

THE STATE

versus

TAURAI DONHAI MURAMBATSVINA

and

JOSEPH MURAMBATSVINA

IN THE HIGH COURT OF ZIMBABWE
MAKONESE J
GWERU 19, 20 AND 21 MAY 2014

Mr *Mpariwa*, for the state
Mr *Mashoko* for accused 1
Ms *Takaendesa* for accused 2

Criminal Trial

MAKONESE J: This is an application for the discharge of accused persons at the close of the state case in terms of section 198 (3) of the Criminal Procedure and Evidence Act [Chapter 9:07]. The relevant section provides 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.

The accused persons are facing each one count of kidnapping and murder. The allegations as contained in the charge sheet on count one are that on the 11th of January 2004 and at Donhai village, Gumunyu, Chief Chireya, Gokwe, the accused persons and unlawfully and intentionally deprived Getrude Zarima a female adult aged 34 years of her freedom of bodily movement.

In count 2 the state alleges that on the 11th of January 2004 at Donhai village, Gumunyu, Chief Chireya, Gokwe, the accused persons did unlawfully and with intent to kill Getrude Zarima a female adult aged 34 years assault her all over the body with unknown objects, thereby causing injuries that resulted in her death. The accused persons are brothers.

The State opened its case by tendering into the record, the state outline (Exhibit 1) and the Defence tendered defence outlines for Accused 1 and Accused 2 both marked Exhibits 2 and 3 respectively. The state then tendered confirmed warned and cautioned statements authored by the

two accused persons in respect of both counts, as Exhibits 4 to Exhibit 7. A red pleated skirt of moss type was entered into the record as Exhibit 8.

The state then led evidence from five witnesses, namely, Edna Dzingira, Memory Zarima, Ruvarashe Zarima, Misheck Chipanga (also known as Mbanu) and Shepherd Zarima.

I shall not repeat the evidence of the aforesaid witness but shall endeavour to summarise such evidence and then indicate the court's findings relating to the evidence.

I shall then consider the law on this subject and determine whether an application for a discharge at the close of the state case should be granted without placing both accused persons on their defence.

The evidence of **Edna Dzingira** confirms that she was the last person to see the deceased alive on the 11th January 2004. She indicates that on the night in question the deceased came to her residence while she was already sleeping or preparing to sleep. She had come to while up time. It is not clear what time it was but this was well into the night. The witness testified that shortly after the arrival of the deceased a male voice summoned the deceased to come outside. She told this court that the person who called out the deceased must have been accused one. She recognised his voice. The deceased went outside. She then proceeded to sleep. She remained steadfast that the person who called out the deceased was Accused one. The witness confirms that the deceased went missing and the following day she made efforts to locate her but failed. For some reason the witness did not wish to disclose to deceased's family, that Accused one had come to her residence to collect the deceased that night. If this had been done early the search for the missing person would have commenced on the 12th of January 2004 or indeed in the following days. It is my view that the evidence of Edna Dzingira was fairly stated without any exaggeration but did not really assist in proving the allegations against both accused persons.

The next witness for the state was **Memory Zarima**. She was very young at the relevant time. She confirmed that on the night of the 11th January 2004 she had seen Alico Shoko in the residence of the deceased. She confirms further that the deceased prepared and served Alico Shoko with supper that evening. She saw Alico Shoko leaving. She testified that she knew that the deceased had gone to Edna Dzingira to while up time. The witness did not see the deceased again that night. Regrettably the evidence of this witness did not, again, assist the state case. The witness raised an important issue regarding the discovery of pair of homemade sandals said to belong to Accused 2. She narrated that sometime after the disappearance of the deceased

