

STATE  
versus  
FREDERICK THEMBINKOSI CHUNGA  
and  
PATRICIA TEMBO

HIGH COURT OF ZIMBABWE  
MUSAKWAJ  
HARARE, 3, 5, 22 and 23 July, 16 and 18 October , 13 November 2013 and 19 March 2015

Assessors: Mr Chakuvinga  
Mr Gonzo

### **Criminal Trial**

*B Murevanhema*, for the state  
*H Nkomo*, for first accused  
*B Rupapa*, for second accused

MUSAKWAJ: At the close of the state case accused persons applied for discharge. The two accused persons were arraigned on a charge of murder. They were originally jointly charged with Douglas Nyirongo who however, could not be accounted for at the time they were notified of the trial date. The prosecutor applied for separation of trials which was granted.

The indictment is framed as follows:-

“In that on the dates unknown but during the period between April 2005 and August 2005 and along a dusty road linking Burnhills and Mvurachena Farm, Raffingora, Frederick Thembinkosi Chunga and Patricia Tembo, one or both of them unlawfully and with intent to kill ran over George Nyachumbu with a Nissan HI Rider vehicle, registration number 569-144 J thereby causing injuries from which the said George Nyachumbu died.”

The summary of state case alleges that between April 2005 and October 2005 the first accused knocked down the deceased with his Nissan Hi Rider vehicle. This happened along a dirt road linking Burnhills and Mvurachena Farm, Raffingora. Some farm workers put the body in a sack before they buried it in the deceased’s field. Before burying the body they cut the deceased’s genitals. These genitals were given to the second accused person who prepared

some medicinal potion. The second accused also gave those who killed the deceased and disposed of his remains some medicine to ward off any vengeful spirits. The workers were promised some monetary rewards which never materialised. This culminated in the depositing of an anonymous letter implicating the first accused at a police station. The deceased's remains were later disinterred from where they had been buried.

In his defence outline the first accused denied the charge. He denies knowing the deceased during his lifetime. He also denies being involved in an accident or being involved in any physical contact with the deceased.

The first accused further denies harbouring any superstitious beliefs. Being a registered land surveyor and a former secretary for lands, he conducts farming and is not engaged in any other business. He became aware of the allegations in 2006 when police picked him up following an anonymous letter whose contents he was not aware of.

The second accused, in her defence outline denies practising witchcraft. She is a former employee of the first accused. She attacks the summary of state case as being vague and based on hearsay. She claims there is no allegation regarding how she is linked to the murder.

The state led evidence from twelve witnesses. From Peter Bench Nyachumbu, the deceased's brother the court heard that the deceased resided alone. The deceased used to visit him after attending church. They lived about seven kilometres apart. Having last met the deceased in October 2005 he paid him a visit in October 2006.

Whilst wondering on the whereabouts of the deceased the witness came across a pit that had been dug for purposes of building a toilet. He wondered why the pit had been covered up. He went to the deceased's kitchen from where he took a plastic jug. He used this to scoop soil from the pit. He reached some maize stalks and then came a bad smell. He dug further and saw a sack. The sack was fragile and he saw a dead body. A T-Shirt on the remains resembled that of the deceased. The witness then contacted police officers.

There was no unanimity regarding how the remains were brought to the surface. Whilst Peter Bench Nyachumbu claimed that the officers instructed him to bring out the remains, the officers claimed they assisted him. Peter Bench Nyachumbu further stated that he had been detained for three days as police queried how he had established the presence of the body in the pit.

It emerged during cross-examination of this witness that in 2005 he had gone to

Mozambique with the deceased. They had visited a place called Chikafa for the unveiling of their late father's tombstone. The witness did not know any of the deceased's friends. Although there was a neighbour close to the deceased's place, he did not inform the neighbour about the tragedy.

When police attended the scene where the remains were recovered, they did not search the deceased's premises. They also did not conduct local enquiries.

The exhumed remains were examined by doctors Masokovere and Moralice. Their joint affidavit noted the following:-

“bilateral fronto-parietal bones on skull.  
No other evidence noted on rest of skeletal bones.”

They concluded that-

“Whether assault or fall not known. (blunt trauma).” The cause of death was given as severe head injury secondary to blunt trauma.

Doctor Gideon Masokovere, a pathologist testified. His qualifications are doctor of medicine.

He and doctor Moralice a Cuban pathologist examined the remains on 28 October 2005. The right frontal area of the skull showed signs of fracture. These presented as a crack on the front and on the lateral side. They were consistent with blunt injury whose cause they could not determine. Trauma being an injury, the cause could have been a fall or assault.

