

THE STATE
versus
PORTIA MUPAZVIRIPO

HIGH COURT OF ZIMBABWE
MUREMBA J
HARARE, 16 & 17, January 2023 & 23 February 2023

Criminal Trial

Assessors: Mr Barwa
Mr Chimonyo

T Mukuze for the State
B Furidzo, for the accused

MUREMBA J: The accused pleaded not guilty to the charge of murder as defined in s 47(1)(a) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] (the Criminal Law Code).

The allegations in the State's summary are that on 26 May 2018 and at Munyuki Business Centre in Epworth, Harare, the accused assaulted the deceased, Kelvin Chikwere and pushed him thereby causing him to fall to the ground. She kicked and stepped on the deceased's head and used an unknown object to strike him on the head several times thereby causing him injuries from which the deceased died on 5 June 2018. It is alleged that what prompted the accused to assault the deceased was that the two had been drinking beer together with one Estery Ngasita. The accused then left around 12 noon after which the deceased missed his phone. He followed the accused and confronted her over the missing cellphone. This is what angered the accused resulting in her assaulting the deceased.

In denying the charge the accused gave a winding explanation about how she had met the deceased for the first time on 26 May 2018 at Munyuki Business Centre and how they had ended up drinking beer together. What is material from the long defence outline is as follows. When the

accused met the deceased on the morning of the day in question, she learnt from him that he was a boyfriend to Perpetua Kalongo whom the accused regarded as a sister. The deceased told the accused that he was robbed and beaten the previous night whilst he was with Perpetua Kalongo. The deceased even removed his cap and the accused noticed that he had a cut on his head. The accused also said that in fact Perpetua Kalongo had told her the previous night that her boyfriend had been hit by a metal object during a robbery. After the accused and the deceased had met, they started drinking beer together. At some point the accused even accompanied the deceased to Perpetua Kalongo's house to collect his cellphone. When they went back to the shops, Perpetua Kalongo phoned the deceased and started accusing him of now being in a love relationship with the accused. This did not go down well with the accused who decided to leave the deceased and go her separate way. The deceased however later followed the accused where she was now drinking beer with her cousin Estery Ngasita. He was now accusing her of having taken his cellphone. He held her and pulled her by the braids. The accused hit the deceased once on the cheek with a fist and he released her. The accused went to Farai night club/ bar where the deceased followed her. The deceased pulled her back as she was proceeding to the front entrance of the club/bar. The accused said she pushed the deceased who staggered and hit his knee on a stool but he did not fall as he supported himself with the counter. The accused said she left Farai night club/bar with the deceased following her. As the deceased got out of the night club, he saw Ngonidzashe Munyuki whom he started talking to about his change. It was now around 12 noon. The accused left the two talking and went to her house. At around 3.20 pm the accused was called by Estery Ngasita who told her that the deceased was lying unconscious at the shops. The accused denied assaulting the deceased in the manner alleged by the State and causing his death.

The State's evidence

By consent the evidence of Estery Ngasita, Fungai Kurima, Margareth Gunda and Doctor Capetillo was admitted in terms of s 314 of the Criminal Procedure and Evidence Act [*Chapter 9:07*] (the CPEA). The evidence of these witnesses can be summarized as follows. Estery Ngasita is an aunt to the accused. She did not know the deceased prior to 26 May 2018. On 26 May 2018 as she was drinking beer with the accused at around 12 noon the deceased came to where they were. He started accusing the accused of having taken his cellphone. He pulled the accused's

braids and she resisted. The deceased struck the accused with a fist and the accused retaliated once with a fist. Estery Ngasita said she walked away from the scene and so did the accused. This is all she witnessed.

Fungai Kurima knew the deceased as his elder brother's friend. On 26 May 2018, at 1500 hours he went to Farai night club to get some music. Upon arrival he saw the deceased lying on the verandah near the entrance and there were people who had gathered around him. The deceased was lying facing upwards and was bleeding from the nose. The witness said he ran to summon the deceased's mother Margareth Gunda from her house. Upon his return, he ferried the deceased to Epworth Police Station with the help of Ngonidzashe Munyuki and Margareth Gunda in Ngonidzashe Munyuki's motor vehicle. He learnt of the deceased's death after some weeks.

