

STATE  
versus  
OKAY MUUYA

HIGH COURT OF ZIMBABWE  
MWAYERA J  
HARARE, 21 October, 20 November 2013 and 11 August 2016

Assessors: 1. Mr Shenje  
2. Mr Chidyausiku

### **Criminal trial**

*I Chingarande*, for the State  
*T Militao*, for the defence

MWAYERA J. The judgment in respect of this matter was delivered *ex tempore* on 20 November 2013. The defence counsel by letter dated 15 April 2016, requested for the written judgment, which is outlined herein.

The matter is coming up for judgment in an application for discharge at the close of the State case. The defence counsel Mr *Militao* applied that the accused, his client be discharged at the close of the State case. He addressed the court pointing out that at the close of the State case evidence adduced by the State fell short of establishing a *prima facie* case. He sought in the process to highlight loopholes in the State case which he referred to as windows which would show the guilty or innocence of the accused or points of concerns which he drew the attention of the court, which he preferred to refer to as loopholes. The areas of concern as highlighted by the defence were six namely the identification of the accused, the alibi of the accused, the indications at the scene of crime, the forensic evidence, the arrest and detention of the accused, the questioning of credibility of evidence of witnesses.

Mr *Chingarande* for the State opposed the application presenting argument that from the evidence adduced at the close of the State case the State had established a *prima facie* case hence the accused ought to be placed to his defence. Because of establishment of a *prima facie* case the accused according to Mr *Chingarande* ought to be placed on his defence. The background to the application is as laid out below: -

The accused pleaded not guilty to a charge of murder as defined in s 47 (1) of the Criminal Law Codification Reform Act [*Chapter 9:23*]. It is the States contention that on 14 April 2009, and at Vantersburg Farm Mabvuku, Harare the accused unlawfully caused the death of Sheba Tsaura by assaulting him with booted feet and other unknown objects on the head and all over his body intending to kill him or realizing that there was a real risk or possibility that death would ensue.

The brief facts of the State case are that on 14 April 2009 the deceased was walking along a path that passes through Vantersburg Farm Mabvuku when the accused who was in the company of other people attacked him by assaulting him all over the body with booted feet and unknown objects. The accused left the deceased and the other injured three male adults unconscious after robbing them. The accused robbed the deceased of a cell phone Nokia 6110 which was later identified by the deceased's son as his father. The deceased and other three men who had been injured were assisted by one John Gatora and a police detail Frank Maseko to be ferried to Parerenyatwa Hospital where the deceased later passed on 18 April 2009.

In support of the allegations, the State adduced evidence from five witnesses John Gatora, Frank Maseko and Calvin Tsaura whose evidence was formally admitted in terms of s 314 of the Criminal Procedure & Evidence Act. The evidence of Gatora was basically that on 15 April he was walking along path in Vantersburg Farm Mabvuku when he observed four people, male adults who were naked and had injuries. He assisted these men to get a lift to be ferried to the hospital Parerenyatwa. He observed that there were struggle marks at the scene and the deceased was bleeding from the mouth. Frank Maseko a member of the ZRP's evidence, which was also formally admitted. He basically confirmed having assisted the last witness to ferry the injured man to hospital.

Also formally admitted was Calvin Tsaura's evidence which was basically to the effect that his father was robbed, sustained injuries from which he passed on 18 April and that he identified a Nokia 6110 cell phone and a khaki trousers belonging to his father the deceased from the police when they called him in. The Nokia 6110 and khaki trousers were

produced as exh 2 and 3 respectively. The State adduced evidence orally from witnesses as follows: -

Mapondera Gomo told the court that he alighted from a train at around 6 pm at Mabvuku turn off and proceeded to walk home along a foot path. As he was walking there was another elderly man who was walking besides him. Behind them there were other people also walking. The witness narrated how they met four men who attacked them causing them to lie on the ground and stripped them naked serve for their under wears. He told the court that there were left in an unconscious state and that during the assault from which they sustained injuries he could not identify any of the assailants since it had rained that evening and it was dark, further the attack was vicious. The witness told the court that he could not identify the accused person who was in court. He also did not know the now deceased but were just walking side by side on the fateful day. According to the witness his small bag was recovered from one of the assailant's residents in the presence of his wife. His wife was not called as a witness. He clearly knew the names of the accused as Okay Machisa and the other assailants according to him were Kaitano Chakanetsa, Potiphar, Milton Maphosa and he got these names from the police as well as from the court in the magistrate when they appeared for robbery charges.

