

THE STATE
versus
ASHTON TADIWANASHE MANDAZA
and
KUDAKWASHE MACHINGAUTA
and
TAKAWIRA DZVOVA

HIGH COURT OF ZIMBABWE
MUTEVEDZI J
HARARE, 18 March 2024

Assessors: Mr Mpofu
Mr Chakvinga

Criminal Trial

K Chigwedere, for the State
M S Musemburi, for the 1st accused
S Masike, for the 2nd accused
C J Mberewere, for the 3rd accused

MUTEVEDZI J: This murder trial particularly in relation to accused one hinged on the evidence of a prostitute. The court understands the shame that the profession of prostitution attracts in Zimbabwe but that mortification must not be the basis of lying when giving evidence in court. Where it is apparent that a woman is a commercial sex worker but deliberately tells the court a different story and a different line of employment, her failure to tell the truth may severely jeopardise the state's efforts to prove the guilt of an accused in instances where such is solely dependent on the testimony of the woman.

Prosecution alleged in this murder trial, that the three accused persons Ashton Tadiwanashe Mandaza (first accused), Kudakwashe Machingauta (second accused and Taurai Dzvova (third accused) contravened s 47(1) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] (the Code) in that on 17 May 2022 at Chivhu Location Shops, the accused persons each or all of them unlawfully and with intent to kill or realizing that there was a real risk or possibility that their conduct may cause death but continuing to engage in that conduct despite the realisation of the risk or possibility, caused the death of Tazvivinga Ngundu by

assaulting him with booted feet, head-butting him and knocking his head on a braai stand several times.

In detail, the allegations by the state were that on 17 May 2022 the deceased had an altercation with Nyarai Muvandi who was selling eggs outside a bar commonly called that Officers Mess Bar at Chivhu location shops. The first accused intervened in the scuffle. It is not indicated whether he was acting as a Good Samaritan or in some other capacity. But when he joined the altercation, he is alleged to have assaulted the deceased with fists, by head butting and knocking his head against a braai stand. The deceased bled from the mouth as a result of the assault. Not content with the punishment already meted, the first accused allegedly force marched the deceased to another bar called Tazviona Bar. Thereat, the second accused arrived and slapped the deceased on the face. The deceased fell. The first accused took that opportunity to take the deceased's cellphone from the right pocket of his trousers. The deceased must have later gathered some strength to rise to his feet. He struggled and walked across to a place called Cross Roads shops where he collapsed once more. When he was still lying in that prostrate position, the third accused kicked him and took USD six dollars from the deceased left trousers pocket. He left the deceased still lying down and unconscious. Later the deceased regained consciousness and managed to crawl to his house which was nearby. When he arrived his landlady one Cynthia Dube promptly took him to Chivhu Hospital. The following day the deceased's sister named Ndanatsei Ngundu and Sergeant Lloyd Charare visited him at hospital. He narrated to them that he had been assaulted by accused two amongst other assailants. The deceased succumbed to his injuries on 19 May 2022. An autopsy was conducted by Doctor Zimbwa. His conclusion was that the deceased's death had been caused by haemorrhagic shock and blunt abdominal trauma. On 20 May 2022 the first accused was apprehended by the police after he had been found in possession of the deceased's cellphone. In turn he implicated the second and the third accused persons.

All the accused persons denied the allegations. The first accused's story was that on the fateful day he was drinking beer at Officer's Mess Bar located in one of the high-density suburbs of Chivhu. During that time, he noticed the deceased in an altercation with a commercial sex worker outside the bar. He tried to intercede on behalf of the lady of the night but got a slap in the face, literally from the deceased. He said he then pushed the deceased in self-defence. The deceased who was apparently inebriated, unfortunately fell onto a disused braai stand which was nearby. The first accused further said he wasn't bothered and proceeded

to the next bar. When he left the scene, second and third accused persons were assaulting the deceased.

The second accused's defence outline was that he was also at the same drinking place as accused one. They were drinking beer. He got wind of the commotion outside the bar. He noticed that accused one was involved. He thereafter rushed outside to restrain the first accused from assaulting the deceased. He refuted the contents of his warned and cautioned statement which he said had been shoved down his mouth through torture by police officers who forced him to admit that he had committed the offence in the company of the first and third accused persons. He further alleged that he implicated the third accused as a result of that torture by the police officers when in truth he (accused 3) had nothing to do with the murder.

