Judgment No. HB 7/2003
Case No. HC 37/2001

THE STATE

Versus

CHARLES NEIL TRECEAY

IN THE HIGH COURT OF ZIMBABWE
CHIWESHE J
BULAWAYO 19, 20 & 21 NOVEMBER 2002

H. Ushewokunze III for the applicant
Adv. T A Cherry (instructed by J James) for the respondent

Judgment

CHIWESHE J: The accused is charged with murder it being alleged that on 22 August 1999 at Greyville Equestrian Centre, Douglasdale, Bulawayo he wrongfully, unlawfully and intentionally killed and murdered one Vivian Marlyn Vassilieff, a female adult.

The summary of the state case is to the following effect. The deceased was the owner of a riding school known as the Greyville Equestrian Centre in Douglasdale, Bulawayo. She was known to the accused in that the accused had at one time been riding at the centre. On or around 22 August 1999 the deceased had made arrangements to have dinner with the accused. On that day the accused proceeded to the deceased's house as per invitation. They had dinner together. "In the process deceased got killed." The accused then ferried the deceased's body at the back of her Nissan truck and drove all the way to the Beitbridge area where he buried the body in an open pit at Paude Mine. The accused was later seen driving deceased's vehicle and selling clothes belonging to the deceased. Most of deceased's property including a .22 Colt pistol were recovered from him. The vehicle has not been recovered. The deceased's decomposed body was recovered after eleven days.

In his defence outline the accused person denies the allegations levelled against him. He admits visiting the deceased's residence on 22 August 1999 at the deceased's invitation. He stated that he and the deceased partook of some alcoholic beverage. He had previously taken a quantity of Rohypnol (Flumitrazepam) tablets which had been prescribed for him. He alleges that this hypnotic drug can cause bizarre and unpredictable conduct. He further states that he suffers from an "Anti Social Personality Disorder" which may affect his conduct. He also has a large arachnoid cyst in the right frontal lobe of his brain. His recollection of what transpired that evening is extremely confusing. He avers that as a result he has made various conflicting and inconsistent accounts of what transpired. He would deny that any indications made or statements made accompanying those indications were made freely and voluntarily. He states that he was seriously assaulted by the police a fact he reported to the magistrate. He would say that any unlawful act proved to have been committed by him (and he admits no such act) was done by him whilst in a state of diminished responsibility.

The following exhibits were tendered by consent. The post-mortem report number 643/572/99 compiled by Dr M K Kayembe (exhibit 3), the accused person's warned and cautioned statement (exhibit 4), an affidavit sworn to bya psychiatrist, Dr Elena Poskotchinova (exhibit 5), an affidavit sworn to by Professor L F Levy, a medical practitioner (exhibit 5(a)), an affidavit sworn to by the Government psychiatrist Dr F B Chikara (exhibit 5(b)), a report by Dr K Naik in respect of a brain scan conducted on the accused person (exhibit 5(c)) and an affidavit sworn to by D J Broomberg, a clinical psychologist (exhibit 5(d)).

The state called five witnesses. The first state witness was David Hanisi Sedeya. He told the court that he was employed by the deceased as a cook. He had been granted time off for the period 22 to 25 August 1999. On 25 August 1999 he had returned to work. He proceeded to his quarters where he changed into his usual uniform. He proceeded to the main house to commence his duties. He found the door to the main house open. The lights were on and the stove warmer had also been left on. There was food all over the stove and the pots. The window in the sitting room was open and things were in general disorder. He proceeded to the deceased's bedroom. There was no one in that bedroom. He discovered that the deceased had left her handbag. She normally carried it wherever she went. The witness then phoned the deceased's friend, a veterinary surgeon called Dr Boye. It was Dr Boye who then phoned the police. The witness also noticed that the deceased's vehicle (a Nissan pick up cream-white in colour) was not at the premises.

