

THE STATE

Versus

MIKE TSHUMA

IN THE HIGH COURT OF ZIMBABWE

CHEDA J

BULAWAYO 31 MAY 2012, 1 JUNE 2012, 25 OCTOBER 2012 AND 21 NOVEMBER 2012

Mr T. Makoni for the state

Mr Z. Ncube for the accused

Criminal Trial: **Ruling on a trial within a trial.**

CHEDA J: This is a ruling on a trial within-a-trial arising from the proceedings of a murder trial. The accused pleaded not guilty to the charge.

During the course of the trial, the State through *Mr Makoni* sort to produce a warned and cautioned statement, allegedly made by the accused. However, the accused, through his legal practitioner, *Mr Ncube* objected as he alleged that the statement was improperly obtained, therefore challenged it.

The state called the Investigating officer, Detective Assistant Inspector Lungisani Pius Tshuma who was the investigating officer in this matter. His evidence was that he has 15 years experience in the Police force and on the 28 October 2010 he warned and cautioned accused in connection with the murder of Endboy Moyo which occurred between the 5th and 8th August 2010. He stated that accused elected to make a statement and told them that he knew the deceased during his lifetime. He asked him if he wanted the services of a legal practitioner to which he stated that he could not afford one. The accused narrated the events and/or circumstances that led to the deceased's demise. The investigating officer wrote it down for him as accused advised that he was illiterate. He thereafter read it back to him and he signed it. Accused was taken before a magistrate for the confirmation of the said statement and it was duly confirmed. He further stated that during the confirmation proceedings both himself and another Police officer were outside the court room except the court officials who remained inside. It was further his evidence that he took accused for photographs and all the

indications he made at the scene were made freely and voluntarily without any threat or undue influence being made to bear on him.

The state also called one Noddy Zimwa who is also a police officer, and he was part of the investigations. His evidence was that he was present when a warned and cautioned statement was recorded from the accused. His evidence is similar to that of Detective Assistant Inspector Tshuma in all material respects. He also stated that accused gave his evidence freely and voluntarily without any undue influence from anybody. It was further his evidence that Detective Assistant Inspector Tshuma wrote down a statement for him as he stated that he was illiterate, but, was however able to write and/or sign his name which he did. The statement was read back to him. He also went further and stated that there was no police officer present when the warned and cautioned statement was confirmed by the magistrate. The State then closed its case.

The defence through Mr *Ncube* led evidence from the accused himself. He told the court that he was arrested for stock theft and is presently serving a sentence for that offence. He was taken by members of the Police homicide section from Khami prison for investigations. It is his evidence that the Investigation, Officer Detective Assistant Inspector Tshuma and four others assaulted him forcing him to admit killing the deceased. He ended up admitting the offence as a result of the assault. He further told the court that he was taken to the scene of the crime where he was made to point at a hole where the deceased was found and photographs were taken while he was doing so.

It was further his evidence that he was later taken before a magistrate for the confirmation of his warned and cautioned statement which he had not voluntarily made. When he got to the court room Detective Assistant Inspector Tshuma together with other police officers sat at the back of the court room while he was in the dock. He admitted having made the statement but did not do so freely and voluntarily as he had been threatened by the police. However, he did not suffer any injuries as according to him they were hitting him on the knees and feet.

It is his contention that the statement allegedly made by him was infact made by the investigating officer who manufactured and wrote it down. All he did was to append his

signature on it. The indications he made were stage managed by the police who asked him to point at the hole where the body was found and thereafter took photographs so as to appear as if he was voluntarily making those indications.

The question which falls for determination is whether or not the statement by the accused was freely and voluntarily made. It is trite that before any statement by an accused can be admitted in evidence against him, the court should be satisfied that such statement was voluntarily made. The accused should have made it without feeling that he was legally bound to do so, see *R v Van Blerck* 1919 CPD 68.

A trial within-a-trial requires proof beyond reasonable doubt that the accused voluntarily made the statement; see *R v Barlin* 1926 AD 459. It is a requirement that the prosecution must prove that the statement was made freely and voluntarily in the sense that it had not been induced by any promise or threat proceeding from a person in authority. Failure to do so will result in that statement being rendered inadmissible.

The prosecution must lead evidence to show that the statement was made voluntarily after which the accused should give or lead evidence to discredit evidence of the prosecution.

In casu the state led evidence regarding the recording of the statement of the accused and further corroborated it by its witness, Noddy Zimwa. Thus, the evidence led established that:

- (a) accused was removed from prison where he is serving a prison term;
- (b) was taken to the scene of crime;
- (c) he indicated a place where he had buried the deceased;
- (d) he elected to make a statement in his own language, *Isindebele*, of which Detective Assistant Inspector is proficient,
- (e) the statement was recorded by Detective Assistant Inspector Tshuma since accused claimed illiteracy;
- (f) he signed the statement after it had been read back to him;
- (g) he was taken before a magistrate who confirmed the statement after putting relevant questions to him to establish whether the statement was freely and voluntarily made and

(h) that the police officers were not in the court room during confirmation proceedings.

As accused indicated that he was challenging the statement it was now his duty to cross-examine the state witnesses in order to discredit them. He indeed cross-examined them and also gave evidence. However he failed to discredit them.

I find that the State witnesses gave evidence very well without seeking to exaggerate. They had no personal interest in the case other than a professional one. The state proved that accused had not been promised anything as an inducement to give a statement or make indications and no violence or threats of violence were used against him.

The accused therefore failed to discredit the state with regards to its assertion that the said statement was voluntarily made.

I therefore find that accused gave his statement voluntarily and as such the warned and cautioned statement is admissible as evidence.

*Criminal Division, Attorney General's Office, the applicant's legal practitioners
Calderwood, Bryce Hendrie and partners, respondent's legal practitioners*