

THE STATE
versus
FOSTER CHISANGO

HIGH COURT OF ZIMBABWE
ZHOU J
HARARE, 15, 16, 22, 23, 30 and 31 March 2016

ASSESSORS: 1. Mr Gweme
 2. Mr Chogugudza

Criminal Trial

H. M. Muringani for the State
W. Bherebhende for the Accused

ZHOU J: The accused person is facing a charge of murder as defined in s 47 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. It is being alleged that on 5 October 2014 at around 1900 hours on a bridge near Dzivarasekwa 4 Primary School, Harare, the accused together with his seven accomplices who are still at large unlawfully and with intent assaulted the deceased Webster Neto with clenched fists and other unidentified objects which caused his death on 15 October 2014. The accused pleaded not guilty to the charge.

The allegations made against the accused person are that on the day in question the accused and his accomplices approached the deceased and his wife Taurai Mitchell Mbisonei who were seated at a bridge near Dzivarasekwa 4 Primary School. The accused persons demanded cash from the deceased and his wife in respect of proceeds of tennis shoes which had allegedly been stolen. They assaulted the deceased and Taurai Mitchell Mbisonei with clenched fists and some unidentified objects until their two victims lost consciousness. The deceased and his wife were conveyed to hospital the following day. The deceased died on 15 October 2014 as a result of the injuries sustained during the assault.

A post-mortem report prepared by Dr Mauricio Gonzalez which was produced in evidence concluded that the deceased's death was due to suppurative broncho-pneumonia, head trauma due to assault.

The State relied on the evidence of eight witnesses. The evidence of six of those witnesses, namely, Terrence Sixpence, Stephen Mutonda, Kauma Pilo, Abedniko Undenge, Charles Munda and Dr Mauricio Gonzalez was admitted in terms of s 314 of the Criminal Procedure and Evidence Act [*Chapter 9:07*]. Two witnesses – Taurai Mitchell Mbisoni and Maud Dengezi gave *viva voce* evidence.

Taurai Mitchell Mbisoni was the deceased's wife. She gave evidence that the accused person was the deceased's friend. Accused would come to their residence and go away with the deceased as friends. On 5 October 2014 the deceased called on his mother's mobile phone and spoke to the witness. He asked her to bring some salt and sugar solution as he had abdominal problems. The witness was given her mother-in-law's mobile phone in order to be able to communicate with the deceased as to where he was. She took the salt and sugar solution to where the deceased was and he drank it. The deceased advised her that he would only go home when it was dark because he was afraid of the accused person who was trailing him. The two of them remained at that place hoping to proceed home later on under cover of darkness. They were approached by eight persons who held her by her hands and searched her and took a cellular phone. Some of them searched the deceased and took his phone as well. The assailants were covering their faces. They assaulted the witness while alleging that she was the one who was "spending the money". They left her unconscious. She therefore did not see how the assailants assaulted the deceased because she had become unconscious. She heard some of the assailants calling out the first name of the deceased, "Foster", and suggesting that they could now leave the scene as their victims had died. The witness thereupon lifted her head and saw the accused person. At that time the accused's face was not covered. She called out his name. Upon realising that the assailants resumed their assaults upon her. She was assaulted so seriously that she lost consciousness and only regained it when she was at hospital on 7 October 2014. According to the witness the assaults took place after half past six at night. There was moonlight although it was not very bright. After her discharge from hospital the accused person visited her at her residence. She informed her mother-in-law that the accused person was one of her assailants. She did not notify the police about the accused person when he visited her. The witness also described an incident in which the accused's uncle led the police to her residence in connections with the

tennis shoes that had been stolen. On that day the police were looking for the deceased. When they failed to locate the deceased they took the witness with them and detained her in police cells overnight. When she was asked during cross-examination as to how long she had known the accused person she stated that she had known him for a month. It was only later during cross-examination that she admitted that she had known him for a much longer period than that as she had stayed along the same road as the accused prior to her marriage to the deceased. She also stated in cross-examination that the owners of the stolen tennis shoes were frequenting her residence looking for the deceased. She stated that around that time that the police and the owners of the shoes were looking for him the deceased was no longer staying at his residence but was staying with an uncle in Budiro Township.

