

THE STATE
versus
LAWRENCE CHIKAZHE
and
FRANCIS NDUME

HIGH COURT OF ZIMBABWE
MUREMBA J
HARARE, 15-16 & 24-25 March and 10 May 2022

Assessors: Mr Barwa
Mr Mpofu

Criminal Trial

P Gumbo, for the State
S Murambasvina, for accused one
R T Mutero, for accused two

MUREMBA J: The accused persons are facing a charge of murder as defined in s 47 (1) (a) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] hereinafter called the Criminal Law Code. It is alleged that they unlawfully caused the death of one Nailord Musetwa by assaulting him several times with a baton stick and wooden stick all over his body intending to kill him on 20 February 2021 at Unit C Shopping Centre, Chitungwiza.

Both accused persons pleaded not guilty to the charge.

In a bid to prove its case the State led evidence from four witnesses; Gift Janhi, Jese Munyaradzi, Makarudze Elifas and Mafukidze Phaeton. The accused persons were the sole witnesses in their cases.

What is common cause from the evidence led is that the deceased died as a result of having been assaulted at Unit C shopping Centre Chitungwiza on the night of 20 February 2021. This was during the Covid-19 lockdown period during the curfew time. The two accused persons were and are security guards at the car parks at Unit C Shopping Centre. They are the persons who were found with the deceased after he had already been assaulted. It is on this basis that they were arrested for his assault and then murder when the deceased later passed on.

It is common cause that none of the State witnesses witnessed the accused persons assaulting the deceased. All the State witnesses arrived at the scene after the deceased had already been assaulted. In prosecuting its case and in alleging that it was the accused persons who assaulted the deceased, the State therefore sought to rely on circumstantial evidence. In defending themselves the accused said the following both in their defence outlines and defence cases. They were guarding motor vehicles at car parks that are next to each other at Unit C Shopping Centre. Their car parks were separated by the main road. On the fateful night they started work at 6pm. Sometime around 11pm accused one who was patrolling his area heard some noise coming from the lorries. When he ran towards the direction of the noise he saw a man, the now deceased underneath one of the lorries trying to remove the battery. When the deceased saw the first accused he picked up his beer bottle and started to run. As accused one chased after him, the deceased crossed the main road towards accused 2's area of work. As the deceased was running crossing the road he tripped himself and fell just after the road. He fell on his stomach and did not rise. Accused one got to where the deceased was lying down. As accused one started to question him about his identity and where he was from, accused two arrived at the scene. His attention had been drawn by the whistle that accused one was blowing as he was chasing after the deceased before he fell. Together the two accused persons started questioning the deceased who remained lying down. They said that the deceased appeared drunk. Accused one said that when the deceased fell, the bottle of beer he had fell and the beer spilled. The deceased acted as if he was sleeping. Accused one said that he held the deceased by his hand as he shook him and asked him to identify himself. The deceased did not say who he was but he said he was from Unit D. Accused 2 noted that the deceased's particulars had fallen from one of his trouser's pockets. The particulars were just by his side. With the help of his phone torch he read them and realized that the deceased was a soldier from the Zimbabwe National Army (ZNA). The deceased had both his national identity document and his work identity document.

The two accused persons said that as they were still talking to the deceased, an army truck belonging to the Zimbabwe National Army drove past the scene. As it was passing through, its occupants who were soldiers saw the accused persons and the deceased who was lying down. The soldiers shouted asking them what they were doing during curfew time. The lorry then stopped and reversed. Two soldiers disembarked and came to where the trio was. They asked the accused persons what was going on. When the two accused persons explained what had happened and said that the deceased was a soldier, the two soldiers