Margareth Gunda the mother of the deceased said that she arrived from South Africa on the same day of 26 May 2018. She called the deceased and asked him to bring her the keys to the house. When he came to give her the keys, he told her that he was robbed of his cash, meat and identification particulars the previous night. Upon the deceased's departure, a boy from the neighbourhood brought to her the deceased's particulars which he had picked up. At around 1600hours Fungai Kurima came and told her that the deceased was lying unconscious at Munyuki Shopping Centre. When she went to the scene, she found the deceased lying in a pool of blood with blood oozing out of his mouth and nose. He could not speak. She noticed some bruises underneath one of his eyes. She ferried the deceased to hospital where he eventually died.

Doctor Iglesias Capetillo examined the remains of the deceased on 7 June 2018 and concluded that death was due to brain oedema, subdural/ acute haematoma and head injuries.

Before leading *viva voce* evidence from the rest of the witnesses, Mr *Mukuze* for the State applied to have the evidence of Ngonidzashe Munyuki expunged from the State's summary. His reasons were that the State had wanted the witness' evidence formally admitted in terms of s 314 of the CPEA, but the defence counsel had not consented. Mr *Mukuze* submitted that he had thus decided that this witness' evidence would not add any value to the State case.

The State produced the accused's confirmed warned and cautioned statement in which she said that she was denying the (murder) allegations since she had fought with the deceased and hit him twice with clenched fists and pushed him and he fell onto a metal stool.

The State then led *viva voce* evidence from Perpetua Kalongo who was the girlfriend of the deceased. Perpetua Kalongo said that she is a beerhall patron and so is the accused. The bulk of her evidence related to how she had spent time with the deceased in the evening of 25 May 2018. She said that they then went to her place to sleep at 2am. At 6am they went back to the shops to collect the deceased's cellphone which they had left charging. After they collected the cellphone, the deceased suggested that they have two quarts of beer. When they were drinking, the accused entered the bar and joined them. The deceased bought her a quart of beer. Perpetua Kalongo said she then bid farewell to the deceased as she went home to sleep. She took with her the deceased's cellphone but he later followed her and collected it in the company of the accused. Later during the day some women who sell their wares at the market came to her house and told her that the deceased had been assaulted and was lying unconscious at the shops. She went there and saw him. He was then ferried to hospital.

What was noticeable about this witness' evidence is that she made no mention of the robbery incident that the accused and the deceased's mother Margareth Gunda spoke about. Surprisingly the State Counsel, Mr *Mukuze* made no effort at all to lead his witness on this piece of evidence.

During cross examination the witness vehemently denied that the deceased had been robbed whilst in her company as they were going to her house together in the evening of 25 May 2018. She was shown the statement that she made to the police to that effect, but she denied ever telling the police that. In the statement she is said to have told the police that the deceased had been robbed by 2 men who took his wallet and meat on 25 May 2018 at 11 pm. These men had pushed the deceased and the witness and the deceased had fallen down. The witness denied that she ever said such a statement. She said that she was in a drunken state and when the police were asking her questions 3 days later, she would just answer questions. The witness said that she did not know anything in relation to the death of the deceased as she had not witnessed anything.

Edward Jimu who repairs and sells cellphones at the shopping centre gave the following evidence. From where he operates, there is a kitchen close by. On 26 May 2018, he saw the accused arriving at the kitchen. He also saw the deceased arriving there as well. The deceased started pulling the accused as he was demanding his cellphone back. The two held each other by the collars and started dragging each other. They were exchanging words. The accused went on

to slap the deceased twice. They later hugged each other and went back in the bar. It looked like they had resolved their issue. The witness said that he knew nothing about how the offence was committed. He said that when he observed the accused and the deceased, he was about 5m away from them. This happened before 12 noon.

