THE STATE
versus
CALVIN GASURA

HIGH COURT OF ZIMBABWE
MUREMBA J
HARARE, 24, 28 January & 20 & 26 September
& 14 November 2022

Application for discharge at the close of the State case

P Gumbo & M Mugabe, for the State
B S Ziwa, for the accused

MUREMBA J: The accused is facing charge of murder as defined in s 47(1)(b) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. The allegations are that he assaulted Clint Maziofa and caused his death on 25 August 2017 at Chitambo Garage in Chinhoyi. The accused pleaded not guilty.

It is the accused's defence that he never assaulted the deceased and that he was arrested by the police when he went to the Police Station to see his friend Victor Mlilo who had phoned him and told him that he was under arrest. Victor Mlilo asked him to come and see him at the Police Station. When he went, that is when the police arrested him.

After the State had led evidence and closed its case the defence applied for the discharge of the accused in terms of s 198(3) of the Criminal Procedure and Evidence Act [*Chapter 9:07*] (the CPEA). The provision reads:

> "If at the close of the case for the prosecution the court considers that there is no evidence that the accused committed the offence charged in the indictment, the summons or charge, or any other offence of which he might be convicted thereon, it shall return a verdict of not guilty."

What this provision means is that if the court deems or regards that there is no evidence that the accused committed the offence that he or she is charged with or any other criminal offence of which he or she might be convicted on that charge, the court has no discretion but to discharge the accused. The provision provides that the court *shall* return a verdict of not guilty. 'Shall' means that the court *must* acquit the accused. The provision has been interpreted by the Supreme Court

in several cases including *State* v *Kachipare* 1998 (2) ZLR 271 (S) @ 276 wherein the court held that,

> *"*Hence, so far as the law in Zimbabwe is concerned, there is no longer any controversy as to whether a court may properly refrain from exercising its discretion in favour of the accused, if at the close of the case for the prosecution it has reason to suppose that the inadequate evidence adduced by the State might be supplemented by the defence evidence."

See also *S v Tsvangirai* 2003 (2) ZLR 88.

The phrase "no evidence" that is in s 198 (3) of the CPEA means that:

a) There is no evidence to prove an essential element of the offence - *Attorney General* v *Bvuma & Anor* 1987 (2) ZLR 96 (S) at 102 F-G; or
b) There is no evidence on which a reasonable court, acting carefully, might properly convict *Attorney General* v *Mzizi* 1991(2) ZLR 321(S) at 323B; or
c) The Evidence adduced on behalf of the State is so manifestly unreliable that no reasonable court can act on it - *Attorney General* v *Tarwireyi* 1997(1) ZLR 575(S) at 576 G.

Whilst in criminal proceedings the State has an obligation to prove the accused's guilt beyond reasonable doubt, at this stage of trial the State is only expected to make out a *prima facie* case against the accused. See *Attorney General v Bennett* 2011(1) ZLR 396 (S). The question is not whether the State has proved the guilt of the accused beyond reasonable doubt. This question only arises at the close of the defence case. When an accused is applying to be discharged at the close of the State case, he or she should prove that the State has failed to adduce reliable evidence favourable to it from its own witnesses such that if the evidence is uncontroverted by the defence, the State cannot secure a conviction against the accused. If the State does not make out a *prima facie* case, it will be hoping to supplement its inadequate evidence with the defence evidence when the trial proceeds to the defence case. In other words, the State will be seeking to secure a conviction on the basis of what the accused will say during the defence case. There will be hope that the accused may convict himself or herself out of his or her own mouth. A *prima facie* case is a phrase which simply means the case at first sight or first appearance. A *prima facie* case is proven when a party with the burden of proof (*in casu* the State) presents enough evidence to support a verdict in its favour, assuming the opposing party (in *casu* the accused/defence) does not rebut or disprove it. This means that the party with the burden of proof has to show that it can meet that

burden as to each element of its case. This means that the State or prosecution has to present reliable evidence supporting each element of the crime charged or any other criminal offence of which the accused might be convicted on that charge.