looked at the deceased's ZNA identity card and satisfied themselves that he was a soldier. They then went to a nearby tree and plucked some switches. They started to assault the deceased with these switches saying that the deceased was putting their name and profession into disrepute. Five other soldiers who had remained in the truck disembarked. They asked what was going on. When they heard that the deceased was one of their own, they also plucked some switches from the same tree and joined in the assault. Only one of them had a baton stick. The seven soldiers severely assaulted the deceased indiscriminately all over his body as the two accused watched helplessly. When the two accused tried to stop the soldiers from assaulting the deceased, they were accused of trying to protect a thief. Some soldiers went to their truck, collected some water and poured it on the deceased. The deceased never made an attempt to rise as he was being assaulted. He would only wriggle sideways as he was lying facing down. The accused persons said that when the soldiers were done assaulting the deceased, they threw away the switches and boarded their motor vehicle and drove off. The accused persons said that they never thought of looking at the registration number of the army truck as the deceased was being assaulted. They identified it as an army truck because of its ZNA camouflage colour. The accused persons said that the assault took about 10 minutes. The accused said that when the army truck left, they then started examining the deceased and noticed that he had been severely injured. One of his fingers was broken and he continued to lie down. As they were contemplating what to do with the deceased, a certain young man who came from the direction of C junction arrived at the scene. He asked them what had happened. When they explained, he gave them the number of Chitungwiza Police Station and proceeded with his journey. The accused persons then phoned the police who eventually attended the scene and found them with the deceased.

That the police attended the scene at the instance of the accused persons is not disputed. Gift Janhi and Munyaradzi Jese are the two police officers who attended the scene together with five other police officers from Chitungwiza Police Station on the night in question. Gift Janhi was the one who was in charge of this reaction team of police officers who attended the scene. This team was on night patrol enforcing curfew as well as doing crime prevention. Gift Janhi was not an impressive witness. He said that he found the deceased lying down facing upwards. He was severely injured and one of his fingers was fractured. He was struggling to talk. His clothes were soiled and it appeared that some water had been poured on him. The first accused person explained that the deceased had

attempted to steal a battery from a motor vehicle he was guarding. He chased after him and accused 2 managed to apprehend him. Gift Janhi did not go on to explain what the accused persons said then happened. Instead he went on to say that he then interviewed one Image Napwalo who was also at the scene. He said that Image Napwalo resides close to the scene. He said that Image Napwalo told him that he had interviewed the accused persons before the police arrived and they confirmed that they had assaulted the deceased. Gift Janhi said that they then took the accused and the deceased to the police station where he handed over the matter to one Sergeant Mirriam Pundo. He said that he instructed Sergeant Pundo to charge the two accused with assault. Whilst he confirmed that the incident happened during Covid-19 lockdown, he denied that members of the Zimbabwe National Army were involved in enforcing curfew. He said that they had last done so in 2020. He also added that even then the soldiers would do the patrols with the police and never alone because the army cannot do patrols alone without the police. This witness finished giving his evidence in chief without telling the court what the accused persons said about how the deceased had sustained injuries. This was surprising because one would expect that the police would have naturally asked the accused persons how the deceased had been injured since they were the ones who had called the police saying that they had apprehended a thief. It also did not make sense that Gift Janhi opted to tell the court what Image Napwalo told him instead of telling the court what the accused persons told him. It was also surprising that the State counsel Mr. *Gumbo* said that he had no further questions for this witness when this witness had not testified on what was crucial. When Mr. *Murambasvina* for accused one asked Gift Janhi during cross examination whether or not he had asked the accused persons if they had assaulted the deceased, he said that he had asked them, but still he did not divulge what the accused persons had said. When it was put to him that the accused had told him that the deceased had been assaulted by some soldiers, he denied that the accused had told him that. When he was cross examined by Mr. *Mutero* for accused 2 he said that he did not ask the deceased who had assaulted him because the deceased was struggling to talk. The court asked the witness why he instructed Sergeant Pundo to charge the accused persons with assault. He said that it was because it was the accused persons who had apprehended the deceased whom they said had tried to steal. When they apprehended him, he could talk, walk and run yet he was later found in their custody having been assaulted. He said that it could only mean that it was them who had assaulted him.