Maud Dengezi was a neighbour of the deceased's family. She regarded the deceased as a "brother" because their mothers shared the same totem. She spoke to the deceased on 5 September 2014. During the conversation the deceased had disclosed to her that the accused person was trailing him using a commuter omnibus. The deceased told her on that day that the accused person owed him a sum of US\$250, a Plasma television set, a car battery and a car radio. The deceased advised her that she had approached the accused person in order to recover the money and the items described above. The evidence of this witness was largely hearsay. Initially she stated that she had seen the accused person for the first time in Court. Later on she stated that at one time she had seen the accused person with a commuter omnibus and the deceased got inside and the two of them drove away together. The witness later said that she saw the accused person when he visited the deceased's wife after her release from hospital. According to her on that day the accused person had a conversation with the deceased's wife during which he asked if she recognised him. She stated that as a result of the assault the deceased's wife failed to recognise some persons she had always known before the assault.

The evidence of Terrence Sixpence which was admitted in terms of s 314 of the Criminal Procedure and Evidence Act was that he was the one who discovered the deceased and his wife lying unconscious. He reported the matter at Dzivarasekwa Police Station. Stephen Mutonda, a member of the Zimbabwe Republic Police stationed at Dzivarasekwa Police Station was the officer who attended the scene. He noticed that the deceased was bleeding from the mouth. The deceased's wife had no visible injuries but appeared to have suffered internal injuries. He escorted the victims to the clinic in the company of Pilo Kauma. Pilo Kauma ferried the deceased and his wife to Rujeko Clinic. Abedniko Undenge is a

registered medical practitioner employed by the Ministry of Health and Child Welfare. He attended to the deceased at the Casualty Department, and noted life-threatening injuries on the deceased. Charles Munda, the investigating officer, arrested the accused person on the basis that he had been identified by the deceased's wife at the scene of the crime. Dr Mauricio Gonzalez was the medical expert who performed a post-mortem examination of the deceased's remains. He concluded that death was due to suppurative broncho – pneumonia, head injury due to assault. The evidence of the above six witnesses does not link the accused person to the offence.

The accused person gave evidence himself and called two other witnesses, Munechi Junior Sithole and Emmanuel Moses. Accused adopted his defence outline in which he denied seeing the deceased or his wife on 5 October 2014. He is a mechanic. He also owns two commuter omnibuses. He had known the deceased for five years prior to his death. Deceased was introduced to him by one Lucky whom the witness had contracted to construct a wooden tuckshop for him. He related well with the deceased such that at times the deceased would purchase items from the accused's tuckshop on credit. The accused stated that he also assisted the deceased with some money at times. He stated that he had known the deceased's wife since he was a teenager as she stayed some three houses from his residence. He denied involvement in the assault that led to the death of the deceased. He only became aware of the assaults on the following day. He went to the scene and found some members of the public already gathered there. The deceased and his wife were lying near a school durawall but in the grass. The two were wearing only their undergarments. He met the grandmother of the deceased's wife when he was returning to his residence with the intention of arranging transport to convey the two to hospital. She asked the accused person to go and cover the deceased and his wife with blankets. He proceeded to assist the deceased and his wife against the advice of the members of the public some of whom were alleging that the deceased had stolen their property while others were stating that he had assaulted them during elections. He and the grandmother of the deceased's wife asked Kauma Pilo to convey the two injured persons to the police station.

He testified that on 5 October 2014 he had spent the whole day attending to a Toyota Hiace motor vehicle belonging to one Pasca Dumbu. After half past four in the afternoon the accused person went to have a bath and retired to his room to watch a film on television entitled "**Undisputed**". Mike Moses and Lolo joined him in watching the film. The television was in his one room which he used as his bedroom and kitchen. The two were watching the

television while they were seated at the door of that room. His wife was preparing the evening meal. He only went out of that room temporarily around 1830 hours to 1845 hours to talk to one Action Dube who stayed at that same house as a tenant. After the evening meal he retired to bed and only woke up to lock the door when his two uncles were retiring to sleep in their bedroom. He never went out of his bedroom until the following morning when he woke up around 8 o'clock.

The accused person recounted an incident when the deceased and one George Malunga Zhoya came to where he was repairing a motor vehicle with two bags containing tennis shoes which they were selling. The deceased person informed the accused that he had purchased the shoes from Mozambique. In the evening of that day police officers accompanied by persons who he believed to be the owners of the tennis shoes came making inquiries about the tennis shoes. The accused and his relatives directed them to the deceased's residence. His uncle got into the motor vehicle which was being used by the police officers and the owners of the shoes while he drove another motor vehicle when they went to the deceased's residence. The deceased was not at his residence on that night. He stated that the persons who were claiming to be the owners of the shoes were agitated and forcibly bundled his uncle into their motor vehicle in order to be shown the deceased's residence. The following morning after the police had visited the deceased's residence the deceased phoned the accused person and asked if he knew the owners of the shoes as he had stolen the shoes and wanted to return them or pay the owners for the shoes.

