

THE STATE
versus
DOUGLAS CHINYANI
and
CHIREMBWE CHIREMBWE

HIGH COURT OF ZIMBABWE
MUSAKWA J
HARARE, 26, 27 March, 13 November 2015, 24 February and 3 March 2017

Assessor: Mr Shenje

Criminal Trial

T. *Kasema*, for the state
Z. *Lunga*, C. *Kasiyo*, for first accused
F. *Mawere*, for second accused

MUSAKWA J: During the course of 2016 Mrs Shava, one of the assessors passed on. In terms of s 8 (1) of the High Court Act [*Chapter 7: 06*] both the defence and the state consented that the trial proceed with one assessor and I accordingly direct so.

The accused persons are charged with the murder of James Tsotsonga (hereinafter called the deceased). It is alleged that: “on 25 September 2011 and along Musvasvi Street, Bindura, the accused, one or more of them unlawfully and with intent to kill murdered James Tsotsonga or realising that there was a real risk or possibility that death might result stabbed James Tsotsonga with a knife on the right shoulder from which injuries the deceased died.” The charge could have been drafted with more precision.

The summary of state case alleges that on 24 September 2011 the deceased left National Railways of Zimbabwe bar and proceeded to Chipadze. He was in the company of Maximina Katembo (hereinafter referred to as Maximina). They used a footpath. Along the way there was a confrontation with the accused persons. The deceased was stabbed on the right shoulder. Apparently the cause of this tragedy was Maximina who was the first accused’s girlfriend. As will be noted from the evidence, Maximina peddled sexual favours.

The first accused's defence outline is very brief. He claims not to have been in Chipadze when the offence was committed. He further claims that Maximina must either be mistaken or is lying.

On the other hand the second accused claims to have been in Mvurwi where he worked. He only learnt about the incident from his wife when he visited his home in Bindura. Although he had a working relationship with the first accused, they are not friends. He got to know Maximina after she was introduced to him by the first accused in December 2011. He was arrested in April 2012.

The evidence led by the state essentially centres on Maximina. She is a simple young woman of limited literacy and intelligence. Her naivety is demonstrated by her casual reference to both the deceased and the first accused as her husbands. This was notwithstanding that she had only met the deceased for the first time on the fateful day.

Maximina lived on and off with the first accused. She stated that she used to see the two accused together. At the time of the incident she had parted ways with the first accused. The evidence-in-chief of this witness did not flow. Perhaps it was the manner in which the evidence was led. Basically questions were put to her and she sort of gave short answers in reply. It may have been the best to let her narrate everything that took place from the time she met the deceased. Therefore, some details emerged during cross-examination and during questioning by the court.

Maximina met the deceased who gave her US\$5 for sexual favours. She later clarified that of that amount US\$1 was used to purchase beer. As they walked from Chipenda Bottle Store towards Chipadze Shops they came across the two accused and another person. This was along a road behind Chipadze Primary School. The first accused told the deceased that the witness was his wife. A fight then ensued. Initially the deceased was assaulted with bare hands. The first accused then produced a small knife with which he stabbed the deceased. After the deceased fell down the first accused ordered the witness to go with him. She was not willing. They then left together with the second accused. They first went to a place called Mupandenyama which is in Chiwaridzo Township. Thereafter they left for the first accused's residence.

She stayed with the first accused for five days. There were eight other tenants at the house. She would do household chores but was afraid to leave. She explained that she was afraid that the first accused would catch up with her. Elaborating on this she referred to a

previous incident in which the first accused had assaulted her. This was after she had gone out without his knowledge.

She got to know about the deceased's death after three days. She overheard people talking about a body that had been found. The deceased was described by his nickname; 'Bolt Cutter' which the witness mistook for 'Body Cutter'. On the fifth day when the first accused was asleep, the witness absconded. She went to live with a friend, Auxilia at a place she termed 'Clusters'.

The witness also stated that she was ill-treated by Police Officers during the course of investigations. At the Police Station, she claimed to have been beaten on the soles. She further stated that she was also burnt on the arm with a piece of iron that had been exposed to sunlight. As to why this happened, she said she naturally stammers. As she was being interviewed the Officers must have concluded that she was being evasive, hence the assault.

Regarding the second accused, she further explained that he had held the deceased as the first accused assaulted him. She said she knew the second accused simply as Last 'Mushurugwi'. Upon the second accused's arrest she was called to Bindura Police Station where she was shown the second accused. She identified him as the one who had been in the company of the first accused. He was the only suspect shown to her at that time.

