

THE STATE
versus
NGONI MUDZIMBA

HIGH COURT OF ZIMBABWE
ZHOU J

HARARE, 21 & 21 September 2015, 5 & 6 October 2015, 2 & 3 December 2015 and 19
September 2017

ASSESSORS : 1. Mr Barwa
2. Mr Gonzo

Criminal trial

D. H. Chesa, for the State
Miss P Garayi, for the accused

ZHOU J: The accused is facing a charge of murder. The allegations against him are that on 3 September 2005 at Mugabe Village, Chief Musana, Bindura, the accused person unlawfully and with intent to kill, assaulted the now deceased Martin Makenzi on the head with a hoe handle thereby causing injuries from which the deceased died. The accused pleaded not guilty to the charge and tendered a defence outline which he adopted as part of his evidence.

In seeking to prove its case against the accused the State adduced evidence from fire witnesses. The evidence of one witness, Dr Masokovere, was admitted in terms of s 314 of the Criminal Procedure and Evidence Act [*Chapter 9:07*]. Four witnesses gave *viva voce* evidence. These are Lovejoy Mudzimba, Barnabas Chakanyuka, Kennedy Mauni and Francisca Ncube.

Doctor Masokovere, a medical practitioner, is the one who conducted a post mortem examination of the remains of the deceased at Bindura Hospital on 7 September 2005. His examination revealed that the cause of death was “intracranial haemorrhage secondary to assault.” The deceased’s body had been discovered floating in a dam by Kennedy Mauni on 4 September 2005. Francisca Ncube, a sister of the deceased, is the one who reported the matter to the police after noticing some fresh wounds on the back of the head of the deceased, which caused her to be suspicious that the deceased may not have drowned as had been suggested.

The undisputed evidence shows that the deceased was indeed assaulted and that he died as a consequence of the wounds caused by the assault. The only issue is whether the accused person is the one or one of the persons who assaulted the deceased. This is a matter that turns largely on the evidence of Lovejoy Mudzimba and Barnabas Chakanyuka.

Lovejoy Mudzimba is a son of the accused's sister. The accused is therefore the witness's maternal uncle. He was sixteen years old as at 3 September 2005. He used to stay with his grandmother Anna Muronzi who is the mother of the accused, at the residence of the said Anna Muronzi. He testified that on the day in question the deceased came to their residence where there was traditional beer on sale. The deceased had a misunderstanding with Anna Muronzi over a debt which the latter owed to the deceased. Deceased attempted to assault Anna Muronzi who called out for help. A brother of the accused, Tafataona Mudzimba, came and dragged the deceased out of the kitchen hut. The accused joined when the deceased was outside the hut. The accused and Tafataona started to assault the deceased accusing him of wanting to assault their mother. They were using fists. The witness and one Muchford Mudzimba followed from behind at a distance of about 30 metres Muchford Mudzimba is a son of Tafataona Mudzimba. The witness stated that when all this was happening it was around 5 o'clock in the afternoon. The accused and Tafataona Mudzimba took the deceased to a place where there were some gardens. The accused picked a hoe handle which he used to strike the deceased at the back of his head. When the deceased was struck on the head he was lying on the ground close to a river. The accused removed the deceased's blood stained white shirt while Tafataona removed the deceased's pair of trousers. The accused and his brother then washed the deceased's clothes, folded them and placed them by the river bank. Tafataona held the deceased's legs while the accused held the upper part of the deceased's body. They threw the deceased into the river.

The witness stated that when the deceased arrived at their homestead he was already drunk, and was staggering.

The witness stated that he was assaulted by the police who accused him of falsely implicating the accused person. He stated that he was also under a lot of pressure from his relatives not to disclose information on how the deceased was killed. Some of the relatives instructed him not to attend court to testify in the matter. The witness maintained that upon his return from the river on the day that the deceased was assaulted and thrown into the river, the accused and other family members ordered the witness and Muchford to go into a room and locked them inside the room. He and Muchford had told Anna Muronzi that the accused and

Tafataona had thrown the body of the deceased into the river. Anna Muronzi proceeded to the river. When she came back she told the witness and Muchford that the matter was supposed to be kept as a family secret.

