

THE STATE
versus
CHARLES MUZA

HIGH COURT OF ZIMBABWE
BHUNU J
HARARE, 26, 27 March 2012 and 18 October 2013 and 02 December 2014

Assessors: 1. Mrs Shava
2. Mr Barwa

Criminal Trial

T. Mapfuwa, for the State
R. Chikwari, for the Accused

BHUNU J: The accused is charged with murder as defined in s 47 of the Criminal Law (Codification and Reform) Act [*Cap 9:23*]. He is alleged to have murdered one Rosemary Kahama Wachipa a woman he was consorting with at Mahere Village chief Zvimba on 16 December 2010. The couple was new in the area as they had recently settled in the village.

She was a divorcee previously married to one Emmanuel Wachipa. He allegedly struck her on the head with an empty beer bottle, fists and head butting thereby causing her death.

A number of issues are to some extent common cause. As a result the evidence of Rosemary Mahere, Tiitirei Mabilila and Doctor Mhongovoyo was admitted by consent of the parties in terms of s 314 of the Criminal Procedure and Evidence Act [*Cap 9: 07*].

The undisputed evidence is that on the day in question there was a beer drink at the accused's homestead where he resided with the deceased. During the beer drink the deceased accused the accused of infidelity and cheating on her with one Irene Musakwa. The accusations led into a heated altercation that broke into a fight between the two. During the

fight the deceased struck the accused with a brick on the head causing him to bleed profusely thereby soiling his clothes with blood.

After the fight the accused changed his clothes and left the homestead. He is alleged to have returned later around 6 pm to pack his belongings and leave. The deceased followed him to the bedroom hut to monitor him packing and leaving the homestead. He is alleged to have taunted and told the deceased that he was leaving her for Irene Musakwa.

That night the deceased retired to bed alone in the house. The next morning Chipo Hwaira a friend and neighbour of the deceased sent her 10 year old daughter around 7am to check on the deceased. She entered the deceased's bedroom and found her lying in bed but not responding. She then alerted her mother and other villagers who rushed to the scene only to find the deceased murdered in her bed.

Chipo Hwaira the deceased's friend was one of the first persons to attend the scene of crime before the arrival of the police. It was her testimony that on the day in question she had seen the accused moving around with an empty 750ml brown beer bottle when he came to her homestead. When she attended the scene she observed that there was a lot of broken glass including a broken 750ml beer bottle. When she checked she found that all the accused's clothes had been removed from the house with the exception of his blood stained shirt he had removed after being struck on the head by the deceased. This is what she had to say:

“When the accused came to my residence Crayton Mahere was present at my residence. The accused was in possession of a brown 750ml bottle.

When I went to the deceased's residence the following morning, I discovered that there were some broken bottles and the deceased was injured on the forehead. The blankets and towels were smeared with blood. There were dishes which were also all smeared with blood. The broken bottles comprised, water glasses. Glass plates as well as the broken beer bottle.

I checked and the only shirt which remained was the one he had removed after being struck on the head by his wife with a brick. There was also a pair of gumboots. The bicycle was no longer there.

I do not know a person called by the name Emmanuel Wachipa. I do not know whether the deceased had been married before cohabiting with the accused.”

Crayton Mahere a neighbour and member of the neighbourhood watch committee confirmed Chipo's evidence to the effect that he was present when the accused arrived with a bicycle and a dog while holding a beer bottle.

Constable Wallace Murowa who attended the scene together with Assistant Inspector Nyaude observed the deceased lying on the bed with bruises and wounds on her face. Blood was oozing from the nose and wounds on the face. There were broken pieces of glass on the floor.

He then referred the body to Chinhoyi Hospital for a post mortem.

The post mortem report compiled by Doctor Mhongovoyo reads:

- “- Bleeding noted from the nostrils and mouth.
- Fracture of the mandible and maxilla
- Compound fracture of the skull right temporal region.
- Conclusion: As a result of the foregoing I am of the opinion that the cause of death was head injuries.”

The accused was arrested on suspicion of having murdered the deceased as he was the last person to have been seen in the company of the deceased after having fought her and came worse off. He would therefore naturally be expected to have had a motive for killing the deceased.

The accused pleaded not guilty and denied murdering the deceased as alleged or at all. He suspects that the deceased might have been murdered by her former husband Emmanuel Wachipa. Apart from his mere say so there is nothing tangible or remotely linking Emmanuel Wachipa to the deceased's murder as alleged by the accused.

Emmanuel Wachipa is a grant old man of 60 years of age. He gave evidence at the Court's instance and request to clarify issues. It was his testimony that he was married to the deceased for 29 years before the accused snatched her from him. She was 46 years of age when she met her death. Although he was bitter that she had deserted him for the accused he denied killing her or being anywhere near her new home with the accused at the time of her murder.

