

THE STATE
versus
BERNARD CHIVENGWA

HIGH COURT OF ZIMBABWE
ZHOU J
HARARE, 8, 9, 10, 11 & 22 November & 8 December 2016

Criminal Trial

Assessors: 1. Mr Kunaka
2. Mr Mhandu

A Muzivi, for the State
G Tapera, for the Accused

ZHOU J: The accused was arraigned before this court on three charges. The first charge is of kidnapping as defined in s 93 (1) (b) (i) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. In respect of that count the allegations are that on 17 October 2015 and at Dzapasi Village, Chief Mangwende, Murewa, the accused with intent to deprive a child of her freedom of bodily movement, intending to cause such deprivation or realizing that there was a real risk or possibility that such deprivation may result, ambushed and kidnapped the now deceased Vaida Mubaiwa. The second count is of murder as defined in s 47 of the Criminal Law [Codification and Reform] Act. The allegations in respect of that count are that on the same date to which the kidnapping charge relates and at the same Dzapasi Village, Chief Mangwende, Murewa, the accused unlawfully and with intent to kill, murdered Vaida Mubaiwa or realizing that there was a real risk or possibility that death might result waylaid and assaulted the deceased with an axe handle all over her body thereby causing injuries from which the deceased died. The third count is of defeating or obstructing the course of justice as defined in s 184 (1) (a) of the

Criminal Law [Codification and Reform] Act. This count is based upon the allegations that on 17 October 2015 and at Dzapasi Village, Chief Mangwende, the accused, with intent to cause judicial proceedings to be defeated or obstructed, or realizing that there was a real risk or possibility that proceedings may be defeated or obstructed, dumped the body of the deceased Vaida Mubaiwa in a gum tree plantation.

The accused pleaded not guilty to all the three counts, and pleaded an *alibi*.

The facts which are not in dispute are as follows. On 17 October, 2015 in the evening the deceased was at her homestead in the company of her two friends, Chengetai Chivengwa and Shantel Chivengwa. She went to the bathroom to collect a bucket which she had left there. She was heard screaming by her two friends who then ran away to alert their grandmother. The following morning the lifeless body of the deceased was discovered dumped in a nearby plantation of gum trees.

The postmortem report, exh. 1, which was prepared by Dr Mauricio Gonzales, a Forensic Pathologist, concluded that the cause of the death of the deceased was: “**(a) subarachnoid haemorrhage; (b) Base skull fracture; (c) Head trauma**”. The foregoing were, according to the report, secondary to assault. The postmortem report was prepared pursuant to a postmortem examination of the remains of the deceased which was conducted on 21 October 2015. The evidence of Dr Mauricio Gonzalez was admitted in terms of s 314 of the Criminal Procedure and Evidence Act [*Chapter 9:07*].

The issue for determination is the identity of the person who kidnapped the deceased and/or caused the death of the deceased, and dumped her remains in a gum tree plantation.

In seeking to prove its case the State relied on the evidence of eleven witnesses. The evidence of four of those witnesses, namely, Dr Mauricio Gonzalez referred to above, Dr S. Ganyani and Violet Chipika, and Walter Mazorodze was admitted in terms of s 314 of the Criminal Procedure and Evidence Act. *Viva voce* evidence was given by seven witnesses. These are: Chengetai Chivengwa, Shantel Chivengwa, Chipo Nyapwere, Courage Chipuriro, Moreblessing Masuka, Benjamin Thamangani and Christopher Chaboka.

Chengetai Chivengwa was a Form Six pupil and a friend of the deceased at the time the deceased lost her life. She gave her date of birth as 16 November 1996, which means that she was just below nineteen years old when the incident happened. She is also a daughter of the

accused's young brother, which means that the accused is her paternal uncle. She stated that she regarded the accused person as her father. Both the accused person and the deceased also resided within the same village where she resided with her parents. After her return from school on 17 October 2015 she interacted with the deceased person on at least three occasions prior to the evening. On the first occasion the deceased passed by the witness's grandmother carrying a bag of mealie-meal. The name of the grandmother is Maud Chivengwa who testified on behalf of the accused person. On the second occasion the deceased visited the witness at the residence of the latter's mother and shared some chicken meat with her. The witness, the deceased and the witness's sister Shantel Muvengwa who is the second witness in this case proceeded to a place at some bridge where they spent about thirty minutes before the deceased left the witness and Shantel and proceeded to her residence. Later on after 5 o'clock in the afternoon the deceased came to the witness's residence and together with the witness and Shantel, the three of them proceeded to fetch some water from a borehole. After fetching the water the witness took the water to her grandmother's homestead while the deceased proceeded to her residence. She stated that after leaving the bucket of water at her grandmother's residence she proceeded to her mother's homestead to collect her books as she wanted to do some reading. This was now around 6 o'clock in the evening. As she was returning from her mother's homestead she met the deceased who was in the company of Shantel Chivengwa. The two girls informed her that they had met the accused person. The information given to her by the two was that the accused person was wearing a black pair of trousers and a black t-shirt which had a white patch on the front. The accused person had appeared drunk to the two girls, and had attempted to conceal his identity by kneeling down. The witness walked with the deceased and Shantel to her grandmother's residence. The deceased then advised that she intended to proceed to her residence to lock the doors as her grandmother was away. The witness and Shantel then accompanied the deceased to her residence so that she would lock the doors. When they got to the deceased's homestead the latter decided to collect a bucket which she had left in the bathroom. As the deceased got to the bathroom the witness noticed the accused person leaning by the wall of the bathroom. She saw that he was wearing the black t-shirt which had been described to her earlier on. The accused was just some 5-6 metres from where she was when she saw him. As soon as the deceased entered the bathroom the accused person followed into the