He confirmed that there was no formal identification parade whereby he and the other survivors identified the accused or their assailants and that since it was very dark on the evening in question and he was under attack he was not in a position to identify the assailants. The witness was candid with the court, his evidence was basically to confirm that the deceased who was in his company and himself were robbed by a group of four. Deceased sustained injuries from which he later passed on. From his evidence it was clear there was a murder which occurred during a robbery.

Ernest Chamunorwa, Tatiwa's evidence was basically that he together with other offices acted on a tip off that the accused and accomplices Potiphar Chakanetsa and Kaitano and Milton had committed robberies in Mabvuku. They arrested the accused from whom they recovered items belonging to the deceased Nokia 6110 phone and a khaki trouser exh 2 and 3. It was clear from the witness's testimony that he was involved during the robbery enquiries and that when the deceased passed on he passed the matter over to another investigating officer. The witness told the court that the accused was in the company of three other accomplices when the offence was committed. He did not know why the State chose to

prefer charges against the one accused in court. He confirmed that the deceased son Kelvin Tsaura identified a Nokia 6110 cell phone and a khaki as his father's property.

It was apparent from the witness's testimony that the accused was not taken to the scene of crime for indications as per the indications document referred to during cross-examination. It was only John Gatora a passerby and the police officers who signed the indications. It was apparent from the witness that he together with other details who were investigating a spree of robberies took a lot of aspects for granted as they had been informed of the robbers and they had had a lead to arrest him. They were hoodwinked by the alleged co-operation which they attributed to the accused and accomplices and in the wake of a murder allegation emanating from robbery omitted a lot of essential investigations and probing. The witness lacked consistency on whether the accused led him to the scene and made indications or not. In the absence of the indications being reduced to writing not even photographs, being taken it was haze whether the accused actually went to make indications and it was not clear as regards what actually transpired.

In fact, as cross-examination progressed the witness changed his version on attending the scene and pointed out that his superior Assistant Inspector Maseko is the one who attended the scene. The witness confirmed that no identification parade was conducted in respect of the suspects. He pointed out that the omission of such identification parade was occasioned by the fact that the survivors like Mapondera Gomo took long to regain consciousness and he went further to say some of the survivors were even mentally disturbed and took longer to recover. The aspect of not taking the three survivors for indications and not having them carry out identification parade remained hollow and unsatisfactorily explained particularly in view of the fact that the witness indicated they took long to recover meaning they recovered even though it took long.

Gift Jeche another police officer told the court that they recovered some property identified as the deceased's property from the accused's place and that accused led them to arrest his accomplices. Gift Jeche another police officer testified pointing out that the deceased's property was recovered from the accused's place and that the accused person led the police to arrest his three accomplices. He was also surprised how the accused was appearing as the only accused in respect of the matter as far as he was concerned as a police officer they were supposed to be four. The witness sought to unconvincingly point out that the accused made indications unconvincingly in the sense that there was no documentation pertaining to such indications. He also pointed out that accused had admitted to commission

of the offence and on realizing that the warned and cautioned statement did not show such an admission he sought to explain his evidence as meaning the accused had shown willingness to co-operate.

It was again clear from the testimony of the witness that a casual approach had been taken in investigation of a murder emanating from robbery. No identification parade and no indications were recorded. The witness just like the other police detail confirmed that the accused was detained for a long period for about 28 days. His explanation for such detention was that accused and his accomplices were required at other police stations. The question is with the accused being available for that long period why were indications not carried out and why was there no identification parade carried out. The witness also confirmed that the accused wife might have been present when they recovered property which belonged to the deceased but he did not satisfactorily account for the witness not being interviewed. He simply said she had done nothing to do with the matter. There was no explanation as regards why the neighbors who were around were also not interviewed it is after the evidence of the witnesses cited above that the State closed its case and the defence applied for the discharge of the accused at the close of the State case.

The question that has to be answered is if the accused chooses to remain silent during the defence case in the face of the evidence so far adduced would a reasonable court acting carefully convict the accused. If the answer is in the affirmative, then the accused ought to be placed on his defence and if it is in the negative then the accused ought to be acquitted. The legal position is fairly settled that an accused should only be placed on his defence where the State has established a *prima facie* case during the State case and not that the accused should be placed on his defence to try and patch up an otherwise hollow State case. In other words, placement of the accused person on his defence is not for purposes of him incriminating himself to assist a weak State case.