The third accused raised an alibi. He said he was not at Chivhu on the night in question but at his farm at a place called Marondamashanu. There was no way therefore that he could commit an offence at a place he wasn't at during the relevant time.

The prosecution's case

The prosecutor opened her case by seeking to tender a number of exhibits. The defence did not object to the production of any of those exhibits. The court therefore duly admitted the post mortem report compiled by Doctor Zimbwa. His findings as already stated were not contested and were that death was due to haemorrhagic shock and blunt abdominal trauma. It became exhibit 1. The second accused's warned and cautioned statement which was confirmed by a magistrate at Chivhu on 24 May 2022 became exhibit 2 whilst exhibit 3 was that deceased's *itel* cellphone which was allegedly recovered from the first accused. Further the prosecutor applied that the evidence of witnesses Ratidzo Dovatova and Cynthia Dube be formally admitted into evidence in terms of s 314 of the Criminal Procedure and Evidence Act [*Chapter 9:07*] (the CP & E Act). The defence once again consented to the application. The evidence of the witnesses was duly admitted as it appeared on the state's summary of evidence.

Ratidzo Dovatova

Her evidence was straightforward. On the night in question around 2300 hours she was advised by Muchaneta Chagonda that Nyarai Muvandi was having an altercation with the deceased at Officers' Mess Bar. She saw the first accused intervening in the dispute and assaulting the deceased. She went to the scene and restrained the first accused from further assaulting the deceased. Thereafter she went home.

Cynthia Dube

On the night in question, she had found the deceased's crying in his room. His clothes were blood stained. The deceased complained of stomach pains and bled from the mouth. She took him to hospital and called his sister Ndanatsei Ngundu to inform her of his situation. Around 1300 hours the same day, the deceased returned home in the company of Ndanatsei because a police report was required. They went to the police and duly filed one. The next day around 1000 hours Ndanatsei informed her that the deceased had passed on.

Nyarai Muvandi

Her testimony was that on the night in question she was selling boiled eggs to patrons of Officers' Mess bar when the deceased approached her. He intended to purchase boiled eggs. He had USD \$5 but she did not have loose change. She gave him back his note. He went away but soon returned demanding to be given back his money. She advised him that she had already given him. He was drunk and couldn't comprehend her explanation. A disagreement inevitably ensued. The first accused arrived and intervened. He assaulted the deceased by head butting him and hitting him against a braai stand which was nearby. She said she knew the first accused prior to this incident as a builder although she had earlier said she knew him through her sister. She knows first accused as a builder and she had earlier said she knows him through her sister. She said she also knew second and third accused persons prior to this incident because they were from the neighbourhood. During the altercation between the first accused and the deceased, someone whom she did not recognise arrived and restrained the first accused from further assaulting the deceased. At that time both the first accused and the deceased had picked stones with which they threatened to hit each other. They faced off. The witness said she took that opportunity to leave the scene. She did not see second and third accused at the scene. She admitted under cross examination that both the first accused and the deceased were drunk. We will return to analyse the witness's evidence later in the judgment.

Muchaneta Chagonda

She was in the vicinity of the crime scene on the night in question. She alleged that she knew all the accused as locals from the neighbourhood where she stays. The incident occurred around midnight. She was standing by the window- of a beerhall we presume. She saw Nyarai sitting on a bench with the deceased outside. From nowhere, the two (Nyarai and the deceased) started shouting at each other. The deceased was demanding back his \$5 note. Nyarai however insisted that she had given him back the money. The first accused suddenly arrived and

