

THE STATE
versus
CHIEDZA ZVIKUKUTU
And
TRUST CHIKUMBA

HIGH COURT OF ZIMBABWE
MAWADZE J
MASVINGO, 4,17,21,24, & 27 July2023

Assessors 1. Mr Mutomba
2. Mrs Chikumba

Criminal Trial

E Mbavarira, for the state

T Nyoka, for the accused 1

J Chipangura, for accused 2

MAWADZE J: Accused 1 Chiedza Zvikukutu (Chiedza) aged 42 years and accused 2 Trust Chikumba (Trust)aged 39 years are jointly charged of the crime of murder as defined in section 47 (1) of Criminal Law [Codification and Reform) Act [*Chapter 9:23*].

The charge is that on 13 November 2020 both accused unlawfully and intentionally caused the death of the now deceased MEJAS CHAMISA by assaulting him with a stone on the head, kicking him several times all over the body and stabbing him with a knife on the leg and face.

The now deceased Mejas Chamisa was aged 46 years and was the husband to accused 1 Chiedza. They stayed together at village 3, Area Pension, Triangle where the offence is said to have happened. Accused 2 Trust was their neighbour. Accused 2 Trust is married but at the

material time his wife was not at home. Accused 2 Trust said she had visited relatives though some state witness said they were now estranged. Accused 2 was staying with his children.

According to the state the basis for this tragic event giving rise to the motive to cause the demise of the now deceased is that Accused 1 Chiedza and Accused 2 Trust were in an illicit love affair which the now deceased allegedly discovered.

It is not in issue that the now deceased's family and Accused 2 Trust's family enjoyed cordial and close relations. They tilled their fields together. Accused 2 Trust would perform various chores at the now deceased's homestead. At the material time they were cooking and eating food together at the now deceased's homestead.

What happened is that on 13 November 2020 both accused were together at the garden in the afternoon.

It is alleged that the now deceased later arrived at the garden and found both accused in a compromising position. It is not in issue that the now deceased assaulted Accused 1 Chiedza his wife and was only restrained by some other two men passing by. The now deceased then left to look for his stray cow.

At around 1800hrs as usual the now deceased, the two accused, their children Mejas Chamisa Junior, Musa Chikumba and Brain Chamisa all gathered at the now deceased's homestead and had supper.

The state alleges that after supper the children went to sleep leaving the two accused and the now deceased chatting in the kitchen. It is alleged that both accused had hatched a plan to kill the now deceased. As a result, it is alleged they both attacked the now deceased in the manner already explained and killed him. Thereafter it is alleged that both accused lifted his lifeless body and laid it on a mattress in the bedroom. Both accused are said to have cooked a story that the now deceased had died while having sexual intercourse with accused 1 Chiedza, his wife. This false story is said to have been sold to fellow villagers and the police.

A report of sudden death was made to police. However, when police attended the scene foul play was suspected on account of the injuries on the now deceased at the back of the head, deep cut above left eye, multiple facial injuries and cuts on the legs. This resulted in the arrest of both accused.

DEFENCE OUTLINES OF BOTH ACCUSED

Accused 1 Chiedza stated in her defence outline that the injuries on the now deceased were inflicted the previous day 12 November 2020 by one Chaka Bvuma at Chaka Bvuma's homestead.

Accused 1 Chiedza confirmed that she was assaulted on 13 November 2020 by the now deceased as the now deceased alleged that he had found her having sexual intercourse at the garden with accused 2 Trust. Thereafter accused 1 Chiedza said she, deceased, their children and accused 2 Trust had supper together at accused 1 Chiedza and deceased's homestead.

Accused 1 Chiedza said accused 2 Trust then left to retire at his homestead. Accused 1 Chiedza said the now deceased complained of chest pains arising from the assault perpetrated on him. Thereafter accused 1 said she retired to bed with the now deceased at 2300hrs after which they proceeded to have sexual intercourse. Accused 1 Chiedza said the now deceased died while on top of her being intimate. As a result, accused 1 Chiedza said she alerted accused 2 Trust and other villagers were informed. Accused 1 Chiedza said she was surprised to be arrested because the now deceased had no visible injuries and the blood seen on the clothes by the police was from a hare killed by her child. Accused 1 Chiedza said the police assaulted her in a bid to cause her to admit to the charge. She insisted that she never assaulted her husband the now deceased.