bathroom. The deceased screamed in a manner that suggested that she had been throttled or attacked. The witness and Shantel ran back to their grandmother's residence also screaming. They dropped the plates of sadza which they had carried when they had left the grandmother's homestead. She and her young sister rushed back to their grandmother's residence and informed her of what had happened. There is a distance of about 500 metres between her grandmother's residence and that of the deceased. She collected a solar lamp and went to a field in between her grandmother's residence and that of the deceased's grandmother and started shouting that the deceased had been attacked. This was after she realized that her grandmother was procrastinating. No one responded to their call. When their grandmother had joined her they went together to the deceased's homestead. They did not find the deceased but managed to pick the plates which she and her sister had dropped. When she briefed her grandmother, Maud Chivengwa, about what she had seen in connection with the attack upon the deceased Maud Chivengwa indicated that such matters caused her blood pressure to rise and would cause her to collapse. The witness then proceeded to her parents' residence and informed her mother about what had happened after which she retired to bed at her grandmother's residence. This was now around 8 o'clock in the evening.

The following morning a certain elderly woman called *Mbuya* Huni came to their residence and inquired as to why they had been screaming the previous night. They told her what had happened.

After that a certain boy called Simba Chimango and advised them that Maud Chevengwa was required at the gum tree plantation because the deceased had been found lying in the plantation. The witness, her young sister Shantel and Maud Chivengwa proceeded to the plantation. She observed the body of the deceased lying on the back with the head facing one side. The red top which she had been wearing the previous night was lifted above her breasts. The deceased was wearing the same grey skirt which she had been wearing on the previous night. A member of the Police Constabulary telephoned the police at Murewa. The police came and took the witness and Shantel. The two of them narrated to the police what had happened to the previous night. On a subsequent day the witness received an anonymous call from a male voice who threatened her and warned her that she was not clever and would be dealt with. She

changed her mobile number after that. She stated that her relationship with the accused person was not bad and she had no reason to falsely implicate him.

During cross-examination it was suggested to the witness that she was deliberately incriminating the accused person because he had had an altercation with her father and that as a result of that altercation there was bad blood between the witness and the accused person. She admitted that such a misunderstanding had taken place in her absence but denied that she had given false evidence and that her evidence was meant to implicate the accused person because of the problem which he had had with her father. She had never discussed the matter with the accused person. She denied the suggestion made to her that she had threatened to deal with the accused person. She referred to a conversation which she had had with the accused's wife, but denied that that conversation had created bad blood or that it had a bearing on her testimony.

The second witness, Shantel Chivengwa, is the last witness's young sister. She was 17 years old when she testified in this court. The deceased was her friend and neighbor, and they resided in the same village. She confirmed that the accused person is her paternal uncle, being an elder brother to her father. She testified that on 17 October 2015 at or about 2 o'clock in the afternoon the deceased person came to her residence when she was studying. Together with the deceased and Chengetai Chivengwa they went to seat by the road. The deceased subsequently left and went to her homestead. She and her sister left the road later. Around 5 o'clock in the afternoon the deceased came to their homestead and the three of them proceeded to fetch water from a borehole. The deceased went to her homestead, but later came to the witness's grandmother and told her that she had seen a person who looked like he was suffering from stomach pain and was suspicious when she had gone to the bathroom at her homestead intending to take a bath. The person appeared to be hiding away from her. The witness's grandmother, Maud Chivengwa, then suggested that the witness accompany the deceased to check on who the suspicious person was. The witness and the deceased proceeded and saw the accused person. He was wearing a black t-shirt with a white patch and black trousers. When the two girls notified Maud Chivengwa that they had identified the suspicious person as the accused person the grandmother stated that she suffered from hypertension and would collapse. When the deceased wanted to go and close the doors at her residence they decided to enlist the company of Chengetai. She again saw the accused person standing under a tree when she and the deceased

