

THE STATE
versus
KAINOS SHOKO
and
ENITA ZANAMWE

HIGH COURT OF ZIMBABWE
MOYO J
GWERU 17-19 MAY 2016

Criminal Trial

Shumba for the state
T. Midzi for the accused

MOYO J: The two accused persons in this matter face a charge of murder. It being alleged that on 13 February 2013, the two accused persons assaulted the deceased resulting in his death on 14 February 2013.

The evidence of the following state witness was admitted into the court record as contained in the state summary in terms of section 314 of the Criminal Procedure and Evidence Act [Chapter 9:07].

- Danha Cecilia
- Freddy Tapfuma
- Sergeant Chinyerere
- Constable Mutekwa
- Inspector Maukazuva

Of these five witnesses the evidence of the following witnesses has some significance in the case.

Danha Cecilia is the teacher who taught deceased at Shabanie Primary School. She states in the summary that on 13 February 2013 deceased reported to school at 0730 hours. He was in good health and condition. She spent the day with deceased and there was nothing wrong she

noticed about the deceased's condition. Deceased dismissed from school at about 15:30 hours and he left for home whilst in good health.

Freddy Tapfuma resides at BB118 Maglas Township Zvishavane, deceased was his classmate. He last saw deceased in good health. Deceased was even playing with his friends, deceased left for home on the day in question without having complained of any ailment. The following day deceased did not report for school and the witness later learnt deceased had died on that day.

Seargent Chinyerere's evidence is to the effect that he was on duty when accused two reported to him the deceased had died after complaining of a severe headache and vomiting. He compiled the necessary documents to enable a Doctor to conduct a post mortem examination. Accused two later came in the company of accused one stating that the Doctor had refused to conduct a post mortem examination of the body of the deceased as the Doctor had observed some bruises on the deceased's head and that the arm was swollen. He asked the accused persons how deceased sustained those injuries and they failed to give a satisfactory answer resulting in their arrest.

The state called Rudo Hove to give *viva voce* evidence. She told the court that she had just started living with accused two and deceased, accused two being her landlady. She started staying with them on 3 February 2013. On 13 February 2013 when she came back from work, she found accused one and Wizzy seated by the veranda. She greeted them and proceeded to her room. Later deceased came with accused two, accused two then warned the witness not to leave her door unlocked as deceased would steal. She said she had tried to discipline deceased to no avail and the witness then proposed spiritual healing. She then told the witness that an uncle would come to chastise the child that evening. Later that evening she heard deceased crying being assaulted with a sound 'bhuu' "bhuu" emanating from the assault she heard a male voice say keep quiet, sit down. The assault took about an hour but was at intervals, there would be moments of silence and people talking. She then fell asleep.

Later that evening she woke up to hear accused two tell accused one that deceased is refusing to take a bath, she then heard accused one say take a bath and deceased saying he was unable to. She then fell asleep. She told the court that although she had been living there for about ten days she knew accused one's voice and she could tell that he is the one who was

talking telling deceased to bath. She said whilst she never conversed at length with accused one he frequented that place and she would hear him talk while in accused two's house, talking to accused two.

She said the following morning accused two told her she was going for prayers. Accused one then came looking for accused two but not did find her. This was after about fifteen minutes of accused two leaving. Accused two later came and told the witness that the uncle had assaulted deceased in a bad way and that he assaulted deceased until he vomited a watery substance. She then asked what deceased had eaten and was told that deceased had eaten rice. She then commented that there were ways of chastising a child that would not assist anyone.

Doctor S. Pesanayi in the post mortem report made a finding that deceased died from

1. Subarchnoid Haemorrhages
2. Blunt Force Trauma to the head
3. Assault
4. Homicide

We then pause to assess Rudo Hove's credibility as a witness.

To start with, Rudo Hove has not been shown anywhere in the court record to be an interested witness in this matter. We take her to be an independent witness as save for being a tenant, she has not been shown to have related with these people in any other way so as to make her an interested party in the matter.

There was no bad blood amongst the three i.e. accused one, accused two and herself.

Rudo Hove could not have fabricated an assault in her mind only for the Doctor at Zvishavane District Hospital to find injuries on the deceased's body as well as Doctor S Pesanai who confirmed that deceased was indeed assaulted.

Rudo Hove could thus not have fabricated an assault that never was which assault the Doctors, who are independent state employees would also confirm.

Rudo Hove did hear the deceased being assaulted in the manner she describes because her evidence is indeed consistent with the Doctor's findings.

Again, accused two told the court that deceased went to play outside before supper, uninjured, came for supper and after supper he watched TV still uninjured in the dining room

meaning deceased was at home that night. If deceased died from injuries as a result of an assault then indeed an assault was perpetrated on him that particular night.