Accused 2 came and demanded his home-made sandals from the deceased's residence. However, for some reason or the other the sandals were handed back to Accused 2 even though the deceased had been reported missing for sometime when Accused 2 came to collect the sandals. The deceased's father never saw it fit and proper to raise the alarm at that stage and hand the sandals to the law enforcement authorities. This piece of evidence raises more questions than answers as to the manner in which the matter was handled, especially and particularly by the deceased's relatives. It seems common cause that at the time of the disappearance of the deceased, most people in the village knew that deceased and Alico Shoko were in love and about to get married. The discovery of any other man's sandals in deceased's bedroom hut should have raised concern and yet the issue was ignored and the pair of sandals handed back to Accused 2. It is even more worrying that Accused 2 was not taken to task by any of the deceased's relatives about the presence of those sandals in the deceased's bedroom hut on the night of her disappearance.

The state then called **Ruvarashe Zarima**. She is a sister to the deceased. She resides at a place called Tchoda in Gokwe North. The place is some distance away from where the deceased resided. She said that she had to board kombis to get to the deceased's home. Her evidence relates to the recovery of Exhibit 8 the red pleated skirt of moss type. The method of the recovery of the skirt leaves a lot to be desired and the evidence of Ruvarashe Zarima was hard to follow. I found the witness to be uncomfortable on the witness stand. She stated that on a certain day in 2012 she was panning for a gold along Mbumbusi river. She just woke up in the morning before sunset and started walking along the river fishing. She says she would catch fish and then throw them back into the river. She confirms that she was not in the right frame of mind and cannot explain what was happening to her on that day. She says when she arrived at a deep and dark pool she felt overcome by some unknown sensation, she says she took off her blouse and immersed it in water before she prayed to God. She says she was gripped by fear and shock and she saw blood in her eyes. At that stage a red-skirt was "revealed" to her in the water. She took the skirt which was blood stained, and observed that close to the skirt was a black blouse, a doek and a wrapping cloth (also known as Zambia) which was on top of a sack. She tried to open the sack but failed. She took the red skirt and left the rest of the items and walked back to the panning site where she spread out the skirt to all the persons present for them to see including her brother Shepherd Zarima. After a period of about a week the witness took the skirt to the police

at Tchoda. The police asked her to take back the skirt for safe keeping. The following are the unanswered questions raised by the testimony of this witness:-

- (1) was the witness in a trance when she recovered the skirt?
- (2) was the skirt the one belonging to the deceased who had gone missing some several years before his discovery?
- (3) why was the skirt not immediately taken to the police as an Exhibit?
- (4) why did she wash vital evidence in the form of blood stains on the skirt?
- (5) why did the witness decide to leave the blouse, doek and wrapping cloth?
- (6) what happened at the scene the following day? Where there bare footprints as alleged by the witness or was nothing observed because the rain had fallen heavily that night?

The evidence of Ruvarashe Zarima cannot pass the credibility test. The evidence is of such a nature that the court cannot objectively rely on the evidence as cogent and reliable for the reasons alluded to above. There were material contradictions in her evidence and that of the other state witnesses. The impression given to the court was that her evidence was somewhat exaggerated. It is unsafe to rely on such evidence.

The next witness for the state was **Misheck Chipanga** (also known as Mbano). The court could not take the evidence of this witness seriously. His evidence was to the effect that on some unspecified date he met persons whom he believed to be Accused 1 and some other unknown persons. They threatened him by saying they would make him disappear. The court was not informed as to why the Accused 1 could or would threaten him. There was no bad blood between the witness and accused persons. His claim that he left the village (that is Donhai village) because of persistent threats by accused persons is not substantiated. In any event and most crucially the alleged threats against Mbano were not linked in the slightest degree to the disappearance of the deceased. If indeed Mbano was in possession of any vital clue as to the disappearance of the deceased and for which he was being threatened and terrorised by accused person he would have brought such information to the attention of the court. We find therefore, that the evidence of Mbano was of no probative value to the state case.