had gone to collect Chengetai. Again she told Maud Chivengwa about that but her response was that she did not want to be involved in matters that would involve the police. She saw the accused person as he was walking away. When they met Chengetai they told her about how they had seen the accused person appearing to be hiding away from them. Her grandmother suggested that the witness and Chengetai accompany the deceased to close the doors at her homestead and return with her. When they got to her homestead the deceased decided to go to the bathroom to collect a bucket which she had left there. As soon as she got into the bathroom the deceased screamed. The witness and Chengetai ran away screaming that the deceased had been attacked. They told her grandmother what had happened but she suggested that they proceed to tell their father. When they got to their homestead their father was not present. They, however, told their mother. Her evidence regarding how the discovery of the deceased's body was communicated to them was the same as that of Chengetai Chivengwa. She stated that she was invited by the police to tell them what had happened on 17 October 2015.

The witness stated that Maud Chivengwa warned her against going about telling anyone about what they had observed on 17 October 2015.

She stated that there was nothing bad about her relationship with the accused person who she regarded as her father.

She confirmed that she was aware of the altercation which had taken place between her father and the accused person, but stated that that had nothing to do with her evidence as she had no business getting involved in a dispute between her fathers.

The third witness, Chipu Nyapwere, was forty years old when she testified. She is a step-daughter of the accused's brother, in that her mother was married to one Patrick Chivengwa who is the accused's brother. She regarded the accused person as an uncle because of that relationship. She stated that the deceased resided within the same area that she resided in. On the date in question she stated that she was at her residence preparing a meal. She heard the deceased crying, and the sound was following a certain direction. She went in the direction where she had heard the screaming but did not see the deceased. The witness then went to a Mrs Chipuriro's homestead to inquire why the deceased was crying. According to the witness Mrs Chipuriro confirmed that she had also heard the deceased crying but had later heard her name being called out by Chengetai Chivengwa and others. Mrs Chipuriro gave the witness her son Anesu to

accompany her to Reverend Chivengwa's homestead to check if the deceased could be there. No one resided at that homestead. The witness and Anesu met one Joe Chivengwa whom the witness regarded as a brother. Joe Chivengwa had also heard the deceased crying. He agreed to accompany the witness and Anesu to Reverend Chivengwa's residence. When they got to Reverend Chivengwa's residence she realized that the doors there were locked. At that moment she heard some footsteps. She and the other two persons in her company stood by the wall of a house and, while there, she saw the accused person carrying the deceased on his shoulders. She concluded that the deceased's body was lifeless because her legs and hands were dangling. She was able to identify the deceased by the clothes which she was wearing because she had seen her earlier on that same day when the deceased was walking from the borehole in the company of the first and second witnesses. She stated that when she saw the accused person he was some 5 -6 metres from where she was standing by the wall of a house. He was wearing a black t-shirt and a black pair of trousers. The accused person proceeded into a thicket of gum trees. When the accused person had gone into the gum trees plantation the witness heard a sound suggesting that something had been placed on the ground. There was also a sound of leaves. Then she heard a thud once.

After that the witness proceeded to Mrs Huni's residence and told her that she had seen the accused person carrying the deceased on his shoulders and appeared to be lifeless. Mrs Huni assigned her son, Muranganwa, to accompany the witness, Anesu and Joe Chivengwa to the homestead of the deceased's grandfather to inform him of what they had observed. They went but on the way Joe Chivengwa decided to leave them and go to a homestead where there was a memorial service. The witness saw the deceased's maternal uncle, Langton Gatsi, and told him about his observation of the accused person carrying the deceased's body. Gatsi telephoned his brother's wife to inform her of that information. She left after Gatsi had advised her that he would make a report to a Mr Nyagwizo who was a member of the Police Special Constabulary.

Courage Chipuriro, the fourth witness to testify, also resided in the same village as the deceased. He and his brother-in-law were the first persons to see the body of the deceased on 18 October 2015. They were coming from the borehole between 6 and 7 o'clock in the morning. He stated that he observed the body lying on the back with the head facing sideways. He informed Mercy Chipuriro. He identified the body as that of the deceased. They sent a child to

go and inform the deceased's uncle about what they had seen. He noticed that the deceased's blouse had been pulled above the breasts. After the police had come he observed a trail suggesting that the body of the deceased had been dragged on the ground for a distance of about 3-4 metres from an uninhabited house belonging to one of the members of the Chivengwa family. The trail was leading to where the body was. The body was about 10 metres from that house.