Detective Sergeant Chimuto testified that he was allocated the matter on the same day of stabbing. He located one Mavis Meke of 35/36 Masvosve Street who is the one to first see the deceased. Apparently, this woman was not called as a witness. He traced a trail of blood to where he saw the blade of a knife minus the handle. It had blood stains. There was a pool of blood.

Despite interviewing people he made no headway. He also visited the deceased at Bindura Hospital but he did not disclose his assailants. The deceased was transferred to Parirenyatwa Hospital on the following day.

In January 2012 the witness received information relating to Maximina. As to how he got leads he stated that he picked information from some prostitutes, as prostitutes are some of their sources of information. Maximina was then picked up. She initially denied knowing anything. It is only when they brought in Auxilia Amando that she then opened up. Detective Sergeant Chimuto further stated that Maximina referred to the second accused as Last 'Mushurugwi'. She led them to the first accused's residence where he was arrested. They could not establish the second accused's residence until April 2012.

They verified the second accused's *alibi* of having been at work in Mvurwi. They confirmed that he was at work on the 24th September 2011 and finished at 1200 hours (actually 1 p.m.). No one could shed light on the second accused's movements thereafter. When the second accused was eventually arrested they called in Maxima who identified him.

This witness further stated that he knew the deceased who was an ex-employee of the National Railways of Zimbabwe. He elaborated that he was known as Jimmy or 'Bolt Cutter'. The nickname arose from the brawls the deceased used to be involved in.

The post-mortem report on the deceased was produced by consent. It noted the following injuries-

-9cm deep wound on the right mid axillary fold superiorly

-large haematoma in the axillary space

-severed axillary artery on the lower on the border of the pectoral minor muscles

-blood in the subpectoral region

The cause of death was haemorrhage due to stab wound.

With this evidence the state closed its case. Both accused applied for discharge. Their applications were dismissed and full reasons were given in a separate judgment.

The first accused testified in his defence. He testified that he was self-employed. He did not know the deceased. He heard people talk about someone called "Bolt Cutter" who had been stabbed in Chipadze. When he was detained by Police they told him to confess all his crimes. He was assaulted in the process.

He told the court that on the day of the alleged murder he was at Mupandenyama Shops, Phase 2. He was waiting for a lorry in connection with his business of quarry stones. He later went home and retired to bed after 8 p.m.

Concerning the testimony of Maximina he stated that they had parted acrimoniously. Maximina had criminal tendencies and she was a prostitute. He established this during the course of their affair. She was thus not trustworthy. In October she had informed him that she was pregnant. He told her that after she gave birth they would go for paternity tests. Instead Maximina then sought an abortion. This led to a termination of their relationship in November. He had refused to pay for Maximina's hospital bills. According to him this

provided the motive for Maximina to lie against him. He admitted that during the subsistence of their relationship he assaulted her. This was to do with her wayward conduct.

The first accused maintained that he never set foot at the scene of crime. However, he also stated that he had not terminated the affair with Maximina during the month of this incident.

During cross-examination he denied being friends with the second accused. In fact, he stated that he has no permanent friends. He confirmed that he introduced Maximina to the second accused. He further stated that the introductions took place after the incident giving rise to the charge. He disputed introducing the second accused as Last 'Mushurugwi' although he also knows the second accused as Last. He admitted that he told Maximina about the name Last. Taking into account Maximina's testimony that she was assaulted before she implicated him, the first accused was questioned why then he claimed she was bitter against their break-up. To this he responded that after their separation he started an affair with another woman and Maximina did not take kindly to that. As a result she got him arrested for assault on 25 December 2011.

The second accused testified that on 24 September 2011 he was in Mvurwi. He was temporarily employed by a construction company called Elevate. Thus he got engaged on 12 September 2011. He also confirmed that he worked together with the first accused in the business of quarry stones. During a long weekend he returned to Bindura. He gathered from his wife that there had been a murder.

Concerning his stint in Mvurwi the second accused stated that they stayed at the construction site at Forrester Estates. One had to travel for ten kilometres to secure transport. His first weekend break was at the end of September. During his free time he would attend soccer at the estate. They used a tractor for transport to the match.

During cross-examination he confirmed that he is also known as Last. He only got to know about the term 'Mushurugwi' at the Police station. This was after Police had called Maximina and her colleague to the station indicating that they had arrested the outstanding suspect. He also stated that he first met Maxima at the end of December 2011. He had initially said he met Maxima for the first time at the Police station on 31 December 2011. However he later stated that the encounter at the Police station was the second time and this was now in 2012.

