

**THE STATE**

**Versus**

**MATHIAS MUZVONDIWA**

IN THE HIGH COURT OF ZIMBABWE

BERE J with Assessors Mr W.T. Matemba & Mrs C.J. Baye

GWERU CIRCUIT COURT 2 & 4 OCTOBER 2017

**Criminal Trial**

*M. Shumba* for the state

*Mrs L. Mavhondo* for the accused

**BERE J:** On 4 December 2015 at around 21:00 hours and at a place called Muwani Business Centre outside Chirume Bottle Store, Chirumanzu, Midlands Province, the deceased Fanuel Makwanya (23 years old at the time) tragically lost his life through knife stabbing. The accused Mathias Muzvondiwa (then aged 19 years) stands accused of having tragically ended the deceased's life. The accused denied the allegations levelled against him.

The facts as put forward by the state are that on the day in question the accused and the deceased who had been enjoying some local genre of music which was being played picked up a misunderstanding over which music was to be played. In the drama that followed this seemingly minor dispute the accused and the deceased started pushing and shoving each other out of the bar. It was when they were outside the bar that the accused pulled out a knife from his pair of trousers and stabbed the deceased on the chest who died on the spot.

The allegations went on to say that after stabbing the deceased the accused proceeded to where Robert Majoni was and stabbed him in the back with the same knife before fleeing from the scene.

In his defence outline the accused stated that on the day of this murder the accused went into Chirume Bottle Store where he found Robert, Costa-alias Bosco, Erasmos Muzvondo, David and others drinking beer.

As the patrons were enjoying their music, accused's brother Emmanuel Muzvondiwa who was seated on the counter took the remote control of the radio and changed the radio station that was playing the music much to the chagrin of others who preferred the music that had been playing.

Robert then picked up a quarrel with the Muzvondiwa brothers over this issue and immediately slapped the accused who retaliated and the two engaged in a fight. The fight degenerated into a gang fight with Erasmus, Costa, Robert and Davidson all joining in to attack the accused. Davidson and Robert Majoni then dragged the accused to a distance of about 50 metres from the shop where the fight continued unabated.

As the fight continued the deceased came out of the shop running and placed himself between the accused and Robert in a bid to restrain them from continuing to fight. In the process Robert reacted by holding deceased's both hands and folded them on the deceased's back. Whilst the deceased was held in that restrictive position, the accused said Costa came out of the shop in full speed armed with a knife and stabbed the deceased on the chest.

The accused said he responded by kicking Costa with the result that the knife fell on the ground. In a bid to let Robert let loose his grip on the deceased the accused then used the knife to stab Robert on the back. The deceased who appeared dead already then fell down headlong.

In short, the deceased's defence was that it was Costa and not him who ended the deceased's life.

The state case was anchored on the *viva voce* evidence of Noberta Dicky (Robert Majoni's wife), Erasmos Muzondo and Edmore Zava, with the evidence of Godfrey Kambamula, Date Katuka, Tinashe Govere and Dr Betancourt being admitted in terms of section 314 of the Criminal Procedure and Evidence Act Chapter 9:07. The accused was the sole witness for the defence.

**The legal position in dealing with accused person's defence**

It is a time honoured principle of our criminal law that the accused has no duty to prove his innocence. That obligation to prove an accused guilty is thrust upon the state and when the state does so it must prove the accused's guilty beyond a reasonable doubt. If that threshold is not reached the accused must be given the benefit of doubt and be acquitted. This approach can be traced as far back as 1937 where in the case of *R vs Difford*<sup>1</sup> WATERMEYER AJA put the legal position succinctly in the following words:

“I must consider whether or not at the conclusion of the trial there was any evidence upon which I was satisfied to convict the accused of the crime charged in the indictment ... It is not disputed on behalf of the defence that in the absence of some explanation the court would be entitled to convict the accused. It is not a question of throwing any onus on the accused, but in these circumstances it would be a conclusion which the court could draw if no explanation were given. It is equally clear that no onus rests on the accused to convince the court of the truth of any explanation he gives. If he gives an 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, then he is entitled to his acquittal ...”

Ten years down the line, this eloquently expressed legal position was reaffirmed by DAVIS AJA in the case of *Rex v M*<sup>2</sup> in the following words:

“And I repeat, the court does not have to believe the defence story: still less has it to believe it in all its details it is sufficient if it thinks that there is a reasonable possibility that it may be substantially true”

---

<sup>1</sup> 1937 AD 370 at 373

<sup>2</sup> 1946 AD 1023 at 1027

See also the position expressed by GILLESPIE J in *S v Makanganyanga*<sup>3</sup>. This is the approach which our courts have followed over the years and this is the approach I prefer to guide the court.

I come now to deal with the story of the accused person in this case.

Upon his arrest and after being warned and cautioned of the allegations of having murdered the deceased the accused voluntarily elected to give a statement and his statement was recorded as follows:

“I have understood the caution but I do not admit to the charges levelled against me because this person was stabbed by Costa nicknamed Bosco. I then took the knife and stabbed Robert.”

When the accused was taken before a magistrate for his statement to be confirmed on 16 March 2016, the accused maintained his story.

When the accused appeared in this court to face trial on the murder of the deceased on 2 October 2017, the accused maintained his position that the killer is out there in Chirumhanzu.

There can be no doubt that the investigating officer did not investigate the accused’s defence. If the investigating officer had done so, the state summary would have contained a hint of what became of such investigations. That yawning gap is there in the state case for all to see.

