

THE STATE
versus
ZADZISAI KUODZA

HIGH COURT OF ZIMBABWE
MAWADZE J
MASVINGO, 28 October 2021, 21 January & 22 February 2022

Mr E. Mbavarira, for the state
T Nyoka with O. Mafa for the accused

Assessors

1. Mr Mutomba
2. Mrs Chademana

Criminal: Discharge at the close of the Prosecution case

MAWADZE J: The 50 year old female accused who is facing the charge of murder as defined in section 47(i) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] seeks to be discharged at the close of the prosecution case.

It is disappointing that at the close of the state case on 21 January 2022 *Mr Nyoka* for the accused who was being assisted by *Mr Mafa* indicated that they wished to apply for the discharge of the accused in terms of section 198(3) of the Criminal Procedure and Evidence Act [*Chapter 9:07*]. They requested to file a written application by 28 January 2022. *Mr Mbavarira* indicated that he would in turn respond to the application by 3 February 2022. We then set the 18 February as the date for the ruling. However by 15 February no such application had been filed. I had to instruct my clerk to chase up on counsel. The application was only filed on 16 February 2022.

I am not sure as to when it was then served on *Mr Mbavarira* for the state who now had to respond within at most a day before we could made a ruling.

It is important to remind counsel that they are officers of this court and that they should take their self-imposed time lines seriously. The accused despite being out of custody hails from rural Gutu. It would be unfair for this court to further postpone the matter on account of counsel's lack of diligence. The proper and efficient administration of justice demands that we all act with due diligence. It is therefore not the duty of the court, where time lines had been self-imposed, to chase after counsel to ensure adherence to such time lines. We now turn to the application.

The facts of the matter are as follows;

This matter involves a love triangle. Despite her advanced age the accused who hails from Mamvura village Chief Munyikwa, Gutu was in love with two men. These were Simbarashe Matombo the aged 46 years who is the now deceased and was residing in Matombo village, Chief Munyikwa, Gutu and one Ephias Chiwara aged 49 years of Mutsaka Village, Chief Munyikwa, Gutu. These two men were aware that they were in love with the same local woman, the accused. In fact Ephias Chiwara said before this incident he had been once assaulted over this same woman, the accused, after being found in her company.

The charge is that on 1 April 2019 and in Mamvura village Chief Munyikwa, Gutu the accused unlawfully and intentionally caused the death of Simbarashe Matombo by assaulting him several times with a blunt object all over the body.

The accused was staying alone at her homestead. The homestead comprised of a kitchen hut, a round hut and a flat with three rooms.

On 1 April, 2019 the accused left for the local market in the company of the now deceased in the morning around 1000 hrs. It is not clear how she separated with the now deceased that day. However later that day at around 1700 hrs she was back at her homestead now in the company of her other lover Ephias Chiwara drinking beer.

It is the state case that the now deceased arrived at the accused's homestead later that evening and requested to spend the night with the accused. At that time Ephias Chiwara the other lover was in one of the accused's house hiding. The accused is said to have refused to accept the now deceased's request resulting in an altercation and fight between the now deceased and the accused.

It is alleged that the accused assaulted the now deceased with a blunt object all over his body causing injuries on the left eye and the back of the head resulting in the now deceased's death.

The body of the now deceased was discovered the next day 2 April, 2019 in a rapoko field some 40 m away from the accused's homestead leading to the accused and Ephias Chiwara's arrest. However during investigations Ephias Chiwara was released and turned into a state witness. There reason for this is not clear save to say that that investigating officer said he was exonerated of any wrong doing by the accused. This is difficult to understand as the accused herself was also denying the charge or any wrong doing.

The accused's defence is that she does not know how the now deceased died or the circumstances of his death.

The accused in that defence outline said the now deceased who was her boyfriend came to the accused's homestead that day and left his wet pair of shoes and hat together with some asbestos sheets. The accused said later that night the now deceased came back to the accused's homestead and requested to put up for the night with the accused. She declined. The accused said the now deceased only left her homestead after hearing the voices of the accused's brothers approaching who were passing by. She said her other boyfriend Ephias Chiwara was in her house. The accused said her brother then discovered the presence of Ephias Chiwara in her house and chased him away whilst wielding an axe as Ephias Chiwara was naked. She said one of her brothers had to restrain the other brother after which her brothers left for their respective homesteads. The accused said Ephias Chiwara returned to her homestead and spent the night with her.

The state led evidence from the accused's other boyfriend Ephias Chiwara, the accused's daughter in law and neighbour 41 year old Shuwai Gapare, the accused's young brother Bonface Kawodza and the investigating officer D/Sgt Tinashe Innocent Davis Nyamayaro.