Clever Kambuyi the site clerk for Mukute Construction also testified. The company was previously known as Elevate Construction. He first got to know the second accused person on 12 September 2011 when he got engaged as a general labourer. He produced the production record for 24 September 2011 which showed details of the second accused person. On that day the second accused worked for six hours (7 a.m. to 1 p.m.). The 25TH was not a working day.

Workers stayed in cabins that were about two kilometres from the construction site. During that month the long weekend started on the 29th and workers resumed work on 5th October. He had no idea on the second accused's activities when he finished work on the 24th. On the morning of the 25th he did not see the second accused when they went to play soccer. Since the venue was far, they went by tractor. However, he did see the second accused in the evening as they prepared food.

Lastly, Felistas Manyoni the second accused's wife also testified. The two have been married for fourteen years. She got to know the first accused after his arrest and release on bail.

She came to know about the deceased's death when she heard people talking about the incident. When the second accused visited for the long weekend around the 1st October she told him about the incident.

During cross-examination she was asked about the name Last. She initially said she did not know about it. When it was put to her that the second accused said everyone knew about it she then changed and stated that he did not normally use it and that she was not used to it. She was also asked about the term 'Mushurugwi' and she stated that it is a name used in reference to robbers or muggers who prey on gold panners. She further stated that the term was popularised when there was a lot of gold panning in the Bindura area.

In its written closing submissions, the state urged the court to convict both accused persons with murder. State counsel further submitted that Maximina's testimony should be accepted despite her apparent daftness. Concerning the first accused, it was submitted that his defence of *alibi* was not elaborated and should be discredited. The same applies in respect of the second accused's defence. It was the state's contention that despite it being established that the second accused had been in Mvurwi and was at work until 1p.m., it was possible that he could have subsequently travelled to Bindura.

Being alive to the fact that the killing of the deceased was witnessed by a single witness, Mr *Lunga* submitted that such a witness must be credible in all material respects. He

referred to s 269 of the Criminal Procedure and Evidence Act [*Chapter 9:07*] and *S v Mupfumburi* HH-261-15. His contention was that Maximina was not a reliable witness as there were material inconsistencies in her testimony. He further submitted that Maximina's statement to Police was recorded under duress.

Mr *Mahere* also attacked the reliability of Maximina's testimony on the basis that it was based on a statement that was not freely and voluntarily given. Reference was made to *S v Slatter and Others* 1984 (3) SA 798 and *S v Masera and Others* HH-50-04. Mr *Mahere* further submitted on the need to treat Maximina's evidence with caution on account of the fact that Police placed reliance on information concerning her that emanated from prostitutes. In this respect reference was made to Hoffman and Zeffert's *The South African Law of Evidence*, 4th edition.

Concerning the second accused's defence, it was submitted his *alibi* was not satisfactorily rebutted by the state. In other words, it was contended that it was not shown beyond reasonable doubt that the second accused's defence was false. In support of this submission counsel cited *S v Kuiper* 2000 (1) ZLR 113 (S), *S v Chindunga* SC 21-02, *S v Petras* 1985 ZLR 105 and G. Feltoe's *Criminal Defenders Handbook*.

Analysis

It is not in dispute that the evidence for the state largely centres on the testimony of Maximina. She presented as a simple person of limited education. Her simplicity is demonstrated by her calling the first accused and the deceased her husbands despite that she and the deceased were never married. Maximina and the first accused had an on/off relationship. Maximina admitted that she engaged in sexual intercourse with the deceased for \$4.

She was not a willing witness as evidenced by the fact that she had not volunteered information to Police. The matter only came out because she had talked about the incident to a friend. She claimed that she had been threatened by the first accused. After the incident she said she had been coerced to move in with the first accused. She also claimed to have been ill-treated by Police officers during the course of investigations. Unfortunately she could not identify the culprits by name. It is doubtful that she lied about this ill-treatment. There does not appear to be any motive for her to lie about that. It is reprehensible that Police officers resort to such dirty tactics as to ill-treat witnesses in order to unlock a case. A good detective

should rely on pure skills and ability to ferret information. Using dirty tactics can sometimes drive a wedge between law enforcement agents and the public.