The last witness for the state was **Shepherd Zarima**. He was a brother to the deceased. He also resided at his own home far away from where the deceased resided at the time of her disappearance. This witness was composed. He gave his evidence fairly and did not seek to exaggerate events. He conceded that most relatives doubted the claims by the Ruvarashe Zarima,

that the red skirt she had found belonged to the deceased. He said it was only after Ruvarashe had insisted that they agreed to take the skirt to the police, after about a week and some few days. One wonders why the relatives doubted Ruvarashe's assertions. Could it be that when they inspected the scene where the skirt was recovered and made their observations they were not satisfied with her story? Shepherd claims that sometime in the year 2011, Accused 2 came and told him that Accused 1 wanted to pay compensation in respect of the disappearance or possibly murder of the deceased. The witness said he did not report this event to the police because it would tend to compromise investigations. The court finds the explanation to be unconvincing particularly given that accused persons had been arrested in 2007 and released. Their arrest was not something new. It seems to me that the value of the assertion by Shepherd on this aspect is weakened by his failure to report to anyone about such a development. That alone in my view casts doubt on the truthfulness of that account. In many respects the evidence of Shepherd Zarima contradicted the evidence of Ruvarashe and Mbano.

It is my view that at the close of the state case what we have are suspicious that accused persons could be linked to the disappearance for the deceased. The law, requires that there be evidence upon which a reasonable court may convict before an accused person is placed on his defence. The state has conceded that it lacks adequate circumstantial evidence upon which this court could be invited to place the accused on their defence. The body of the deceased was not recovered. There is no post-mortem report. The court shall never know what exactly happened to the deceased person. It is not for the court to rely on speculation and rumor. The court is obliged to apply the law. The law regarding circumstantial evidence is well settled in our law. The position was well formulated by WATERMEYER;JA in the case of *R v Blom* 1939 AD 288, where the learned Judge of Appeal summed up the position by referring to two cardinal rules of logic which he referred to as follows;

- “(1) The inference sought to be drawn must be consistent with all proved facts. If it is not, than the inference cannot be drawn.
- (2) The proved facts should be such that they exclude every reasonable inference from them save the one to be drawn. If they do not exclude other reasonable inferences, then there must be doubt whether the inference sought to be drawn is correct.”

See also the case of *S v Marange* 1991 (1) ZLR 244 at page 249 and *S v Masawi and another* 1996 (2) ZLR 472(S)

In *casu*, the state sought to place reliance on the evidence of Edna Dzingira, Memory

Zarima, Ruvarashe Zarima, Misheck Chipanga (Mbanu) and Shepherd Zarima. The evidence of the state witnesses is manifestly unreliable and inconsistent that no reasonable court can convict the accused persons on such evidence. The investigations into the murder were not conducted properly and the totality are pieces of evidence not consistent and sometimes pointing in different directions.

In terms of section 198 (3) of the Criminal Procedure and Evidence Act, the court shall acquit the accused at the close of the state case where there is inadequate evidence.

I agree with the defence counsel that the evidence that has been adduced by the state is manifestly unreliable and has been so discredited under cross-examination that no reasonable court exercising its mind properly could convict the accused persons. The state has in my view failed to establish a *prima facie* case.

I shall not deal with the issue of the alleged confessions. In terms of section 273 of the Criminal Procedure and Evidence Act there must be competent evidence other than the alleged confession that proves that the offences were actually committed. In any event the alleged confessions are not direct confessions of guilt. It would be necessary to adduce evidence *aliunde* to establish beyond a reasonable doubt that the accused did commit the heinous crime of murder.

The court has no option under the circumstances, but to find that on the evidence led so far, the state has not placed before the court sufficient evidence to invite the court to place the accused on their defence. I therefore conclude that the concession by the state was properly made.

Accused persons are accordingly found not guilty in respect of both counts and are acquitted.

*Criminal Division, Prosecutor General's, state's legal practitioners
Jumo Mashoko and partners, accused 1's legal practitioners
Danziger and partners, accused 2' legal practitioners*