Stephen Billiati told the court that he was working at Farai night club/bar at the material time. His evidence was as follows. On 26 May 2018, the accused and the deceased entered the bar grabbing each other by their clothes. It was apparent that they were having a misunderstanding. However, in not more than 10 minutes, they exited the night club. When the State Counsel asked him if he had not said that the accused and the deceased fought in his statement to the police, he said that the accused had slapped the deceased on the face. Asked why he had not said it before, he said that due to lapse of time he had forgotten some of the things. The witness said that it was when he knocked off duty that he saw the deceased lying by the door way of the night club outside. He said that he had not seen what had happened to him that had caused him to lie on the ground. When it was put to him that in his statement to the police, he had said that he had seen the accused assaulting the deceased with clenched fists, he said that the accused had slapped the deceased using open hands but he could not recall how many times. It was put to him that in his statement to the police he had said that people had tried to restrain the accused from assaulting the deceased to no avail. In response he said that he could not recall some of the detail. When it was put to him that he had said that the accused had continued to assault the deceased until he fell down on the verandah, he said that he could recall that the accused and the deceased exited the bar dragging each other. This witness initially said that he had no recollection of the time the deceased was found lying on the door way. He said that his memory was failing him. He however later said that he must have seen the deceased lying on the verandah when he was knocking off duty at around 1 pm. He said that the accused and the deceased had entered the bar at around 10am. The witness said that it is his employer Mr Munyuki (Ngonidzashe) who came and ferried the deceased to hospital. However, this happened after he (the witness) had gone home.

Aaron Mayedzenga who was the investigating officer also testified. He said very little. He said that he was allocated the matter on the same day the offence was committed i.e. on 26 May 2018. He attended the scene on the very day. However, he found the deceased having been ferried

to hospital. He located the witnesses and interviewed them, but none of them indicated to him the weapon that had been used in the commission of the offence.

The accused's evidence.

The accused was the sole witness for her case. She gave a narration of the events of the evening of 25 May 2018. She said that she was seated outside Farai bar around 9- 10pm. Perpetua Kalongo passed by running. The accused asked her what the matter was. Perpetua Kalongo said that she and her boyfriend had been attacked by some thieves. Perpetua Kalongo said that she wanted to leave some things in the bar and go back to the scene where she had left the deceased unconscious. The accused said that on the next morning she went to the shops to buy bread. She then got into Farai bar intending to buy beer. The deceased approached her and introduced himself as Perpetua Kalongo's boyfriend. He said that he had seen the accused the day before. He then paid for her beer. He then asked her to accompany him to Perpetua Kalongo's house to collect his cellphone. Initially she refused but he pleaded with her saying that Perpetua Kalongo had caused him to be attacked by thieves the previous night and that as such he was afraid to go to Perpetua Kalongo's place alone. On that note she then accompanied him. When they got to Perpetua Kalongo's place she said that she had left the phone at the shops at Blue bar. The three of them proceeded to Blue bar where Perpetua Kalongo collected the deceased's phone and handed it over to him. They then all went to Farai Bar where they started drinking beer. Some man who was also a boyfriend of Perpetua Kalongo entered the bar. The deceased and Perpetua Kalongo started quarrelling over this man as the deceased was asking why Perpetua Kalongo was dating other men. At that point the deceased removed his hat and accused Perpetua Kalongo of causing him to be attacked by thieves. The accused said that when the deceased removed his hat that is when she got to see the injury on his head. Perpetua Kalongo then left in a huff only to phone the deceased later accusing him of now being involved in a love relationship with the accused. Perpetua Kalongo then threatened the deceased that she would cause him more harm. The accused said that she was not happy with the threats. So, she decided to part ways with the deceased. The accused said that she then went to Edward Jimu's shop where the deceased who was very drunk followed her saying that she had taken his phone. He grabbed her by her hair and started pulling her. The accused said that she struck the deceased with a fist on the cheek so that he would release her. He then let go