The fifth witness, Moreblessing Masuka, was the Acting Headmaster at Nyamhondoro Primary School in Mudzi, where the accused person was also working as a school teacher. He stated that on 16 October 2015 the accused person reported for work just before 7 o'clock in the morning. Around 3 o'clock in the afternoon he noticed the deceased passing by close to the witness's office with his son Ronald Chivengwa following behind. The accused person was carrying a bag which was strapped on his shoulder. Later around sunset the witness saw Ronald Chivengwa playing with other children at the teachers' quarters. On Saturday 17 October the witness did not see the accused person at all for the whole day. The witness specifically recalled that one Christopher Chaboka, a member of the Seventh Day Adventist Church came to his residence looking for keys to the classroom which the Church used for its services on that day. The classroom was the one that the accused's pupils also used for their lessons, hence the accused had the keys to it. The witness stated that he directed Christopher Chaboka to the accused's cottage to collect the keys. Chaboka returned and advised him that he had knocked on the accused's door but had got no response. He had to give him spare keys to use to open the classroom. The following day on 18 October 2015 the witness saw the accused person between 0730 hours and 0830 hours when he was arriving at his residence at the school. They greeted each other. Accused's residence was about 20 metres from that of the witness. Accused advised the witness that he had received a telephone message that his wife was not feeling well and wanted to travel to Murewa to see her. The accused advised the witness that he might arrive late for work on the following day. During the conversation the accused told the witness that the previous day, 17 October, he had spent the day inside his house because he was experiencing pain in his leg. He even pulled up his trousers to show the witness the leg which was allegedly swollen. The accused did not come to work on Monday 19 October 2015. The witness tried without success to telephone him on his mobile phone on Monday, Tuesday and Wednesday. On

Thursday police officers from the Criminal Investigation Department came to the school in connection with the accused person. The witness stated that when he asked Ronald Chivengwa where the accused had been on 17 October the boy had told him that accused had been in the house suffering from stomach pain.

The sixth witness for the prosecution was Christopher Chaboka. He is a member of the Seventh Day Adventist Church. Their church holds its Saturday services at Nyamhondoro Primary School. He knew the accused person as a teacher at that school. On 17 October 2015 around 10 o'clock in the morning he got to the school but found the classroom which they used for church services locked. He went to Blessing Masuka's residence to ask for the keys but was referred to collect them from the accused person. He knocked hard on the accused's door but got no response. He eventually got spare keys from Blessing Masuka which he then used to open the classroom.

Benjamin Thabangani is the investigating officer. He told the court that he has been in the Zimbabwe Republic Police for seventeen years. On 18 October 2015 he was on duty when a report of a person who had been found dead at Dzapasi Village, Chief Mangwende, Murewa, was made by a certain police officer. Together with his colleagues, Detective Inspector Gapara and Detective Sergeant Mudungwa they joined other police officers and proceeded to Dzapasi Village. Courage Chipuriro who was the informant was also in the motor vehicle. When he and the other officers got to the scene they found people gathered about 100 metres from the body. They parked their motor vehicle a distance and then proceeded to inspect the body. He noticed that there was a portion where there was a trail suggesting that the body had been dragged on the ground for some distance. He also observed some shoe prints which seemed like those of a Pathfinder shoe. The witness testified that when the accused person was arrested he was found with shoes whose prints matched those found at the scene. The pair of shoes was produced as exh. 3 after the witness identified them. About 4-6 metres from where the body of the deceased was, the witness found an axe handle. He identified the axe handle, which was admitted in evidence as exh. 2. The Police took some photographs at the scene. He observed that the body of the deceased was bleeding from the nose and ears. He took the body of the deceased to the mortuary at Murewa Hospital.

During his investigations Benjamin Thamangani discovered that the complainant was a complainant in a rape case in which the accused person was also the accused in that matter. The rape case had been given a trial date in November 2015 at Murewa Magistrates Court. The complaint of rape had been received at Murewa Police Station. His fellow police officers discovered that the accused person was actually in Murewa. They arrested him. The accused was taken to the offices of the Criminal Investigations Department at Murewa. A warned and cautioned statement was recorded from him. The accused person denied the charge. It was during that exercise that the witness discovered that the shoes which the accused person was wearing matched the shoeprints which he had observed at the scene as pointed out above. The witness stated that the accused person denied being in Murewa on 17 October 2015, and stated that he was at his work place at Nyamhondoro Primary School. The witness and other police officers visited the school. The interviews with the Acting Head informed the witness that the accused person had been last seen at the school on Friday 16 October 2016. He also gathered that on 17 October 2016 Christopher Chaboka had looked for the accused person at his staff residence but did not find him. He also interviewed the accused's son, Ronald Chivengwa who stated that on 17 October his father, the accused, had remained in the bedroom for the whole day because of stomach pains.

The witness took the accused person's mobile phone which had an Econet sim card to Econet. They checked the accused person's call history and produced a printout which showed that at some point the accused person's phone received some calls using the Nhakiwa 2 Base Station which covered Dzapasi Village which is the place where the deceased's body was recovered. The print out showing the call history was produced as exh. 4. He also took the axe handle which he had recovered from the scene for weighing. The Certificate of Weight issued was identified by the witness after which it was produced as exh 5. According to that document the axe handle weighed 970 grammes. He took the axe handle together with the body when he took the body for a post-mortem examination.