Successfully presenting a *prima facie* case does not mean that the party with the burden of proof wins. In other words, it does not mean that the accused is convicted at that stage. This only enables the matter to proceed to the defence case and the accused then has the opportunity to offer evidence that contradicts or rebuts the State's *prima facie* case. The State will then have an opportunity to attack the accused's rebuttal evidence by cross examining him or her and his or her witnesses. It is at this stage of trial that the State is required to prove the accused's guilt as to each element beyond reasonable doubt to win a conviction. Proof of a *prima facie* case does not therefore guarantee that judgment by the court will be in favour of the State. It is just an early screen to determine whether the State or prosecution can go forward to try the accused fully by putting him or her to his or her defence. If the State does not present a *prima facie* case by the time it closes its case, the accused must be acquitted without having presented any evidence. It is therefore clear that the purpose of s 198(3) of the CPEA is to protect accused persons against frivolous or abusive charges. It is also meant to protect accused persons from being convicted on the basis of having incriminated themselves during the defence case because it is the duty of the State to prove its case against the accused persons.

The defence's submission in the present case was that the State failed to establish a *prima facie* case of murder against the accused and that as such he is entitled to his acquittal. It was submitted that all the three grounds on which the court can discharge an accused at the close of the State case were satisfied in the present case: There is no evidence to prove an essential element of the offence; There is no evidence on which a reasonable court acting carefully, might properly convict; and the evidence adduced on behalf of the State is so manifestly unreliable that no reasonable court can safely act on it. We will deal with the three grounds hereunder.

There is no evidence to prove an essential element of the offence

The elements of murder as defined in s 47(1)(b) are that: (i) a person was killed, (ii) the accused caused his or her death, (iii) realizing that there is a real risk or possibility that his or her conduct

may cause death but continued to engage in that conduct despite the risk or possibility. In arguing this ground Mr. *Ziwa* submitted that none of the State witnesses' direct testimony placed the accused person at the scene of crime. He submitted that the State had sought to rely on the evidence of Tatenda Lonah Katsvamutima who had passed on by the time this trial commenced to place the accused at the scene of crime. Apparently, the State's summary is to the effect that Tatenda Lonah Katsvamutima was involved in a love relationship with the deceased. At the same time, she was also involved in another love relationship with one Victor Mlilo, a friend of the accused. On the night of 28 August 2018 Victor Mlilo and the deceased had a misunderstanding. This led to the deceased being assaulted by Victor Mlilo and his four friends who included the accused. This happened near Chitambo Garage in Chinhoyi. They are alleged to have severely assaulted him and left him unconscious by the roadside. A good Samaritan one Trust Mugwenhi an ambulance driver found him lying by the roadside and took him to hospital where he later died. Trust Mugwenhi reported the matter to the police. Investigations resulted in the police picking up Tatenda Lonah Katsvamutima for an interview. She is the one who implicated Victor Mlilo, the accused and the rest of their friends who were involved in the assault. This is the evidence that Tatenda Lorna Katsvamutima would have testified on had she not died. Vincent Mabido the police officer who interviewed her and arrested the accused testified in this trial and confirmed that this is what he gathered from her.

Mr *Ziwa* submitted that relying on what Tatenda Lonah Katsvamutima told the police was basically relying on hearsay evidence which is not admissible in terms of s 253 of the CPEA because she did not testify to it herself. We are in agreement with Mr. *Ziwa* that what Tatenda Lonah Katsvamutima told the police as she was being interviewed is hearsay evidence which is not admissible. For such to be admissible she ought to have testified to it in court herself. We cannot therefore accept that the accused was placed at the scene of crime on the basis of what Tatenda Lorna Katsvamutima told the police. However, the State argued that the indications that the accused made to the police had placed him at the scene. We are in agreement with the State. In his defence outline the accused said that he was nowhere near the scene on the night in question. However, the evidence led from the police officers Vincent Mabido who arrested the accused and Nobert Mangwiro the investigating officer was to the effect that the accused freely and voluntarily led them to the scene of crime for indications saying that he had been present when the deceased

was being assaulted by his colleagues who included Victor Mlilo. Although the defence challenged the admissibility of the indications on the grounds that they were not freely and voluntarily made, we ruled that the indications were freely and voluntarily made after a trial within a trial was conducted. We ruled that the indications were admissible and allowed them to be produced. The indications are therefore evidence which place the accused at the scene of crime. It is therefore not correct to say that the only evidence that placed the accused at the scene of crime was the inadmissible evidence of Tatenda Lonah Katsvamutima.