intervened by slapping the deceased on the face once. The deceased stood and walked towards the first accused. The first accused in turn held the deceased and hit his head on the braai stand once. The deceased got up, picked his cap from the ground and brandished a half brick with which he wanted to strike the first accused. The first accused was agile and got hold of the half brick before it could be hurled at him. After he was disarmed, the deceased went behind Tawonezvi bar. The first accused followed him. At that stage, the witness said she went inside the beerhall from where she asked the second accused to go and restrain the first accused from fighting with deceased. He obliged. Sometime later, both the first and second accused came back into the bar where they stayed for a while before going out again. When they returned into the bar for the second time the first accused was now holding a cellphone. He removed the phone's sim card and threw it on the ground. A while later all the three accused persons went out again. They proceeded to where the deceased was. She did not however observe them whilst they were out there. It was only the next day that she heard that the deceased had died from injuries sustained in the assault. Crucially she alleged that when the altercation occurred, she was about three to four metres away from the protagonists. It meant she could clearly see and hear what they did. She then learnt of the death of the deceased the following day. She also confirmed that both the first accused and the deceased were heavily intoxicated.

Ndanatsei Ngundu

The deceased was her brother. She received a phone call from Cynthia Dube informing her that the deceased had been seriously injured. She requested Cynthia to take the deceased to hospital. When she later visited him, the deceased advised her that he had been assaulted by accused three and some other young boys who he did not know by name. She took the deceased to the police to make a report. The police later attended the scene. The deceased also advised her that his assailants had taken his *Itel* cellphone and USD \$6. The police could not record a statement from the deceased because of his condition. They referred him to hospital where he later died. She once again informed the police about his passing on.

Lloyd Zharare

He is the police officer who received the report that the deceased had been robbed from Ndanatsei Ngundu the deceased's sister. He attended the scene and observed that the deceased had swollen lips and bruises on the right hand. He referred the deceased to Chivhu Hospital. The deceased had also narrated to him that he had been assaulted by accused three and some other men he could not identify.

Alfred Zvenyika

He is the police officer who recorded statements from witnesses and the accused persons' warned and cautioned statements. He also drew a sketch plan of the scene and took the accused persons to court for confirmation of the statements.

After leading the above evidence, the prosecution closed its case.

Defence case

In augmenting his defence outline which he incorporated into his evidence in chief, the first accused maintained that he only intervened when he noticed the scuffle between the deceased and Nyarai Muvandi. That resulted in a fight between himself and the deceased. In the fight, both of them fell onto the braai stand that was just in front of the bar. After the fight and after he had gone into the bar, he later went outside where he picked a phone. He returned into the bar and advised the second accused about it. He alleged that he was not aware that the phone belonged to the deceased since this was a public place. His intention was to surrender the phone to the police the following day after he had returned from work. He was unfortunately arrested before he could do so.

The second accused maintained the stance he took in his defence outline. His argument was basically that his confession to the police was false. Under crosss examination by the first accused he mentioned that the injury which deceased suffered during his altercation with first accused was minor. He said contrary to the picture painted by Muchaneta Chagonda regarding the extent of the deceased's injury to the forehead, the deceased had in reality only suffered a bruise and not a cut. The bleeding was not heavy and he had only observed a few drops of blood. He alleged that the state had not contested that evidence.

The third accused equally maintained his defence outline. He was not present when the assault occurred.

The common cause issues and those already resolved

1. The first and the second accused were present at the scene on the fateful night
2. The deceased approached witness Nyarai Muvandi with a USD \$5 note. Other witnesses said he wanted sexual favours but Nyarai said he wanted to purchase boiled eggs. What is not in issue is that the negotiations did not go well. It resulted in the deceased demanding his money back.

3. During the altercation the first accused intervened and fought with the deceased. The deceased ended up hitting his head on a braai stand which was nearby.
4. The deceased did not die from head injuries but largely from abdominal injuries
5. The first accused was found in possession of the deceased's cellphone

The issues for determination

The circumstances of the three accused persons are different. Their defences are different. As such the manner in which the court will resolve the issues before it will differ from accused to accused. In relation to the first accused the question is simply whether or not he caused the injuries which led to the deceased's death and if he did, whether he intended to kill the deceased. Accused two allegedly confessed to participating in the deceased's assault. In his defence he attempts to disown his warned and cautioned statement. The question therefore is whether or not he can be convicted on the basis of his confession to committing the crime. Accused three pleaded an alibi. His case rests on that defence. We turn to deal with the law governing the specified issues. I begin with the alibi.