Violet Chipika whose evidence was admitted in terms of s 314 of the Criminal Procedure and Evidence Act was employed by the accused's wife. She resided at Panzvimbo Bottle Store at Murewa Business Centre. Her evidence was that on 16 October 2015 at around 1910 hours she was at Panzvimbo Bottle Store selling beer when the accused arrived carrying a black ray bag.

The accused was wearing a pair of black trousers and a long sleeved light blue shirt. The witness's evidence is that the accused asked for his wife. He informed the witness that he was going away but would return on Saturday 17 October 2015 and night to check if his wife would have returned. On 17 October 2015 the accused did not return. He only came back on 18 October 2015 at around 1400 hours. On that day the witness saw the accused crossing at Chibanguza shop coming from the direction of Murewa Banks.

Dr S. Ganyani is a registered Medical Practitioner who at all material times was employed as Government Medical Officer at Murewa District Hospital. On 18 October at about 1347 hours he was on duty at Murewa District Hospital. He examined the deceased's body. He found that the body had no sign of life and, accordingly, certified the deceased dead.

The accused gave evidence and also led evidence from his mother, Muadi Chivengwa. He adopted his defence outline. In his defence outline the accused stated that on 16 October 2015 he went to Murewa Shopping Centre and saw Violet Chipika who worked at the accused's bottle store. He spoke to her and inquired about the whereabouts of his wife Agnes. He was advised that Agnes had gone to Uzumba Maramba Pfungwe. He tried without success to call his wife. He went back to his work place at Nyamhondoro Primary School around 9 o'clock in the evening. He left Nyamhondoro Primary School in the morning on 17 October 2015 and went to Uzumba Maramba Pfungwe to look for his wife. He did not find her. He went back to Murewa Centre to resolve a problem with his bank. Later on he went to consult a spiritual healer about his marital problems but the healer was not available at his shrine. The accused person tried again without success to contact his wife by phone. Later the wife called him and suggested that they meet at her aunt's place on 18 October 2015 which was the following day. He went back to Nyamhondoro Primary School and arrived around 6 o'clock in the evening. He instructed his son Ronald to take his phone for charging at Mr Marara's place. On Sunday 18 October Ronald collected the phone and some meat from Mr Marara's place. On that day he spoke to Moreblessing Masuka and asked for permission to visit his wife on the understanding that he would return the following day. He tried to telephone his wife but failed to get through on her phone. He then passed through the bank to inform the authorities there that he had failed to locate his national identity card. He then got a telephone call from his wife, and spoke to her and her brother who asked him to come to Murewa. He told his brother-in-law that he was already at

Murewa. He then met his wife at Murewa Park. At that time the accused person received a telephone call from his daughter Samatha advising him that the deceased had been severely assaulted by an unidentified gang. He passed that news to Agness who, according to him, “showed no signs of surprise”. During that time Agnes asked to be allowed to go to the bottle store to pack her clothes. She later returned in the company of a female friend. All of a sudden the police arrived and apprehended him. He states that his relatives who became the witnesses for the prosecution were tortured by the police and forced to falsely implicate him in the commission of the offence. He stated that he never went to Dzapasasi Village on the day in question.

In his oral evidence the accused stated that he went to Murewa on Saturday at sunset because he was having a misunderstanding with his wife. He therefore wanted to tell her where they were supposed to meet to resolve their problems and to inform the wife’s brother that she had failed to come to the agreed meeting place. He stated that the State witnesses were severely assaulted by the police in his presence. Those assaulted included his mother. He stated that he did not enjoy a good relationship with Chengetai and Shantel Chivengwa. His reason for the bad relationship was that he had reprimanded Chengetai when she had an illicit affair with the husband of one of the teachers who was working with him at Dandara Primary School. That lady had complained to him and cried that Chengetai was destroying her marriage. He stated that Chengetai informed her father who is a younger brother of the accused about the reprimand. That did not go down well with the brother who then confronted him and assaulted him on 29 May at about 7 o’clock in the evening. He stated that on that day Chengetai and her mother insulted him and threatened to cause his arrest. That, according to him, created animosity between him and the family of the two witnesses Chengetai and Shantel. He denied that the pair of shoes which was produced in court belonged to him. His evidence was that his shoes were brown in colour and were size 9. The shoes were inscribed with the word “Rockport” at the back, and their print was round. When he surrendered his shoes to the police he was made to sign a document. He stated that the police severely tortured him in order to extract a confession from him. He refused to admit to committing the offence notwithstanding the torture. He produced a medical report as proof of the torture.