The doctor conceded an affidavit cannot be attested vicariously. He also conceded that his English is bad. It would be understandable as he studied his bachelor's degree and post graduate studies in Russian. He further explained that the remains had no flesh. The bones were intact with bone to bone contact. There was detachment on the right elbow.

Police investigations were triggered by an anonymous letter which reads as follows-

“Police, we give information that the man who was killed at Mudziwe was hit by a vehicle belonging to Mr Chunga of Bvurachena. He was finished off by guards who went with him home to hide/bury him. Chunga wanted to cause the arrest of the guard who stole some diesel at Bvurachena and he then said, if you do so I will disclose your case of murder. Chunga then abandoned it.

The motor vehicle is damaged/dented.”

When detectives conducted their investigations as a follow up of the anonymous letter

they arrested Maplan Kondori, Douglas Nyirongo, Elias Mayere, Gift Damiano, Lovemore Zulu Snade, Canaan Bvimba and an unnamed guard. They initially treated these as suspects and thus detained them. Warned and cautioned statements and indications were recorded from some of them. In the case of Canaan Bvimba a video of his indications was recorded.

Through advice from prosecutors police decided to turn the initial suspects into state witnesses. Hence, sworn statements were recorded from them. Since they were implicating the accused persons police then arrested the two accused.

A very remarkable development took place in the course of the trial. Maplan Kondori, Lovemore Zulu Sande and Gift Damiano were treated as accomplices and they were given the necessary warnings. All three departed from their sworn statements and were impeached. In the case of Canaan Bvimba he was clearly hostile and was cross-examined by the prosecutor.

Maplan Kondori a former employee of the first accused testified that in the evening he was summoned by the guard, Douglas Nyirongo. They went to the workshop from where he was told to get a hoe and shovel. They then drove the first accused's vehicle to where they saw a dead body. There was blood on the ground. They loaded the body and took it to Madziwe where they buried it in a pit. The body had been placed in a sack. After the interment they returned home. Douglas Nyirongo proceeded to see the first accused.

This witness claimed to be illiterate. During cross-examination he prevaricated. At some stage Mr *Nkomo* for the first accused applied that he be examined by a psychiatrist. Upon resumption of trial following adjournment the witness suddenly recalled the name of the guard who instructed him as Douglas Nyirongo. He had hitherto been referring to Douglas Nyirongo as the guard. He claimed that Douglas Nyirongo is the one who told him that the first accused had knocked down someone with his vehicle. At some stage during cross-examination the witness sought the exclusion of the first accused's relatives from the proceedings on the basis that he was not comfortable to testify in their presence. The court did not accede to the request.

Next the witness stated that it was the first accused and Douglas Nyirongo who loaded the body into the vehicle. He had met the first accused at the place where the body was loaded. The first accused then directed him to Madziwe farm where they interred the body. The first accused threatened to kill anyone who disclosed what happened. This happened in the presence of Douglas Nyirongo and the foreman, Elias Masamba. The witness had left Mvurachena Farm in 2006 and had not met the first accused since then.

The witness stated that he was detained for a week in Chinhoyi. He was assaulted on the knees and soles to induce a confession. He sustained swollen knees and had difficulty in walking.

Lovemore Zulu Sande stated he was told by Douglas Nyirongo that the first accused had knocked down someone with his vehicle. They went to the scene and he assisted in loading the body. He knew the deceased as the route to the deceased's place passed through the witness's residence. They used to exchange greetings.

He stated that when they went to the scene Douglas Nyirongo had a sack. They placed the body in the sack. Maplan Kondori drove. He remained behind when the body was taken away.

The witness was impeached. When he was asked about his statement to police he stated that it contained the truth. However, he maintained that he did not go to the place where the body was buried. Concerning the removal of the deceased's genitals he said he heard from Douglas Nyirongo.

It emerged during cross-examination that he was detained for two weeks at Chinhoyi. He claimed that he was assaulted. Thus when he gave his statement he was not free. He first said they lifted the body onto a sack and loaded onto the vehicle. Then he changed and said they first loaded the body into the sack but first the body was cut to fit into the sack. This was done by Douglas Nyirongo.

He further conceded giving conflicting statements. Whilst admitting that he gave most of the details in the statement whilst under duress he also stated that he did not know most of the details.

Under re-examination he said the statement was too long. He denied that the body had been cut. He also denied knowledge of removal of genitals. Then he said even though he was assaulted by police he told the truth. He conceded that he was illiterate.

