

THE STATE  
versus  
AARON JARICHA

HIGH COURT OF ZIMBABWE  
MUSAKWA J  
MASVINGO, 12, 13 and 16 October 2015

Assessors: 1. Mr Gweru  
2. Mr Dhauramanzi

### **Criminal Trial**

*E Chavarika*, for the state  
*Mumbengeranwa*, for the accused

MUSAKWA J: The accused person pleaded not guilty to a charge of murder. It is alleged that on 17 December 2013 and at Mufuka Village, Chief Marozva, Bikita the accused stabbed Joseph Mudzorwi (hereinafter called the deceased) on the left side of the chest thereby inflicting a penetrating stab wound with the intention to kill or realising that there was a real risk or possibility that his conduct might cause death and continued to engage in such conduct despite the real risk or possibility.

The background to the incident is that the accused and the deceased and his cousin Josphat Mudzorwi (hereinafter called Josphat) were at Chinhamo Business Centre where they drank beer. Later at night they went home. It is the circumstances in which they travelled that gave rise to the charge.

The accused confirmed leaving the business centre at mid-night in the company of Josphat. Along the way they met the deceased. Together they walked for a short distance and came to a junction where they parted ways. This happened when the deceased asked for some beer from Josphat and the accused left the two there.

Josphat, the deceased's cousin testified that they left the business centre together with the deceased. He had been drinking with the accused when one Taku who was in the

company of the deceased purchased a crate of opaque beer which they consumed. Along the way the deceased teased the accused about his cattle which he said were lean and few. The accused retorted and said he was better than the deceased who was a traditional healer's aide.

When they got to the intersection the deceased tried to snatch the witness's beer. In trying to ward him off the witness fell down. He got up and went home. He said this was around 2 a.m.

Josphat was of the view that the exchanges between the accused and the deceased were made in jest. In addition, he claimed they were all not very drunk. The accused and the deceased proceeded together as he branched off. When he got home he loitered outside and sang before he retired to bed.

Around 8 a.m. he was awaked by the deceased's wife who reported about the deceased's injury. Together they went back to the deceased's residence. He saw some Police Officers. The deceased had already been taken to Silveira Mission Hospital. They then proceeded to the Police Station.

The witness later saw the deceased after his discharge from hospital. The deceased explained how he had been injured. An attempt to lead evidence of the statement made by the deceased was dismissed as it was hearsay and did not fall within the exception to the rule against hearsay.

He confirmed that following the death cattle were received from the accused's family. The cattle were handed over as compensation.

Tracy Mutimhodyo (hereinafter called Tracy) the deceased's wife also testified. She stated that the deceased arrived around 2 a.m. He knocked on the door and she opened. The deceased reported that he had been stabbed by the accused. He further stated that the accused had demanded payment for ploughing their fields. He then told her that he was going to the Police Station and that the witness should remain home with the child.

Later Police Officers came and took her to the Police Station. However, the deceased had already been taken to Silveira Mission Hospital. It appears Police officers collected her for the purpose of cleaning the deceased's blood that had spilled at the Police Station. This is because the witness stated that she was shown the blood and told to wipe it. She suggested that several statements were recorded from her. In another breadth she said she was interviewed several times.

According to her the deceased died on 5 December 2013 following a visit by the investigating officer when a statement was recorded from him. The deceased was advised to

attend court on 10 December. As the deceased and the witness went to Josphat's home the deceased then collapsed. The witness confirmed that cattle were received from the accused's family. She claimed not to have witnessed the entire transaction.

The witness also stated that as she went to fetch water she saw a trail of blood leading to where the paths branched. This was about ten metres from their home.

Sergeant Madhara the investigating officer is the one who received the report of the stabbing from the deceased. He noted a chest wound that was bleeding. He recorded a statement from the deceased. As the deceased's condition was bad he caused that he be referred to hospital. He later arrested the accused who denied the allegations.

Despite traversing the scene of the possible stabbing he did not observe any blood. He later visited the deceased in order to clarify the earlier statement. In the process he recorded a more detailed statement. The deceased still implicated the accused.

The state also produced the accused's confirmed warned and cautioned statement in which he denied the allegations. The post-mortem report detailing the injuries on the deceased and stating then cause of death was produced by consent.