Maud Chivengwa testified that on 17 October 2015 the deceased came to her homestead and advised her that a suspicious person was walking close to her residence. The person, according to the deceased, appeared to be intoxicated. She stated that the deceased told her that she had failed to identify that suspicious person. The witness stated that she then suggested that the deceased should spend the night at the witness's residence but the deceased suggested that the person she had seen appeared to be a thief. The doors had not been locked at the deceased's residence. The deceased also advised the witness that she wanted to sleep at her uncle's residence. The name of the uncle was Hondo. The witness then suggested that the deceased be escorted by Chengetai and Shantel. They left. This was around 7 o'clock in the evening. A short while Chengetai and Shantel returned screaming that the deceased had been attacked. The witness stated that she and her two grandchildren then took a lamp and went to the deceased's homestead. They called out her name but there was no response. She assumed that the deceased had gone to Hondo's homestead to sleep there. She stated that Chengetai and Shantel did not tell her that they had identified the person who had attacked the deceased. The two girls refused to accompany her to Hondo's residence or to their father's homestead because they stated that they were afraid. She went alone to their father's residence but found that he had not returned from Murewa where he was doing some construction work. She returned to her residence but was worried. The following morning she woke up intending to go and look for the deceased but got the message that the deceased had been found at the plantation. She went and saw the lifeless body of the deceased.

The accused's defence is an *alibi*, as his contention is that he was not at Dzapasi village on the day and at the time that the offence was allegedly committed. The onus is, therefore, on the state to disprove that *alibi*. In the case of *R v Biya* 1952 (4) SA 514(A), the appellate Division held that the accused does not bear the onus to prove his *alibi*. See also, Hoffman & Zeffertt, *The South African Law of Evidence 4th Ed.*, p. 619.

Three of the witnesses who testified on behalf of the prosecution stated that they positively identified the accused person on the night of 17 October 2015. These are Chengetai Chivengwa, Shantel Chivengwa and Chipu Nyapwere. Whenever the identification of an accused person is contested the court is required to approach the evidence of the identifying witness or witnesses with caution in order to satisfy itself that the observation of the witness or witnesses

was reliable. The reliability of the witnesses' observation depends, among others, upon the following factors as held in the case of *S v Mthetwa* 1972 (3) SA 767(A) at 768A-C (Per Holmes JA):

“Lighting, visibility, eyesight, the proximity of the witness, his opportunity for observation, both as to time and situation, the extent of corroboration, suggestibility, the accused's face, voice, built, gait, and dress . . . and of course, the evidence by or on behalf of the accused. The list is not exhaustive. These factors, or such of them as are applicable in any particular case, are not individually decisive, but must be weighed one against the other, in the light of the totality of the evidence, and the probabilities.”

The above approach has been upheld in this jurisdiction. See *S v Dhlwayo & Anor* 1985 (2) ZLR 101(S) at 107A-D; *S v Ndhlovu & Ors* 1985 (2) ZLR 261(S) at 263G-264E; *S v Mutandi* 1996 (1) ZLR 367(H) at 370E-371F; *S v Gomera* 2002 (1) ZLR 59(H) at 593H-594H; and, recently by this court in *S v Marera & Ors* HH 518 – 16 at p. 7 of the cyclostyled judgment.

Chengetai Chivengwa's evidence was that when she met the deceased and Shantel and they advised her that they had seen the accused person moving suspiciously it was around 6 o'clock in the evening. This was in the month of October. There is nothing to suggest that it would be so dark at that time of the evening that there would be insufficient light for the two girls to be able to identify the person that they saw. Shantel Chivengwa saw the deceased twice, firstly after she had been directed by Maud Chivengwa to accompany the deceased to go and check on the identity of the suspicious person and, secondly, when she was going to collect Chengetai so that the latter would also accompany the deceased to lock the doors at her homestead. There was therefore ample opportunity for her to observe the accused. In respect of both instances she was able to describe his clothes which included a black t-shirt with a white patch and a black pair of trousers. Her evidence as to the clothes which the accused person was wearing on the evening in question is corroborated by both Chengetai Chivengwa and Chipso Nyapwere. Chengetai's testimony was that the accused was only some 5 – 6 metres when she saw him trying to hide by the wall of the bathroom at the deceased's homestead. As regards lighting and visibility, she categorically stated that it was not dark since it was around 6 o'clock in the evening. There was nothing that impaired visibility. There is very little chance that she could mistake another person for him at that distance and given the fact that she had known him as a very close relative for virtually the whole of her life. She regarded him as a father. The same observation as to how much the accused was known applies to the evidence of Shantel. As

regards visibility, she also stated that although it was in the evening it was still clear that one could see a person and there was no chance that she was mistaken about the identity of the accused person.