The second state witness was Peter Robert Strobel. He was the deceased's mechanic and plumber. On 22 August 1999 the deceased had spoken to him at a church service. She had locked her keys in a cupboard and wanted the witness to come to her house and attend to that problem. He said that he visited her that evening. Whilst there he learnt that she was expecting the accused person for dinner. She advised him that she had been trying to cancel that engagement by phone. The witness duly opened the cupboard and retrieved the keys. Thereafter the witness and the deceased came out of the house. They met the accused outside. The deceased introduced the witness to the accused person. The witness and the deceased discussed further works needing attention at the premises. The accused according to the witness

followed them behind listening to their conversation. The witness under cross examination admitted that the accused had not attempted to hide his identity. The witness had suggested to the deceased if he could take the accused with him to town seeing as she had intended to cancel dinner with him. The deceased declined the suggestion and showed the witness a short gun which she said she would use if attacked. She did not say why she expected to resort to the use of the short gun. The witness left the premises between 6.30pm and 7pm. He had visited the deceased with his family. Also present at the premises was a youngster called Karl Zechmer. The witness was unable to say why the deceased felt uncomfortable on account of the presence of the accused person. He said that the accused had told him that he was staying in Killarney but working in Mozambique. Under cross examination the witness said he was aware that the deceased was having problems with her marriage. She had been married four times. She also had health problems relating to her goitre. She had a thyroid condition for which she took medication.

The third state witness was Clement Sithole. He is a petrol attendant at a service station in Beitbridge. He had known the accused person prior to the events leading to the present case. The accused used to work at Beitbridge for a company involved in third party insurance. On 23 August 1999 the accused had come to the service station seeking to refuel. It was around 7.30pm. He was driving a yellowish pick up. He was driving alone. As the witness was filling the said car the accused person indicated to him that he was selling two watches and a blouse. On being shown the items the witness decided to buy the blouse. He was charged one hundred dollars.

The witness did not enquire as to where the accused had got the items he was selling. After serving him with fuel, the accused left. The witness never saw the accused again.

During cross examination it became apparent that the witness had given two statements to the police – one on 18 November 1999 and another on 2 September 1999. In the former he had said that he had met the accused sometime in August 1999 whilst in the latter he had been specific about the date of the meeting namely 23 August 1999. It had been suggested to him that he had mentioned the exact date in his evidence in chief as a result of a leading question put to him by the prosecution. He was also quizzed by the defence pertaining the description of the motor vehicle driven by the accused person on the day in question. In his statement he had described it as being white in colour when in his evidence in chief he had described it as yellow in colour. The witness said that it was yellowish white. He said that the blouse he bought from the accused person had been taken by the police. It has not been produced in evidence.

The fourth witness was Matthew James Dahl. He is a Zimbabwean born South African citizen. He is related to the deceased. They are second cousins. He lives in South Africa but visited the deceased regularly in Bulawayo. On 26 August 1999 he received a telephone call from Dr Boye concerning the deceased's disappearance from her home. He immediately left for Zimbabwe. He made several inquiries on the matter and assisted the police with the investigations. He is a qualified reflexologist who had treated the deceased on several occasions. He was able to identify the deceased's body at the mortuary by feet, teeth and physical

appearance. He also identified the body by facial operations which had been confirmed by the doctor. He said that he was aware that the deceased had a thyroid problem for which she had been receiving treatment. Otherwise she was a very healthy person. He said that he had not seen any signs of trauma or injuries on the deceased's body. He was aware the deceased had had cosmetic surgery. He had also seen some implants which the doctor had removed from the body. He said that implants could pause danger to the patient if they leaked or burst and that they also could have a toxic effect. He was aware also that the deceased's marriage (her fourth) was on the verge of collapse and that she was living as a single person. He would not be drawn to say whether or not in her situation she needed to seek male entertainment. The witness said that the deceased's house was out of bounds to her horse riding clients. Although initial interviews would be conducted at the house, clients would not be expected to visit the house thereafter as it was a restricted area.