The evidence of the now deceased's young brother Sylvester Matombo, Cst Namatai DinHIRA and Dr Godfrey Zimbwa was admitted in terms of s 314 of the Criminal Procedure and Evidence Act [*Chapter 9:07*]. Nothing turns on that evidence. Dr Godfrey Zimbwa carried out a post mortem on the deceased's remains and compiled the post mortem report exhibit 1. Cst Namatai DinHIRA took photographs of the now deceased's body exhibit 3. The deceased's young brother Sylvester Matombo confirmed that on 1 April, 2019 his brother the now deceased left

home in good health without injuries. On 2 April he was called and identified the now deceased's body together with the now deceased's red cap and pair of shoes (recovered at accused's homestead).

The fact that the now deceased did not die of natural causes is clear. As per the post mortem report Dr Zimbwa observed the following on the deceased's body;

- “1. *Facial and neck bruising*
2. *Bilateral peri orbital haematoma*
3. *bruising and haematoma on frontal area*
4. *loose neck, moves with crepitus*
5. *bruising both upper limbs”*

As a result Dr Zimbwa concluded that the now deceased died as a result of head injury and cervical spine fracture.

The same signs of violence are visible from the now deceased's body as is clear from the photograph exhibit 3.

Further, the investigating officer D/Sgt Nyamayaro who attended the scene and examined the now deceased's body observed the following injuries;

- (i) Swollen left eye
- (ii) A cut at back of the now deceased's head
- (iii) Bleeding from the nose and mouth

It is therefore a fact that the now deceased died a violent death and was in all probabilities physically assaulted.

The offence of murder is clearly proved.

What is contentious is who caused the now deceased's death.

The contention by the accused in making this application is that the state at the close of the prosecution had not established a *prima facie* case against the accused. It is the accused's contention that at this stage there is no nexus, link or causation between the accused and the now deceased's death.

It is this contention we now interrogate.

The accused's confirmed warned and cautioned statement exhibit 2(a) is almost similar to her defence outline already alluded to. In that statement the accused maintains that she does not

know how the now deceased met his demise. What is of note however is that in that statement the accused omitted to disclose her altercation with the now deceased on the night in question prior to his death.

The indications by the accused exhibit 2(b) reveal nothing material not covered by her warned and caution statement and the defence outline annexure (B).

It should be conceded that there are indeed gaps, grey areas and some inconsistencies in the evidence led by the state.

We turn to the *viva voce* evidence led by the state.

D/Sgt Tinashe Innocent Davies Nyamayaro (D/Sgt Nyamayaro)

D/Sgt Nyamayaro is the investigating officer who attended the scene and examined the now deceased's body.

His evidence is that after observing marks of violence on the now deceased's body he interviewed witnesses. He was made aware of the love triangle and the altercation between the accused and the now deceased on the night of 1 April, 2019 which he gathered degenerated into a fist fight. He disclosed that some witnesses had heard the accused shouting in Shona saying "*ndokutema*". This prompted him to arrest the accused and charge her of this offence. As already said he also gathered that the accused's other lover Ephias Chiwara was present at the accused's homestead when this altercation between the accused and the now deceased ensued. He also arrested Ephias Chiwara. What remains unclear is why he believed the accused when she exonerated Ephias Chiwara when accused herself was also denying the charge. In our view there was no capital at all in making Ephias a state witness.

There are other aspects of D/Sgt Nyamayaro's uncontroverted evidence explains why he arrested the accused. The deceased's body was merely 40 m from the accused's homestead, albeit in Shuwai Gapare's rapoko field. It had no shoes. The deceased's shoes and cap were recovered at the verandah of the accused's house. The accused's explanation was that the now deceased had left the cap and shoes as they were wet as it was or had been raining together with his asbestos sheets which were to be collected the next day. Is this explanation plausible? Our view is that it needs further interrogation and accused should be allowed to explain herself why these items were found at her homestead.

Further, D/Sgt Nyamayaro said the grass where deceased's body was showed signs of struggle marks as the grass was flattened. The deceased's belt was removed and was along a foot path leading to the accused's homestead. In view of the said altercation and fight between accused and the now deceased is it not prudent for the accused to explain the exact nature and form of this fight? It is only accused who can testify as to how the accused left her homestead that night.

Shuwai Gapare (Shuwai)

Shuwai is accused's neighbour and a daughter in law. Her testimony is not disputed. She was aware the accused was in love with both the now deceased and Ephias Chiwara for a long time. She would see both men visit the accused at different intervals. It is a fact that on the night in question both men clashed at the accused's homestead. This was after Shuwai had seen the accused leaving for the market in the morning with the now deceased. Later she said towards sunset she saw accused and the now deceased at the accused's residence. Now given this evidence at what point did the now deceased leave and when did the other lover Ephias Chiwara arrive? Is it not prudent for the accused to explain this?