The accused's defence is that commonly known as an *alibi*. He denies being anywhere near the scene of crime at the material time. He claims to have spent the night of 16 December 2010 at his late uncle Titus Chibanda's house in Madzima village. He claims that after the fight with the deceased he proceeded to Masiyarwa Shopping Centre. At around 4 pm he received a phone call from his late uncle Titus Chibanda calling him to his residence at Madzima village. He proceeded to his uncle's homestead where he spent the night. The following morning 17 December 2010 he was sent by his uncle to go and buy him his tablets in Harare.

He left for Harare the following Morning at around 7 am. At around 10 am while on his way back on a Kombi he received a telephone call from his sister advising him that his wife the deceased had been found dead. The police suspected that he had murdered the deceased and were looking for him. Instead of going to his home to attend to his wife's death the accused chose to go to his uncle's homestead to deliver the tablets before proceeding to his mother's place at Masiyarwa village. He took refuge at his mother's place and adopted the attitude that if the police wanted him they would find him there. In his own words this is what he had to say in his evidence in chief:

“The following day I left for Harare at 7 am to buy my uncle's tablets. Around 10 am I was through and I decided to board a Kombi to Zvimba. At that time I was phoned by my sister who said that my wife had been found dead and the police were looking for me. They suspected that I had murdered her.

Madzima village is in Zvimba . I told her that I was coming. I was already on my way but I was going to my uncle with his tablets first and then to my mother's place at Musiyarwa village. If the police wanted me they would find me there.

....

The name of my sister is Tendai Muza I told her that the police should wait for me I was coming. She told me that they had already left but they had left their phone number. She tried to call them but failed up until I got there, I got there that is at my mother's residence at 5 pm.

Q. Constable Muroyiwa said you were arrested on 20 December.

A. He was lying on the 20th of December that is when I was removed from Kutama police station. Muroyiwa arrested me on 17 December. I told the police that I deny the charge. I had slept at Madzima's place and proceeded to Harare the following day. I only heard about the death of my wife while in Harare.”

At this juncture I must pause to observe that the accused's conduct in first going to his uncle's place to deliver tablets before proceeding to his mother's home to take refuge after hearing of his wife's tragic death is wholly inconsistent with an innocent frame of mind. His failure to contact the police who had left their phone number with his sister can only betray a guilty frame of mind.

The accused admitted that he deliberately decided not to attend to his wife's tragic death opting to take refuge at his mother's place because he was afraid of being attacked by the deceased's relatives. The adage that the guilty are always afraid is apt. If the accused was genuinely ignorant of how his wife had met her death in his absence he would have taken the

first opportunity to contact the police in a bid to resolve the mystery surrounding his wife's death.

The accused's insistence that he was arrested on the 17 of December the day the deceased was found murdered was directly contradicted by the evidence of his own brother Pedzisai Muza whom he called as his witness. Although this witness was not certain as to exactly when the accused was arrested he did state that it was the following day after the 17th of December 2010. The arresting detail Constable Muroyiwa was however certain that he arrested the accused on 20 December 2010. He explained that he could not have possibly arrested the accused on 17 December 2010 because he was busy attending to the scene and ferrying the deceased's body to hospital for a post-mortem. His initial attempts to locate the accused at his house and that of Edson Makwavarara were fruitless. He only made concrete arrangements to arrest the accused on 19 December 2010 as his initial attempts to locate the accused were unsuccessful. He had to trap him using his best friend Edson Makwavarara and the accused's brother Simon Muza to locate and arrest the accused. He only managed to arrest the accused at Simon Muza's homestead on 20 December 2014 after he had been lured to the home by his best friend Edson Makwavarara.

Constable Muroyiwa confirmed that in his investigations he found no evidence at all linking the deceased's former husband Emmanuel Wachipa to the commission of the offence. Apart from the accused's mere say so no evidence was placed before this court suggesting that Wachipa had anything to do with the death of the deceased. The evidence before this court establishes that when the deceased deserted him for the accused Wachipa was aggrieved. He however eventually overcame his grief and remarried. On the day in question he was nowhere near the scene of the murder at the accused's home.

On the other hand there was overwhelming evidence that directly placed the accused at the scene of crime. It is common cause that he had a fight with the deceased in which he came worse off shortly before she was murdered. After the fight he left the premises for some unknown destination but he says that he went to Masiyarwa business centre a distance of 4 to 5 km from the murder scene. Chipu Hwaira a family friend testified that soon after the fight between the deceased and the accused she went to her nearby home together with the deceased. The accused later came to her home and found her in the company of the deceased. Her evidence reads:

"When we got to my place of residence and when I was about to dish out the sadza the accused came and sat on the bench whilst holding an empty beer bottle. He

indicated that he was going to pack his clothes and soon after he left. The now deceased followed him.

Rosemary Mahere who happens to be my daughter was staying with the deceased but on this day she slept at my residence.”