Gift Damiano also knew the deceased. He worked for the first accused as a guard. He initially denied any knowledge about the case. He stated that he was arrested by police. He claimed to have been forced to give a statement. He is illiterate. After impeachment he agreed to the contents of his statement. He stated that he assisted in the disposal of the body whilst in the company of Douglas Nyirongo and Lovemore Zulu Sande. He could not recall the names of the other people. Maplan Kondori drove the first accused's vehicle which was used for that purpose. He was not forthcoming on what took place at the burial. He said he left the place of

burial on foot but then said he rode in the vehicle. He did not identify the body they buried.

Under cross-examination he stated that in 2005 he was no longer employed by the first accused. He had been collected from his home to assist in the burial. He agreed because he deferred to Douglas Nyirongo. He then disowned the statement.

Canaan Bvimba the husband of the second accused testified. Although an objection was raised against his testimony on account of marital privilege, I dismissed it. This is because the witness was compellable to testify against the first accused person. As it turned out, he had nothing to say against the second accused.

He used to be a tractor driver at Mvurachena Farm. He was forthrightly hostile. He claimed to have been forced to give a statement. He described how he was ill-treated by being forced to squat; an act he termed being made to sit in the 'air'. This was after he was taken from where he was doing guard duties at night. He stated that by then he no longer worked for the first accused. This was confirmed by police. Video footage of his indications was played.

He was duly declared hostile. He was cross-examined by both the state and defence. His explanation of how he denied what was in the video was confusing. Having initially claimed that the video must have been manipulated he ultimately conceded that he stated what was recorded but he did know anything about the case.

Section 198 (3) of the Criminal Procedure and Evidence Act [*Chapter 9:07*] provides that:

“If at the close of the case for the prosecution the court considers that there is no evidence that the accused committed the offence charged in the indictment, summons or charge, or any other offence of which he might be convicted thereon, it shall return a verdict of not guilty.”

It is well established that a court will discharge an accused person at the close of the state case under the following circumstances.

1. Where there is no evidence to prove an essential element of the offence.
2. Where there is no evidence on which a reasonable court, acting carefully, might properly convict
3. Where the evidence adduced by the state is so manifestly unreliable that no reasonable court could safely rely on it.

In support of the above, counsel for the first accused cited *AG v Bvuma* 1987 (2) ZLR 102 (S), *AG v Mzizi* 1991 (2) ZLR 323 (S) and *AG v Tarwirei* 1997 (1) ZLR 575 (S).

Statements of the impeached witnesses were produced by state counsel. In this respect Mr *Murevanhema* submitted that it does not follow that because the witnesses were impeached, then their evidence is entirely discarded. He cited *S v Millar* 1971 (1) RLR 159 (A) and *S v Chari* ZLR 231 (SC). To this I would add *S v Donga and Anor* 1993 (2) ZLR 291 (SC) in which a state witness was impeached on the basis of a warned and cautioned statement that had been recorded from him.

The trial court in *S v Donga and Anor (supra)* went on to hold that the warned and cautioned statement contained more truth than the witness's *viva voce* testimony. McNALLY JA had this to say at p 294:-

“But in general the rule is that where a State witness is shown to have deviated materially from a previous statement to the police, the evidence of that witness is discarded entirely. The court may not, as it did here, decide that the extra-curial statement contains the real truth. See *S v Chari* 1989 (1) ZLR 231 (S); *S v Banda & Anor* S-73-89; *S v Lubu* S-56-89; *S v Chawundura* S-95-89; and *S v Machakata* S-106-89.

It was said in *S v Millar* 1971 (1) RLR 159 (A) at 160 that impeachment of a witness's evidence does not necessarily mean that all of her evidence must be rejected. If, in spite of her attempts to shield the accused, she says in her evidence things which are against the interests of the accused, those things may be accepted as true.”

Concerning the impact of a previous inconsistent statement as well as the effect of cross-examining a hostile witness, GELLESPIE J in *S v Mazhambe and Ors* 1997 (2) ZLR 587 (H) expressed it as follows-

“The purpose of proving a prior inconsistent statement is to neutralize the effect of the unexpectedly adverse testimony. The statement does not itself become evidence. The contents of the statement cannot be relied upon as evidence. If the witness who has already departed from the statement nevertheless on confrontation admits the truth of the statement and adheres to it, in the sense of repeating it in evidence, then the court may act on that oral evidence, although not on the previous statement. The weight of any such evidence will of course usually be substantially affected by the equivocation of the witness. Conversely, the fact that a witness has had his credibility impeached by production of a previous inconsistent statement does not mean that his evidence, adverse to the party calling him, must necessarily be rejected. It remains evidence given in court and must be properly examined and a judicial determination reached as to whether or not to accept it. In particular, the explanation for the giving of the prior statement may be such that the credibility of the evidence actually given in court cannot be discounted.

