed at or in connection with the hospital, nursing-home, ambulance or mortuary and that in the performance of his official duties there or in connection therewith he observed the physical characteristics of the deceased person or dead body described in the affidavit, or that while the deceased person or dead body was under his care, such person or dead body sustained the injuries or wounds described in the affidavit or sustained no injuries or wounds, or that he identified, pointed out or handed over the deceased person or dead body to another person or left the deceased person or dead body in the care of another person, or that the deceased person or dead body was identified, pointed out or handed over to him or left in his care by another person, shall, on its mere production in those proceedings by any person, but subject to subsections (11) and (12), be *prima facie* proof of the facts so stated.”

- (11) An affidavit referred to in this section shall not be admissible unless the prosecutor or the accused, as the case may be, has received three days’ notice of its intended production or consents to its production.
- (12) The court in which any affidavit referred to in this section is produced in evidence may, of its own motion or at the request of the prosecutor or of the accused, cause the person who made the affidavit or any other person whose evidence the court considers to be necessary to give oral evidence in the proceedings in question in relation to any statement contained in the affidavit or may cause written interrogatories to be submitted to such person for reply, and such interrogatories or any reply thereto purporting to be a reply from such person shall, on their mere production in those proceedings by any person, be admissible in evidence.”

It is apparent from subs 5 that an affidavit prepared by a person there in cited is admissible in evidence. The mere production of the affidavit is *prima facie* proof of the contents therein. (See *S v Tawona Michael Mhute* HH 12/12). However, the affidavit must be properly produced in terms of subs (11).

In order for an affidavit to be said to have been properly produced, the accused must have been given 3 days’ notice of the production of the affidavit failing which the accused must consent to the production. (See *S v Hamadziripi* 1984 (1) ZLR 318 (HC) at 321 C-E where WADDINGTON J discussed the meaning of s 260 (7) of the Criminal Procedure and Evidence Act [*Chapter 59*] (now s 278 (11) of the CP&E Act; *Willard Chawira v The State* HH 42/12). It is not in issue that the accused was given the requisite notice and I did not hear him to be saying that he was not given notice. The post mortem report would therefore be admissible in evidence on its mere production. The accused’s submission, accepted by the State that the post-mortem report can only be properly produced through the pathologist, therefore lacks merit. The propriety of the production is not that it must be through the deponent. It is that requisite notice for the production must be given and in the absence of the requisite notice, the accused must consent to the production.

The issue raised by the accused regarding subs 12 equally lacks merit. The accused's submission is that since he has questioned the factual findings, the court is enjoined to call Doctor Gonzalez to give oral evidence and the post-mortem report will only be produced then and through the doctor. It will not be adequate to call any other doctor. The State seems to agree with the accused.

The import of subs 12 is, in my view, that the court can only cause the pathologist to give oral evidence where the post mortem report has been properly produced and is before the court. It is apparent from the subsection that the court is required to exercise a discretion having had sight of the post-mortem report. The court cannot be able to do so either *mero motu* or on the request of either party unless and until the report has been produced. It is only after the report has been produced that it can determine whether the contents of the report require the pathologist who deposed to the affidavit or any other expert to give oral evidence. In G Feltoe's *Judges' Handbook for Criminal Cases* (2009, Legal Resources Foundation) p 71, it was observed that:

"It will be necessary to use the power to ask the doctor to give oral testimony when the original affidavit is inadequate and the court is unable to arrive at a just decision on the basis of the report. If the information is very scanty or vital information is omitted, or the information in the report seems to be contradictory, this power should be exercised. But if it contains all the necessary information there will be no need to summon the doctor. *S v Anock* 1973 RLR 154 (A), *S v Sibanda* A-10-72; *S v Melrose* 1984 (2) ZLR 217 (S)." (Cited with approval in *S v Ndzombane* 2014 (2) ZLR 197 (S)).

It is implicit from the above that the post-mortem must be before the court in order for the court to decide from the contents thereof whether or not it is necessary to call a doctor to assist it in arriving at a just decision.

Further, the accused appears to be limiting the word "statement" in subs 12 to words and phrases that require explanation and not factual findings. It was submitted on his behalf in paragraph 1.8 of the submissions filed on 23 November 2015 that:

"By subsection 12, the court can allow the state to call another coroner only to deal with "any statement" contained in the affidavit. It is submitted that the court's powers are under such circumstances limited to calling a doctor who will only deal with statement(s) in the affidavit. Otherwise put, subsection 12 permits the calling of a person who will only interpret or educate the court as to what certain words, or phrases when used under such circumstances mean. It does not permit the court to call a person who will talk about factual findings that they never made and are unaware of."

The limitations ascribed by the accused to the meaning of the word "statement" are baseless. The word is defined in the **Cambridge Dictionary** to mean: "something that someone says or writes officially or an action done to express an opinion". On

www.thelawdictionary.org, the word is defined as follows: “in a general sense, an allegation; a declaration of matters of fact. The term has come to be used for a variety of formal narratives of fact, required by law in various jurisdictions as the foundation of judicial or official proceedings”. In **Words and Phrases Legally Defined**, Volume 5, 1970 the word is defined as follows: “Statement includes any representation of fact, whether made in words or otherwise.” If the word is so defined, it follows that the court is not limited to calling the deponent to the affidavit or any other expert to explain “certain words or phrases” only as suggested by the accused. There is nothing preventing the court from calling any other expert to explain the findings of fact in light of the evidence that will be before it. Ultimately, it is the discretion of the court not only to decide when to hear oral evidence under subs 12 but also as to what probative value to place on the post mortem report in the event that the pathologist who compiled the post-mortem or any other expert is not called to give oral evidence.

In the circumstances, I decline to accept the decision of the State to tender a lesser offence.

National Prosecuting Authority, respondent’s legal practitioners
Coghlan Welsh and Guest, accused’s legal practitioners