The accused testified in his defence. He maintained his denial of the allegations. He confirmed that he used to work with the deceased who would be his assistant. Apparently he is a builder and a fitter.

He denied that on the day in question he was drunk. He maintained that when they left the shops or bar he was in the company of Josphat. He claimed that the deceased must have left in one Mapare's motor vehicle. He based this on the fact that when he and Jospaht left they could not find the deceased as well as Mapare. They later came across the deceased who was walking ahead of them and they walked together. He said he established that the deceased had been dropped off at Ali Motors. This piece of evidence is purely hearsay. However, he stated that he told this to the investigating officer.

He denied trading insults with the deceased. Instead, he said it was the deceased who told Josphat not to be mean with his beer as he had no stale. As Josphat branched off the deceased followed him requesting for beer. He then left them.

The accused further stated that the Muposhi homestead is close to the deceased's home. If there had been an attack on the deceased they could have heard that.

The accused's son, Energy Jaricha also testified. It must be noted that he confirmed that he sat in court during the testimony of Josphat. He said he sat for ten minutes before he was advised to go outside.

His evidence was to the effect that on two occasions he held secret discussions with Josphat. The first time was after the deceased's stabbing. Josphat told him that he heard from the deceased's wife who visited him to report the stabbing that the deceased had arrived home at daybreak. He also told the witness that he had left the shops in the company of the accused.

After the deceased's death they met again and Josphat told him he was worried that his uncle Moses was influencing him to incriminate the accused. This is because accused's cattle had been handed over as compensation and they did not want them returned.

The only issue with this testimony is that it was not summarised in the defence outline. In addition, this version was not put to the state witnesses, namely Josphat and Tracy.

Two issues arose for determination as articulated by both counsels. These are whether it can be inferred that the accused is the one who killed the deceased. The second is whether the statement made by the deceased to Tracy qualifies as a spontaneous utterance accompanying an act (*res gestae*).

As observed by respective counsels, circumstantial evidence may sometimes be conclusive proof of the commission of a crime in the absence of direct evidence. But it must always be narrowly construed to minimise reaching a wrong conclusion. In this respect see *S v Blom* 1939 AD 188, *R v Mlambo* 1957 (4) SA 727, *S v Marange and Others* 19191 (1) ZLR 244 and *Teper v R* [1952] AC 480.

The two cardinal rules for deductive reasoning were enunciated in *R v Blom* (*supra*) which has been followed over time. These are-

- (a) The inference sought to be drawn must be consistent with all the proved facts. If not, then the inference cannot be drawn.
- (b) The proved facts should be such that they exclude every reasonable inference save the one sought to be drawn. If the facts do not exclude other reasonable inferences, then there is doubt whether the inference sought to be drawn is correct.

The inference sought to be drawn is that the accused must have killed the deceased as he was the last person in his company. The motive for the killing is supposed to be the insults the two traded as they went home.

The majority view (of the assessors) is that Josphat told the truth that the accused was the last person in the company of the deceased. The minority view is that it could not be conclusively held that Josphat was more truthful than the accused.

It must be noted that Josphat and the accused stuck to their respective divergent versions starting from departure from Chinhamo Business Centre. It was also observed that the accused's claim that the deceased was dropped off at Ali Motors is hearsay. One cannot elevate that to a lie simply because it was not corroborated. In any event, this becomes a non-issue because at some stage of the journey the deceased, the accused and Josphat were together.

Although the majority preferred Josphat's version to that of the accused it equally accepted that the accused impressed as a witness. In terms of demeanour the minority view is that the accused presented his defence very well. He was composed, forthright and articulate. On the other hand Josphat was not so impressive. There were occasions he did not speak audibly and the same happened with Tracy. Both Josphat and Tracy did not speak with the same confidence as the accused person.

Josphat also conceded that he and the deceased tussled for the beer that Josphat held. In the process the deceased grabbed Josphat's shirt. Josphat shrugged him off and in the process he, Josphat fell down. Josphat explained that the fall could have resulted from a combination of slipping and intoxication.

It cannot be conclusively held that Josphat was the more impressive of the witnesses. If that is so, it follows that a doubt is created regarding who was the last person in the deceased's company. It therefore means that the inference that is sought to be drawn is not consistent with the proven facts.