Shuwai said later that evening she heard accused shouting in Shona saying "*ndokutema*" [meaning I will strike at you]. The question is who was accused referring to? Most importantly what was happening at accused's homestead? Shuwai said accused and the now deceased were in the habit of fighting. Again it is only accused who can explain what prompted her to shout in that manner and what was happening.

Bonface Kawoza (Bonface)

Bonface accused's young brother was only aware of accused's love affair with the now deceased and not with Ephias Chiwara.

Bonface's testimony is even more interesting when one considers accused's defence outline as his evidence is totally at variance with what accused alleges happened.

Bonface said on the night in question around 2200 hrs he passed by the accused's homestead from the market in the company of Farai, Newlife and Mudete. He then saw accused walking around her yard using a cell phone light. The accused called out to him that she had been threatened by thieves. This caused Bonface to proceed and attempted to check for an intruder(s) in accused's house. He said as he opened the door Ephias Chiwara bolted out wearing boxers only and Bonface left.

We pause here to comment as follows;

Is this version by Bonface true? It is only the accused who can answer to that. If not true what possibly motivated Bonface to lie? If true what then attracted Bonface to accused's homestead late at night? What was the accused doing walking around her yard so late in the night? What prompted the accused to call for help? Were there thieves at her residence? Is it not that it as Ephias Chiwara who was in her company. Again only accused can explain these bizarre happenings.

Ephias Chiwara (Ephias)

The evidence of Ephias was difficult to follow or understand. Ephias said he was drinking beer with the accused at accused's homestead on the night in question when the now deceased arrived.

It remains unclear as to where, when and how the accused met Ephias Chiwara on that day. Again only the accused can shed light on that.

Ephias was inconsistent as to the number of times the now deceased visited the accused's homestead. The accused should explain this and the purpose of such visits on all those occasions if any that night.

Ephias confirmed that during one of the visits the accused and the now deceased has a misunderstanding. What was the cause of this misunderstanding from the accused's point of view? Most importantly Ephias said he saw the now deceased assaulting the accused. Is that true? Ephias said the now deceased used open hands resulting in both accused and the now deceased holding each other and pushing each other towards the fields.

Ephias said he too heard the accused as some point shouting in Shona saying, "*ndokutema*" (I will strike at you). In fact Ephias said accused was wielding an axe which she later put back in the house. Ephias also heard accused shouting that she wanted to report to her relatives that the now deceased was harassing her and that she infact reported to Bonface. As a result Ephias said Bonface came and as he was searching inside accused's house Ephias bolted naked.

Given all this evidence given by accused's other lover is it not necessary for the accused to explain what exactly happened that night? How did accused fight with the now deceased if they did? How did that fight or altercation end? It is only accused who can explain the events which unfolded at her homestead that night involving the now deceased. Is it true that the now deceased

later that night was asking the accused to open the door for the now deceased to sleep and to be given his property?

In a nutshell the events at the accused's homestead involving the now deceased and the accused calls for an explanation from the accused. The accused is not being asked to bolster the so called "limping" state case or to nail herself but to simply place before the court what in her view exactly happened for the court to make an informed decision.

The accused has not managed to make up a case for her discharge at the close of the prosecution case as was said in *S v Kachipare* 1998 (2) ZLR 271 (S). We say so because;

- (i) the state has managed to prove all the essential elements of the offence of murder see *AG v Bvuma & Anor* 1987 (2) ZLR 96 at 102 F
- (ii) given the evidence led by the state which points to how accused and the now deceased interacted that night and in the absence of the accused's own explanation this court may indeed properly convict the accused. See *AG v Mzizi* 1991 (2) ZLR 321 at 323
- (iii) it cannot be said that on the material aspects the evidence adduced by the state is manifestly unreliable or that it has been discredited in cross examination that this court cannot safely act on it see *AG v Tarwirei* 1997 (1) ZLR 575 at 576 G.

This is a case which cries out loudly for the accused's own evidence. The evidence before us of an altercation between accused and the now deceased may well support a murder charge or even any other permissible verdict in the absence of the accused's evidence.

It is for these reasons therefore that the accused's application to be discharged at the close of the prosecution case is both ill-informed and improperly made. As I said in the matter of *Prince Chokuwa and Anor v State* HMA 53/20 this is not one of the more carefully considered applications. There is a *prima facie* case.

The application for the discharge of the accused at this stage is hereby dismissed.