Accused 2 Trust gave brief defence outline. He denied being in love with accused 1 Chiedza let alone being intimate with her. Accused 2 Trust said on November 2020 the now deceased just found accused 2 Trust assisting accused 1 Chiedza in the garden. Accused 2 Trust said he would not have gone for supper at the now deceased's homestead that same day of he had been found having sexual intercourse with the accused 1 Chiedza. Accused 2 Trust said if he had a hand in the now deceased's death he would have waited to be arrested but would have fled.

THE CAUSE OF THE NOW DECEASED'S DEATH

Accused 1 Chiedza seems to put into issue the cause of the now deceased's death. However, the post mortem report was admitted by consent as Exhibit 1.

The following injuries were noted by the doctor on the remains of the now deceased;

- "1. Extensive facial and scalp bruising*
- 2. Bleeding from the nostrils, mouth and ears*

3. *Neck is broken*
4. *Abdominal bruising and distension*
5. *Haemorrhage small bowels*
6. *Laceration left lateral tibial area"*

The cause of the now deceased's death is stated as;

- "1. *Head injury*
2. *Neck fracture*
- Blunt abdominal trauma"*

It is clear that the now deceased did not die from natural causes. There is clear and irrefutable evidence that he was fatally assaulted. The question then is who assaulted him and what time or stage, did that happen?

EVIDENCE OF STATE WITNESS AND ITS ANALYSIS

The evidence of doctor Godfrey Zimbwa was admitted in terms of section 314 of the Criminal Procedure and Evidence Act [*Chapter 9:07*]. It relates to Exhibit 1 the post mortem report and the cause of the now deceased's death.

The State led *viva voce* evidence from Mejas Chamisa Junior; Elias Chiukuhwa, Charles Jojo, Constable Peter Shonga and D/Cst Jabulani Moyo.

It is important to examine that evidence.

Mejas Chamisa Junior (Mejas)

Mejas is now 13 years old. He is a son of accused 1 Chiedza and the now deceased. He is in grade 6 and is currently staying in Gokwe with an uncle Obert Ncube. Mejas said on the fateful day in the afternoon he arrived at garden from school and found his father the now deceased assaulting accused 1 Chiedza on allegations of being in an improper association with accused 2 Trust. Thereafter the now deceased was restrained by some two men. Mejas then accompanied the now deceased to look for their stray cow. At sunset he went home with the now deceased and that both accused persons arrived home in a scotch cart. He said one of accused 2

Trust's child collected floor from accused's homestead. They all had supper together with accused's children.

Mejas said after supper all the children retired to bed leaving both accused in the kitchen (he was using the kitchen as the bedroom).

Mejas seemed to say the now deceased retired to bed leaving both accused in the kitchen. After he fell asleep, he was woken up by sound outside which was like people chasing each other. During that same night his mother accused 1 Chiedza told him about the death of his father the now deceased.

Mejas said would he would not know the time accused 2 left. He said during that evening he did not witness anything amiss between the now deceased and accused 2 Trust. He said he did not witness anything wrong with his father the now deceased that day.

Mejas is a young child and his evidence should always be approached with caution. However, in *casu* he simply narrated sequence of events which unfolded on the day in question. He would not have any reason to falsify his evidence. Accused 1 Chiedza is his mother. He never sought to fabricate evidence on an assault he did not witness being perpetrated on the now deceased. The critical four issues of his evidence are as follows;

- (i) He witnessed accused 1 Chiedza his mother being assaulted at the garden on allegations of improperly associating with accused 2 Trust.
- (ii) After supper he said his father the now deceased went to retire in his bedroom first leaving both accused in the kitchen and he fell asleep while both accused were in the kitchen.
- (iii) He was woken up by what sounded like people chasing each other outside the kitchen.
- (iv) His father the now deceased was in apparent good health and did not see any the injuries on him that evening before he retired to bed.

Elias Chikuhwa [Elias]

Elias is 48 years old and the village chairman in which both accused reside. He however works at Triangle. He confirmed the cordial relations between the now deceased's family accused 2 Trust's family as they would work in their respective fields together.