The alibi defence

Put simply, an alibi is when a person accused of crime seeks to rebut the accusations by demonstrating that he could not have committed the crime charged because he could not possibly have been present at the crime scene by reason of having been elsewhere at the relevant time. This view is supported by authors Hoffman and Zeffertt, *The South African Law of Evidence* 4th ed at p. 619. In other words, the accused will be denying the charge and essentially alleging that whoever says he was present when the crime was committed must have mistakenly identified him. It is a defence which is predicated on the physical impossibility of an accused's guilt because he was at some other location, away from the scene of crime at the material time.

I must hasten to mention that the defence of alibi appears to be one of the easiest defences to raise. It does not require the accused to say anything more than that he was at some place other than the crime scene when the offence was committed. It is the reason why some jurisdictions have legislated the rule that where an accused seeks to raise an alibi as his defence, prosecution must be given prior notice of such defence to enable the state to investigate the veracity or otherwise of it. Unfortunately, no such requirement exists in our law. In future, it may be prudent to adopt such progressive rules to ensure that this apparently low hanging fruit for persons accused of crime is not abused. How the defence currently operates in this

jurisdiction is as was stated by MCNALLY JA in the case of *State v Musakwa* 1995 (1) ZLR 1 at p 3 D-E, when he remarked that:

“What no-one seems to have realised is that the defence raised was that of an *alibi*. The appellant was saying that he had only just arrived when he was accused. So, he was not there when the confidence trick was set in motion. The appellant said so right from the beginning. So why did the police not check whether he was being truthful... Why did they not check how long it takes to walk from there to the spot where the offence was committed... The court should have been alive to the importance of these matters...”

What comes out of the Supreme Court holding in the above case is that where an accused raises an alibi, it is the responsibility of the police and by extension, that of prosecution to investigate the alibi and reach a definitive conclusion regarding its truthfulness and accuracy. I also read the decision to mean that it is not expected that the police and prosecution will investigate an alibi that is raised for the first time when the accused gives his/her defence outline. Instead, the accused must raise the alibi at the earliest possible opportunity. An accused who was far from the scene of crime should be able to advise the police right from the time of arrest that he could not have possibly committed the crime by reason of having been in another location away from the crime scene. It is senseless and self-defeating for him/her to wait until the trial commences to raise the defence. It must equally follow that where an accused has timeously raised the alibi but the police and prosecution have not done anything about it, that defence cannot be disputed by reason that the police believe in the truthfulness of the witnesses who allege that they saw the accused at the crime scene. That conclusion stems from the principle of the law stated by GILLESPIE J in *S v Makanyanga* 1996 (2) ZLR 231 at 236 when he held that:

“Whilst it is axiomatic that a conviction cannot possibly be sustained unless the judicial officer entertains a belief in the truth of a criminal complaint still, the fact that such credence is given to testimony for the State does not mean that conviction must necessarily ensue. This follows irresistibly from the truth that the mere failure of an accused person to win the faith of the Bench does not disqualify him from an acquittal. Proof beyond a reasonable doubt demands more than that a complainant should be believed, and the accused disbelieved. It demands that a defence succeed wherever it appears reasonably possible that it might be true. This insistence upon objectivity far transcends mere considerations of subjective persuasion which a judicial officer may entertain towards any evidence.” (Underlining is for emphasis)

It is only a proper investigation of the alibi that can allow prosecution to illustrate that an accused’s alibi cannot reasonably possibly be true. The requirement that the alibi must be raised at the earliest opportunity must however not be taken to mean that if it is not then the accused is precluded from raising the defence at his/her trial. He/she is still allowed to do that. It is so because the accused may adduce sufficient and credible evidence to convince the court

of the truthfulness of the alibi. Where the defence is belatedly raised, the rider is that the court is allowed to draw adverse inferences that it is being raised as an afterthought. The issue was settled by the Supreme Court of Canada in the case of *R v Clerghorn* [1995] 3 SCR 175 where it held that:

“The requirement that disclosure of an alibi defence be made is one of expediency, not of law. If the police are not given adequate notice to allow for an investigation of the alibi, the trial judge may draw a negative inference given the potential for fabricating alibi evidence...Disclosure need only be made in sufficient time for the police to be able to investigate...”