of her and said he had now remembered where he had left his phone. The deceased told her that he was now interested in her. The two of them then proceeded to Farai bar where the deceased wanted to go and collect his change. When they got there, the deceased asked for his change from Stephen Billiati who pushed him and he staggered backwards and knocked against the gate that leads to the cashier's area. However, the deceased did not fall. The accused said that she started walking out of the bar. The deceased upon seeing her leave, grabbed her by the shoulder. The accused said that she pushed the deceased who staggered and knocked his knee on a stool, but he did not fall. He supported himself using the counter. The two of them then exited the bar. When they were outside the bar, the deceased saw Ngonidzashe Munyuki the owner of Farai bar seated in his motor vehicle. The deceased approached him and started quarrelling with him over the issue of his change which he had not been given by his cashier Stephen Billiati. The accused said she took that opportunity to evade the deceased. She went home. Estery Ngasita later phoned her around 3pm saying that the deceased had collapsed at the shops. The accused said that she proceeded to the shops where she learnt that the deceased had been ferried to the police station by Ngonidzashe Munyuki. She said that she was arrested after 5 days.

The accused said that although when Perpetua Kalongo testified in court denied that the deceased was robbed on 25 May 2018, she had actually said it in her statement to the police. She said that the deceased had even told his mother about it on the morning of 26 May 2018 when the mother came back from South Africa. The accused said that the wound that she had seen on the accused's head was about 3cm long but she could not see how deep it was because of the blood that had dried and formed a crust. The accused denied that she assaulted the deceased by stepping on his head. She said that she only struck him on the cheek once and that could not have caused him head injuries from which he died. She also denied ever using an object to assault the deceased. She said that when she pushed the deceased he never fell down. She said that she did not know what caused the deceased to fall at the verandah of Farai Bar and what caused him to bleed from the nose and the mouth. She said that she had left the shops around 12pm and at that time the deceased was talking to Ngonidzashe Munyuki.

During cross examination the State counsel put it to the accused that the deceased had not been robbed. He further put it to her that the robbery that she was talking about was a figment of her own imagination. She maintained that it had happened because Perpetua Kalongo had told the

police about it and the deceased had told his mother about it. The State counsel put it to the accused that it is the blows that she inflicted on the deceased that caused the injuries that led to the deceased's death. The accused maintained that a fist on the face cannot cause head injuries.

Analysis of evidence

The physical ingredient of the charge of murder is the unlawful causing of the death of the deceased by the accused. This also known as the *actus reus*. For the State to secure a conviction it has to prove this ingredient apart from proving the required mental state known as the *mens rea*. The starting point for the State is to prove this physical ingredient.

In casu the allegation by the State is that the accused assaulted the deceased resulting in injuries from which the deceased died. The State therefore needed to prove the positive act of assault on the deceased by the accused. The State further needed to prove that the assault caused head injuries and brain oedema from which the deceased died. Put differently, in a murder charge if the State alleges and proves that the accused assaulted the deceased, it should also go on to prove that it is the injuries thereof that caused the death of the deceased. The question to ask is: but for the accused's actions would the deceased have died? If the State does not prove that the assault that the accused perpetrated on the deceased is what caused the injuries that led the to the death of the deceased, the accused is entitled to his or her acquittal.

In casu the State's summary says that the accused assaulted the deceased by striking him with fists twice on the face. She further assaulted him with open hands on the face and pushed him outside Farai bar. He fell on the verandah where the accused continued to assault him by kicking and stepping on his head. She further struck him with an unknown object several times on the head and he bled from the nose and mouth. He then lost consciousness. However, none of the State witnesses gave evidence of this assault that the State alleges. Even the State counsel Mr *Mukuze* admitted to this in his closing submissions. Estery Ngasita only saw the accused strike the deceased with a fist once in retaliation after the deceased had struck her with a fist. Estery Ngasita whose evidence was formally admitted did not say where the accused struck the deceased. In the absence of evidence, it cannot be assumed that the accused struck the deceased on the head. Edward Jimu said that the accused hit the deceased twice with clenched fists on the face. Stephen Billiati who was supposed to be the key witness to the assault denied seeing the accused assaulting the deceased as alleged by the State, yet the State's summary of this witness' evidence shows that