Mr *Ziwa* further submitted that, even if it is assumed that the accused made the indications he is alleged to have made, these do not in any way demonstrate how the accused caused the death of the deceased. This is an issue which Mr *Mugabe* did not address in his response to the application for discharge. Mr. *Mugabe* simply submitted that the State proved a *prima facie* case when the court ruled after the trial within a trial that the indications made by the accused were admissible. Mr. *Mugabe* submitted that once that ruling was made, the onus to disprove or rebut lies on the accused and this can only be done if he is put to his defence. Mr. *Mugabe* was not clear on what exactly the accused ought to disprove after being put to his defence. Mr. *Mugabe* further submitted that the defence had not in its application for discharge discredited the evidence led by the State. He further submitted that the *alibi* defence that the accused gave to the effect that he was at home on the fateful night was disproved by the State. He thus submitted that the burden now shifts to the accused.

We noticed that Mr. *Mugabe* failed to address the pertinent issue that was raised by the defence which is that the State did not demonstrate or lead evidence on how the accused caused the death of the deceased, even if it adduced evidence that shows that the accused was at the scene of crime on the fateful night. The two police officers, Norbert Magwiro, the investigating officer and Vincent Mabido the arresting detail made it clear that when the accused volunteered to lead them for indications at the scene of crime, it was in a bid to exonerate himself. The accused never admitted to having assaulted the deceased. His defence was that the deceased was assaulted by Victor Mlilo and his other friends while he was standing and watching. The two police officers said that in taking the police to the scene of crime for indications, the accused said that he wanted to show them where this had happened. That this is the reason why the accused led the police to the scene of crime is corroborated or confirmed by the indications form which was produced as

exhibit No. 4. This exhibit shows that throughout the indications, the accused never for once said that he had participated in the assault of the deceased. He maintained that the deceased was assaulted by Victor Mlilo and his three other friends. The question now is although the court ruled that the indications were admissible, do they show that the accused caused the death of the deceased? The answer is in the negative. The indications do not tell us how the accused caused the death of the deceased. Adducing evidence that shows that the accused was at the scene when the deceased was being assaulted is not enough. The State ought to have led evidence that showed the accused's participation in the assault of the deceased. It however, did not do that. What Tatenda Lorna Katsvamutima told the police on this aspect is hearsay evidence which is not admissible. If she had not died, she would have testified for the State herself and the truthfulness of her evidence would have been tested under cross examination by the defence. So, in respect of the indications that the accused made at the scene of crime, nothing shows that he caused the death of the deceased.

The arresting detail Vincent Mabido said that Tatenda Lonah Katsvamutima led them to the accused's house to recover the t- shirt and shoes that the accused was said to have been wearing on the fateful night. These were tendered in court as exhibits. Vincent Mabido said that these clothing items were said to have blood stains. They were recovered in the absence of the accused. They were given to the police by the accused's wife. The problem is that during trial no evidence of the said blood stains was led by the State. Furthermore, it does not look like the alleged blood stains were ever tested to see whose blood it was. No evidence was therefore adduced to show that the clothing items in question had any blood stains and let alone the deceased's blood. Again, using the evidence of the accused's clothing items that were said to have been blood stained, the State failed to adduce evidence that shows that the accused caused the death of the deceased.

In view of the foregoing, we are therefore in agreement with Mr. *Ziwa* that the State adduced no evidence to prove an essential element of the offence of murder which is that the accused caused the death of the deceased. Having failed to prove this essential element, it also follows that the State failed to adduce evidence which proves the other element of the offence which is that the accused realizing that there was a real risk or possibility that his conduct may cause death, he nevertheless continued to engage in that conduct despite the risk or possibility. The State thus failed to establish a *prima facie* case against the accused. He cannot be put to his defence with the hope that he will incriminate himself when he is asked to explain what happened

at the scene of crime since he said that the deceased was assaulted in his presence. This is a clear case where the State is seeking to secure a conviction on the basis of what the accused will say during the defence case. It is hoped that the accused will convict himself out of his own mouth. The State failed to present enough evidence to support a conviction of murder or any other offence even if the matter is to proceed to the defence case and the accused decides not to say anything to rebut or disprove the evidence that the State led. The evidence of the State is inadequate and the danger that is there is that if the matter is allowed to proceed to the defence case, the inadequate evidence adduced by the State might be supplemented by the accused's evidence.

In view of the foregoing, the accused is entitled to his discharge at the close of the State case. We therefore consider it unnecessary to consider the other two grounds that entitle the accused to be discharged at the close of the State case.

In the result, the accused is found not guilty and acquitted.

The National Prosecuting Authority, the State's legal practitioners
Gill, Godlonton and Gerrans, the accused's legal practitioners