Lastly, an accused is required to give sufficient details of his alibi in terms of the location, the persons he alleges to have been with, the times he alleges to have been at the alibi location and any other records such as entry logs into particular places, cellphone records, passage of vehicles through tollgates among others which may show that indeed he was at that location at the relevant time

Application of the law to the facts

The third accused's story was simply that he was not in Chivhu town or at the Officers' Mess Bar at the time the deceased was assaulted. He said he was at his farm located at a place called Marondamashanu some considerable distance from Chivhu. He was with his family and they could vouch for him. He not only mentioned this in his defence outline but stated it to the police from the time he was arrested. The investigating officer was asked in court if he had investigated the third accused's alibi. He admitted he hadn't done so. His reason for not investigating the defence was that he believed the testimonies of the witnesses who said they knew him and had seen him at the scene more than the third accused's story. But as shown earlier it was a fatal error of judgment which the officer made. In fact, it must be known that in the case of the defence of an alibi, an investigating officer has no business believing or not believing an accused's defence that he was elsewhere when the offence was committed. Even where the police officer is so sure that the witnesses who are saying they saw the accused at the crime scene are telling the truth, the requirement to investigate the alibi cannot be waived. We need not overemphasize therefore that the third accused's defence that he was at Marondamashanu remains reasonably possibly true. It cannot be controverted without a proper investigation having been carried out. Accordingly, prosecution failed to prove the allegation of murder against the third accused person beyond reasonable doubt as required by law.

Did the first accused inflict the injuries which caused the deceased's death and did he have the intention to kill?

The question whether the first accused caused the deceased's injuries is a factual one. It is dependent on the evidence of the witnesses and his own evidence. We have already indicated that he admits that he fought with the deceased. He admits that it was during that fight the deceased fell and hit his head on a braai stand. We commence the examination from an analysis of the evidence of Nyarai Muvandi, the state's key witness in this regard. She is described in the state papers as a commercial sex worker. Her testimony however completely hides that fact. The allegations are that the deceased had approached her that night, handed her USD \$5 in return for sexual intercourse. She turned down his request because her prize was USD \$8. She handed back the USD \$5 she had earlier been given. The deceased was drunk. He went away but later returned to demand the return of his money as he alleged that the witness was wasting his time. The disagreement arose from that misunderstanding. In court, the witness said she was selling boiled eggs and that the five dollars was for boiled eggs. She returned it to the deceased because she had no change to give him after he had purchased some eggs. In other words, she refuted that she was selling sex. Yet all the other witnesses seemed to be in agreement that Nyarai Muvandi was a prostitute who was selling sexual favours to men at the bars around the area on the fateful night. In the opening paragraph of this judgment, we stated and in particular reference to this witness that:

“The court understands the shame that the profession of prostitution attracts in Zimbabwe. Where it is apparent that a woman is into that profession but deliberately tells the court a different story and a different line of employment, her failure to tell the truth may severely jeopardise the state's efforts to prove the guilt of an accused in instances where such is solely dependent on the testimony of the woman.”

In this case, prosecution's case was in danger of crumbling before it even started except that Nyarai's lies about what she was doing at the bar were not significant and did not make her evidence wholly untruthful. As will be illustrated, that she was given five dollars by the deceased is correct; that the deceased demanded it back at some stage is equally truthful. Further that the first accused assaulted the deceased and hit his head against a braai stand is also correct. We conclude so because those issues are not only mentioned by Nyarai but also by other witnesses who have not been shown to have lied about any aspect of their testimonies. What makes it even more credible is that the second accused also confirms that the first accused assaulted the deceased. He was called from the bar to go and restrain the first accused from assaulting the deceased. He went and did so. The first accused's argument is that it was a fight. He acted in self-defence. That assertion seems to be supported by evidence on the ground. Both Nyarai and Muchaneta testified that the first accused and the deceased were both hopelessly

drunk. When they tussled, they both rose from the fall at the braai stand. Each is said to have picked stones or bricks. Whatever it was is immaterial. The bottom line is they were both armed. They faced off until they were restrained. So, we agree that there was a fight between the two. When the first accused arrived at the scene, the deceased was harassing Nyarai. As a responsible citizen, the first accused was obliged to intervene. They were insinuations during trial that he was also interested in Nyarai's services but that was never pursued by any of the parties. It remains conjecture and is immaterial. Additionally, it would appear from the post mortem report that the injuries sustained by the deceased at the braai stand did not directly cause his death if they did at all. The pathologist's findings are interesting in that regard. He noted the injuries which caused death in the following manner:

