

THE STATE
versus
COSMAS JUMO

HIGH COURT OF ZIMBABWE
MUSAKWA J
HARARE, 12 &13 February 2015, 12 March and 24 November 2015

Assessors: Mr Mhandu
Mr Mutambira

Criminal Trial

P. Chikangaise, for the State
T. Zhuwarara, with him *N. Chamisa*, for the accused

MUSAKWA J: The accused person is charged with the murder of Remember Mupasi. The incident occurred on 27 May 2014 along 270th Street, Kuwadzana 3 in Harare. At the close of the state case defence counsel applied for the accused's discharge.

It is common cause that the deceased was attacked by some unknown persons. The deceased's cell phone, a Nokia Asher was subsequently recovered from a person who claimed to have purchased it from the accused person. This led to the arrest of the accused person and another. The other suspect is said to have committed suicide whilst in Police cells.

The accused denies ever having been to Kuwadzana. His defence is to the effect that he visited his sister at number 6 Jumbo Road, Kambuzuma 6. He spent two days there. On 28 May he left for Mbare at 0830 hours in the company of his wife enroute to Gokwe Nembudziya. Whilst waiting for a bus he met an old school mate, Chimika Bauti who offered him a cell phone for US\$20.00. Since he did not have money he offered the phone to a friend, a bus conductor. The friend did not buy as the phone had some problems.

The accused took the phone to Chimika Bauti who rectified the problem. He then took back the phone which he gave to Tafadzwa Muchina. Tafadzwa Muchina in turn took the phone away and returned with US\$30.00. The accused did not see the person who bought the

phone. He was surprised to be accused of murder two weeks later. He was assaulted by Police Officers. He indicated Chimika Bauti as the seller. Chimika Bauti later committed suicide.

Evidence was led from Bothwell Simenti who works as a tout for Zvishandwa Bus Service. On 28 May at 0800 hours he was at Mbare Bus Terminus. The conductor, Tafadzwa remarked to the witness that he had a cheap phone. He further told the witness that someone had a better phone. He was introduced to the accused person who had a black Nokia Asher cell phone which he said he was selling. Tafadzwa had told the witness that the accused had insufficient money for bus fare.

After he inserted a subscriber identity module card (sim card) and memory card, the phone froze. The accused stated that the memory was full and he made some deletions. This took place as they stood by the bus. The accused's wife was present. When the sim card was inserted again the phone began to function. Tafadzwa told the witness that the accused and his wife were regular travellers. The accused stated that the phone was used by his wife and the wife confirmed so. The witness paid US\$30 for the phone.

After a few days Police approached the witness and questioned him. He was arrested and taken to Harare Central Police Station. He denied ever seeing Chimika Bauti. He identified the phone that was produced as an exhibit.

During cross-examination it was put to the witness that there were some aspects of his evidence that were not in his statement to Police. For example, the issue about the presence of the accused's wife. On this aspect, even if the witness omitted that in his evidence in chief, it is not in dispute that the transaction took place in the presence of the accused's wife. The same applies to the evidence regarding the visit to the accused's home where the arrest took place. The witness was also taken to task regarding the inserting of the sim and memory cards.

Tafadzwa Mashina the conductor testified that the accused used to travel on their bus between Gokwe and Harare. On two previous occasions they carried the accused and his wife on credit. They would pay the fare upon reaching their destination. He would hold onto their wares until they paid the fares. His evidence on the transaction relating to the phone is similar that of Bothwell Simenti. He was also put to task regarding the omission of some details from his statement.

Never Mupandira resides in Kuwadzana 3. He testified that during the night he heard someone cry out. He went outside and saw two people jump over a wall to Kuwadzana 1 High School.

He went to where the deceased was and noted that he had injuries to the head. The deceased could not speak. The deceased's sister later came and identified him. It was confirmed that the deceased was on his way home from work at Rainbow Towers. His uniform was in a bag.

The arresting detail and investigating officer, detective sergeant Madzivanyika stated that he received the docket on 5 June 2014. He visited the scene and interviewed witnesses. He established that the deceased lost a Nokia Asher cell phone with line 0774357113. Through Econet he sought the location of the phone. This led him to Bothwell Simenti who implicated the accused whose whereabouts he did not know. He apprehended Tafadzwa Mashina who led them to Musadza Business Centre, Gokwe. From there they proceeded to Chief Gumunyu area where they arrested the accused on 11 June 2014.

The accused implicated Chimika Bauti and led them to Mungate village, Domboshava. Chimika Bauti in turn implicated the accused. Chimika Bauti hanged himself at Rhodesville Police Station on 12 June 2014.

The witness denied assaulting the accused. A warned and cautioned statement was recorded from the accused person by detective sergeant Muuya. The statement was not confirmed because the accused claimed that he had been assaulted. The court ordered that the issue be investigated. The accused's wife told Police that she had been using the phone prior to it being sold.

In written submissions the defence cited s 198 (3) of the Criminal Procedure and Evidence Act [*Chapter 9:07*] as well as relevant case law that has evolved in determining the circumstances under which an application for discharge should be granted. These are *S v Kachipare* 1998 (2) ZLR 271 (S), *Attorney-General v Bvuma and Another* 1987 (2) ZLR 96 (S), *Attorney-General v Mzizi* 1991 (2) ZLR 321 (S), *Attorney-General v Tarwirei* 1997 (1) ZLR 575 (S) and *Tivenge v S* HH-1-14. The principles enunciated in these authorities have become notorious and need not be regurgitated.

The evidence we have is that the deceased was attacked by unknown persons on 27 May 2014. He sustained injuries to the head and shoulders. The head injury was in the form of depressed skull fracture of the left parietal bone. The cause of death was subarachnoid haemorrhage arising from depressed skull fracture because of head trauma. The deceased died on the same day of the attack. The essential elements of the crime of murder are present.

It is not in dispute that the day following the attack on the deceased the accused and his wife were in possession of a cell phone that was identified as having belonged to the

deceased. The accused's defence is that the cell phone belonged to a co-accused who hanged himself whilst in custody.

The evidence from state witnesses is to the effect that the accused sold the cell phone as a means of raising bus fare. The state witnesses denied ever transacting with any other person other than the accused who was in the company of his wife. Following the arrest of the buyer the accused person was traced to his rural home. He in turn led to the arrest of Chimika Bauti in Domboshava.

I do not think that it can be said the state has not led any evidence on which a court acting carefully might convict. It can also not be said that the evidence led by the state is unreliable. The defence takes issue with the fact that no one saw the accused at the scene of crime and the fact that it was not established that the deceased lost the cell phone at the time he was attacked. Basically the contention here is that on what legal principle can a court found liability where there is no direct evidence incriminating the accused person. The answer is circumstantial evidence. However, in my view the court is not at this stage seized with the issue of sufficiency of evidence for purposes of establishing guilt or otherwise as this is done at the close of the defence case. The accused has not testified. So far it is only his defence that has been put to state witnesses. As such, the defence so proffered and put to state witnesses is not such that one can say there is no evidence on which a court acting carefully might convict.

I can not see how the accused can avoid being placed on his defence to explain fully the circumstances that led to his being in possession of a cell phone belonging to the deceased a couple of hours after the deceased had been attacked. The application for discharge is therefore dismissed.

National Prosecuting Authority, legal practitioners for the State
The Chambers: Advocates of Zimbabwe, accused's legal practitioners