Elias said it is accused 2 Trust who approached him around 2300hrs on the night in question as the Village Chairman. He said accused Trust reported that accused Chiedza had advised accused 2 Trust of the now deceased's death. As the Village Chairman he proceeded to accused 1 Chiedza's homestead that night. Upon arrival he inquired from accused 1 Chiedza the circumstances of the now deceased's death. In response he said accused 1 Chiedza said the now deceased had chest problems and had suddenly died as he was being intimate with accused 1 Chiedza. He advised accused 1 Chiedza to report matter to the police and other villagers we alerted.

Elias did not check the now deceased's body. The evidence of Elias is clear and uncontroverted. It is accepted.

Charles Jojo [Charles]

The 38 years old Charles is a neighbour of accused 1 Chiedza. Charles said on the fateful day he had met the now deceased looking for his stray cow. He regarded the now deceased as a nephew. The now deceased proceeded to report to him that he, the now deceased had found accused 2 Trust having sexual intercourse with his (deceased's) wife. Accused 1 Chiedza and had called a mai Matonho to witness this incident.

Later that night he was woken up and advised of the now deceased's death by the Village Chairman Elias. This shocked him as the now deceased did not exhibit any signs of illness. He proceeded to the deceased's homestead.

Charles, said he inquired from accused 1 Chiedza how the now deceased had died, accused 1 Chiedza said the now deceased had died whilst having sexual intercourse with her and on top of her. Other villagers were advised and a report made to the police.

Charles said when the police arrived, he also observed the now deceased's body and noted the following;

- (i) there were injuries on the now deceased's leg consistent with two stab wounds.
- (ii) the cuts on the head and forehead
- (iii) the now deceased was naked
- (iv) there was blood on the mattress where the now deceased was lying
- (v) the injuries were fresh as the now deceased was bleeding

Charles said police asked him to dress up the now deceased and his view was that the injury to the head was fatal.

He further said the police asked accused 1 Chiedza about the injuries but accused 1 Chiedza surprised all and sundry present by simply crying out asking the same question as to what had befallen the now deceased. Thereafter both accused were arrested.

Under cross examination by *Mr Nyoka* for accused 1 Charles said the injuries on the now deceased were fresh and he was bleeding. He said there were also blood stains on the mattress and some of deceased's child Brian's clothes which were nearby. He said there was also blood underneath the bed. In his assessment Charles said the injuries on the leg were stab wounds and the possible fatal injury on the head was most probably inflicted with a blunt object.

Charles had no motive at all to falsify his evidence. As a good normal neighbour, he attended to the report of the now deceased's sudden death. He had last seen the now deceased around 17000hrs with no injuries. He is the witness who said accused 2 Trust had separated from his wife. Charles was clear that accused 2 Trust and the now deceased were very close or best friends. Charles said he also told the police of the alleged affair between the accused persons.

Cst Peter Shonga [Cst Shonga]

After a report of sudden death had been made at ZRP Triangle of the now deceased he attended the scene as the leading detail. Upon arrival he noted the following;

- (i) both accused were surrounded by apparently restless and angry villagers.

- (ii) The now deceased's body was lying in his bedroom facing down and naked but covered with a blanket.
- (iii) Upon examination of the deceased's body he observed a deep cut on the left eye, and 2 deep cuts on the leg.
- (iv) There was blood on the mattress.
- (v) Clothes were strewn and all over that bedroom and there was evidence of an attempt to wipe blood from bleeding injuries on the now deceased but the injury on left leg was still bleeding.

Cst Shonga said he arrested both accused as he suspected foul play and villagers had told him both accused were in an illicit love relationship. He said accused 1 Chiedza simply said the now deceased had died whilst being intimate with her but could not explain cause of injuries.

Cst Shonga said he revisited the scene with CD officers and closely examined the mattress which was drenched in blood. A mosquito net, jersey and pair of shorts also had blood. There was a pool of blood underneath the mattress.

Cst Shonga said no one alleged the now deceased had been assaulted by one Chaka.

D/Cst Jabulani Moyo [D/cst Moyo]

D/cst Moyo took over the matter from the uniform branch of ZRP. The now deceased's body was brought to the station and he noted the said injuries.