The accused person stated that he knew the deceased's wife, Taurai Mitchell Mbisoni from his days as a teenager. He stated that after her release from hospital he visited to check on her since he had assisted her and the deceased following the attack upon them. He stated that when he got to Taurai Mitchell Mbisoni's residence he asked her if she recognised him because he had heard that she was having problems identifying people as a result of the injuries which she had suffered. When he asked her if she recognised him she did state that he was Forster. The accused also asked the deceased's mother if she recognised him and when she indicated that she did not he reminded her that he was the one who had assisted the deceased and his wife on the day that they were discovered following their assault.

Munehi Junior Sithole, the accused person's wife, testified that on the evening on which the deceased and his wife were attacked the accused person never left his residence. Her evidence was materially the same as that of the accused person in relation to what the

accused person did in the evening after he had finished attending to a motor vehicle. She disputed the suggestion that the accused person might have slipped out of the house during the night in order to commit the offence.

Emmanuel Moses is an uncle of the accused. He stays at the same residence with the accused person. His evidence in relation to the activities of the accused person in the evening of 5 October 2014 was similar in material respects to that of the accused person and Munechi Junior Sithole.

The Court is enjoined to consider whether, on the evidence led, the State has proved beyond reasonable doubt that the accused person committed the offence charged. Mr *Muringani* for the state conceded that the evidence of the state fell short of satisfying the quantum of proof required. The concession was, in the view of the court, properly and commendably made. Two celebrated cases illustrate the approach to be embraced in a criminal trial. In the case of *R v Difford* 1937 AD 370 at 373 GREENBERG J said:

“ . . . no onus rests on the accused to convince the court of the truth of any explanation which he gives. If he gives an explanation, even if that explanation is improbable, the court is not entitled to convict unless it is satisfied, not only that the explanation is improbable, but that beyond any reasonable doubt it is false. If there is any reasonable probability of his explanation being true, then he is entitled to his acquittal.”

In *R v M* 1946 AD 1023 at 1027, Davis AJA articulated the same principle as follows:

“ . . . the court does not have to believe the defence story, still less does it have to believe it in all its details; it is sufficient if it thinks that there is a reasonable possibility that it may be substantially true.”

LORD DENNING’s famous statement in *Miller v Minister of Pensions* [1947] 2 All ER 372 at 373 on the quantum of proof in criminal proceedings elegantly sums up the essence of the concept of proof beyond reasonable doubt in the following terms:

“It (the degree of proof) need not reach certainty, but it must carry a high degree of probability. Proof beyond a reasonable doubt does not mean proof beyond a shadow of doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour, which can be dismissed with the sentence ‘of course, it’s possible but not in the least probable’, the case is proved beyond reasonable doubt, but nothing short of that will suffice.”

See L. H. Hoffmann and D. T. Zeffertt, *The South African Law of Evidence* 4th ed, pp. 524 – 525.

The above principles have been consistently upheld in this jurisdiction. See *S v Tambo* 2007 (2) ZLR 32(H) at 39F-40A; *S v Katsiru* 2007 (1) ZLR 364(H) at 372B; *S v Makanyanga* 1996 (2) ZLR 231(H) at 235.

The only state witness who implicated the accused person was Taurai Mitchell Mbisonei. The arrest and prosecution was predicated upon her testimony that after she had been attacked by the assailants she heard the accused's name being called out by one of the assailants, and she saw the accused person and also called out his name before the assailants assaulted her and rendered her unconscious. The credibility of this witness and, indeed, the reliability of her evidence, must therefore be assessed. She stated that when she was discharged from hospital she was able to talk. However, there is no evidence that she mentioned the accused person as one of the assailants and the only one she had managed to identify during the attack. Even on the day that the accused person visited her a day after her release from hospital she did not raise the 'hue and cry' upon seeing him. Instead, she exchanged greetings with him, and allowed him to depart from her residence even though that would have been a perfect opportunity for her to alert the world that he was one of her attackers. The evidence led on behalf of the state shows that at least two adult persons were with her on that day that the accused person visited. These were the witness's mother in law and Maudi Dengezi who also testified before this court. The accused person was only arrested about two weeks after the death of the deceased and more than two weeks after he had visited the witness's residence.