The last state witness was Lahliwe Nyathi. She was employed by the deceased as a housemaid. Her duties were to clean the house and to do the laundry and ironing. She as such was familiar with the deceased's clothing. On 1 September 1999 she was shown certain clothing by the police. She identified the clothes as belonging to the deceased. These were panties, a bra and a sleeveless dress. She had been in the deceased's employ for seven months. None of these items were produced in evidence. The state had intended to call two further witnesses – a pathologist and a sixteen year old boy from Beitbridge. The witnesses were not immediately available. The case was adjourned. On resumption the state reported its failure to secure the witnesses and proceeded to close its case.

The defence applied for a discharge at the close of the state case on the grounds that there was no case for the accused person to answer. It was argued in support of the application that none of the state witnesses had linked the accused person to the commission of the offence. The first state witness David Hanisi's evidence was to the effect that he found the deceased's house abandoned. Although his evidence shows that the house was in a state of disorder and untidiness, he was unable to advert to any signs of struggle or violence. He did not implicate the accused person in any way. The second state witness Mr Strobel met the accused person at deceased's house. The accused person did not hide his identity and acted normally throughout. Although the deceased was apprehensive of the accused's presence she did not confide to the witness why she felt that way and why she had nonetheless invited the accused for dinner. Otherwise all this witness can establish is that the accused person was at deceased's premises that evening for purposes of having dinner at the invitation of the deceased.

The third state witness testified to the fact that he had on or about 23 August 1999 seen the accused person driving a "yellowish white" Nissan pick up. This vehicle is similar to the one that belonged to the deceased save that the witness was unable to say whether it was really white or a shade of white. He did not give its registration number. He bought a blouse from the accused person. He did not describe the blouse nor was the blouse produced as an exhibit. In this regard it was not therefore shown that the blouse so sold belonged to the deceased. There is a missing link between his evidence and that of Lahliwe, the last state witness, that

tends to confirm that the blouse they both refer to is indeed the same blouse belonging to the deceased. The items referred to by the two witnesses have not been produced in order that the witnesses confirm their evidence. The items were supposedly taken by the police for purposes of production as exhibits in this trial. The vehicle belonging to the deceased and allegedly driven by the accused has not been recovered.

The third state witness Mr Dahl is a relative of the deceased. It was him who identified the deceased's body at the mortuary. His evidence does not implicate the accused person in any way.

I agree with the defence counsel that the evidence presented by the state is insufficient to establish a prima facie case upon which the accused person may be put on his defence. It is unlikely in my view that a reasonable court would convict on the basis of the evidence at hand.

More importantly vital police evidence has not been adduced. Firstly the accused person is challenging the admissibility and probative value of his warned and cautioned statement on the grounds that it was not made freely and voluntarily. Whilst the onus rests on the accused person in this regard (the statement was confirmed by a magistrate) that fact does not absolve the state from its duty to put before the court evidence which prima facie would tend to show that the normal procedures were complied with during the recording and confirmation process. In the absence of evidence from the police officer who recorded the statement and his witness, if any, and the magistrate who confirmed it, the statement cannot stand. Allegations made in the state outline must be supported by evidence, particularly

where no admissions have been made and moreso where the allegations are as in this case denied.

It is trite that a court may not convict an accused person purely on the basis of a confession unless there is evidence *aliunde* corroborating the contents of such a confession. In this case it has not been established that the body retrieved at Beitbridge is the same body identified at the mortuary as being that of the deceased. In fact there is absolutely no evidence of the recovery of the body. Any reference to such an exercise is to be found in the state outline and in the accused person's warned and cautioned statement. It was imperative that the state adduces the evidence of the police officers who recovered the body. Accused is alleged to have made indications leading to the recovery of the body. These indications have not been included in the evidence before the court. We are informed that one of the police details has since died and that the other is serving a prison term relating to another case. No reason has been advanced as to why the serving police officer has not been called. It is inconceivable that only these two police officers were privy to the investigations. Surely other officers must have been involved at one stage or another. None have been called. There is also the absence of a juvenile witness, one Mpho Mbedzi. He is alleged to have spotted the accused person driving a white pick up truck (similar to that belonging to the accused person) in the vicinity of the disused mine shaft where the deceased's body was retrieved. He is alleged to have observed the accused person loading some boxes into the truck. This was on 24 August 1999, two days after the alleged murder. The witness is alleged to have positively identified the accused person as the person he had seen that day. This witness has not been located.