D/Cst Moyo said on 17 November 2020 he proceeded to the now deceased's homestead to investigate focusing on the now deceased's bedroom. As a result, he noted the following;

- (i) There was a pool of blood underneath the mattress when one lifted it up
- (ii) There were blood stains on the mosquito net and clothes belonging to the now deceased's son being jersey, shirt and ¾ pair of shorts

D/cst Moyo said he asked accused 1 source of the blood and accused 1 Chiedza only said the blood on the pair of shorts was from a hare her son had killed. However, he said the son disputed this and even took issue with accused 1 as to why she used his clothes to wipe the

blood. D/Cst Moyo said accused 1 Chiedza could not explain source of blood on mattress and mosquito net. After the post mortem results, he proceeded to charge both accused with murder.

D/Cst Moyo said he would not know what became of the blood-stained clothes as he was transferred to Beitbridge.

D/Cst Moyo said accused 1 later alleged the now deceased had been assaulted by one Chaka. However, upon investigations this assault had happened some two weeks before this incident and not relevant to the injuries the now deceased had as per the post mortem report Exhibit 1. He also recorded warned and cautioned statement from both accused which they both disowned during confirmation proceedings. He interviewed both accused about alleged love affair and intimacy and they were not consistent as they confirmed it and denied.

The evidence of these two police officers is straight forward. It would be foolhardy to imagine that such evidence mostly centred on the observation on the now deceased's body (which is confirmed by the post mortem report) and his bedroom (which is corroborated by Charles) is a fabrication. In fact, there is no reasonable basis to impugn the testimony of the two police officers.

ACCUSED'S EVIDENCE AND ITS ANALYSIS

Both accused gave evidence and did not call any witnesses.

Accused 1 Chiedza

Accused 1 Chiedza said on the day in question the now deceased simply assaulted her on basis of rumours of having a love affair with accused 2 Trust. In fact, she said she was just seated in the garden with accused 2 Trust.

Accused 1 Chiedza said after supper she retired to bed first leaving accused 2 Trust with the now deceased and children. She said after children fell asleep both accused and the now deceased remained smoking dagga and cigarettes. She would not know the time accused 2 Trust left.

Accused 1 Chiedza said the only injuries on the now deceased were on the legs. She maintained that the now deceased died while on top of her having sexual intercourse after which she advised accused 2 Trust. Accused 1 Chiedza said that accused 2 Trust should explain injuries on the now deceased as he was with him after she had left.

Accused 1 Chiedza could not tell a consistent story on a number of relevant issues. They include *inter alia*;

- (a) the reason the now deceased gave for assaulting accused 1 Chiedza in the garden
- (b) whether the now deceased had injuries before he retired to bed
- (c) who amongst herself, accused 2 Trust and the now deceased retired to bed first.
- (d) why she failed to see injuries on the now deceased and the blood in the bedroom

Accused 2 Trust

Accused 2 Trust confirms the rumour of the love affair but denied its truthfulness. Accused 2 Trust also confirmed the assault of the accused 1 Chiedza by this now deceased at the garden. However, Accused 2 also said the alleged assault of the now deceased by Chaka was a day before this fateful day. Accused 2 maintained that he would not know source of the now deceased's injuries. He maintained his innocence.

The evidence of both accused is difficult to accept. There are a number of reasons for this;

- (a) Accused 2 Trust and the now deceased were very close friends. They tilled their fields together. Accused 2 Trust would assist with many chores at now deceased's homestead. They would even cook and eat together. If that is so why would the now deceased suddenly take offence and assault accused 1 Chiedza if she and accused 2 Trust were simply in each other's company helping each other in the garden on the day in question. In fact, why would even these rumours and allegations of a love affair even arise?

- (b) Both accused could not have failed to see the injuries on the now deceased on the day in question at the garden and during supper if he had such injuries outlined in Exhibit 1 post mortem report.
- (c) If at all the assault by one Chaka is relevant why would both accused tell a different story as to when the assault happened. Accused 1 Chiedza was not even consistent on that and accused 2 Trust said it was days before this fateful day
- (d) There is no plausible reason as to why both accused could not agree as to who remained with who after supper if they are truthful
- (e) Accused 2 was not the immediate neighbour of the now deceased but Charles. There is no plausible explanation as to why after the death of the now deceased accused 1 Chiedza would opt to first advise accused 2 Trust far away, a man she was rumoured to be in love with and had been assaulted for being with him that very same day.
- (f) It can not be reasonably possible that both accused would fail to see the injuries on the now deceased as observed by Charles and the two police officers and the blood in his bedroom.

