

THE STATE  
versus  
DOUGLAS CHINYANI  
and  
CHIREMBWE CHIREMBWE

HIGH COURT OF ZIMBABWE  
MUSAKWA J  
HARARE, 26, 27 March 2015 and 13 November 2015

Assessors: Mrs Shava  
Mr Shenje

### **Criminal Trial**

*T Kasema*, for the state  
*Z Lunga*, for the first accused  
*F Mawere*, for the second accused

MUSAKWA J: At the close of the case for the state, both defence counsels applied for discharge.

The accused persons are charged with the murder of James Tsotsonga (hereinafter called the deceased). It is alleged that; “on 25 September 2011 and along Musvasvi Street, Bindura, the accused, one or more of them unlawfully and with intent to kill murdered James Tsotsonga or realising that there was a real risk or possibility that death might result stabbed James Tsotsonga with a knife on the right shoulder from which injuries the deceased died.” The charge could have been drafted with more precision.

The summary of state case alleges that on 24 September 2011 the deceased left National Railways of Zimbabwe bar and proceeded to Chipadze. He was in the company of Maxima Katembo. They used a footpath. Along the way there was a confrontation with the accused persons. The deceased was stabbed on the right shoulder. Apparently the cause of this tragedy was Maxima Katembo who was the first accused’s girlfriend. As will be noted from the evidence, Maxima Katembo peddled sexual favours.

The first accused's defence outline is very brief. He claims not to have been in Chipadze when the offence was committed. He further claims that Maxima Katembo must either be mistaken or is lying.

On the other hand the second accused claims to have been in Mvurwi where he worked. He only learnt about the incident from his wife when he visited his home in Bindura. Although he had a working relationship with the first accused, they are not friends. He got to know Maxima Katembo after she was introduced to him by the first accused in December 2011. He was arrested in April 2012.

The evidence led by the state essentially centres on Maxima Katembo. She is a simple young woman of limited literacy and intelligence. Her naivety is demonstrated by her casual reference to both the deceased and the first accused as her husbands. This was notwithstanding that she had only met the deceased for the first time on the fateful day.

Maxima Katembo lived on and off with the first accused. She stated that she used to see the two accused together. At the time of the incident she had parted ways with the first accused. The evidence-in-chief of this witness did not flow. Perhaps it was the manner in which the evidence was led. Basically questions were put to her and she sort of gave short answers in reply. It may have been the best to let her narrate everything that took place from the time she met the deceased. Therefore, some details emerged during cross-examination and during questioning by the court.

Maxima Katembo met the deceased who gave her US\$5-00 for sexual favours. As they walked from Chipenda Bottle Store towards Chipadze Shops they came across the two accused and another person. This was along a road behind Chipadze Primary School. The first accused told the deceased that the witness was his wife. A fight then ensued. Initially the deceased was assaulted with bare hands. The first accused then produced a small knife with which he stabbed the deceased. After the deceased fell down the first accused told the witness to accompany him. She was not willing. They then left together with the second accused. They first went to a place called Mupandenyama which is in Chiwaridzo Township. Thereafter they left for the first accused's residence.

She stayed with the first accused for five days. There were eight other tenants at the house. She would do household chores but was afraid to leave. She explained that she was afraid that the first accused would catch up with her. Elaborating on this she referred to a previous incident in which the first accused had assaulted her. This was after she had gone out without his knowledge.

She got to know about the deceased's death after three days. She overheard people talking about a body that had been found. The deceased was described by his nickname, Bolt Cutter which the witness thought was Body Cutter. On the fifth day when the first accused was asleep, the witness absconded. She went to live with a friend, Auxilia at a place she termed 'Clusters'.

The witness also stated that she was ill-treated by Police Officers during the course of investigations. At the Police Station, she claimed to have been beaten on the soles. She further stated that she was also burnt on the arm with a piece of iron that had been exposed to sunlight. As to why this happened, she said she naturally stammers. As she was being interviewed the Officers must have concluded that she was being evasive, hence the assault.

Regarding the second accused, she further explained that he had held the deceased as the first accused assaulted him. She said she knew the second accused simply as Last from Shurugwi. Upon the second accused's arrest she was called to Bindura Police Station where she was shown the second accused. She identified him as the one who had been in the company of the first accused. He was the only suspect shown to her at that time.

Detective Sergeant Chimuto testified that he was allocated the matter on the same day of stabbing. He located one Mavis Meke of 35/36 Masvosve Street who is the one to first see the deceased. Apparently, this woman was not called as a witness. He traced a trail of blood to where he saw the blade of a knife minus the handle. It had blood stains. There was a pool of blood.

Despite interviewing people he made no headway. He also visited the deceased at Bindura Hospital but he did not disclose his assailants. The deceased was transferred to Parirenyatwa Hospital on the following day.