Again, Rudo Hove says she was told by accused two that the uncle, whom she perceived to be accused one, would chastise deceased that night and indeed deceased must have been chastised that night for he could not have suffered injuries miraculously on that day. Again, Rudo Hove told the court that accused two left for prayers in the morning of 14 February 2013 and indeed accused two did go for prayers that morning according to the defence case.

Again, Rudo Hove told the court that accused two told her that “uncle” had chastised deceased badly until when he vomited and indeed, deceased had been assaulted as per the doctors findings. Also deceased, according to accused two did vomit on that day.

Even during cross examination Rudo Hove was never shown to have told lies in her evidence in chief. In fact if Rudo Hove was anything she was a fair witness in the court’s view for she did not seek to tell the court that she saw the assault being perpetrated or that she was definite 100% on whose male voice it was which spoke while deceased was being assaulted. She told the court she believed it was accused one but could not be 100% certain on that point. She told the court that she heard accused one tell deceased to take a bath later that night.

It is for these aforestated reasons that we find Rudo Hove to be a credible witness as there is no other reasonable finding that the court can make with regard to her evidence.

It was submitted by defence counsel that Rudo Hove must not be believed as she sought to be an expert on people’s voices, but really does it take any expertise for a person to recognize another’s voice. This court takes judicial notice of the fact that many a time a person can tell whose voice is speaking as long as they have heard that voice before and are used to it.

Accused one also told the court that he had a caretaker’s role on accused two as per the husband’s instruction meaning Rudo Hove is right when she says he did come on a number of occasions. By the way he had a duty to take care of his friend’s family. Again, the number of times accused one came between 13 and 14 of February 2013, shows that he must have been a regular there. Rudo Hove found him seated on the veranda with Wizzy, he later came looking for accused two the following morning, he later participated greatly in the problem that followed after the death of the deceased. In fact Rudo Hove says accused one came the following morning looking for accused two. Accused one says he only came when he had been called and had been

told by accused two of deceased's death. Accused two, when she answered a question about why she decided to call accused one instead of telling nearby neighbours she said in fact she called accused one who did not answer and he later came on his own without her having spoken to him. This aspect of the evidence in the court record also shows that it is true indeed that Rudo Hove saw accused one that morning when he came to look for accused two after she had gone for prayers.

Rudo Hove thus told the truth, her version of events cannot be faltered in any way in our view.

We now move to assess the defence case. Accused one told the court that he had been tasked by accused two's husband to take a caretaker's role over accused two as she suffered from fits. He lived about 130m from accused two's place. On 12 February 2013 accused two told him that deceased suffered from a headache but that he had gone to school.

He went there the following day and found Wizzy seated on the veranda. He had gone there to seek for and buy chicken cuts. He sat in the veranda with Wizzy. Rudo Hove entered and greeted them. Accused two and deceased also came, he asked the deceased how he felt and he said that he was fine. He then bought relish that is chicken cuts and went back home. This was around 6:20pm. He left Wizzy seated on the veranda. Accused one never entered accused two's house.

In the following morning while in the garden he heard his phone ring from within the house, he took it and realized it was accused two, he then kept it in his pocket. She then called around 6:45am, she invited him to get to her place. Her voice was hoarse. He saw accused two and Wizzy getting into their gate, he also got in.

It was then that he noticed accused two looking down shedding tears. She then told him deceased had died. He was also told that deceased had vomited. He asked where the corpse was and he was told it was in the bedroom, he uncovered the face and saw a scratch on the right cheek.

He went to the police to report and was told to take the corpse to hospital. He was nowhere near accused two's house between 8-11 pm on 13 February 2013. He never saw accused two assault deceased.

Now in the defence outline accused one's version differs from the one given in court in the following respects:

In paragraph 8 of the defence outline accused one would state that on 13 February 2013 he visited accused two's place to check up on the deceased whom he had been told was suffering from a headache. However in his evidence in chief he told the court that he had gone there for chicken cuts. Accused one's mission on 13 February 2013 is therefore not clear as per his own case. Again in the defence outline paragraph 13-15, accused one would tell the court the following:

“That in the morning of 14 February 2013, the first accused person was called by the second accused who hysterically told him that the deceased appeared dead. That the first accused was further told that when accused two had gone to wake the deceased, she realized that the deceased had died and that there were some vomits on the deceased. That first accused rushed to accused's residential place and was further told of the fate of the deceased. He then helped accused two ferry deceased to the hospital whereupon they were told to take the deceased to the police station first.”

Now, in his evidence in chief, accused two called him and invited him to her house, whereupon he met Wizzy and accused two by the gate. It was then that he noticed accused two looking down shedding tears. That's when he learnt of deceased's death.

Now from accused one's own case it is not clear what transpired on the morning of 14, was he found by accused two who told him hysterically that deceased appeared dead and that he had vomited? Or was he only invited to go to accused two's residence and later saw accused two look down and shed tears, and thereafter tell him about the death?