His evidence is not before the court. Nor is there any evidence from the police describing the circumstances under which this witness had positively identified the accused person. The absence of his testimony and that of the police details who investigated the case leaves a yawning gap in the state case. Such evidence would have corroborated the accused person's warned and cautioned statement in several material respects, assuming there had been evidence tending to show that the statement had been freely and voluntarily made.

Then there is the question of various exhibits which have not been placed before the court through the witnesses. The state alleges that most of the deceased's property including a .22 Colt pistol was recovered from the accused person. None of that property has been produced. Again this is a serious gap in the state case. No explanation has been given for this omission. Evidence in this regard would have called for an explanation on the part of the accused person as to how he came into possession of the deceased's property. It would also have corroborated the contents of the accused person's warned and cautioned statement in a material way. The only item referred to by two of the state witnesses as belonging to the deceased was the blouse. It too was not produced. If indeed all the property recovered from the accused person is in police custody, why has it not been made available?

The cause or probable cause of death has not been ascertained. The post mortem report does not refer to any evidence of trauma or injuries. In his warned and cautioned statement the accused says he had contaminated the deceased person's cup of coffee with a knock out drug. The toxicology report says no traces of such drug were detected. There is thus no evidence to corroborate the accused person's warned

and cautioned statement in that regard. On the contrary we have evidence from state witnesses that the deceased suffered from a thyroid condition and that she was receiving medication for it. That she had at some stage undergone cosmetic surgery and had had implants which may become toxic if torn or ruptured. Evidence has also been led that the deceased's marriage was on the verge of collapse. The question that arises from all this is whether the deceased was murdered in the first place.

In his warned and cautioned statement the accused person says an accomplice who has not been accounted for had returned to the deceased's residence to fetch an item he had dropped there. Whilst there the accomplice had discovered that the deceased had regained consciousness from the effects of the drug earlier administered by the accused. The accomplice had narrated to the accused how he had shot the deceased in order that she would not disclose his identity. The accomplice had then bundled the body into the white pick up. This statement is not directly inculpatory in respect of the accused and its contents have not been corroborated by any other evidence. Besides it is a confession allegedly made by another person and would ordinarily not be admissible against the accused person.

Because the state is relying on circumstantial evidence, it is imperative that the circumstances relied upon be placed before the court by way of evidence. The only evidence before the court is that which established that the accused person visited the deceased at her residence on the date in question and presumably had dinner with her. That the deceased was subsequently seen at Beitbridge driving a vehicle similar to that belonging to the deceased. He was selling two watches and a blouse. No evidence has been led to show that these items belonged to the deceased. It cannot be

said that the only reasonable inference that can be drawn from these facts is that the deceased must be the person who killed the deceased.

The state argues that the accused person's admissions in his warned and cautioned statement in themselves constitute a *prima facie* case upon which the accused should be put on his defence. In this regard reliance was placed on the ruling in *S* v *Dube* 1992 (1) ZLR page 234. I agree with the defence counsel that that case is distinguishable from the present case. In the *Dube* case *supra* the accused person had confessed to five counts of murder. His warned and cautioned statement had been confirmed by the magistrate. He had subsequently challenged the admissibility of the warned and cautioned statement. The trial court had ruled against him. In the present case although the onus is on the accused person to prove that his confirmed warned and cautioned statement is inadmissible, it is nonetheless imperative that the state adduces evidence tending to show that the statement was properly obtained and confirmed. No such evidence has been adduced. In the face of a challenge, the statement cannot stand.