he is the person who witnessed the accused assaulting the deceased in the manner described in the State's summary. As was correctly submitted by Mr *Mukuze* the State counsel, this witness was very economical with the truth from the way he gave his evidence. It was clear that he was avoiding revealing too much of the truth. He was simply withholding information. Initially he just said that the accused and the deceased entered the bar grabbing each other by their clothes and that they then went on to exit the bar. He gave the impression that this was all that he saw. It was only after the State counsel started asking him questions about the statement that he had given to the police in which he had said that the accused and the deceased had fought that he then said that the accused had slapped the deceased on the face with an open hand. When it was further put to him that in his statement he had said that the accused had assaulted the deceased with clenched fists, he said that the accused had slapped the deceased using open hands. When asked how many times, he said that he could not recall. It was also put to him that he had also said that other people had tried to restrain the accused from further assaulting the deceased to no avail, and he said that he could not recall some of the detail due to time lapse. When it was put to him that he had said that the accused continued to assault the deceased until he fell down on the verandah, he simply said that all that he could recall was that the accused and the deceased had exited the bar dragging each other. This was just a very untruthful witness. He chose to hide behind lapse of time when he was asked about the contents of the statement that he gave to the police. His excuse was that his memory was failing him yet according to the State counsel, he had been given his statement to refresh his memory.

For a person who was working as a cashier in the bar where the whole incident is said to have happened, this alleged loss of memory was deliberately designed to deceive the court. It is clear that he deliberately chose to withhold information. What is apparent is that he never denied that he is the one who had told the police what was contained in his statement. He just said that he had forgotten some detail of what had happened. Clearly if we go by what the witness told the police, the accused perpetrated a severe assault on the deceased and there can be no doubt that this is the assault that resulted in the head injuries that the deceased sustained which later caused his death. However, the witness chose to depart from his statement to the police. His evidence in court was very difficult to follow. It was even surprising that he said that he did not see how the deceased fell at the verandah which was just 10 metres away from where he was inside the bar.

He said that he only saw the deceased lying unconscious when he knocked off duty at 1p.m. The time of 1pm that he gave was also puzzling because every other witness who witnessed the deceased lying on the verandah said that it was around 3pm. He said that he saw that the deceased was bleeding from the nose and mouth, but despite that and the fact that there were people gathered around the deceased, he said that he went home. The witness's lack of interest in what had befallen the deceased is actually shocking and unbelievable. Is it realistic that he proceeded home leaving the deceased in this state at the verandah of the bar where he was working? In the State's summary of his evidence the impression given is that the deceased was ferried to hospital in his presence. All that we can say is that Stephen Billiati turned hostile against the State case by departing from the statement that he gave to the police.

A witness can turn hostile due to several factors. It is possible that he or she may have been influenced or interfered with by the accused or any other person(s). It is also possible that he or she may just choose to protect the accused. Some witnesses turn hostile out of fear of what they think may have been the likely consequences if they tell the truth of what happened. A witness may be afraid of facing the wrath of an accused who may be well connected. A witness may thus fail to tell the truth in court for reasons beyond his or her control or due to ignorance or some corrupt collusion. In other words, monetary inducement, intimidation, threats or fear or an unholy combination of these factors may be at play. However, all that we can say is that witnesses who turn hostile cause a disservice to justice delivery. They ruin cases of the party calling them. They allow criminals to walk scot free, making a mockery of the whole criminal justice system. This has the effect of shaking public confidence in the criminal justice delivery system.

