

THE STATE
versus
FREDDY JOSAM

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 14, 15, 16, 21, 23, 30 June 2017 & 5 July 2017

Criminal Trial – Murder

Assessors: 1. Msengezi
2. Chivanda

A Masamha, for the state
E Chimombe with *P Jambwa*, for the accused

CHITAPI J: The accused is charged with murder as defined in s 47 of the Criminal Law Codification & Reform Act [*Chapter 9:23*]. The indictment alleges that on 23 August 2013 the accused person acting with intent strangled the deceased Dadirayi Mupaya at Shuramurove Road Mufakose, Harare, thereby starving the said Dadirayi Mupaya of breathing air resulting in her consequent death. The accused pleaded not guilty to the charge.

In his defence outline, the accused averred that on the day in question he was not anywhere near the scene of the alleged murder but was at home. The accused denied ever meeting with the deceased on the fateful or being at the places where the state witnesses alleged that he was seen with the deceased.

There was no eye witness to the commission of the offence. The state sought to prove that the accused had in the course of the night when deceased died been seen in her company in circumstances of disagreement. The state also sought to prove that the accused was seen dumping the deceased at the entrance to her rented home and that the deceased was dead or dying when so dumped. The state also sought to rely on evidence of an identification whereat the accused person was identified by state witnesses dumping the body of the deceased.

The state therefore based its case on circumstantial evidence. Circumstantial evidence depending on circumstances of each case is no less cogent than direct evidence. However, because the evidence involves the consideration to various pieces of evidence and drawing an inference from them, the courts have laid down principles which they follow in assessing such evidence and determining whether such evidence proves the guilty of an accused person beyond a reasonable doubt. The principles which guide the court in this regard are set out in *R v Blom* 1939 AD 288, a decision which has been followed consistently by the courts. The principles are stated as:

- (a) The inference sought to be drawn must be consistent with all proven facts; and
- (b) The proven facts must exclude every reasonable inference which can be drawn from them save for the one sought to be drawn.

See *S v Marange* 1991 (1) ZLR 244 (S)

In assessing circumstantial evidence, the court considers all the proven facts in their totality and does not single out individual circumstantial facts to assess and determine whether each fact has been proven beyond a reasonable doubt.

The state case was fraught with difficulties. The deceased was a known lady of the night or prostitute who frequented Samuriwo Shopping Centre in Mufakose. She stayed at an unelectrified house not far from the shopping centre with her daughter. She also shared the premises albeit in different rooms with different entrances with one Shamiso Gaura who was in a love relationship with a police state witness, Cuthbert Shoko.

The state produced by consent, a post-mortem report on the examination of the deceased by Dr Aguero. The post mortem examination was carried out a few hours after the death of the deceased. The deceased was seen alive after 12 midnight by state witness Liberty Tembo at Samuriwo Shopping Centre. Therefore this would have been the early hours of 23 August 2013. The doctor from section 3 of the post mortem report examined the body of the deceased on the same date between 9.50 am and 11.10 am. In section 7, the doctor noted that the deceased was dressed in a T/Shirt orange in colour, a white short and red and black underwear. This observation is made by the court because according to the state witness Liberty Tembo, the deceased had been dressed in an adidas track suit with 3 golden lines labeled on the track suit jacket and trousers. What this basically means is that the deceased if one accepts Liberty

Tembo's evidence must have gone home and changed into the clothing which she was discovered dead wearing. Liberty Tembo in his evidence stated that on passing by the deceased's residence after midnight, he heard the deceased laughing saying "Let me laugh, I Mupaya's child." This means that the deceased was alive. For the deceased to then have been brought to the gate entrance of her residence dead means that she must have gone out again and been returned to her residence dead. She could not have been killed inside her room because state witnesses Shoko and Gaura saw the person who dropped the deceased to have approached the house from outside the deceased's residence.

The post mortem report shows that the deceased had froth from the nostrils and blood in the eyes. She had bruises on the left thigh. The cause of death was described as "asphyxia due to strangulation due to assault". In short, the deceased was therefore assaulted and strangled. The unanswered question is where and when exactly time wise. No one provided this answer.

The question which the court had to answer was whether or not the person who dumped the deceased person was the accused. The other issues of whether the deceased had had a short time sexual session with the accused and of the accused allegedly insisting on a full night session or a refund of his \$4.00 are on the periphery. The reason why the issues aforesaid are on the periphery is that the answer to them does not provide the link between the deceased's death and the accused. They may have quarreled and the accused followed the deceased but then there is no evidence that the accused was in the deceased's house when the witness Liberty Tembo passed by the house. One does not even know whether even if it is accepted that the deceased was followed by the accused, the latter did not refund the money which the accused was demanding.

It left the court therefore to determine where there was evidence of sufficient cogency led by the State to prove that the person who dumped the deceased was the accused. The court was mindful of the evidence of the identification parade but did not find it of probative value because there was no need to hold it since the identification of the accused going by the state evidence was not an issue to the identifying witnesses. The identifying witnesses had already recognised the person that they were supposed to identify without reservation.

State witness Cuthbert Shoko testified that he identified the accused as the person who dumped the deceased's body. He said that he chased after the person to an area lit by tower lights. Having failed to apprehend the person when chasing him, the person turned round and

faced him as he ran back towards the witness into hiding. He then identified the accused as a local Mufakose resident whom he had last seen some 10 years back at school soccer tournaments. It then turned out that the accused would have been doing grade 2 or 3 at that time, being grades which did not take part in soccer tournaments but were required to go home after school owing to their tender ages. The witness also said that he identified the witness by his afro hair and medium build. Such a description is hardly useful. In fact if the identification parade had been conducted properly so as to be of probative value, persons of the same build, body make up and other similar features should have taken part. No pictures of the parade were available as the negatives were said to have been destroyed in a mishap at police studios with the originals having been lost between the prosecutor's office and the police during the docket movement.

The court was not satisfied that Liberty Tembo was truthful when he stated in evidence that he had never seen the accused except on the day in question. It was very unlikely that the accused had not been a frequent visitor at Samuriwo Shopping Centre. The court found the evidence of the accused more probable when he stated that the witnesses Shoko and Liberty were not strangers to the accused, or to Samuriwo Shopping centre. It was not disputed in any event that the accused was a local Mufakose person. In the court's view, the alleged identification evidence was not given by an independent person(s). Human perceptions are not always accurate. The process of recalling an event on experience triggers memories of the subjective experience of an event or image. Where the image is impure as in this case, it would be unsafe for a court to place reliance on it, let alone to be disabused of reasonable doubt. A mistaken identity presents itself as one of the worst and significant terms of miscarriage of justice and a court must be satisfied that the identification evidence is satisfactory in all material respects.

Although the prosecutor tried his best to build a case, the court after considering all the evidence led including evidence of witnesses not specifically commented upon was left in doubt as to the reliability of the evidence of the accused's identification in this case. It followed then the court could not draw any inference of guilt let alone one which excluded other inferences from unproven or doubtful facts.

In consequence, the court concluded that the State had failed to discharge the onerous burden of proving the guilt of the accused person beyond a reasonable doubt.

The verdict of the court therefore is that:

“The accused is found not guilty and acquitted on the indictment.”

*National Prosecuting Authority, State’s legal practitioners
Magwaliba & Kwerera, accused legal practitioners (Pro-Deo)*