Chengetai Chivengwa saw the accused person as he was hiding by the bathroom wall and when he entered the bathroom soon after the deceased had entered the same bathroom. The deceased immediately screamed in a manner that suggested that she had been attacked or throttled. The screaming was heard not just by the two girls but also by Chipo Nyapwere. When Chipo Nyapwere decided to investigate what was happening she saw the accused person carrying the deceased on his shoulders. That evidence corroborates the evidence of the two girls, in that it does not just place the accused person at the scene of the offence but links him to it. Chipo Nyapwere described how she came to the conclusion that the deceased was probably lifeless when she was being carried by the accused person on his shoulders. Her limbs were dangling. When one considers the distance between Chipo Nyapwere and the accused when he was observed carrying the deceased person, which was about five metres, and the fact that she had known him for about twelve years according to the accused himself, and resided in the same area as him, the chances of her mistaking his identity are fanciful. She said that there was moonlight which was the source of light. The light enabled her to observe the accused person until he disappeared into the gum trees plantation. Even then, she could hear the noise of leaves suggesting that the distance between them was not significant. She also heard the thudding sound.

The evidence of the three witnesses, namely, Chengetai Chivengwa, Shantel Chivengwa and Chipo Nyapwere corroborated each other. Their evidence was straight forward, and consistent in all material respects. Both Chengetai and Shantel stated that the deceased screamed after she had been attacked. They screamed too after the deceased had been attacked while she was in the bathroom. Chipo Nyapwere heard the deceased screaming. Maud Chivengwa, a defence witness, confirmed that the two girls were indeed screaming when they came to notify her that the deceased had been attacked. She thus corroborated their evidence.

The accused person suggested in his defence outline that the three witnesses mentioned above were severely assaulted by the police in order to induce them to give false evidence against him. They denied that they were assaulted or tortured or otherwise unduly influenced to

testify in this matter. The accused did not lead any evidence of such undue influence. Further, it was never seriously suggested to the witnesses when they testified that they had been forced to give evidence against him. If anything, the accused brought another dimension to his defence which he never raised in the defence outline. This was the allegation that there is animosity between him and the family of Chengetai's family which was caused by his reprimanding of Chengetai and the altercation which he had with that girl's father on 29 May 2015. It was never suggested to Chengetai during cross-examination that she had been reprimanded by the accused person for improperly associating with a married man. In any event, if indeed the alleged animosity was so serious as to induce the two girls to want to deliberately fabricate allegations against the accused person then there would have been no need for them to be coerced by the police by being tortured in the manner suggested by the accused person. The two positions postulated by the accused person are clearly inconsistent with one another.

Further, nothing was said about why Chipo Nyapwere would testify falsely against the accused person. There was no suggestion made to her that she had been assaulted by the police in order to force her to give the evidence that she gave in this court. It was not suggested to her that there was any animosity between her and the accused person or that she had any motive to tell a lie. She regarded him an uncle because her mother was married to the accused's brother.

The court finds that the three witnesses, Chengetai Chivengwa, Shantel Chivengwa and Chipo Nyapwere were credible.

The accused person's version is that he was not at Dzapasi Village in Murewa but at Nyamhondoro Primary School around 6 o'clock in the evening on 17 October 2015. He was not at the school during the day. He states that he left the school in the morning. His counsel in cross-examining the state witnesses suggested that he left around 7 o'clock in the morning. Thus the evidence of the witnesses for the prosecution, Moreblessing Masuka, Christopher Chaboka and Walter Mazorodze, that the accused person was not at Nyamhondoro Primary School when Chadoka looked for him clearly makes sense and is supported by the accused himself. Walter Mazorodze's evidence which was not disputed is that Chaboka knocked at the accused's door around 8 o'clock in the morning. The question of whether or not he had left the school earlier on that day or on the previous day is irrelevant because Chaboka did not look for him at his residence at night on 16 October 2016. What is known from the undisputed evidence of Violet

Chipika, which is consistent with that of Moreblessing Masuka, is that the accused person did leave the school in the afternoon on 16 October 2015. The next time that he was seen at the school was in the morning on 18 October 2015, when he spoke to Moreblessing Masuka. The suggestion by the accused that Moreblessing Masuka did not like him because the accused stood a better chance of being appointed substantive headmaster of the school cannot be believed because there was no evidence of animosity between the two. After all, that allegation was not put to the witness when he gave his evidence.

The evidence of the accused person that he was not at Dzapasi Village on 17 October 2015 cannot be believed. He was seen by witnesses. The shoeprints of his shoes also place him at the scene of the crime.

No other person saw the accused person at the school in the evening of 17 October which is the material time. He states that his son Ronald was with him. He also states that his son took his phone for charging at Mr Marara's place. Both Mr Marara and Ronald Chivengwa were not called to testify. The failure by the accused to call the person he says were with him at the time that the offence was committed detracts considerably from the credibility of his defence. See *R v Bezuidenhout* 1954 (3) SA 188(A) at 197.