During re-examination the witness disclosed that his relationship with the accused was not good as the accused would always remind him that he did not belong to that family. He also disclosed that a male person called and threatened him if he was to testify in the case.

Barnabas Chakanyuka was a friend of the deceased. He stated that the deceased was murdered by the accused person using a hoe handle. He stated that both he and the deceased were drunk. According to him it was after sunset when the accused killed the deceased. He stated that a misunderstanding which led the accused to assault the deceased started when the deceased demanded his money from the accused's mother, and she called out to the accused that the deceased was attacking her. His evidence was that the accused placed the deceased on a wheelbarrow and took him to the river. He stated that the accused struck the deceased using an axe twice at the back of the head. When that happened the patrons who were at the homestead fled the scene. The witness remained there. When the accused struck the deceased with an axe handle the accused moved the deceased outside the yard of the homestead. During cross-examination the witness stated that he attempted to restrain the accused from assaulting the deceased but the accused pushed him away. After being pushed away he went and told the deceased's parents.

This witness became incoherent in his testimony, and contradicted some of his statements in the written statement. It was clear that he may have been heavily intoxicated on the day in question. He also showed that he had forgotten some of the events.

The accused person gave evidence himself. He also led evidence from two other witnesses, namely, Muchford Mudzimba and Monica Munyoro. The accused denied being at the residence of Anna Muronzi at the time that the deceased had a misunderstanding with his mother. He denied knowledge of how the deceased met his death. His evidence was that he was at his mother's residence at about 1100 hours but left about an hour after that. He went to another village, Jonas Village where he stayed for about an hour before he left for his residence around 1330 hours. He returned to Mugabe Village, his mother's residence, the following day on 4 September 2005, at about 0800-0900 hours. Present at his mother's residence were Tafataona Mudzimba, his wife Monica Munyoro and Tafataona's children Muchford and Blandina. Lovejoy Mudzimba was also present. He only became aware of the death of the deceased on 4 September 2005, at about 1100 hours.

Muchford Mudzimba is a son of the accused's late brother, Tafataona Mudzimba, who was also an accused person in this matter. His evidence was that on 3 September 2005 he was 13 years old. On that day he met the accused person at the gate to their homestead when the witness, Lovejoy Mudzimbu, Simbarashe Mudzimba and Kudakwashe were going to the dam for fishing. They only returned towards 5 o'clock in the afternoon after which he left to go and look for cattle. The next date that he saw the accused at that homestead was on 4 September 2005 at about 1000 hours. He denied ever seeing the deceased at that homestead on that day.

Monica Munyoro was married to Tafataona Mudzimba. The accused was therefore her brother-in-law. She stayed at the same homestead with Anna Muronzi. Her evidence was that there was beer being sold at that homestead up to about 6 o'clock in the evening. She saw the accused at the homestead around 1100 hours. The deceased came to their homestead at around 3 o'clock in the afternoon. He was very drunk. He was given some beer by Anna Muronzi which he drank. Deceased then went on to ask for his money from Anna Muronzi. The money was for the work he had done of sharpening axes belonging to Anna Muronzi. Anna Muronzi promised to give him the money after the beer had been bought. The conversation about money took place inside the hut. The deceased later went out of the hut. The witness did not take note of how he left that homestead but said he left around 4 o'clock in the afternoon. On 4 September 2005 she saw the accused at the homestead around 9 o'clock in the morning.

Lovejoy Mudzimba, the first witness for the prosecution, was a witness under pressure from relatives. There is evidence of attempts to influence him not to testify in this matter not just by his own mother but by other relatives. He also gave evidence of an anonymous telephone call which he received during which the caller threatened him with harm if he testified. At the request of the State the court had to be cleared of his relatives. The evidence of this witness was very detailed and largely remained intact even after intense cross-examination. His evidence was corroborated in material respects by the medical evidence, as well as by the evidence of one defence witness, Monica Munyoro.