Maximina's evidence during examination in-chief did not flow. She gave short answers to questions she was asked. I pointed out during the ruling on applications for discharge that more tact was required in leading this witness. She actually gave more details during cross-examination and when being questioned by the court. It is also apparent that she did not abide by her statement to Police. For example, in her statement it is stated that the first encounter with the first accused was outside Chuma Nite Club in Chipadze. As the deceased went to where an unidentified woman had called him, the first accused approached the witness and called her a prostitute. He also wanted to know if she was no longer his wife. The witness told him that since he was not taking care of her, she was no longer his wife. The first accused then went away.

The first accused was later to approach the witness and the deceased from behind as they made their way to the deceased's residence. In her statement, the witness claimed that after the deceased was stabbed, the second accused and the third man threatened her. The two then ran towards a banana plantation whilst the first accused grabbed the witness and they walked towards Chipadze shops before eventually proceeding to the first accused's quarters. This is contrast with the witness's testimony. She appeared to be confused by these aspects. We therefore treat her testimony with some caution.

The other witness we can comment about is Detective Sergeant Chimuto. At least he made efforts to piece together aspects of the case. Nonetheless, the investigation of the second accused's *alibi* was not a complete affair. Having established that the second accused had been at work in Mvurwi until 1 p.m. on the day in question, he was content to leave it at that. For example, why was it not necessary to establish the second accused's movements after work? Surely, enquiries could have been made at the living quarters at Forrester Estates. And then, there was need to probe the second accused's possible movements within Bindura on the material day.

With the above analysis we come to the following conclusions in respect of the accused persons:

The First Accused

The evidence of Maximina places him squarely at the scene of crime. Maximina could not be mistaken about the first accused's identity. This was a person she once lived with. In

fact she stayed with the first accused for some days after the incident, albeit against her will. As for motive, there is nothing to suggest that Maximina wanted to fix the first accused. It must be noted that Maximina was a reluctant witness, which must have been engendered by threats made to her by the first accused person. Chances are that if she had not talked to Auxilia Amando the case might not have been solved early, if at all.

The first accused's defence as cast in the defence outline is a bare denial. Apart from denying that he was not in Chipadze at the time, he did not suggest where he was. The state could not have been expected to rebut such a vague defence. Essentially such a defence does not amount to an *alibi*.¹ He only elaborated on this defence during the defence case.

The Second Accused

Two aspects arise from the defence tendered by the second accused. Firstly, Maximina claimed to have known the second accused after he was introduced to him by the first accused as Last 'Mushurugwi'. Whilst we accept that evidence, is there no room for mistaken identity on the day in question? This is because the incident took place at night where there was no illumination. It must also be taken into account that the witness did not explain by what features she identified the second accused.

In her statement to Police Maximina stated that it was dark and there was no source of light. She further stated that she identified the second accused through his hoarse voice, his height and big frame. There is nowhere she stated that at that stage the second accused uttered any words. This could have given credence to the identification by voice. As was held in *S v Ndhlovu and Others* 1985 (2) ZLR 261 (SC) at 264-

“.....the identification of an accused person is a matter notoriously fraught with error. It is an area wherein the potential for honest mistake looms large.”

The second aspect is that the second accused's *alibi* that he was in Mvurwi was confirmed by Police. However, we note that he finished work at 1 p.m. and thereafter his movements are not known. He was later to be seen in the evening of the following day as stated by Clever Kambuyi one of the defence witnesses. Whilst it is possible for the second accused to have left Mvurwi after work, it does not seem to accord with the probabilities. In the first place he was not due for time off as it was not what was termed long weekend. What could have motivated him to travel to Bindura on that day and to be back in Mvurwi on the following day? The second accused did not have any score to settle with the deceased, unlike

¹ *S v Mutandi* 1996 (1) ZLR 367 (HC)

the situation with the first accused. As previously pointed out, the movements of the second accused after he finished work were not properly investigated. It must be noted that there is no onus for an accused to prove an *alibi*. See *S v Mutandi supra*. Therefore, the *alibi* that was not fully investigated coupled with the possibility of mistaken identity by Maximina casts some doubt on the second accused's involvement in the killing.

Conclusion

In light of the foregoing, the first accused is found guilty in terms of s 47 (1) (b) of the Code. We cannot hold that the first accused set out to kill the deceased and therefore desired to bring about death. This is on account of the shortcomings in Maximina's testimony on circumstances preceding the killing. The second accused is found not guilty.

National Prosecuting Authority, legal practitioners for the state
Lunga Gonese Attorneys, first accused's legal practitioners
Gill, Godlonton & Gerrans, second accused's legal practitioners