In *casu* the rest of the State witnesses were not eye witnesses to the severe assault that is described in the State's summary. They only witnessed the accused striking the deceased with a clenched fist or with an open hand on the face once or twice. It is unfortunate that the investigating officer in this case was not thorough in his investigations. Evidence led shows that a number of people gathered around the deceased at the verandah. As was correctly submitted by Mr *Furidzo* for the accused, some of these people saw what transpired. Stephen Billiati in his statement to the police even said that some people had tried to restrain the accused. The investigating officer should have made efforts to find these people and record statements from them. Murder is a very serious crime. The police need to take it very seriously when they do investigations thereof. Recording a

statement from one eye witness and seeking to rely on the evidence of that one eye witness in a case where there are several people who witnessed the offence being committed is a disservice to justice delivery. Out of abundance of caution, the police must record statements from more than one eye witness. In the event that one witness decides to turn hostile as what happened in the present case or if he or she dies that marks the end of the matter. The end result is an injustice. It cannot be over emphasized that the role of witnesses is paramount in the criminal justice system. Witnesses are the eyes and ears of justice. A criminal case is built on the evidence given by witnesses. It is therefore imperative for the police to gather evidence from as many witnesses as possible.

With Stephen Billiati having withheld information about the assault, the court cannot make a finding that the assault the accused perpetrated on the deceased is what caused the head injuries that caused the death of the deceased. The evidence that he gave in court is favourable to the accused. Mr *Mukuze* acknowledged this in his closing submissions. What is clear though is that the State did not apply to impeach its witness, a procedure that was available to it in terms of s 316 of the Criminal Procedure and Evidence Act [*Chapter 9:07*]. Mr *Mukuze* simply showed the witness his statement and asked him to confirm if he is the one who had made the statement to the police. When the witness confirmed, he then highlighted to him the discrepancies which were between what he was now saying in court and what he had said in his statement to the police. He asked the witness to explain the discrepancies. The witness simply attributed this to his memory failing him due to lapse of time. Mr *Mukuze* did not take the matter further. He did not apply to have the witness declared hostile by the court so as to have the witness impeached. As a result, Mr *Mukuze* did not go on to cross-examine his witness.

What is surprising though is that in his closing submissions Mr *Mukuze* despite submitting that Stephen Billiati and Edward Jimu had colluded with the accused and suppressed the severity of the assault perpetrated on the deceased by the accused, he prayed that the accused be convicted of murder. The question is with the key witness having turned hostile what case did the State prove against the accused? In the circumstances can it be said that the State proved its case of murder against the accused beyond reasonable doubt? The State counsel did not say which *viva voce* evidence of Stephen Billiati shows that the assault perpetrated by the accused led to the head injuries which caused the death of the deceased. In his submissions Mr *Mukuze* urged the court to

convict the accused on the basis of the statement that Stephen Billiati made to the police. This approach is not provided for in the rules of evidence. If the State manages to show that a witness has departed from his or her statement to the police, that simply means that the witness is not credible. His evidence cannot be relied upon. Even if the witness is impeached, the contents of his or her statement to the police cannot be accepted by the court in place of the *viva voce* evidence that he or she would have given in court. The impeachment process only serves to prove that the witness cannot be relied upon. It is only those things that the impeached witness may say under cross-examination by the prosecutor which implicate the accused which the State may seek to rely on in seeking to secure the conviction of the accused: See *Miller* 1971 RLR 159(A); *Mpofu and Anor* S-150-89. In *casu* if the State wanted to rely on the evidence of Stephen Billiati it should have applied to have the witness declared hostile and then gone on to cross-examine its own witness. If during cross examination the witness had then said things that incriminate the accused, it is those things that the State would then have relied on to pray for a conviction against the accused. In *S v Donga* 1993(2) ZLR 291 (S) @ 292 it was held that,

“If a witness departs materially from a previous statement to the police, she can be impeached. If she is impeached her evidence in court is normally discarded entirely. However, if she tries to shield the accused but also says things against the interests of the accused, the latter things may be accepted by the court as true. The court cannot during impeachment proceedings decide that her extra-curial statement contains the true facts and her testimony in court is false.”

The *Donga* case shows that the court cannot simply decide that what the State witness said in his extra-curial statement which he or she departed from is the truth and accept that evidence against the accused. From the way Mr *Mukuze* led evidence from Stephen Billiati and what he said in his closing submissions in respect of evidence led from this witness, it does not look like Mr *Mukuze* is conversant with the impeachment procedure. If he was aware of this procedure, he would not have urged the court to convict the accused of murder on the basis of what Stephen Billiati said in his statement to the police. What we can only say is that the evidence of Stephen Billiati cannot be relied upon to convict the accused. He was clearly not a credible witness and he turned hostile to the State case.

