

THE STATE
versus
JAFARY MHINGIRO

HIGH COURT OF ZIMBABWE
MUTEVEDZI J
HARARE, 15, 21 March 2023 and 7 July 2023

Assessors: Dr Mushonga
Mr Mabandla

Criminal Trial

T Mukuze, for the State
B T Kazembe, for the accused

MUTEVEDZI J: The fear of death is called thanatophobia. It is largely natural in human beings because death is a threat to the meaningfulness of life. It transcends across gender considerations. If females were more afraid of death than males like we heard in this case, we wonder where some genders would stand in these days where gender seems to be fluid and some people can easily transition from one sex to another whilst others actually claim to be gender neutral. The causes of thanatophobia are not a legal subject but it appears that in this case, a discussion about the fear of death contributed to the tragic loss of life which resulted in Jafary Mhingiro (the accused) being accused of murder in contravention of s 47(1) of the Criminal law (Codification and Reform) Act [*Chapter 9:23*] (hereinafter the Criminal law Code). The allegations are that on 2 July 2017, the accused unlawfully and with intention to kill or realising that there was a real risk or possibility that his conduct may cause death and persisting with his conduct despite his realisation of the risk or possibility, pushed Tinashe Muroyiwa (the deceased) out of a moving vehicle. The deceased sustained injuries from which he died. In detail, the state alleged that on the fateful day, the deceased and the accused were passengers in a lorry travelling from Nyabira to Belgown Farm in Mazoe. Around a place called Mackey Farm in the Mazoe area, the deceased alerted other passengers that there was an unusual sound coming from the rear of the wheels of the truck. One of the

passengers called Langton Meki (Langton) in turn alerted the driver who stopped the lorry. The driver discovered that the noise was coming from a chain used to secure the spare wheel. He fixed it and they resumed the journey. Soon after the accused started shouting profanities at Langton. He accused him of unnecessarily delaying their journey. The accused slapped Langton on the cheek. The deceased intervened and demanded to know why the accused had slapped Langton. The accused moved from the side of the lorry he was. He accosted the deceased and shoved him on the chest with both hands. The deceased fell from the vehicle and landed on the gravel road headlong. For the second time, the driver was alerted. He stopped. The deceased was assisted back on to the lorry by his colleagues. He was taken to Belgown clinic where he received basic medical treatment before being referred to Parirenyatwa Hospital where he died on admission. An autopsy was conducted on his remains. The pathologist concluded that his death was due to respiratory insufficiency, pulmonary laceration, haemothorax multiple fractures and multiple traumatic encephalopathy.

The accused denied the allegations. His story fitted into the allegations by prosecution up to the point when the suggestion was made that there was a problem with one of the lorry's wheels and the driver stopped the vehicle. At that moment he jokingly mocked all men aboard the vehicle by telling them that their fear of death made them look like women. He chastised them and said death came at God's time. A fellow passenger called Langton Meki did not take kindly to the ridicule. He poked the accused on the head. The deceased joined in by striking the accused with a fist once on the cheek. The accused was incensed. He demanded to know why the deceased had assaulted him. A scuffle ensued. The other passengers alerted the driver to stop. The car stopped. Clearly geared for a confrontation both the accused and the deceased disembarked. One was on the right and the other on the left of the lorry. As already said, they were spoiling for a fight. They shouted at each other but there was no physical confrontation. The accused alleges he then quickly jumped back into the car. His intention was to encourage the driver to quickly restart the vehicle and leave the deceased behind. The deceased was however more agile than the accused thought. He also jumped back onto the vehicle before the driver could leave. He perilously sat on the board of the car's loading box. He had nowhere to cling to. The lorry travelled for a few metres. Accused said he then heard other passengers saying that someone had fallen off the car. It was the deceased. The accused further alleged that it was getting dark. He had not seen how the deceased had fallen. All the same, the deceased's friends picked him and assisted

him back on to the lorry. They alleged that the accused was responsible for the deceased's fall when they well knew that it was not true. They threatened that they were going to blame him for the deceased's fall. He was sitting directly opposite the side on which the deceased was sitting. There were other passengers between them. He had no direct access to the deceased. The accused further stated that after he was arrested, the deceased had made a statement to the police indicating that he had not been pushed by anyone from the car but that he had fallen on his own. That he pushed the deceased off the vehicle was therefore a creation of Langton Meki. He was the only one out of about fifteen passengers who were in the car who made the accusation. He rounded off by reemphasising that he did not push the deceased in any way and that he had no intention to kill him. He prayed for his acquittal.