1. Distended abdomen
2. Raptured small bowel, extensive stool leakage in retutoneum with reactive peritonitis
3. Extensive bruising of bowels with bleeding

The doctor then concluded that death was due *haemorrhage shock* and *blunt abdominal trauma*. The findings show that the doctor did not observe any head injuries consistent with the head being hit against a braai stand as stated by the witnesses. Clearly, the deceased was injured in the abdomen. Even when he went home, Cyntia Dube his landlady indicated that he complained of stomach pain. But the assault appears not to have stopped at the braai stand. Muchaneta's testimony was that:

"After he was disarmed, the deceased went behind Tawonezvi bar. The first accused followed him. At that stage, the witness said she went inside the beerhall from where she asked the second accused to go and restrain the first accused from fighting with deceased. He obliged. Sometime later, both the first and second accused came back into the bar where they stayed for a while before going out again. When they returned into the bar for the second time the first accused was now holding a cellphone. He removed the phone's sim card and threw it on the ground. A while later all the three accused persons went out again. They proceeded to where the deceased was. She did not however observe them whilst they were out there."

From the above, it would seem that the first accused continued to assault the deceased behind Tawonezvi bar. In fact, there is little doubt that the deceased was assaulted behind that bar. In his defence outline, the second accused said he falsely implicated the third accused in the commission of this crime. Yet there are telling revelations in his confirmed, warned and cautioned statement. Although we will comprehensively deal with the question of its admissibility when we turn to his case it makes sense to reproduce it here. He said:

"I admit to the allegations levelled against me, it is true that I assaulted Tazvinga Ngundu resultantly caused his death. On the 17th day of May 2022 and at around 2300 hours, I was at

Chivhu business centre partaking liquor in a bar called Cross Roads. I then went outside intending to proceed to another bar called Staera Kombo that is when I was called by Muchaneta Chagonda who advised me that Ashton Tadiwa Mandaza was assaulting the now deceased severely at a bar which is called Taonezvi Bar. I went there so that I could see what was happening. When I arrived, I saw Ashton Tadiwa Mandaza fighting with Tazvivinga Ngundu. I then separated them and then assaulted Tazvivinga Ngundu once with an open hand in the face. I and Ashton Tadiwa Mandaza then went back to Cross Roads and we left Tazvivinga Ngundu sitting down. We then came back with Ashton Tadiwa Mandaza to where Tazvivinga Ngundu had sat down intending to check whether he was still there. That is when we saw Takawira Dzvova taking some money from the now deceased's pockets while stamping on him repeatedly. We then went back to the bar and continued partaking liquor at Cross Roads Bar.”

Evidently, the third accused Takawira Dzvova was not at the crime scene. We have already accepted his alibi. Our conclusion is vindicated by the second accused who confirmed that he lied that the third accused was present. At the same time the second accused admits that his colleague, accused one assaulted the deceased behind Tawonezvi Bar. He also admits that the assault on the deceased included being repeatedly stomped. The assailants took the deceased's money from his trousers' pockets. That evidence is curious. Muchaneta said the first and second accused persons repeatedly went out of the bar to behind Tawonezvi Bar where the deceased was. At the last time they did so they returned with the first accused holding a cellphone which turned out to belong to the deceased. He removed the sim card from the phone and dumped it. He was later apprehended by the police whilst in possession of that cellphone. There is no doubt that it belonged to the deceased. His explanation is that he had picked it outside the bar. He did not know who it belonged to and intended to surrender it to the police the following day after returning from work. The evidence however suggests that the explanation is a cock and bull story. First, accused one had just fought with the deceased. He knew that the deceased was the person with whom he had engaged in some riotous conduct and the possibility of him having dropped the cellphone was very high. Second, if he had genuinely picked the phone, there was no reason for him to tamper with it by removing the sim card. If anything, the sim card would have made it easier for the police or anyone else for that matter to identify the owner of the phone. Third, we were told that the first accused's residence was close to the police station but he never surrendered the phone to the police until he was apprehended. That can only mean he had no intention to do so. Fourth, at the bar, he did not bother to ask if anyone had dropped their phone outside the bar. Instead, he engaged in an act that clearly showed he did not want anyone to know about his possession of the phone. Our view is therefore that he violently took it from the deceased at the time he and his colleague second accused were assaulting the deceased behind Tawonezvi Bar. The deceased reported that his assailants had also robbed him of his money. The second accused talks about that