In the result both accused are not being candid or truthful with the court.

THE LAW

This matter is based on circumstantial rather than direct evidence. There is no witness who saw injuries being inflicted on the now deceased.

In the celebrated case of *R v Blom* 1939 AD 188 at 202-203 Watermayer JA cites two important principles or rules of logic which govern the use of circumstantial evidence in criminal matters,

- (a) that the inference sought to be drawn must be consistent with all proven facts and
- (b) that the proved facts should be such that they excluded every reasonable inference from them save or except the one to be drawn. If they do not exclude other reasonable inferences then there must be a doubt whether the inference sought to be drawn is correct.

- (c) It is important to note that value of circumstantial evidence is the same as direct evidence. It is competent for a court to return a verdict of guilty solely on the basis of circumstantial evidence. All what the court is to be satisfied is that the circumstantial evidence preclude every reasonable inference of the innocence of the accused. See S v Shonhiwa 1987 (I) ZLR 215 (S), S v Vhera 2003 (I) ZLR 668 (H) at 680 (H).
- (d) The exhortation to be also be made is that circumstantial evidence should always be narrowly examined. See S v Marange & Ors 1991 (I) ZLR 244 (S) at 249.

Lastly, it is to be understood that in relation to circumstantial evidence the proved facts considered individually or singularly may not mean anything and cannot be sufficient to prove an accused's guilt. The proven facts should be taken cumulatively and should lead to one reasonable inference pointing at an accused's guilty beyond reasonable doubt.

Now turning to this case in *casu* what are the proven facts?

- i) it is accepted that there was a rumour or suspicion that both the accused were in an illicit love affair.
- ii) it is not in dispute that on 13 November 2020 the fateful day accused 1 Chiedza was assaulted at the garden by her husband the now deceased after being found in the company of the accused 2 Trust.
- iii) the now deceased disclosed to both to his child Mejas and a neighbour Charles that very same day that he had caught both to accused in a compromising position or being intimate.
- iv) on that fateful evening both accused were the last persons to be seen with the now deceased.
- v) on that fateful day and even after supper the now deceased was in his normal health state and had no injuries. He did not complain of any ailment.
- vi) during the night Mejas heard unusual sounds in the yard which is likened to people chasing each other.
- vii) the now deceased passed on that same night at his homestead.
- viii) the now deceased did not die from natural causes but had marks of violence on the face head, leg, intestines and a broken neck.

- ix) no plausible explanation is given by either accused on the cause of those injuries.
- x) the injuries on the now deceased were evidently fresh as some were bleeding and there were attempts to wipe the blood.
- xi) both accused are the first persons to have known of the now deceased's death.
- xii) accused 1 Chiedza presumably chose to first advise Accused 2 Trust of the now deceased's death when accused Trust was not her immediate neighbour.
- xiii) both accused told material lies on a number of issues relating *inter alia* to the reason the now deceased assaulted accused 1 Chiedza at the garden, who remained with the now deceased after supper, the alleged assault by Chaka, why they failed to see the injuries on the now deceased and the blood in his room.

There can be no other reasonable inference to be drawn from these factors. All these factors taken cumulatively point to the both accused persons' guilt. It is clear that both accused acted in common purpose. Their liability is on the basis of co-perpetrators as envisaged in section 196 A of the Criminal an (Codification and Reform) Act [*Chapter 9:23*]. Both accused had the motive to cause the demise of the now deceased as they were in an illicit love affair or were so suspected. It is sheer ingenuity to argue that the now deceased died while having sexual intercourse with accused 1 Chiedza. That is impossible with a broken neck and an assortment of such injuries whilst bleeding.

The intention of both accused is clear. The injuries on the now deceased clearly show that they wanted to bring the now deceased's death, which is what happened. The injuries like the head injury, broken neck and haemorrhage in the small bowels can only point to an intention to cause death. The assault on the now deceased was clearly to inflict fatal injuries.

CONCLUSION

It is from all the above factors that both accused had actual intent to cause the now deceased death.

VERDICT: Both accused

Guilty of contravening section 47 (1) (a) of the Criminal Law [Codification and Reform]
Act [Chapter 9:23]: - Murder with actual intent

National Prosecuting Authority, counsel for the state

Muzenda & Chitsama, pro deo counsel for the accused.