Munyaradzi Jese with whom Gift Janhi attended the scene testified as follows. When they arrived at the scene there was the two accused persons and the deceased who was lying down badly injured. The finger of his left hand was fractured. His head was swollen. His body had switch marks. Gift Janhi asked accused one to explain what had happened which he did. The story was about the deceased having attempted to steal a battery from a motor vehicle. Accused two intercepted him as accused one was chasing after him. When this was happening people came from different directions to see what was taking place. It is these people who then assaulted the deceased. After assaulting him, they left him lying on the ground. Munyaradzi Jese said that they then took the accused persons and the deceased to the police station where the accused persons were charged with assault. At the police station, the deceased only managed to give his father's phone number to Sergeant Pundo. He was struggling to talk and he did not say who had assaulted him. This witness said that they had the accused charged with assault because they had failed to satisfactorily explain what had happened to the deceased and it was their duty to protect the deceased against any harm. This witness said that the deceased was a member of the ZNA. He had his ZNA identification card. When the deceased's father was called to the police station, he came and took the deceased to Chitungwiza General Hospital that same night. The witness later learnt from Gift Janhi on 22 February 2021 that the deceased had died at a ZNA hospital. Mr. *Gumbo* asked this witness if the accused persons ever spoke about the deceased having been assaulted by soldiers. In response the witness said that he had heard the accused persons saying so. He did not say more and neither did Mr. *Gumbo* probe further. During cross examination Mr. *Murambasvina* for accused one pursued the issue about the soldiers. He asked Munyaradzi Jese to confirm that the accused persons had told the police at the scene that the deceased had been assaulted by some soldiers. Surprisingly he was reluctant to respond to the issue of soldiers. Instead he said that the accused persons said that the deceased had been assaulted by people who had come from different directions. Mr. *Murambasvina* insisted that he was talking about soldiers. That is when the witness said that the accused persons had indeed told them that some soldiers had arrived at the scene and assaulted him for embarrassing them as a soldier, after which they left. Munyaradzi Jese said that it was accused one who said this as he was explaining to Sergeant Gift Janhi what had happened. He further said that if Gift Janhi denied that accused one told him that the deceased was assaulted by soldiers, he was not telling the truth. This witness said that although the accused persons spoke about the deceased having

been assaulted by some soldiers, he suspected them of having assaulted him since they had arrested him for attempting to steal. He said that it was the accused's duty to protect the deceased from being harmed or injured by other people.

There were some notable contradictions between the evidence of Gift Janhi and Munyaradzi Jese. Whilst Gift Janni said they found four people at the scene, namely, the two accused persons, the deceased and Image Napwalo, Munyaradzi Jese said that they found only three people at the scene, namely, the two accused and the deceased. Surely if Image Napwalo was at the scene, Munyaradzi Jese ought to have seen him since Gift Janhi said he interviewed him on what had happened and this Image is said to have said that the accused had confessed to him that they had assaulted the deceased. The other contradiction relates to members of the public who are said to have come from different directions and assaulted the deceased. It is only Munyaradzi Jese who spoke about them. Gift Janhi did not talk about the accused persons having spoken about such people. The major contradiction related to the issue of the deceased having been assaulted by soldiers. What is noticeable is that both witnesses were reluctant to disclose that the accused persons had told them that the deceased had been assaulted by some soldiers. Gift Janhi completely denied it, whilst Munyaradzi Jese only spoke about it after he had been pressurized to do so under cross examination. These two witnesses fared as bad and untruthful witnesses especially for police officers. They were withholding information to the court. From the way they gave evidence, they did not impress the court. They said nothing about the murder weapons i.e. the switches that were used to assault the deceased. They said nothing about whether or not they looked for them or even asked the accused persons about them. An astute police officer would make an effort to look for the weapon used to assault the victim especially in a case of a severe assault.