Instead, the state appears to have been determined to completely ignore the story told by the accused person in simple language and to rely on the evidence of Noberta Dicky, Erasmos Muzondo and Edmore Zava to counter it. I will now proceed to analyse that evidence and demonstrate its shortcomings.

---

<sup>3</sup> 1996 (2) ZLR 231 (H)

Noberta Dicky is the wife of Robert Majoni whom the accused said was holding the deceased's hands from the back at the time the deceased was stabbed by Costa owing to the exposure of his chest.

When giving her evidence in court, it was apparent that contrary to the rest of the evidence recorded, Noberta Dicky was eager to take her husband away from the conflict and restrict the misunderstanding to the deceased and the accused person only. But we know from the evidence of the other state witnesses that Robert was involved in a fight with the accused's brother and the accused himself.

Noberta Dicky, when asked about the existence of Costa, she tried to give the impression that this person does not exist or that she does not know him. Noberta Dicky gave the impression that when the accused stabbed the deceased she was barely a metre away from the two and that she did not witness the two exchanging any words but that all she saw was the accused pulling a knife from his pair of trousers and stabbing the deceased.

Compare the evidence of Noberta Dicky with that of Erasmos, the security officer who said he was standing at a distance of about 17 metres away from the scene of crime when he saw all what happened. Much to the surprise of the court the witness said Costa does exist but he was not there at the scene of crime. He struggled to explain why he was so adamant that Costa was not there.

The witness stated that although Noberta Dicky was at the bar, she was not two metres away from the scene of stabbing but was among the other patrons who were positioned by the verandah about 5 metres away from the deceased and the accused.

Of particular concern to us is the undeniable fact that in the state summary that was presented to us, it was apparent that this witness did not actually see the stabbing when it occurred but when he gave his evidence in court he departed from that statement and purported to have seen what he had not seen before. The witness's departure from his recorded statement

was not explained, neither did the prosecution sought leave to have this conflicting position clarified by the witness.

Contrary to the explanation by Noberta Dicky who said she did not see the accused and the deceased quarrelling, this witness actually saw the accused and the deceased involved in a fight right in front of the bar.

To possibly resolve the conflict between Erasmos's testimony and that of Noberta Dicky one must then consider Edmore Zava's testimony. Apparently this man, contrary to Noberta Dicky's evidence, knows a man called Costa but said on this day, he was not there. Again the witness did not adequately explain why he was so certain that this man was not at the business centre on that day.

But there were more startling revelations to come from his testimony. The witness stated that when he saw the deceased falling (which falling he initially attributed to the drunken state of the deceased) Noberta Dicky was not at the scene of crime but had run in the general direction her husband who was involved in a dispute with some other people had taken. According to this witness, Noberta Dicky could not possibly have been in a position to see how the stabbing took place as she was not at the spot of the stabbing.

Faced with such conflicting versions, the court must out of desperation go to the story told by the accused person to try and possibly find some curative guidance from it.

The accused's explanation is that Noberta Dicky is pointing a finger at him as the killer because she is desperately trying to protect her husband Robert who was holding the deceased from the back when Costa stabbed the deceased. Our view is that this explanation is reasonably possibly true.

The accused explained that Costa is a drinking mate for the other witnesses and that these witnesses may be misleading the court in an effort to shield him.

We are worried that both the investigating officer and the state at the time this matter was regarded as ripe for trial did not see the need to investigate the accused's defence. It is highly unlikely in our view that given the levels at which murder cases are investigated, the investigating officer would have overlooked trying to investigate the accused's defence or explanation. We can only speculate and say probabilities are that the investigations must have exonerated the accused person and that factor may not have been disclosed to the state for reasons that we may never get to know.

One of the reasons why an accused is required to give a statement after being properly warned and cautioned is to enable the police to investigate his explanation. It is elementary procedure which is an integral part of police procedure.

The failure by the state to ensure that the accused's defence was investigated before trial means that the accused's position remains intact and must carry the day. The accused, not having the onus to prove his innocence must be given the benefit of doubt. This is one of the many cases, where probably a guilty man is let loose but it is better to acquit an otherwise guilty man than to convict an innocent man.

During arguments I was referred to inter alia the cases of *S v Chigova*<sup>4</sup>; *S v Gardner*<sup>5</sup> and *S v Golden Nyachito*<sup>6</sup>. These are not authorities which support convictions where poor investigations have been carried out as in this case.

The *Chigova* case, is not authority that every departure from a witnesses recorded statement must be condoned without explanation. The witness must be given an opportunity in court to explain any patent discrepancy between their evidence as recorded by the investigating officer and the evidence as given in court by the witness.

---

<sup>4</sup> 1992 (2) ZLR 206 (HC)

<sup>5</sup> 1982 (2) ZLR 290 (SC)

<sup>6</sup> HH-42-83

It is also doubtful in my view that given the high levels of experience and qualifications of those superintending the investigations of these cases in the National Prosecuting Authority office, the relaxed approach in *Chigova's* case should be maintained.

This is so because, we know that in practice, the state summary at this level is not prepared by a police officer at the station but by a senior qualified officer/legal practitioner in the National Prosecuting Authority who would have seriously considered the issues at stake at trial. The officer has the authority to recommend further clarification if in doubt before he/she sets down to draft the outline of the state.

For these reasons the accused is found not guilty and acquitted.

*National Prosecuting Authority* state, legal practitioners  
*Mvura-Mavhondo & Partners*, accused's legal practitioners