

THE STATE
versus
HUMPHREY JOE

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 28 September, 2017

Criminal Trial

A Muziwi, for the State
A. Nyamupfukudza, for the accused

CHITAPI J: The accused was arraigned before this court on a charge of murder as defined in s 47 of the Criminal Law (Codification and Reform) Act, [*Chapter 9:23*]. The indictment alleged that the accused unlawfully and with intent to kill or realising a real risk or possibility of his conduct resulting in death assaulted the deceased Pedzisai Kanyepa by striking him on the head with a log, causing injuries from which he died. The incident allegedly occurred at 1 Shumba Close Rujeko, Marondera in the night of 13 May, 2016. The accused pleaded not guilty to the charges.

In his defence outline which was produced in court as annexure ‘B’, the accused protested his innocence and stated therein that he knew nothing about the charge. He surmised that the deceased might have been assaulted at his in-laws place which is near his place of residence because the deceased and his wife were estranged and the wife had returned to her parents place. The accused opined that there could have been a fight at the in-laws place when the accused visited because of the matrimonial differences.

The court would ordinarily not have bothered to write a judgment in this matter because the State Counsel withdrew the indictment after plea following the leading of state evidence from all the state witnesses. Since the State is *dominis litis*, once it decides to withdraw a charge against the accused person as permitted under section 12 (1) (c) of the National Prosecuting Authority [*Chapter 7:20*], the court’s hands are tied and it acts accordingly by giving effect to the withdrawal. The consequences of the withdrawal of the charge after plea as in this case entitles the accused

person to a verdict of not guilty as provided for in section 8 (b) of the Criminal Procedure and Evidence Act, [*Chapter 9:07*].

The reason why the court has decided to write this judgment is to express its disgust at the allegations made by a state witness that he was forced to lie in his statement and in his testimony in court. A brief summation of how the case progressed is necessary.

The summary of the state case listed three witnesses and a summary of their evidence. The first two witnesses Victoria Masadza, the wife to the deceased and Muchabaiwa Nherera a resident of Rujeko Township where the murder occurred, had their evidence admitted as outlined in the summary of state case in terms of s 314 of the Criminal Procedure. Their evidence was not contentious. It was to the effect that the deceased was discovered lying on the ground and unconsciousness around 0500 hours on 14 May, 2016 at the corner of Shumba and Chirinda Roads in Rujeko suburb, Marondera. The deceased was subsequently ferried by police to Marondera Hospital from where he was transferred to Parirenyatwa Hospital. The deceased passed on at Parirenyatwa Hospital on 17 May, 2016. The two witnesses did not witness the assault upon the deceased.

The only witness to the murder according to the summary of the case was a 15 year old juvenile, Tinashe Nyausopo. Although he was listed by name in the summary of state case, it is ordered that his name shall be withheld and not be published for purposes of his protection.

The juvenile is related to the deceased. He testified to having seen the deceased knock at the house where the witness stayed. Upon getting no response to his knocking, the deceased left the homestead. The deceased then allegedly got into the accused's yard where upon the witness saw the accused person striking the deceased with a wooden plank on the back of the head. The witness testified that the deceased person staggered, fell down, rose up again, walked for a short distance and fell down once more. The witness claimed to know the accused well and to have identified the accused with the aid of electric lighting. He claimed to have been some 12 paces away from the place where the deceased was struck by the accused. He also claimed to have made his observations through the window of the room where he slept. The window overlooked the place of the assault. Before the prosecutor closed his examination in chief of the witness he asked him, "Do you have any reason to lie against the accused person?" The witness said, "yes". The

court and indeed both counsel thought that the witness had not understood the question. The interpreter repeated the question and the witness again responded affirmatively.

When asked to give his reasons as to why he would lie against the accused person, he explained that following the discovery of the unconscious deceased, police picked up his grandfather, that is, his mother's father for questioning and detained him. After a few days the grandfather was released. Upon the grandfather's release, the police then picked up the witness and took him to the police station. They allegedly threatened to torture him. He said that he was given a choice to either be electrocuted or beaten up. He was shown an electric cable which police threatened to use to electrocute him. If he did not want to be electrocuted or beaten up, he had to co-operate. He was therefore coerced into lying that he had witnessed the accused assaulting the deceased. The witness said that the police after telling him what to say at court then typed a statement which he was made to sign. It was the witness statement which he was shown today before trial. He therefore said that he lied to the court by testifying to what the police had told him to say.

The court asked the witness whether he was simply alleging being coached or he did not know anything about the commission of the offence. He responded that he did not witness anything at all because he was sleeping. In other words the witness was just a decoy enticed to lie to the court for fear of assault by the police. The prosecutor had no choice but to withdraw the charge against the accused person after plea.

This judgment therefore served to express the court's very serious concerns about the alleged conduct by the police if true, of enticing the juvenile witness to lie and perjure himself before the court. If what the juvenile testified to is true, then stern action ought to be taken against the errant police officer. Our society cannot benefit through exploitation of children. It is an offence under the Children's Act, Chapter 5:06 for any person to encourage a child, that is a person under 16 years, to commit an offence. In casu, the juvenile witness perjured himself. If it is found after investigation that he did so at the instance of any police officer, that police officer is liable for perjury as well and should be punished for it.

The juvenile named a police officer by the name Gondora as having been the one who enticed him to lie. He said that the officer was also acting with his colleague whom he could

identify. The police officers are based at C.I.D Marondera. The court cannot pass a judgment on the named police officers without their being heard.

The court has felt compelled to bring the serious allegation of misconduct made against the police officer(s) concerned to the attention of the police authorities so that investigations may be made and appropriate action taken in the event that these serious allegations are proved to be true. For ease of reference, the police reference of this case according to documents filed of record is C.I.D Marondera D/R 40/05/16; Dombotombo CR 67/05/16.

The Registrar is accordingly directed to forward a copy of this judgment to the Deputy Commissioner General Crime, Zimbabwe Republic Police, so that his office gets to know the court's misgivings on the serious allegations made against the police. Another copy should be forwarded to the Prosecutor General.

*National Prosecuting Authority, for the State
Nyamupfukudza & Partners, for the accused.*