In the present case the State has placed before the court that the deceased who was walking with another gentleman was a victim of robbery following which he sustained injuries on the head leading to his death. Cause of death was confirmed by doctor Gonzalez as subdural haematoma on the occipital area head injuries secondary to assault exh 4 was tendered. I must hasten to point out that it is common knowledge that murder was occasioned during a robbery. That position is confirmed from evidence before the court. The State went further to even over zealously produce photographs depicting different positions

of injuries on the body or occasioned on the deceased's body exh 1A to 1E. I said overzealous as the photographs were produced to buttress a common knowledge aspect.

The deceased died as a result of being assaulted, an assault which occurred during a robbery. The question that has to be placed side by side with evidence adduced by the State at the close of the State is who assaulted the deceased together with the three other men inflicting injuries from which the deceased died. That question begs of answer given the evidence before the court at the close of the State case, and it remains unanswered at the close of the State case. Only one survivor of the robbery Mapondera Gomo was called to testify and the other two gentlemen were not called and no explanation was given for such omission given that Mapondera Gomo clearly stated he could not identify the deceased and his assailants given the vicious attack and the darkness of the evening. His evidence was that they were attacked by four people, assaulted robbed, left for the dead, seriously injured and one of them died.

His linking of the accused with the offence was merely from evidence obtained from the police in an inadmissible manner. Again, this brings the question how then were the four tried for robbery in which a murder allegedly occurred but this is simply in passing. The State in its wisdom or lack of it chose to proceed against one accused in respect of a murder charge which is buttressed on the robbery which is alleged to have occurred. The survivors, the other two were not called to testify. The two police detail's evidence was that accused failed to account for a cellphone and khaki trousers which was recovered from his residence during the presence of the accused's wife and some neighbors. The accused's defence outline clearly shows he disputes having been part of the robbery gang. The neighbors who are alleged to have been there when the property was recovered and the accused's wife were not called to corroborate such evidence.

Assuming he was in possession of the property which was recovered in the absence of the corroborative evidence from the neighbors what is it then that links him to the commission of the murder. More so when viewed in conjunction with the absence of recorded indications and identification parade at the scene of crime, would that evidence on its own be sufficient to place the accused to his defence and if he chooses to remain quiet in the defence case will there be evidence before the court on which to convict of the allegation of murder labeled against him. One of the survivors mentioned that his small bag was recovered by the police during the presence of his wife and he mentioned that his wife was

going about with the police as they were carrying out the recoveries and effecting the arrest but she was not called to testify.

In short no third party was called to confirm the accession by the police as regards recovery. The two police detail who testified, none of them made it clear that indications were carried out. On realizing the omission, they sought to explain it by saying it was an issue of resources but I must comment indications do not necessarily have to be photographed, they can be written indications. Even in his opposition to the application the State counsel buttressed this aspect of resources constraints. The question is should justice be compromised at the expense of taking judicial notice of resources constraints. The answer to that is definitely no. this is not to suggest that the court is buying the assertion and argument that there were resources constraints. This is clearly a case where there was neglect of duty in terms of investigation. A lot of things were taken for granted simply by dancing under the tune of co-operation from the suspects. At the close of the State case there is no reliable evidence upon which a reasonable court acting carefully might properly convict. See *State v Tsvangirai & Others*, ZLR, 2003 (2) 88 and also *Attorney General v Makamba*, ZLR (2), 2005 54.

Excitement that the robbers in an area had finally been netted took over events and took over investigation. The murder component of this allegations was completely forgotten. During presentation of the case at some instances the State sought to rely on inadmissible evidence as he sought to request from the police what the accused would have said. The court will not take regard of that. What do we have then at the close of the State case other the common knowledge aspect that the deceased was murdered during a robbery and that the matter was shrewdly and ineptly investigated. The question that remained looming is who murdered the deceased more so given that the survivor of the robbery told the court that there was no identification parade which was conducted and that the other survivors were not interviewed or called to testify and that the State witnesses and the police officers indicated that the suspects were four but there is only one accused yet they say those other three are readily available.

Given the glaring loopholes in the State case at the close of the State case the application by the defence for the discharge of the accused at the close of the State for want of evidence, for failure to establish a *prima facie* case is upheld and granted. Given such loopholes and the technicality or failure to properly investigate the matter the accused cannot

be placed to his defence for purposes of incriminating himself and is entitled to a verdict. He is accordingly found not guilty and acquitted.

National Prosecuting Authority, State's legal practitioners  
Kwenda & Chagwizira, defence's legal practitioners