Elifas Makarudze the employer of accused one testified as well. He said the following. He is the one who deployed accused one to go and work at Unit C Shopping Centre. He was phoned whilst at his home and informed about a thief who had been caught at Unit C Shopping Centre. He was phoned by the supervisor to accused one, one Chidyeni. He immediately left for the scene. He was the first to arrive and immediately followed by Chidyeni who had phoned him. He found the two accused persons with the deceased at the scene. There was no one else. The deceased was lying down, badly injured and was wet. The witness asked accused one what had happened. Accused one explained all that had happened and how some soldiers had arrived at the scene and assaulted the deceased upon

learning that he was one of them. The narration by Elifas Makarudze is similar to the explanation that the accused persons gave in all material respects. Elifas Makarudze said that he also tried to talk to the deceased by asking him what had happened and who had assaulted him, but he did not respond. He said that he then sent Chidyeni to go and make a report at the police station. Chidyeni who was using a motor bike went and reported. He then phoned from the police station and gave feedback that police officer Janhi who was patrolling the area with his team is the one who had been assigned to attend the scene. After that a police motor vehicle with several police officers arrived at the scene. It was Gift Janhi and his team. Janhi asked the accused persons what had happened and they narrated their story the same way they had explained to him. The accused persons and the deceased were ferried to the police station in the police vehicle. Elifas Makarudze said that he did not go to the police station.

Elifas Makarudze impressed the court as a truthful witness. His evidence was clear and straight forward. From the way he narrated the events it was clear that he had attended the scene. His story was adding up. It confirmed that when the accused persons were questioned by Janhi as to what had happened, they said that the deceased had been assaulted by some soldiers, just like police officer Munyaradzi Jese had said. Elifas Makarudze did not speak of having been told by the accused that the deceased had been assaulted by some members of the public. It is puzzling though that police officers Gift Janhi and Munyaradzi Jese chose to lie that they only saw the two accused persons, Image Napwalo and the deceased at the scene. Clearly the evidence of Elifas Makarudze is not the evidence of a person who did not attend the scene. It is unfortunate that Gift Janhi and Munyaradzi Jese were just two untruthful police officers. May be they just wanted to secure a conviction against the accused persons at all costs.

Phaeton Mafukidze the investigating officer (the I.O) testified as follows. He was allocated this case on 22 February 2021 before the deceased had passed on. The accused were already under arrest for his assault. Soon after receiving the assault papers, the I.O received information that the deceased had passed on at his work place hospital in Cranborne. He said that he then warned and cautioned the accused for the murder charge and recorded their statements. These statements were later confirmed by a magistrate at the Magistrates Court. In their confirmed statements, the accused persons did not admit to the charge. They said that the deceased was assaulted by some soldiers who arrived at the scene in an army motor vehicle. The story the accused gave in their statements is similar

to what they said in court in their defence outlines and defence cases. The confirmed warned and cautioned statements were produced as exhibits by the State during trial. The I.O however believes that it was the accused persons who assaulted the deceased because they are the ones who had arrested him for attempting to steal. No other people were there since it was curfew time and no other people were allowed to be moving around. He said that Image Napwalo who guards motor vehicles at the next car park had arrived at the scene and saw the accused persons with the deceased. This part of his evidence was hearsay since the State did not call Image Napwalo to testify. It remains a mystery why the State did not call Image Napwalo to testify when it clear that he arrived at the scene on the fateful night. Mr. *Gumbo* tendered no explanation as to why Image Napwalo could not testify.

What is clear is that the I.O did not conduct any investigations in order to verify the accused's defence. He did not investigate their defence. Mr *Gumbo* did not ask him to explain why he did not investigate the accused persons' defence. In short, the accused persons' defence was that the deceased was assaulted by soldiers who accused him of tarnishing their image.