The witness also lacked credibility in that she was prepared to mislead the court and contradicted herself in a number of instances. She stated initially that she had known the accused person for only a month prior to the attack upon her and the deceased. It was only later during cross-examination that she admitted to have known the accused person since 1997 which is a period of about seventeen years. She was very evasive about her level of education choosing in the first instance to state that she was illiterate. Later she said she had attended school up to grade five, but still claimed to be illiterate. Later on without proper explanation she testified that she was able to write her names. It was clear, too, that she was not telling the truth regarding the reason why the deceased was not prepared to go to his residence save under cover of darkness. She knew that the police had visited her residence looking for the deceased in connection with stolen shoes, and they had even arrested and detained her at the police station for one night in connection with that same matter. Yet she wanted the court to believe that the deceased person was trying to avoid the accused person.

The reason proffered by her as to why the deceased was trying to hide away from the accused person did not make sense at all. She suggested that he had told her that the accused person was trailing him in connection with a debt owed to the deceased by the accused person. If that was so the deceased would have simply reported the accused person to the police instead of taking shelter in darkness away from home to the extent that the witness had to carry a salt and sugar solution for him to that dark spot.

Taurai Mitchell Mbisonei's evidence of how she identified the deceased must be approached with caution not only because she is the only person who gave that evidence but also because it was the basis of the arrest of the accused and the only ground upon which a conviction would be sought. See *S v Dhliwayo & 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 591(H) at 594A-595A. The witness's description of the attack upon her and the deceased was thoroughly unsatisfactory and replete with inconsistencies. Not only did she contradict her statement to the police regarding the events surrounding the attack; she even contradicted her own oral testimony. In her evidence in chief she first stated that she became unconscious when she was first assaulted by the eight assailants. She only regained consciousness at the time that the accused person's name was called out. Later on she stated that she had actually not lost consciousness but pretended to be unconscious after the first assault. In her statement to the police she did not refer to being assaulted on two occasions but merely that four of the assailants attacked her while the other four attacked the deceased. But she denied in this court that she saw the assailants assaulting the deceased. She was asked as to how she had identified the accused person. Initially she said that he was slightly light in complexion; later on, no doubt after having a second look at him she changed to say that she had identified him by his dark complexion. Given her testimony that the only source of light was the moon and that the light was not quite clear it is difficult, and is not explained, how she would have been able to recognise a person's complexion at night. She was unable to describe the clothes that the accused person was wearing or any features which would suggest how she identified him among the assailants. Thus her evidence of identification of the accused person is seriously unsatisfactory and cannot be relied upon. She feigned ignorance about the issue of the stolen shoes but does not explain why she would not seek clarification in connection with them from her husband given that she had been detained at the police station for one night in connection with those shoes. Even on the simple issue of what type of cellular phone had been given to her, the witness

contradicted herself. In one instance she stated that she had a Samsung model; later after some leading question from the prosecution she stated that the only phone she had was a Nokia type which had been given to her by her mother-in-law. She also gave incoherent evidence regarding her interaction with the accused person when he visited her after her release from hospital. While she admitted that she suffered loss of memory as a result of the assault, her first evidence was that she had not engaged in any conversation with the accused person when he came to her residence. Her evidence was contradicted by Maudi Dengezi who referred to a conversation between the witness and the accused person.

The accused's case was that he was at his residence, and never left his residence, during the time that the deceased and his wife were attacked. His defence was therefore of an *alibi*. The accused's *alibi* was not disproved by the evidence led on behalf of the prosecution. The onus was on the prosecution to disprove that defence. See *S v Gomera, Supra*, at 595G-596B; *S v Mutandi, Supra*, 370E. His evidence, as well as that of the defence witnesses, was unchallenged by any evidence to the contrary. He and his witnesses were not shaken in cross-examination, and gave their evidence well. No evidence was led as to any possible motive for him to kill the deceased person whom he had related to as a friend during his life time. Maudi Dengezi's evidence was hearsay which could not be relied upon. In any event, as pointed out above, the version of the creditor being trailed by his debtor simply does not make sense and must be rejected.

In all the circumstances of this case, the evidence led does not prove the guilt of the accused person.

In the result, the accused person must be found not guilty, and is hereby acquitted.

National Prosecuting Authority, legal practitioners for the State
Bherebende Law Chambers, accused's legal practitioners