

THE STATE
versus
TAFADZWACHIOTA
and
NGONIDZASHE CHIOTA
and
TONDERAI CHIOTA
and
MAXWELL CHIOTA
and
EDMORE CHIOTA

HIGH COURT OF ZIMBABWE
MUSAKWAJ
HARARE, 26, 27 and 29 October 2015

Assessors: Mr Kunaka
Mrs Shava

Criminal Trial

M Manhamo, for the state
R G Gumbo, for the accused

MUSAKWAJ: The accused persons and two others pleaded not guilty to a charge of murder. It is alleged that on 6 July 2013 and at Forrester H Section Farm, Mvurwi the accused unlawfully and with intent to kill murdered Chrispen Kamu by assaulting him with booted feet, clenched fists and open hands all over the body thereby causing injuries from which the deceased died.

At the close of the state case defence counsel applied for the discharge of all the accused persons. He subsequently withdrew the application in respect of the present accused but persisted in respect of the other two. The state conceded that it had not made a case against those other two. Hence the discharge of the co-accused.

The facts are relatively simple. The deceased and a colleague reacted to the theft of

maize from a farm where they did guard duties. Upon confronting the suspects they were attacked. The deceased's colleague managed to escape and alerted others. The deceased sustained injuries from which he subsequently died. Follow-ups of shoe prints from the scene of confrontation led to the accused's home. The accused persons were then arrested, including the outstanding co-accused, Maxwell Chiota. At the hearing the state applied for separation of trials and this was duly granted.

In their defence the accused persons confirm going to Forrester H where they rustled up left-over maize that was left in the wake of a combine harvester. There were other farm workers and members of the public who participated. Upon departing they met people who challenged them to identify themselves. They in turn demanded that the persons identify themselves. All the people who were rustling for maize joined in and started to throw stones. The two people emerged and commenced to flee. They were pursued and in the process the deceased was kicked and slapped by many people. Thus the accused denied ever assaulting the deceased person.

The bulk of the evidence of the state was led by way of admission of the facts as outlined in the summary of state case. Doctor Takawira who conducted the post-mortem examination testified. He elaborated on his findings as summarised in the post-mortem report that was produced.

According to Andrew Musundasora, around sunset on the fateful day he received a report from the deceased who had knocked off duty. Together they went towards the field. As they used a shorter route they met about five people who were coming towards them. They hid behind a bush and the people shot at them with sling shots. The people also threatened to unleash some dogs. The witness and the deceased fled. The witness managed to outpace the deceased. He ran to the shade where he made a report. When they went back to the scene the deceased reported that he had been assaulted. This witness further explained that people had not been permitted to pick left over maize from the field.

Detective Sergeant Sakupwanya testified on the investigations they conducted. They trailed some shoe prints that led to the accused persons' home. They met the first accused who granted them permission to search. As a result they recovered some shoes which matched the print they had followed. It was fortuitous that the accused persons did not dispute setting foot at the farm. This evidence of the shoe prints, though interesting, was hanging. This is because the shoes were not produced. In addition, there appears to have been no sample taken of the

shoe prints from the scene of crime for comparison with the recovered shoes. I am not sure how the state was going to prove the match between the shoe prints and the recovered shoes.

The witness also testified that the first accused led to the recovery of five bags of unshelled maize from where they had been stashed. He also participated in the recording of the accused persons' warned and cautioned statements and indications. When it was put to him that the accused persons were unduly prevailed upon to have the statements confirmed, he stated that he did not attend court on that occasion.

The state produced the accused's confirmed warned and cautioned statements with the consent of the defence.

The first accused testified in his defence. They went to Forrester H after they heard that permission had been granted to pick left over maize. He estimated the number of people in attendance to be around fifty. Whilst admitting that there was violence between the maize pickers and the guards he claimed not to have seen who assaulted the deceased.

Concerning his confirmed statement, he disowned it as not being the one he gave. He claimed to have given a statement in which he denied the charge. Thus he was surprised about the contents of the present statement. He also claimed to have been assaulted by the investigating officer, detective sergeant Maziti and the officer who testified, detective sergeant Sakupwanya.

The second accused also gave evidence similar to that of the first accused regarding the number of people at the field and what transpired there. However, he even sought to deny some aspects that were part of the defence outline. Whilst the defence outline states that the five of them went together to the field he now claimed to have gone with the first accused only. He also claimed that about fifteen people assaulted the deceased.

Concerning the warned and cautioned statement the second accused gave a rather unconvincing explanation. He claimed that he acceded to its confirmation because he had been threatened by the Police Officers. In addition, he stated that the Police Officers were present when the statement was confirmed. He further stated that although he was denying the charge the Police Officers coerced him to admit. It may be noted that the confirmed statement is not an admission of the charge of murder.

Both the state and defence counsels correctly submitted that there is no evidence proving murder. However, Mr *Manhamo* insisted that the evidence is sufficient to prove culpable homicide. On the other hand Mr *Gumbo* submitted that the evidence only discloses

assault and cited several authorities in support of his argument.