In January 2012 the witness received information relating to Maxima Katembo. As to how he got leads he stated that he picked information from some prostitutes, as prostitutes are some of their sources of information. Maxima Katembo was then picked up. She initially denied knowing anything. It is only when they brought in Auxilia Amando that she then opened up. Detective Sergeant Chimuto further stated that Maxima Katembo referred to the second accused as Last from Shurugwi. She led them to the first accused's residence where he was arrested. They could not establish the second accused's residence until April 2012.

They verified the second accused's alibi of having been at work in Mvurwi. They confirmed that he was at work on 24 September 2011 and finished at 1200 hours. No one

could shed light on the second accused's movements thereafter. When the second accused was eventually arrested they called in Maxima Katembo who identified him.

This witness further stated that he knew the deceased who was an ex-employee of the National Railways of Zimbabwe. He elaborated that he was known as Jimmy or Bolt Cutter. The nickname arose from the brawls the deceased used to be involved in.

Counsel for first accused cited authorities such as *S v Kachipare* 1998 (2) ZLR 271 (S), *Attorney-General v Bvuma and Another* 1987 (2) ZLR 96 (S), *Attorney-General v Mzizi* 19191 (2) ZLR 321 (S) and *Attorney-General v Tarwirei* 1997 (1) ZLR 575 (S). He also made reference to s 198 (3) of the Criminal Procedure and Evidence Act [*Chapter 9:07*] which is the enabling provision for such an application. In his written submissions attacked the reliability of the sole eye witness, Maxima Katembo. Similar submissions were made on behalf of the second accused who also cited the case of *S v Hartlebury and Another* 1985 (91) ZLR 1 (H). In addition, it was also submitted that the second accused's defence of alibi was confirmed. It is also contended that the second accused was not properly identified. The murder weapon is said to be of no probative value as no fingerprints were uplifted from the blade.

The state, in opposing the applications placed reliance on the same authorities referred to by the defence and further cited *S v Tsvangirai* 2003 (2) ZLR 88 (H) as well as *S v Benjamin Paradza* 2006 (1) ZLR 20 (H). In its written submissions the state contended that the evidence of its witnesses was not so discredited or rendered manifestly unreliable through cross-examination.

The authorities cited by respective counsels give effect to s 198 (3) of the Criminal Procedure and Evidence Act which states 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 the sufficiency of the evidence that has been summarised or lack of it that led to the applications for discharge. There are questions that naturally arise from Maxima Katembo's testimony. I have already pointed out that some details of her testimony arose during cross-examination and during questioning by the court. This cannot be the fault of the witness. She only went up to grade 5. She also stammers. Witnesses come in different moulds. A prosecutor must therefore treat each witness differently depending with their idiosyncrasies. It cannot be a one size fits all, as has been noted with this particular witness.

There are witnesses who are garrulous and can just unleash without much prompting. That type needs to be led with specific questions otherwise the record will be cluttered with irrelevant detail. Then there is the reticent, if not docile type, like Maxima Katembo that require a different approach altogether.

Despite the flaws that emerged regarding the manner in which the evidence of Maxima Katembo was led, it cannot be said that her testimony was discredited through cross-examination. There is no question of her being mistaken about the identity of the first accused. She used to co-habit with him, and did so after the incident. Even her identification of the second accused cannot be faulted. She knew him by a different name and by sight. The informal identification by the Police could have been done in a better way. For example, they could have thrown in a few volunteers to be together with the second accused before calling Maxima Katembo.

Commenting on the credibility of state witnesses McNALLY JA in *S v Kachipare* had this to say at 575-576:

“Now, it is true that a court may acquit at the end of the State case where the evidence by the prosecution witnesses -has been so discredited as a result of cross-examination or is so manifestly unreliable that no reasonable tribunal could safely convict on it”  
(per Lord Parker CJ, cited with approval by Dumbutshena CJ in *Attorney-General v Bvuma & Anor* 1987 (2) ZLR 96 (S) at 102-103).

But such cases will be rare. In *S v Mpetha & Ors* 1983 (4) SA 262 at 265 E-F, Williamson J said:

“This would really only be in the most exceptional case where the credibility of a witness is so utterly destroyed that no part A of his material evidence can possibly be believed’ (See also *S v Moringe* 1993 (4) SA 452 (W)).”

The second accused’s alibi does not absolve him. He could easily have travelled to Bindura after he finished work. He was not on night shift. It was not good enough to simply claim that he was at work. It seems he refrained from volunteering to shed light on where he went after work. This was information within his peculiar knowledge. Police Officers could also have done better on this aspect by asking the second accused as to his movements after work. However, the fact that the second accused finished work at mid-day, that Mvurwi is not far from Bindura and that apart from him being known to the first accused Maxima Katembo places him at the scene of crime puts paid to the alibi.

It follows then that it cannot be said with any conviction that the state has not led any evidence on which the court might convict. Therefore both applications are hereby dismissed.

*National Prosecuting Authority*, state's legal practitioners  
*Lunga Gonese Attorneys*, first accused's legal practitioners  
*Gill, Godlonton & Gerrans*, second accused's legal practitioners