The evidence of Maudi Chivengwa was tailored to suit the accused's version of events. She is not a credible witness. Being the mother of the accused person she sought deliberately to tell half-truths and, in some instances, untruths about the events of the evening of 17 October 2015. Her evidence was largely consistent with that of Chengetai and Shantel Chiwenga save in those instances where the evidence of the other two witnesses implicated the accused person. The two girls told the court that they told her that they had seen the accused person prior to and at the time that the deceased was attacked and abducted by the accused person. Her response to the mention of the accused's name was that she had high blood pressure which would be elevated and she was not interested in getting involved in matters that would involve the police. Shantel told the court in her evidence, and was not challenged in cross-examination, that Maudi Chivengwa had actually warned her against discussing what she had seen on 17 October 2015. Clearly, this was a witness who wanted to conceal the offence, and went the extra-mile to seek to exonerate the accused person.

The Court is convinced that the State managed to disprove the accused person's *alibi* beyond reasonable doubt.

As regards the actual commission of the offences charged, the accused person was seen by Chengetai and Shantel Chivengwa at the relevant time on 17 October 2015. Chengetai saw him as he entered the bathroom in which the deceased was. The deceased screamed upon the accused person entering the bathroom in a manner that showed that she had been attacked or throttled. The accused person was seen carrying the deceased person on his shoulders by Chipo Nyapwere. The deceased looked lifeless when he was carrying her on his shoulders. There is also other evidence which places the accused at the scene of the crime. The shoe-prints of the shoes which were produced in evidence which were recovered from him matched the shoe prints which were observed at the scene of the crime according to the evidence of Benjamin Thabangani. The debate regarding whether the type of shoe was "Grasshopper" or "Rockford" or some other type is immaterial as nothing turns on that. The fact is that the shoe prints are the same as those observed at the scene of the crime. The accused person stated that the shoes produced in court were bigger than his shoes. The court saw for itself when the accused put on the shoes and was able to walk perfectly well while wearing them in court. Those were, clearly, the shoes which the accused was wearing on 17 October 2015 when he went to Dzapasi Village.

The offence of kidnapping has its origins in the *Lex Fabia de plagiariis* of the Roman Law, which was embraced by the Dutch legal system. By that law the carrying away of a human being with a view to depriving him or her of liberty was regarded as a grave offence punishable by severe penalties. See Jonathan Burchell, *Cases and Materials on Criminal Law 4th Ed.*, and the case of *Motati* (1896) 13 SC 173, which is cited at pp. 954-955 of that text. In this case the person kidnapped was a child as the deceased was aged 14 years at the time. The accused, by manhandling the deceased and carrying her on his shoulders deprived the deceased of freedom of bodily movement intending to do so. The court has no difficulty in finding that the accused kidnapped the deceased, thereby contravening the provisions of s 93 (1) (b) (i) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*].

The State also managed to prove beyond a reasonable doubt that the deceased was killed intentionally and unlawfully by the accused person. The motive on the part of the accused person to kill the deceased was established. She was a complainant in a rape case in which the deceased

was the accused person. Thus the accused contravened s 47 (1) (a) of the Criminal Law (Codification and Reform) Act. The murder was committed with actual intent.

As regards the charge of defeating or obstructing the course of justice, the facts upon which the charge is predicated are that the accused person dumped the body of the deceased person in a gum tree plantation with intent to cause judicial proceedings to be defeated or obstructed, or realizing that there was a real risk or possibility that the proceedings may be defeated or obstructed. The charge does not speak to the proceedings which were intended to be defeated or obstructed. It seems to relate to the instant proceedings. That makes it difficult for the court to find that such a charge is sustainable given that the placing of the deceased's body in the plantation was a continuation of the conduct upon which both the kidnapping and the murder charges are founded. It is not known as to whether the deceased had already died when the accused person took her to the plantation. Chipo Nyapwere's evidence was that she heard a thud. Also, an axe handle was found near the deceased's body which in all probability was the weapon used to kill her. If the charge of defeating or obstructing the course of justice had been linked or related to the pending rape matter in the Magistrates Court then the Court would have probably considered it differently, as the killing was no doubt intended to eliminate the deceased as the witness in that matter. But, as pointed out, that is not the basis of the charge. The court is therefore not persuaded that that charge can be sustained on the facts alleged in the charge.

In the circumstances, the following is the verdict of the court:

1. In respect of Count 1, the accused person is found guilty is charged of kidnapping as defined in s 93 (1) (b) (i) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*].
2. In respect of Count 2, the accused is found guilty of murder as defined in s 47 (1) (a) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*].
3. In respect of Count 3 (Defeating or Obstructing the course of justice), the accused is found not guilty and is hereby acquitted.