The first accused's warned and cautioned statement reads as follows;

"I admit the charge alleged against me. On the 6th of June 2013, in the evening, myself and my young brothers namely Ngoni Chiota, Maxwell Chiota and Tonderai Chiota arranged to go and steal maize from Forrester H. We then went and took Edmore Munyoro from his residence and went to Forrester H. When we got to Forrester H we started picking maize that had been left over when the field was harvested. After picking the maize, I carried my sack out of the field and went to wait for the others at a place where grass had been cleared so as to guard against fire. My colleagues later on came to that place and Ngoni Chiota told us that he had seen a guard of that farm at the side he was picking maize. We then carried our sacks that had maize and we walked going home. On the way when we were near the fields of that farm, I saw a thing that moved ahead of us and hid in a shrub. I picked a stone and threw it and two guards came out running. Myself, Ngoni Chiota, Edmore Munyoro and Tonderai Chiota ran after those guards whilst Maxwell Chiota remained standing. I ran faster and outpaced my colleagues and I caught the first guard whom I assaulted with an open hand. I pushed him and he fell down as my colleagues arrived and caught him. I left them there as I ran after the other guard who had run away. My colleagues remained assaulting that guard. I failed to catch that guard who had run away and when I came back, I found my colleagues had already carried their sacks. I then lifted my sack and followed them. We later went home but we hid the maize that we had stolen in the bush on an ant hill."

The confirmed statement recorded from the second accused reads as follows;

"I do not admit the charge being alleged against me. I admit that I assaulted the deceased. On the 6th day of July 2013, in the evening, myself, Tafadzwa Chiota, Edmore Munyoro and Tonderai Chiota arranged to go and steal maize from the fields at Forrester H farm. We had sacks which we wanted to use in carrying the maize. We went via Edmore Munyoro's home taking him and we went to Forrester H farm. We got at a field at Forrester H farm and started picking maize that had been left over during harvesting. We filled our sacks and carried them going home. Tafadzwa was leading us and he saw people who were ahead of him. Those people asked Tafadzwa who he was and Tafadzwa asked them who they were. Tafadzwa threw a stone at those people and they ran away. Tafadzwa ran after them and he caught one of them whom he assaulted with an open hand and he pushed him down. Tafadzwa left this person and ran after the other one. I also followed running and went to where that person had been caught. I kicked him on the buttocks and assaulted him with an open hand on the back since he was lying down. I ran past that place following Tafadzwa but I did not go far. I then went back. Tonderai and Edmore also followed and also assaulted that person. Maxwell who had remained standing called us so that we would go. We went back and carried our sacks going home. We then agreed that we were supposed to hide that maize fearing that guards from that farm would come to our homes."

It is apparent that there is no direct evidence on the assault perpetrated on the deceased. The only other incriminating evidence is in the form of the confirmed extra curial statements. The confirmed statements constitute confessions to assault. The defence did not object to their production. The accused persons only raised issues regarding the recording of the statements during the course of their testimony. The irregularities claimed by the accused persons were never put to detective sergeant Sakupwanya so as to cast doubt on the

voluntariness of those statements. This is why the accused persons laboured to claim they were forced to admit the charge when it is clear they denied the allegation of murder.

The procedure regarding the production of a confirmed warned and cautioned statement was articulated in *S v Woods and Another* 1993 (2) ZLR 258 (SC) where at p 268 GUBBAY CJ said:

“In *S v Woods & Ors* S-60-93 (not reported) I ventured to suggest that:
“If ... at the stage the prosecutor seeks to tender a confirmed extra-curial statement to the court, the defence is able to raise a potentially sustainable challenge to the propriety of the confirmation proceedings, even though there is nothing ex facie the record to support it, I consider that the court is obliged to determine the validity of that challenge as a separate preliminary issue of fact.”

I went on to say:

“If the challenge is rejected by the court, and the onus is on the State to prove the absence of any irregularity, then s 242(1a) is satisfied and the statement is provisionally admissible with the onus upon the accused to rebut the presumption. No separate trial on the issue of admissibility is required. See *S v Gwaze & Anor* 1978RLR 13 (A) at 17H. If, on the other hand, the challenge is upheld, then the onus remains on the State to prove beyond a reasonable doubt that the accused made the statement and, if he did, that it was made freely and voluntarily and without undue influence. See *S v Gwaze & Anor (supra)* at 18D-E.”

It is not in dispute that there was no challenge to the production of the confirmed statements. That is why in his closing submissions Mr *Gumbo* was constrained to admit that the accused persons had no meaningful challenge to the admissibility of the statements.

Although the accused persons assaulted the deceased, there is the issue of causation that needs to be resolved. Section 11 of the Code provides that:

“1) A person shall not be held criminally liable for a consequence unless the person’s conduct caused or substantially contributed to its occurrence.
(2) A person’s conduct shall be deemed to have caused or substantially contributed to a consequence for the purposes of subsection (1) if the conduct
(a) is the factual cause of the consequence, that is, but for the conduct the consequence would not have occurred; and
(b) is the legal cause of the consequence, that is, the consequence
(i) was a reasonably foreseeable consequence of his or her conduct; or
(ii) was brought about by a new cause supervening after his or her conduct, which cause was itself a reasonably foreseeable consequence of his or her conduct.”

The extent to which the two accused assaulted the deceased is as stated in their warned and cautioned statements. One can only regard that as minor assaults which could not have resulted in the internal injuries that the deceased sustained. I do not think that legally it can be said that the accused persons should have foreseen the possibility of death ensuing as a result of the manner in which they assaulted the deceased.

The accused persons assaulted the deceased separately as evidenced by the warned and cautioned statements. There is a suggestion that the deceased was also assaulted by the other co-accused who unfortunately were acquitted at the close of the state case. A causal connection must be shown between the separate acts of the accused persons and the resultant death. It also becomes difficult, from the available evidence, to conclude that there was a common purpose to assault the deceased. In this respect see *S v Muchita and Others* 1984 (1) ZLR 1 (H).

There is also no basis for concluding that, because the accused persons admitted assaulting the deceased, then they were responsible for inflicting the fatal injuries. That conclusion could have been possible was the evidence to the effect that they were the only people who had contact with the deceased.

In the result, the accused can only be found guilty of assault which is a permissible verdict to murder.

National Prosecuting Authority, legal practitioners for the state
Gumbo & Associates, accused's legal practitioners