Chipo’s husband Clayton Mahere a member of the neighbourhood police who was also present at the home corroborated the evidence of his wife in every material respect. This is what he had to say:

“On 16 December Charles Muza (Accused) had gone to Masiyarwa. That is when his wife came to my homestead where my wife was just to spent time. After a few minutes her husband arrived. He had a bicycle with him, a dog and he was holding a beer bottle. I did not have a closer look at the bottle because I was in the hut and there was no light. That is when Charles Muza indicated to his wife that he wanted to go and pack his things. His wife said that he was accompanying him because he could also pack her belongings.

They then went out of the house. I did not accompany them. I remained with Rosemary Mahere and my wife. We remained and retired to bed.”

Chipo Hwaira testified that the deceased was found murdered in her hut the following morning. She was one of the very first persons to attend the scene of the crime. She observed that there was a lot of broken glass including the remains of a broken beer bottle matching the description of the empty beer bottle she had seen the accused carrying the previous evening. Her evidence in this respect found ample corroboration in the evidence of constable Muroyiwa who attended the scene.

His testimony reads:

“At the scene I managed to collect pieces of bottle glasses on top of the blankets and which I now see as exhibits before the court. They were brown in colour. The room was scattered all over with metal plates and broken glasses on top of the blankets. There were no clothes in the room except one T- shirt stained with blood.

On the 19th of December I made some arrangements to arrest the accused person.”

Although the evidence of all the State witnesses snugly fits as pieces of a gig sew puzzle it remains circumstantial evidence as no one saw the accused committing the offence. Circumstantial evidence can however amount to proof beyond reasonable doubt where the inference sought to be drawn from the proven facts is the only reasonable inference that can be drawn from the facts. See *R v Bloom* AD 288 at 302 where the court had occasion to remark that:

“There are 2 cardinal rules of logic, which govern the use of circumstantial evidence in a circumstantial trial. The inference sought to be drawn must be consistent with all the proved facts. If it is not then the inference cannot be drawn. The proved facts must be such that they exclude every reasonable inference from them save the one to be drawn. If they do not exclude other reasonable inferences then there must be a doubt whether the inference sought to be drawn is correct.”

I now turn to apply the test to the facts of this case. It is common cause that the deceased was found murdered in her hut on the morning of 17 December 2010. The previous evening she had had a fight with her husband the accused during which she struck and injured him with a brick on the head. Shortly after the fight the accused left for the local business centre about 5 km away.

There is a dispute as to whether or not the accused returned to his home after the fight. Both Chipo and Clayton who are family friends testified that after the fight they took the deceased to their home. And the accused later pitched up at their home with a bicycle and an empty beer bottle. At around 6 pm the accused indicated that he was going to pack his belongings and leave. The deceased followed him saying that she wanted to monitor him packing his things just in case he might take her property with him. The two were alone at their home that evening. The next morning the deceased was found murdered with the accused nowhere in sight.

Both Chipo and Clayton were honest and credible witnesses who had no motive to misrepresent or falsify facts. They were family friends. They knew the accused very well, they had ample opportunity to converse and interact with the accused shortly before he left with the deceased that fateful evening. Unless both witnesses were deliberately lying before the court it is inconceivable and not in the least probable that they could have mistaken the accused for anyone else. In the absence of any suggestion of mistaken identity the court finds that both state witnesses were honest and believable witness. We accordingly have no qualms whatsoever in accepting their evidence as the truth. For that reason we find as a fact proved that on the evening of 16 December the accused was seen leaving Clayton Mahere’s Home in the company of the deceased under acrimonious circumstances. The two had previously fought and the feud had not been settled. The two belligerents were still angry with each other and determined to part ways as husband and wife.

The accused was the last person to be seen in the company of the deceased under acrimonious circumstances. Shortly thereafter the deceased was found murdered with a weapon matching the one he was seen carrying before the murder. When he initially left for

Masiyarwa Township he did not carry with him his belongings. The purpose for going back to their home was for the accused to pack his belongings and leave. Indeed his belongings with the exception of the blood stained T-shirt were found missing. The accused must therefore have collected his clothes when he left for his home with the deceased that evening. This explains why he never complained that his belongings were missing because he knew that he had taken them. The removal of his clothes from the scene of crime establishes his presence at the scene of crime at the time the deceased was attacked and fatally wounded.

As I have already stated above. The totality of the evidence and the accused's strange behaviour in fleeing from the police after being advised of the deceased's death coupled with his refusal to attend the funeral wake can only lead to the one and only irresistible inference that he is the murderer. The court therefore finds as a fact proved that the accused intentionally struck and killed the deceased before fleeing to his uncle's place in Madzima Village. There is thus no substance or credibility in the accused's concocted defence of an *alibi*.

The court therefore finds that the State has proved its case against the accused beyond any reasonable doubt, he is accordingly found guilty as charged.

*The Prosecutor General's Office, the State's Legal Practitioners
Nsingo & Associates, the Defence's Legal Practitioners*