In terms of s 70 (1) (a) of the Constitution of Zimbabwe, an accused person is presumed innocent until proven guilty. So, it is not for the accused to prove his innocence, but for the State to prove his guilt. The standard of proof requires that the accused's guilt be proven beyond reasonable doubt. If there is room for doubt, the court must acquit the accused. In *S v Makanyanga* 1996 (2) ZLR 231 (H) it was held that:

“Proof beyond reasonable doubt demands more than that a complainant be believed and an accused disbelieved. It demands that a defence succeeds whenever it appears reasonably possible that it might be true.”

In *R v Difford* 1937 AD 370 at page 373, it was held that:

“It is equally clear that no onus rests on the accused to convince the court of the truth of any explanation even if that explanation be improbable. The court is not entitled to convict unless it is satisfied, not only that the explanation is improbable, but that beyond any reasonable doubt, it is false. If there is any reasonable possibility of his explanation being true, he is entitled to his acquittal.”

So, the accused is not required to convince the court of the truth of his explanation. It is for the State to prove that the explanation cannot be and is not true. In *casu* the accused's defence right from the start at the scene was that the deceased was assaulted by soldiers. They maintained this version at the police station and in court through and through. The

State was unable to rebut this defence. As was correctly submitted by Mr *Mutero* the onus on the State is high. It must prove that the accused's defence is not merely improbable but impossible. The accused has no onus to prove the veracity of his defence.

As I have already said elsewhere above, the State is relying on circumstantial evidence. The inference of the accused's guilt is sought to be drawn from the fact that the deceased had attempted to steal from a lorry accused one was guarding. The deceased was apprehended by the two accused persons. When the police attended the scene, it was only the accused persons who were with the deceased. Although the accused spoke about soldiers having assaulted the deceased, there were no soldiers at the scene. However, for a conviction to be sustainable, the circumstantial evidence must be complete and incapable of explanation by any other hypothesis than that of the guilt of the accused. Such evidence should not only be consistent with the guilt of the accused, but should be inconsistent with his innocence. The circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability, the crime was committed by the accused and no one else. See *S v Shonhiwa* 1987 (1) ZLR 215 (SC). In *casu* in light of the defence given by the accused persons, it cannot be conclusively said that it is the accused persons who assaulted the deceased. The State did not prove that their defence cannot reasonably possibly be true. The accused persons were consistent right from the start. It is even difficult for the court to say that this was an after-thought. The accused persons are not sophisticated persons. They are mere security guards. It does not look like they are clever enough to have quickly come up with the kind of defence they gave at the scene of evidence. They did not even have legal representation at the scene such that it can be said that may be it was their lawyers who helped them to come up with this defence. In any case their explanation of how the soldiers arrived at the scene, what they said and what they did was so detailed that it is difficult to say this was a made up defence.

The three police officers who testified for the state including the I.O said that the issue about the deceased having been assaulted by soldiers is a lie because at the material time soldiers were no longer enforcing curfew. In our considered view, this issue does not take the State case any further because the issue is not about whether soldiers were still enforcing curfew or not. The accused said the army truck was driving past when the soldiers saw them. They did not say the soldiers were enforcing curfew. The accused would not know where these soldiers were headed and it is not for the court to conclude that soldiers could only have been moving around to enforce curfew. They could have been just passing

through. The mere fact that they asked what the accused were doing during curfew does not necessarily mean that they were enforcing curfew.

In view of the foregoing, we conclude that the State did not prove its case beyond reasonable doubt against the two accused persons. Whilst it is possible that the accused persons assaulted the deceased, it is also possible that it is the soldiers that the accused persons spoke about. It is a 50-50 case, yet the State is required to prove its case beyond reasonable doubt. It failed to do so. We therefore find the accused persons not guilty and acquitted.

National Prosecuting Authority, State's representative
Jarvis Palferman legal practitioners, accused one's legal practitioners
Caleb Muccheche and Partners, accused two's legal practitioners