

THE STATE
versus
LOVEMORE KATAYAMAOKO
and
ELSE BANDA

HIGH COURT OF ZIMBABWE
BHUNU J

HARARE 4th July 2013, 15th July 2013, 16th July 2013, 17th July 2013 and 23rd July 2013.

ASSESSORS: 1. Mr. Shenje
 2. Mr. Mutambira

Trial Within a Trial

E. Makoto, for the state.

Ms Dzumbunu, for the 1st accused.

T.W. Nyamakura, for the 2nd accused.

BHUNU J: The two accused have been in a marriage relationship since July 2011. They were both employed at Plot number 7 Moulton Estate, Saruwe. They are both charged with murder as defined in section 47 of the Criminal Law (Codification and Reform) Act [*Cap.* 9:23]. Both accused are alleged to have murdered their employer's brother one Edward Zvoma on 7 September 2011.

The circumstances surrounding the deceased's death are hotly contested by the first accused person. During the course of investigations the first accused made a warned and cautioned statement duly recorded by detective sergeant Nyasha Chikorondo on the 26th of December 2011 and witnessed by Constable Farai Muzondo.

That the accused person made the warned and cautioned statement is not in dispute. What is in dispute is whether or not the accused made the statement freely and voluntarily without having been unduly influenced thereto. The accused challenged the admissibility of the warned and cautioned statement on the basis that he made the statement under duress a fact that is denied by both police officers concerned.

It was submitted on his behalf that in recording the statement the police took advantage of his ignorance of the law and subjected him to threats of physical force thereby inducing him to sign the warned and cautioned statement. He is also alleged to have been intimidated by the presence of an armed police officer during police investigations. Detective Chikorondo is

alleged to have poked and threatened to shoot the accused person. He is alleged to have at one time dismantled his gun to show the accused that it was loaded and he could easily shoot him and nothing would happen to him as the police were above the law.

It was the accused's testimony that at Norton police station he was handcuffed and suspended between two tables with a metal bar placed between his legs. The investigating officer sergeant Chikorondo then subjected him to severe assaults using an empty Coca-cola bottle. When he was taken for indication a certain police officer unknown to him kept on poking with his fingers threatening to kill him. He boasted that they were the infamous CID who could kill him without any repercussions. Another police officer whom he cannot identify then took the gun, released the safety catch and threatened to shoot him.

At the scene of crime the investigating officers Sergeant Chikorondo and constable Muzondo pushed him around and forced him to make indications against his will. They again threatened to kill him and assaulted him with open hands

Initially he refused to sign the warned and cautioned statement but was coerced into signing by threats that they would endorse on the papers that he was of no fixed abode so that he would be denied bail by the courts.

When he was taken before the magistrate for confirmation of the warned and cautioned statement he repudiated his warned and cautioned statement saying that it had been extracted from him through duress. The magistrate then declined to confirm the warned and cautioned statement.

Both police officers Chikorondo and Muzondo vehemently denied having subjected the accused to any form of duress or improper conduct as alleged or at all. They both testified that he was in his sound and sober senses and he voluntarily elected to sign the warned and cautioned statement.

The accused's denial that he made the statement freely and voluntarily without having been unduly influenced thereto has no ring of truth. I come to that conclusion because when he appeared before the magistrate on his initial remand on the 29th of December 2011 he told the magistrate that he had no complaints against the police. The magistrate's record reads in part.

Court: *Allegations read and understood.*
Accused 1: *No complaints and I understand allegations.*
Accused 2: *Same applies*
PP: *13/01/12.*
Court: *Bail High Court"*

When the accused appeared before the same court for confirmation of his warned and cautioned statement he however alleged that he made the warned and cautioned statement because he had been subjected to duress. This prompted the magistrate to decline to confirm the statement.

It is needless to say that the accused's behaviour during his initial remand proceedings and confirmation of his warned and cautioned statement is fraught with serious contradictory statements of fact as to render the veracity of his allegations against the police improbable.

His argument that he did not tell the magistrate that he had failed to tell the magistrate that he had been subjected to duress cannot reasonably be true because he went on to tell the same magistrate that he had been subjected to duress thereby leading the magistrate to refuse to confirm the warned and cautioned statement tendered by the state.

While it is possible that the police may have roughed up the accused during investigations I accept that the police in the discharge of their difficult job particularly in cases of serious homicide cases such as this one are not expected to handle the accused person with kid gloves. Their possession of a firearm for their own protection and others cannot be faulted in the circumstances of this case.

The accused's failure to sustain any visible injuries militates against his assertion that he was subjected to severe assaults with a gun barrel and an empty cool drink bottle. In the result I come to the conclusion that the state has proved beyond any reasonable doubt that the accused made the disputed warned and cautioned statements and indications freely and voluntarily without having been unduly influenced thereto.

The statements and indications are accordingly held to be admissible in this Court. It is so ordered.

*The Attorney General's Office, the State's Legal Practitioners
Chinyama and Partners, the 1st Accused's Legal Practitioners
Mtetwa & Nyambirai, the 2nd Accused's Legal Practitioners*