The second witness for the prosecution, Barnabas Chakanyuka, was evidently drunk when the event took place on 5 September 2005. Monica Munyoro confirms that Barnabas Chakanyuka and deceased were drunk. His recollection of the events of that day was very poor. Save where his evidence is consistent with or corroborated by that of the other witnesses, the court will not place reliance on his evidence. This witness's evidence is consistent with that of Lovejoy Mudzimba, and is supported by the evidence of Monica Munyoro in respect of the facts that on 3 September 2005 the deceased was at the homestead of Anna Muronzi, and asked

to be paid money for work which he had done for her, and the money was not paid. The presence of Barnabas Chakanyuka was confirmed by Monica. In respect of what happened after Anna Muronzi failed to settle the debt owed to the deceased, Monica Munyoro's version differs from that of the State witnesses, in that she states that the deceased left the kitchen in which the conversation about the money took place. She did not see what happened to the deceased when he got out of the kitchen. Both Lovejoy Mudzimba and Barnabas Chakanyuka state that the deceased was assaulted by the accused person. While Lovejoy Mudzimba states unequivocally that the accused was in the company of the late Tafataona Mudzimba, Barnabas Chakanyuka did not categorically state that name but stated that there was indeed another person who assisted the accused when he assaulted the deceased when the latter was out of the kitchen hut. Barnabas Chakanyuka also mentions the use of a wheelbarrow by the accused to carry the deceased from the homestead, which is not mentioned by Lovejoy Mudzimba. But both agree that the accused was involved in taking the deceased away from the homestead. Their evidence in that respect has not been contested.

Muchford Mudzimba, a police constable who is the son of Tafataona Mudzimba who was one of the accused persons was being deliberately untruthful. He took the easy way of not having seen the deceased at the homestead of his parents despite the fact that the deceased was at that homestead on that day. His version that he, Lovejoy Mudzimba and two others at some point went for fishing was never put to Lovejoy Mudzimba when he testified. This witness stated that they returned from fishing "around or towards" 5 o'clock in the afternoon on 3 September 2005. That is the time around which, according to Lovejoy Mudzimba, the deceased was manhandled, assaulted and taken to the dam by the accused and Tafataona. He confirmed that around 5 o'clock there were still people who were drinking beer in the kitchen hut. He did not count them. He was therefore being untruthful when he stated that he never saw the deceased at the homestead on that day. He has a motive to lie, as the accused is his paternal uncle and his father was an accused person in this matter. There is no rule of law or practice, as suggested by Mr *Chesa* in the closing submissions, that a police officer is more likely to be believed than other witnesses. His evidence is assessed like that of any other witness. After all he was not testifying in his capacity as a police officer.

Monica Munyoro's evidence was carefully structured to place her husband, Tafataona Mudzimba, from the scene. Having referred to the conversation about money between the deceased and Anna Muronzi, and the promise from the latter to pay the deceased the money after receiving payments from the sale of beer, this witness's evidence becomes meaningless

because she does not explain why and how the deceased would then leave the homestead before being paid. Her evidence about the condition of Tafataona Mudzimba on that day does not make sense, and presents this witness as one who selected when to tell the truth and when not to do that. She portrayed Tafataona Mudzimba as a thoroughly ill person who for three days was bed-ridden, hardly ate food, did not take a bath, did not go outside the kitchen hut at all, and did not go to the toilet. She does not explain how on the following day 4 September 2005 he had become strong enough to go to board transport to hospital all by himself. Her husband left for the hospital and never came back. She did not bother to go and see him for a whole month up to the time that he was arrested. She was clearly aware that her husband was not seeking medical treatment but was evading the police.

When considered in the light of the totality of the circumstances and the evidence led by both the prosecution and defence, and the probabilities in this matter, Lovejoy's evidence is credible. He readily admitted that his relationship with the accused was not always that good because the accused did not accept him as part of the family and never concealed this to the witness. This, however, did not affect the credibility of his testimony. The accused himself never suggested in his defence that this witness deliberately implicated him because of the relationship between the two of them. In fact, in his evidence, the accused stated that as far as he was concerned he enjoyed good relations with the witness. Further, there is no suggestion that Lovejoy's relations with Tafataona were the same as those with the accused. There is no reason why he would implicate Tafataona in the case if all he wanted was to get the accused person to be arrested. Besides being corroborated in some material respects by the evidence of Barnabas Chakanyuka and Monica Munyoro, Lovejoy Mudzimba's evidence found support in the post-mortem report which concludes that the deceased was indeed assaulted. Francisca Ncube, a sister of the deceased who is also a police officer, testified that when she examined the body of the deceased she noted some injuries, including an injury at the back of the deceased's head. Lovejoy Mudzimba's evidence was that he saw the accused person strike the deceased on the back of the head using a hoe handle when they were at the river. His evidence that the accused and Tafataona left the deceased's clothes on the banks of the river is corroborated by the evidence of Kennedy Mauni who found the clothes at the river on 4 September 2017.