Now Rudo Hove places accused one at the scene of crime on the night in question that is when deceased was being told to take a bath. Accused one having been placed by Rudo Hove at the scene of crime. We have already found Rudo Hove to be a credible witness. Accused one then tells us in his defence that he was never at the scene of crime on the night in question. Of course the court notes that his residence was just about 130m from accused two's residence, that distance being a walking distance. In his defence case he tells two diverse versions on the reason he went to accused two's residence on that night. On one hand he tells the court he had gone to buy relish, on the other hand he tells the court he had gone to check on the deceased.

Rudo Hove tells the court that according to accused two, accused one was to chastise deceased on that night, now that accused one cannot tell us a clear reason for having gone there that day, the court has no option but to reject his diverse reasons on his mission to accused two's residence on that day. He must have gone there to chastise deceased as per Rudo Hove's testimony. Again, the following morning he says he was phoned by accused two who hysterically told him that deceased appeared dead and had vomited. But again he tells us in his evidence in chief that accused two simply invited him to her residence, then looked down and shed tears telling him deceased had died which is which? What is accused one's version of events with regard to that fact? Again it is not known for his own case gives two diverse versions.

Accused one is lying, he as at the scene of crime on the night in question as per Rudo Hove's evidence and is telling different stories because he has fabricated a defence to save his skin from the offence.

We say so for there is credible evidence placing accused one at the scene of crime on the night in question.

The state case as it relates to accused one hinges partly on real evidence, that is Rudo Hove hearing accused one telling deceased to take a bath at about 11 pm on the night in question, soon after the assault and partly on circumstantial evidence in that she heard accused one would be chastising deceased that night, and she saw accused one at accused two's residential on that day, she also heard a male voice which she believed to be that of the first accused while deceased was being assaulted. It is also common cause that accused one played a caretaker's role at accused two's residence.

Now the rules relating to circumstantial evidence are as follows:

In the case of *S v Blom* 1939 AD 188 (a) 2002-203 the cardinal rules of logic in drawing inferences in criminal trials were given as follows:

- (1) The inference to be drawn must be consistent with the proven facts.
- (2) The proved facts must exclude all other inferences except the one sought to be drawn.

Now the proved facts as they relate to accused one in this matter are that accused one was indeed at accused two's residence on the night of 13 February 2013, although he says he left

after 6pm, he was indeed there. Rudo Hove heard accused one's voice which she was familiar with at about 11pm ordering deceased to take a bath. While deceased was being assaulted a male voice was present telling deceased to keep quiet and to sit down. Accused one had a caretaker's role on accused two and he frequented the place. Accused one gives two different reasons for his visit to accused two's residence on 13 February 2013. Accused one narrates two different stories with regard to how he learnt of the deceased's death. Rudo Hove was aware of the fact that accused one would come to chastise deceased that night.

Accused two told the court that she decided to notify accused one first of deceased's demise, before neighbours who were closer to her, before family and before deceased's parents. These proved facts point towards only an inference, that accused one was indeed present at accused two's residence when deceased was being assaulted and that in fact he is the one that assaulted deceased together with accused two.

Accused one was at the scene and this court draws the inference that he partook in the assault because he himself whilst denying having been there at all, he firstly gives different reasons for his mission on 13 February 2013. He also explains the events of 14 February in two different versions, if indeed he was culpable he would have no reason to tell two different stories on the event.

It is our finding that the cumulative effect of the facts as they relate to accused one herein do point towards his guilt.

With regard to proof beyond reasonable doubt it was stated in the case of *Isolano* 1985 (1) ZLR 62 at pages 64-65 that:

"The state is required to prove the guilt of the accused beyond reasonable doubt, proof beyond reasonable doubt requires more than proof on a balance of probabilities. It is not however, proof to an absolute degree of certainty or beyond a shadow of doubt. When there is proof beyond reasonable doubt no reasonable doubt will remain as to the guilty of the accused. If a reasonable person will still entertain a reasonable doubt as to whether accused is guilty, the accused is entitled to be acquitted. Fanciful or remote possibilities do not introduce a reasonable doubt."

Professor G. Feltoe in the Judges Handbook 2009 Edition page 80 thereof states as follows on proof beyond reasonable doubt. He quoted the case of *Isolano* that I have referred to herein and then expands on that point as follows:

“To be reasonable doubt, the doubt must not be based on pure speculation but be based upon a reasonable and solid foundation created either from the positive evidence or gathered from reasonable inferences not in conflict with or outweighed by the proved facts. He goes on to say

“It is not necessary for the state to prove every single individual fact in a criminal case beyond reasonable doubt although the state must prove beyond reasonable doubt a fact which is particularly vital and upon which the whole case hinges. The question which needs to be asked is: Do all the facts taken together prove guilt beyond reasonable doubt? Even a number of lines of inferences, none of which would be decisive, may in their total effect lead to there being proof beyond reasonable doubt.”