Similarly, where the court goes further and declares the witness hostile. The adverse evidence is effectively neutralized as evidence led by the party against itself. It is not, however, ipso facto to be disregarded. The evidence given by that witness, both under cross-examination by the party calling him and otherwise, may be considered and accepted or rejected in whole or in

part depending upon the weight to be attached to it.”

The evidence of Gift Damiano and Lovemore Zulu Sande, in as far as it incriminates the first accused amounts to hearsay. This is because they claimed to have heard what they attributed to the first accused from Douglas Nyirongo. Lovemore Zulu Sande was more equivocal than Gift Damiano. Some aspects of his evidence were not independently corroborated. For example, he stated that the deceased’s body was cut in order to fit in the sack. But doctor Masokovere’s testimony did not confirm that. As for Canaan Bvimba, he remained hostile when he was cross-examined by state counsel. No reliance can be placed on his caution that was video recorded.

Maplan Kondori, just like Lovemore Zulu Sande, was equally if not more equivocal than the latter. His evidence in respect of where it incriminates the first accused amounts to hearsay. He flip flopped in his versions of events between the evidence in chief and under cross-examination. His sanity was at some stage doubted by the defence. The worst he said about the first accused was that he was present when the body was loaded onto the vehicle and that the first accused subsequently threatened against disclosure of what had happened. Surprisingly he stated that he heard from Douglas Nyirongo that the first accused had knocked down the deceased with his vehicle. Why would he not have heard this from the horse’s mouth?

One might argue that the evidence of the accomplices corroborates each other. The limitation still remains that of the hearsay nature of their testimony. This is apart from the fact that they were clearly recalcitrant.

There is need to first prove that the alleged offence was committed. There is no one who witnessed the killing of a human being by the first accused. There is also no one who witnessed the first accused knocking down a human being with his motor vehicle. Therefore, the essential elements of the crime of murder have not been proven.

It is also necessary to consider whether any other offence has been disclosed by the evidence such that a reasonable court acting carefully might convict. The permissible verdict in the present situation is culpable homicide. There is no evidence on which one can impute negligence on the part of the first accused. Even if the skeletal remains show a fracture that is of blunt force causation, the same problem arises as to how this is linked to the first accused person. That the first accused admitted that he knocked down the deceased with his motor vehicle remains hearsay. There is even doubt regarding the identity of the exhumed remains.

Concerning accomplice witnesses, s 267 of the Criminal Procedure and Evidence Act provides that:-

“(1) When the prosecutor at any trial informs the court that any person produced by him or her as a witness on behalf of the prosecution has, in his or her opinion, been an accomplice, either as principal or accessory, in the commission of the offence alleged in the charge, such person shall, notwithstanding anything to the contrary in this Act, be compelled to be sworn or to make affirmation as a witness and to answer any question the reply to which would tend to incriminate him or her in respect of such offence.

(2) If a person referred to in subsection (1) fully answers to the satisfaction of the court all such lawful questions as may be put to him, he shall, subject to subsection (3), be discharged from all liability to prosecution for the offence concerned and the court or magistrate, as the case may be, shall cause such discharge to be entered on the record of the proceedings.

(3) A discharge in terms of subsection (2) shall be of no effect and the entry thereof on the record of the proceedings shall be deleted if, when called as a witness at the trial of any person upon a charge of having committed the offence concerned, the person concerned refuses to be sworn or to make affirmation as a witness or refuses or fails to answer fully to the satisfaction of the court all such lawful questions as may be put to him.”

Of the accomplice witnesses in the present case, it is only Maplan Kondori who testified as was expected of his statement. There are reservations regarding his consistency. One can safely conclude that he was shaken. He cannot be said to have been untruthful. It is basically the reliability of his testimony that is in issue. He is accordingly discharged from all liability arising from the present proceedings.

As regards Lovemore Zulu Sande, Gift Damiano and Canaan Bvimba, they did not answer questions put to them truthfully. This is worsened by the fact that they departed from their previous sworn statements. They are therefore not discharged from any liability to prosecution for this offence or any other that may be disclosed by the facts or their conduct. However, the state should be guided by the evidence that was led, especially the allegations of ill-treatment at the hands of police officers involved in the investigations.

The state has quite correctly conceded that no case was established against the second accused. To this I will add that no case has been made against the first accused as well.

Accordingly, both accused are found not guilty and are hereby discharged.

*Prosecutor-General's Office*, legal practitioners for the state  
*Mhisi Legal Practice*, first accused's legal practitioners  
*Mutumbwa, Mugabe and Partners*, second accused's legal practitioners