money being taken from the deceased's pockets. If he confirms that and also confesses that he falsely incriminated the third accused whom he alleged was the one who had taken the money, it must follow that he either took the money or that he knows the person who took the money but was simply substituting the third accused's name for that of the real perpetrator. If the first accused took the cellphone which was in the same pockets as the money, the possibility that it was him or and the second accused who also took the money is almost irresistible. We conclude therefore that the first accused did not only engage in a fight with the deceased at Officers' Mess bar but followed him and severely assaulted him behind Tawonezvi bar. He robbed him of both the cellphone and the money which was in his possession. That assault, as confirmed by the second accused involved repeatedly stamping on the deceased. It must have been indiscriminate and resulted in the mortal abdominal injuries.

The first accused's defence that he acted in self-defence is self-defeating. We gave him the benefit of doubt that at first, he fought with the deceased. But when that first phase ended, the first accused went into the bar whilst the deceased staggered away possibly looking for some sanctuary away from the violence, any attack that the first accused may claim to have been apprehensive about had completely dissipated. The deceased was no longer a danger to him. It was the accused who then literally hunted the deceased, sought him out and bashed him to death. That defence therefore fails on the very first hurdle which requires the attack against which an accused was defending himself/herself to have commenced or to have been imminent. In this case, there was none such attack.

The second accused's confession

In the case of *S v Tafadzwa Shamba & Anor* HH 396/23 I remarked that three scenarios usually arise where an accused contests his alleged extra-curial statement. To begin with, an accused may completely refute having made a statement. Second an accused may accept that he made the statement but contest having made it freely and voluntarily. The third scenario is where an accused denies both having made the statement and having made it freely and voluntarily. In *casu*, the scenario we have is that the second accused admits that he made the statement to the police. He however asserts that he did not do so freely voluntarily. He is mistaken.

How extra curial statements are admitted into evidence is a process governed by s 256 of the Criminal Procedure and Evidence Act [*Chapter 9:10*] which provides as follows:

“256 Admissibility of confessions and statements by accused

(1) Any confession of the commission of an offence and any statement which is proved to have been freely and voluntarily made by an accused person without his having been unduly influenced thereto shall be admissible in evidence against such accused person if tendered by the prosecutor, whether such confession or statement was made before or after his arrest, or after committal and whether reduced into writing or not.”

Read on its own subsection (1) of s 256 no doubt enjoins that there must be proof that the extra curial statement was made freely and voluntarily before it can be admitted into evidence. In other words, all that an accused is required to do is to dispute having made the statement without coercion or other undue influence. It is the responsibility of prosecution to then show that indeed the statement was made freely and voluntarily.

Subsection (2) of the same section however turns the above on its head. It provides that:

“(2) A confession or statement confirmed in terms of subsection (3) of section *one hundred and thirteen* shall be received before any court upon its mere production by the prosecutor without any further proof.

Provided that the confession or statement shall not be used as evidence against the accused if he proves that the statement was not made by him or was not made freely and voluntarily without his having been unduly influenced thereto, and if, after the accused has presented his defence to the indictment, summons or charge, the prosecutor considers it necessary to adduce further evidence in relation to the making of such confession or statement he may re-open his case for that purpose.”