In this case the deceased was certainly assaulted as per the post mortem report. Rudo Hove knew of a plan to chastise deceased by accused two and the uncle. Rudo Hove heard deceased being assaulted that night. A male voice was there when the assault was perpetrated. Accused one was present at accused two's residence at about 11pm the same night as per Rudo Hove's testimony. The following morning accused two liaised with accused one to the exclusion of neighbours on deceased's death. Accused one has given two reasons on his mission at accused two's house on 13 February 2013. Accused one gives two diverse versions on what transpired on the morning of 14 February 2013.

The cumulative effect of the events of 13 and 14 February 2013 do point without any reasonable doubt to the guilt of accused one. It is for these reasons that this court finds that accused one was present at accused two's residence on the night the child was assaulted. His denial thereof and his diverse reasons on his mission there as well as the diverse versions on what transpired on the morning of 14 February can only be taken by this court to buttress Rudo Hove's evidence that indeed she heard accused one's voice at about 11pm on the night in question ordering deceased to take a bath.

We then move to deal with accused two. Accused two told the court that deceased suffered from a headache but he went to school on 13 February 2013.

Deceased appeared healthy although he complained of a headache. On the night in question she locked her doors shortly after 7pm and retired to bed leaving deceased who was watching TV in the dining room.

Deceased was never assaulted in her presence, she shared the same bedroom with deceased. She also confirmed that accused one played a caretaker's role on her. She woke up in the morning prepared porridge and went for prayers. She later came to wake deceased up and discovered he had died, deceased had vomited. The previous night when she retired to bed leaving deceased in the dining room she did not notice any injuries on deceased.

Now accused two is the custodian of deceased. On that night deceased was in her custody with no injuries whatsoever, Rudo Hove head deceased crying being assaulted. The post mortem report point towards an assault. Accused two never heard anything, these people live in a four roomed house. It would be absurd and fanciful as given in the *Isolano* case, for us to accept that accused two does not know what happened to deceased. The state has again in relation to accused two discharged the onus on it to prove her culpability, the totality of the evidence as given before us show that accused two cannot be absolved from the knowledge of what happened to deceased as her custodian.

Again accused two in paragraph 29 of her defence outline she states that upon discovering deceased's lifeless body she then phoned accused one who came and assisted her to ferry deceased to hospital.

In court while being asked by defence counsel in relation to matters arising after questions by the court she said that she never spoke to accused one on the phone, that she called him, he did not answer but later came. She also said in her defence outline accused one assisted her to ferry deceased to the hospital and later to the police, that they ferried deceased to the hospital and later went to report the matter to the Zimbabwe Republic Police (ZRP) where upon they were arrested for murder.

The admitted evidence of Sergeant Chinyerere is also to the effect that accused two reported deceased's death to him and then went to the hospital to come back later in accused one's company. She however denies ever being part of the team that went to the hospital and to the police station in her evidence in chief. Accused two clearly is giving a bold defence in that it is common cause that the deceased, who was in her custody was assaulted between 13 and 14 February 2013. She is the one who says no other person came to the house on the night in question. She locked the doors when she went to sleep. The only logical conclusion is that what transpired on the night in question as stated by Rudo Hove is indeed what transpired. Accused

two is merely trying to evade culpability when she acts like the assault on the deceased was a miracle.

This court is enjoined therefore to draw the following conclusion with regard to this matter. Deceased was assaulted by both accused persons in the manner described by Rudo Hove. The post mortem report confirms this, and Doctor S Pesanai who gave *viva voce* evidence eliminated a headache as a cause of deceased's death but insisted that he concluded that deceased died as a result of an assault. We have already found how accused one was placed at the scene by Rudo Hove and how we find that he is equally culpable. We accordingly find that both accused persons did act wrongfully and unlawfully on that day.

We then move to assess what they are guilty of. Rudo Hove told the court of the accused person's plan to chastise the deceased. She did not see what was being used to assault deceased. Dr S. Pesanai says the abrasions were consistent with a switch or other similar object. He concluded that the injuries on the head were as a result of blunt force trauma. It is however unknown what object was used to inflict them. The length of the assault was about an hour but there were intervals when it would stop. We can thus not infer intention from these facts. The only logical conclusion the court can arrive at is that in their bid to chastise deceased, accused one and two were negligent in their persistent assault resulting in deceased sustaining fatal injuries. It is for these reasons that both accused persons will be found guilty of culpable homicide.

National Prosecuting Authority, the state's legal practitioners
Gonese and Partners, 1st accused's legal practitioners
H. Tafa and Associates, 2nd accused's legal practitioners