Even if it were to be accepted that the accused was the last person in the deceased's company, it again cannot be the only inference that he is the one who stabbed the deceased. This is because the scene of the stabbing was not established. If the scene was close to the deceased's home, how come the Muposhis did not hear anything? Then, how long did the deceased take to travel from the scene of stabbing to his home? There is also the fact that Tracy could not even alert the neighbours when the deceased arrived and reported to her that he had been injured by the accused. An opportunity was lost to make immediate follow-ups with the accused.

Apart from these observations there was no other incriminating evidence against the accused. For example, the scene of crime was not analysed during daylight. This is despite

the fact that the investigating officer used the same route when he went looking for the accused. According to the investigating officer, he saw no blood and this contradicts the testimony of Tracy Mutimhodyo. During cross-examination the investigating officer conceded that the deceased could have been stabbed at a different place. It was also not clear if the investigating officer ever conducted a search at the accused's home. This is notwithstanding the fact that the accused was arrested away from home. The accused himself stated that he was doing some work at a certain home.

Section 253 (2) of the Criminal Procedure and Evidence Act [*Chapter 9:07*] provides that-

“When evidence of a statement, oral or written, made in the ordinary course of duty, contemporaneously with the facts stated and without motive to misrepresent, would be admissible in the Supreme Court of Judicature in England if the person who made the statement were dead, such evidence shall be admissible in any criminal proceedings if the person who made the statement is dead or unfit by reason of his bodily or mental condition to attend as a witness or cannot with reasonable diligence be identified or found or brought before the court.”

Mr *Chavarika* referred to *S v Bowa* 1964 (4) SA 54 and *S v Tuge* 1966 (4) SA 565.

He summed up the requirements as follows-

- (a) The original speaker must be unavailable.
- (b) There must have been an occurrence that induced some nervous excitement on the part of the speaker.
- (c) The statement must have been made where there was no room for reconstruction.
- (d) The statement must have been made contemporaneously.

According to Mr *Chavarika* the incident occurred in close proximity to the deceased's residence. The report was made in close proximity to the scene of the stabbing. A report was subsequently made to the investigating officer and this amounted to a dying declaration.

The case of *S v Bowa* supra dealt with the requirements of a dying declaration. These are-

- (a) The declaration must be relevant to the cause of death.
- (b) Evidence adduce must relate to a homicide.
- (c) The deceased must have been competent to testify.
- (d) The deceased must have made the utterance when he had a settled hopelessness of death.

*Res gestae* is Latin for “things done”. It is a term found in substantive and procedural American jurisprudence and English law. It is an exception to the hearsay rule for statements that are made spontaneously as part of an act. The concept began to be refined in the 1920’s when a renowned lawyer and educationist, Edmund M. Morgan attacked its reliability when he said-

“This troublesome expression owes its existence and persistence in our law of evidence to an inclination of judges and lawyers to avoid the toilsome exertion of exact analysis and precise thinking.”

As can be noted from s 253 (2) of the Criminal Procedure and Evidence Act the statement that the state relies on must have been made contemporaneously with the act that accompanied it. Contemporaneous means at the same time. In the context of the present case the utterance made by the accused must have been made at the same time or around the time of the stabbing. This is where a problem arises. The deceased is said to have told his wife that he had been stabbed by the accused around 2 a.m. which is the same time he arrived home. It is the same time Josphat said they parted ways. That cannot be, without the distance the deceased covered being unknown. It goes back to the issue of where the stabbing took place. In the context in which the statement was made it is envisaged that the deceased would have cried out at the time the stabbing took place as opposed to reporting sometime after the event.

The statement the deceased made to his wife would have been more appropriate as a dying declaration as opposed to a spontaneous statement. But we know that the statement fails to qualify as a dying declaration because there is no proof that the deceased had lost all hope of survival.

This is a case that could have benefited from collateral evidence other than Police confining themselves to the one witness who was in the company of the accused and the deceased. Because of the want of corroborative evidence it would not be just to make conclusions against the accused based on the evidence available.

In the result the accused is found not guilty and is acquitted.

*National Prosecuting Authority*, state’s legal practitioners  
*Legal Aid Directorate*, accused’s legal practitioners