What is left of the State’s evidence which incriminates the accused is what was said by the witnesses who said that the accused struck the deceased twice on the face with a clenched fist or with open hands. Whilst the deceased died as a result of injuries sustained on the head, none of the

witnesses said that the accused struck the deceased on the head. None of them explained how the deceased was injured on the head. Right from the start, starting with the defence outline, the accused never admitted that she assaulted the deceased on the head. She also said that the deceased had sustained a cut on the head when he was hit with a metal object when he was robbed. Going by what the accused said in her defence outline, it is obvious that the State counsel needed to thoroughly deal with the issue of the head injury that led to the death of the deceased. The purpose of the defence outline is to inform the State and the court about the nature of the accused's defence. The defence outline is a categorical assertion by the accused of facts on which he or she relies for his or her defence: *S v Mandwe* 1993(2) ZLR 233(S). The defence outline therefore serves to identify what may be in issue and that which the State needs to prove against the accused.

In *casu* in light of the nature of the accused's defence it was imperative for the State to lead evidence to rebut the averments by the accused that the head injuries that led to the death of the deceased were sustained during the robbery which was committed against him on the night of 25 May 2018. However, the State did not lead any evidence on the robbery. It was even surprising that when Perpetua Kalongo testified, she denied that the deceased and herself had been robbed on 25 May 2018. As was correctly said by the accused, this was contrary to what she (Perpetua Kalongo) said in her statement to the police. When she was being cross-examined, she was shown her statement, but she maintained that she never said that to the police. The State counsel never took issue with this. In fact, during the defence case and in cross examining the accused, the State counsel went on to put it to her that the issue of the robbery that she had raised was a figment of her own imagination. What the State counsel forgot was that in the summary of evidence of Perpetual Kalongo which forms part of the State's summary of evidence, it is stated that on 25 May 2018 at around 2300 hours as she (Perpetual Kalongo) was going to her place with the deceased, they met two male persons who robbed them of a wallet and the meat that the deceased had bought. The State counsel had also forgotten that Margareth Gunda, the mother of the deceased in her evidence which was formally admitted in this trial in terms of s 314 of the CPEA she said that when the deceased came to give her the keys to the house upon her arrival from South Africa on the morning of 26 May 2018, he told her that he had been robbed of his cash, meat and identity particulars.

If the State counsel had been alive to this evidence, he would not have alleged that the robbery was a figment of the accused's imagination. Instead, he would have taken the issue seriously and endeavoured to lead evidence to rebut the accused's defence that the head injury that led to the death of the deceased was as a result of the assault perpetrated on him when he was robbed. Mr *Mukuze* ought to have asked Perpetua Kalongo why she was now denying that the robbery had happened when she had told the police otherwise. The State counsel ought to have led *viva voce* evidence from the deceased's mother Margareth Gunda in order to ascertain everything that the deceased had told her about the robbery. She might have shed some light on whether or not the deceased had sustained injuries in the head during the robbery. The foregoing shows that the State left the issue of the robbery unclear. Now it is not known what injuries if any, the deceased sustained during the robbery.

It cannot be over-emphasised that the nature of the accused's defence as outlined in the defence outline defines the trajectory the trial takes. It informs the State which issues are common cause between the parties and which issues are disputed. It is those issues that are disputed that are material for the determination of the case that the State needs to lead evidence on in order to prove the guilt of the accused. The defence outline thus informs the State which witnesses it needs to lead *viva voce* evidence from in order to rebut the accused's defence. It also informs the State which witnesses need not be called to give *viva voce* evidence on the basis that their evidence is not disputed. It is the evidence of such witnesses which can be produced in terms of s 314 of the CPEA.