Even assuming that the warned and cautioned statement was properly obtained the state would find it difficult to satisfy the requirements of section 255B of the Criminal Procedure and Evidence Act which provides as follows:

> "Any court which is trying any person on a charge of any offence may convict him of any offence with which he is charged by reasons of a confession of that offence proved to have been made by him, although the confession is not confirmed by the evidence:
>
> Provided that the offence has, by competent evidence other than such confession, been proved to have been actually committed."

In the present case there is hardly evidence *aliunde* (save for the allegations in the state summary), that the offence was committed nor is there evidence tending to corroborate the contents of the warned and cautioned statement. *R* v *Taputsa and Ors* 1966 RLR 662 A at 667E it was held that the effect of a provision such as the one under section 255B of the code is that where there is evidence *aliunde* proving that the offence was committed the court may satisfy itself of the genuineness of the confession by the accused that he committed it or took part in it from the nature of the confession itself. "Where however there is no evidence *aliunde* proving that the offence was committed, the court must in addition, go outside the confession and be satisfied that it is confirmed by other evidence." In other words there must be confirming evidence which corroborates the confession in a material respect.

In the *Dube* case *(supra)* the court had admitted the confession as, being freely and voluntarily made and in all the five counts the body of the deceased had been found in the Rangemore area of Bulawayo as confessed by the accused person. The accused had confessed to striking each deceased with a stone in the vicinity of the head. The post mortem had confirmed injuries consistent with that part of the confession in respect of three of the bodies. Stones had been found in close proximity to three of the bodies. The accused had confessed to have used stones in killing the deceased persons. In two of the counts the accused had been seen in the company of the deceased persons prior to the commission of the offences. The property of some of the deceased had been found in the possession of the accused. An eye witness had given evidence of how he and the deceased in one of the counts had been lured by the accused to a place in Rangemore where they had been given a certain liquid to drink

which caused them to get drowsy. He had managed to escape but the body of his deceased friend was found in the area. EBRAHIM JA observes as follows at pages 238H and 239A to B,

> "In respect of each of the five counts however, it seems to me that there was evidence *aliunde* proving that the offence had been committed. Five bodies were discovered, three of them exhibited signs of having been battered in the vicinity of the head. Three of them had large stones lying nearby. All of them were found in the Rangemore area. They had all met their death between the period extending from February 1987 to January 1988. The conclusion to my mind, is inevitable that they met their death by foul means. The appellant confessed that it was he who caused their deaths by these means.
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> Consequnetly the trial courts' verdict that he was guilty of murder in respect of each count is unassailable whether on the basis that there is evidence *aliunde* establishing the commission of the offence supported by confessions or on the basis that his confessions are corroborated in material respects leading to the conclusion that they re genuine confessions."

It is unlikely that a reasonable court given the facts of the present matter would convict the accused person on the basis outlined in *Dube*'s case *supra* or for that matter any other basis.

It appears to me that from the outset the state was ill prepared to prosecute this case. State counsel had complained that he had only taken over the matter from a colleague the previous day. Clearly he had not had sufficient time to prepare his case given the gravity of the charge and the complexity of the evidence to be produced. He was invited to apply for postponement on that basis. He declined the invitation. He would also have needed more time to ascertain the availability of his witnesses. He sought and was granted a day in which to arrange the upliftment of an important witness from Beitbridge. His efforts in that regard were fruitless. He nonetheless chose to proceed despite that major handicap. He also was not in a position to lead

the crucial evidence of the police details who investigated the matter. He would have needed more time to establish the whereabouts of those details who were still available and to secure their attendance. As a result he failed to lead basic run of the mill evidence. The outcome was inevitable.

It was for these reasons that the application for a discharge at the close of the state case was granted. The accused person was accordingly found not guilty and discharged.

Attorney General's Office applicant's legal practitioners
James, Moyo-Majwabu & Nyoni respondent's legal practitioner