Section 113(3) deals with the procedure where an accused is brought before the court of a magistrate, the statement he is alleged to have made to the police or some other person in a position of authority is produced, read to him and the court thoroughly interrogates the accused in relation to whether it was him who made the statement, and if it was whether he made the statement without undue influence having been exerted on him. Through that process, the law recognizes that an accused appears before a designated and impartial judicial officer who is not interested in whether the accused is guilty or not guilty but simply wants the truth. The magistrate is a neutral body standing between the accused and his accusers. He therefore presents an opportunity for the accused to pour out his heart as it were and inform him if there has been anything untoward in the making of the confession or statement. The procedure is carried out in the absence of police officers because their presence could intimidate the accused into withholding his grievances against them. It is from that realization that the law prescribes that once an accused confirms to a judicial officer that there was nothing untoward in the way that he made the statement, the prosecutor is not required to do anything more than just produce the confirmed statement as evidence of the issues stated therein. There is no major difference between a confession and any other ordinary statement. The distinction is that in a confession,

an accused admits having committed the crime yet in ordinary statements he is simply stating facts that may be relevant to the resolution of the issues in dispute without necessarily admitting that he committed the offence in question.

The *proviso* to s 256(2) clarifies the procedure to be followed when dealing with confirmed confessions or statements. The confirmed statement is provisionally admitted by the court. It however must not be given any probative value if the accused proves either that it was not him who made it or that it was him who made it but did so under duress or some other form of undue influence. An accused may not be able to do so without questioning the propriety of the confirmation proceedings. The confirmed statement bears the seal of the magistrate. It is therefore him/her that the challenge must initially be directed towards. That seal insulates a confirmed statement from any challenge and must be removed first. Once the proceedings are shown to have been irregular, the statement reverts to the same status as an unconfirmed one and becomes open to similar challenges as those that can afflict unconfirmed statements/confessions.

The second accused's statement was confirmed by a magistrate at Chivhu on 24 May 2022. The prosecutor was therefore within her rights to produce it without further proof as evidence showing the guilt of the second accused. Besides mentioning it in his defence outline, the second accused did not raise a finger about the inadmissibility of his confession during trial. He neither suggested that to any of the witnesses nor testified on it during his evidence in chief. The law is that it is him who must prove the impropriety on a balance of probabilities. He is allowed to do so even after the state's witnesses have given evidence. It is the reason why the law provides that where it deems it necessary prosecution may reopen its case to deal with such evidence. As stated, the second accused did not even begin to discharge the onus he bore. His confession remained unscathed at the end of the trial.

The law allows a court to convict an accused on the basis of his/her confession. Section 273 of the CP & E Act provides that:

“273 Conviction on confession

Any court which is trying any person on a charge of any offence may convict him of any offence with which he is charged by reason of a confession of that offence proved to have been made by him, although the confession is not confirmed by other evidence:

Provided that the offence has, by competent evidence other than such confession, been proved to have been actually committed.”

See also the cases of *R v Taputsa & Ors* 1966 RLR 662 A at 667E and *S v Frank Mbano & 2 Ors* HB154/17 which deal with convictions based on confessions.

The stand out requirement from the provision and the cases cited above is that the state must through evidence other than the confession prove that indeed the offence confessed to was committed. It is intended to ensure the truthfulness of the confession because it is not unheard of that some people confess to crimes they never committed or which never occurred. In this case, that there was a murder is undoubted. The doctor certified that the death of the deceased was not through natural causes but was a result of a violent assault on his body. There is evidence adduced from eye witnesses that the second accused and his accomplice participated in the commission of the crime.

Disposition

We found above that the third accused's alibi was not disproved by prosecution. He cannot be liable for the murder by virtue of physical impossibility of having been in two places at the same time. In the circumstances, **the third accused is found not guilty and is acquitted of the charge of murder.** The first and the second accused participated neck deep in the assault which led to the demise of Tazvivinga Ngundu. For reasons we stated above, they cannot escape liability for his death. **It is therefore ordered that first and second accused be and are hereby found guilty of murder as charged.**

M S Musemburi Legal Practitioners, first accused's legal practitioners
Maja and Associate, second accused's legal practitioners
Magoge Law, third accused's legal practitioners