The way Mr *Mukuze* prosecuted this case generally shows that he failed to identify the issues that were common cause and those that were disputed. He did not know which issues the State needed to prove in order to secure a conviction of murder against the accused. The main blunder that he made was to close the State case without leading evidence on the head injury the deceased sustained. None of the State witnesses testified to it. No one saw the accused inflicting it and no one said where exactly on the head the injury was. The people who ferried the deceased from the verandah to the hospital could have testified on this issue. These people are Fungai Kurima; Margareth Gunda, the deceased's mother; and Ngonidzashe Munyuki. Obviously, they made some observations on the deceased when they lifted him, but none of them was called to give *viva voce* evidence. Fungai Kurima and Margareth Gunda's evidence was formally admitted

in terms of s 314 of the CPEA but the evidence is completely silent on the head injuries. *Viva voce* evidence from these witnesses would have made a difference. If injuries are inflicted on a particular part of the body thereby causing the death of the victim, the State cannot close its case or finish the whole trial without leading evidence that identifies that particular injury unless the issue of the injury is common cause between the State and the defence.

It is even shocking that the State applied to have the summary of Ngonidzashe Munyuki's evidence to be expunged from the State's summary yet a reading of the accused's defence outline shows that Ngonidzashe Munyuki's *viva voce* evidence was necessary to rebut the accused's defence. It was the accused's defence that when she went out of Farai bar the deceased followed her. She said that when the deceased then saw Ngonidzashe Munyuki sitting in his car, he approached him and started talking to him about his change. The accused said that it was at that time that she evaded the deceased and went home. She said that the time was around 12 noon. At around 3.20pm that is when she said she was phoned by Estery Ngasita telling her that the deceased was lying unconscious at the shops. Put differently, the accused simply said that when she left the deceased, he was alive and well and he was in the company of Ngonidzashe Munyuki. This explanation by the accused demanded the State to lead evidence from Ngonidzashe Munyuki. The State needed the evidence of this particular person or witness to rebut the accused's defence. Ngonidzashe Munyuki was one of the State's key witnesses. Yet the State closed its case without leading evidence from him. It was Mr *Mukuze's* submission that the evidence of Ngonidzashe Munyuki was of no use to it. This was despite the fact that the witness was actually in attendance at court when the trial commenced. How can a person who is alleged by the accused to have been in the company of the deceased when the accused left the shops be said to be unimportant? Besides, it is this same Ngonidzashe Munyuki who later helped ferry the deceased to hospital. If Ngonidzashe Munyuki had been called to testify, he would have either disputed or confirmed the accused's story. He would also have told the court the injuries that he observed on the deceased when he ferried him from the scene.

If the State fails to fully understand the nature of the accused's defence and to properly identify the issues that are in dispute between the parties, the result is that it will fail to identify the witnesses that it needs to call to give *viva voce* evidence in order to rebut the accused's defence and to prove the guilt of the accused. Once an accused lays a sufficient foundation for his or her

defence in his or her defence outline, the substantive onus to disprove the defence rests squarely on the prosecution. This is because the rule in our system of law is that the onus of proof is on the State to prove the guilt of the accused. The accused has no burden to prove his or her defence. One exception is when the accused raises the defence of insanity. See s 18 of the Criminal Law Code and G Feltoe *A Guide to the Criminal Law in Zimbabwe*, Legal Resources Foundation, 3rd Edition, 2004 @ p 3. At the end of a criminal trial the question that the court needs to ask is: do all the facts adduced by the State prove the accused's guilt beyond reasonable doubt?

In *casu* looking at the totality of the evidence adduced by the State, it cannot be said that the accused's guilt was proven beyond reasonable doubt in respect of the murder charge that she is facing. The State did not prove that the accused assaulted the deceased on the head or in a manner that caused him to sustain head injuries which resultantly caused his death. However, the State managed to prove that the accused assaulted the deceased on the face with clenched fists or open hands a couple of times. It was not proven that this is what caused the head injuries that caused the deceased's death. At most the accused can only be convicted of assault.

In view of the foregoing, the accused is found not guilty and acquitted of murder. She is thus found guilty of assault as defined in s 89 of the Criminal Law (Codification and Reform)) Act [*Chapter 9:23*].

*National Prosecuting Authority, the State's Legal Practitioners
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