The accused's evidence is that he left his mother's homestead between 12.20 and 1230 hours on 3 September 2005. He proceeded to Jonas village where he spent about an hour before he went to his homestead in the same Jonas village. He did not return to his mother's residence

in Mugabe village until the following morning between 0800 and 0900 hours. None of the persons who were allegedly with the accused testified to confirm his version about his movement on 3 September 2005. Further, the accused initially gave the impression that this Jonas village was far away from Mugabe village. However, according to his own evidence Jonas village is only between 600 – 700 metres from Mugabe village. That is a very short distance which does not place him away from the scene of the crime. He also stated that when he got to his mother's homestead on 3 September 2015 he sat outside. He gave the impression that he never went into the kitchen hut where his mother and, from the evidence of Lovejoy, the deceased were. His evidence is contradicted by Monica Munyoro who stated that the deceased went inside the kitchen hut and remained there for about 15 minutes.

The fundamental principle of the law of evidence is that in a criminal trial the burden of proof rests on the prosecution to prove the accused's guilt beyond a reasonable doubt. See P J Schwikkard & S E van der Merwe, *Principles of Evidence* 4 ed, p 602; also *S v Alex Carriers (Pty) Ltd & Anor* 1985 (3) SA 79 (T). In the case of *S v Glegg* 19973 (1) SA 34 (A) the court explained that proof beyond reasonable doubt, should not be equated to proof beyond the slightest doubt, as such an approach would in practice subvert the ends of criminal justice. The expression "reasonable doubt" in the context of the standard of proof in criminal trials connotes doubt which exists because of probabilities or possibilities which can be regarded as reasonable on the ground of generally acceptable human knowledge and experience, See P J Schwikkard & S E van der Merwe, *Principles of Evidence* 4 ed, p 613.

The above standard is underpinned by the presumption of innocence of an accused person in a criminal trial which principle is firmly entrenched in the Constitution of Zimbabwe, see s 70 (1) (a) of the Constitution of Zimbabwe. The accused is not required to prove his innocence, such that it is not a requirement for an acquittal that the court should believe the innocent version of the accused. It is sufficient that the accused's account might be substantially true.

In deciding whether the prosecution has discharged its burden beyond a reasonable doubt the court does not embrace a piecemeal approach by considering the evidence implicating the accused person separately from any exculpatory evidence. The evidence must be considered in its totality, and together with all the circumstances of the case. In the instant case, the court is dealing with a case in which the deceased, the accused and all the witnesses are related. The main witness, Lovejoy Mudzimba was only 16 years old at the time that the offence was committed and, as noted earlier on, has been exposed to serious pressures in

connection with his involvement as a witness. The other state witness, Barnabas Chakanyuka was intoxicated at the time that the offence was allegedly committed. But he was able to recall that the other persons who were not at the homestead dispersed upon realising that the deceased was under attack. Mr Chesa for the state expressed doubt as to the sufficiency of the evidence to establish the guilt of the accused person. This court, while mindful of that submission, is not bound by it. Having regard to all the evidence as considered above, the court finds that beyond reasonable doubt the following facts have been proved.

1. That on 3 September 2005 the deceased was at the homestead of Anna Muronzi, who is the mother of the accused.
2. The deceased demanded payment of a sum of money which was due to him by Anna Muronzi.
3. A misunderstanding ensued between the deceased and Anna Muronzi who had failed to settle the debt owed to the deceased.
4. The accused got involved in that dispute, and assaulted the deceased person, causing injuries from which the deceased died.
5. The accused threw the body of the deceased into the river and left the deceased's clothes on the banks of that river.

The weapon used to strike the deceased, the targeted part of the deceased's body, as well as the fact that the accused threw the deceased or deceased's body into a river with water show a clear intention to kill. The killing was unlawful.

In the result, the accused is found guilty of murder.

*National Prosecuting Authority, legal practitioners for the state
Chinawa Law Chambers, accused's legal practitioners*