State case

The prosecutor commenced his case by seeking the formal admission into evidence of the testimonies of witnesses Prudence Chipu Gupo (Prudence), Joseph Chamunorwa (Joseph), Constable Kabasa, Christopher Mbofana (Christopher) and Elfias Mabondo (Elfias). With the consent of counsel for the accused, the testimonies of the witnesses were admitted into evidence in terms of s 314 of the Criminal procedure and Evidence Act [*Chapter 9:07*] (the Code) as they appeared in the state's summary of evidence.

Prudence's evidence was simple. The driver stopped the car after being alerted of the misunderstanding between the accused and the deceased. She confirmed that both the accused and the deceased disembarked from the lorry. The deceased was on the right side and the accused was on the left. They both got back into the vehicle after which the driver advised them to sit securely. Soon after the vehicle had been restarted, the quarrel erupted once more. She thereafter concentrated on the safety of her child.

Joseph was the driver of the lorry. His evidence was that after he had fixed the chain which was making noise from the rear wheel of the lorry, he advised all passengers to sit securely and not on the side boards of the truck. They resumed their journey and travelled for about three hundred metres. He was stopped again and advised by Langton that the deceased had fallen out of the car. He had then proceeded to a police base with Tafadzwa Chabata, Christopher Mbofana and the accused. At the police base, the deceased had been asked as to what had transpired. His answer was that he had jumped out of the vehicle to create space but had fallen and gotten injured.

Constable Kabasa's evidence was all hearsay.

Christopher Mbofana is a member of the neighbourhood watch stationed at Mazoe Police station. He was at Tavydale base when the deceased was interviewed by Elfias Mabondo. The deceased indicated that he had not been pushed by anyone but had fallen off the car when he wanted to exchange blows with the accused person.

Elfias Mabondo was on charge office duty at Tavydale police base when the deceased was brought in as stated above. He interviewed the deceased on how he had sustained his injuries. The deceased indicated that he had fallen off the vehicle on his own.

The prosecutor also applied for the admission of the post mortem report compiled by Doctors Roberto Trecrau and Ivan Betancourt. As already stated, it detailed the cause of deceased's death. It was uncontentious and with the consent of the defence, it was duly admitted and became exhibit 1. The cause of death was as already stated in the earlier paragraphs of this judgment. In addition, the prosecutor also applied to produce the accused person's warned and cautioned statement. Once more there was no objection from the defence. It was admitted and became exhibit 2.

Thereafter, the prosecutor called the oral testimonies of the witnesses whose evidence we deal with below.

1. **Langton Meki (Langton)**

Summarised, his testimony was that on the day in question, they were aboard a truck from Nyabira enroute to Mazoe. A misunderstanding arose between him and the accused. The witness wanted the car stopped to confirm the source of the noise he was hearing from the lorry's rear wheels. The accused opposed any stoppages because he feared they would reach their destination when the sun had set and it was dark. The deceased who was the witness's friend, joined in to support the witness. An argument ensued and the accused pushed the deceased off the moving vehicle. He fell and hit the gravel road with his head. Langton together with his friends rushed to the deceased's aid. They found him in a brace position. When they inquired if he was injured, the deceased said he wasn't despite apparent bruises on the chin and others on the side of the head. They helped him back into the car. Aboard the car, he once more inquired from the deceased if he was in pain and if he wanted to go to hospital. The deceased answered both questions in the negative. All the same, the witness said they were concerned. They resolved to report the incident to the police. They

asked the driver to take them to Tavydale base where the incident was reported. The police officers asked the deceased if he was injured and he said he was. They asked him if he had been pushed from the car and he said yes. Langton said all the answers which the deceased gave to the police officers were in the affirmative. They got a police note which allowed the deceased to receive medical attention and proceeded to Belgown clinic. On arrival the nurse asked the deceased if he was in pain and he said he was. She further asked him what had happened but he remained silent. The nurse concluded that the deceased's injuries were bad. She recommended that he be taken to Parirenyatwa hospital in Harare. Langton and another person got a vehicle in which they attempted to take the deceased to Harare. Unfortunately he died along the way. Langton concluded his testimony by stating that there were no hostilities between him and the accused because before this incident they were unknown to each other.

Under cross examination, Langton indicated that on the night in question, the car had stopped twice. First when he raised concern about the unusual sound coming from the rear wheels. Second when the deceased fell off the vehicle. Counsel indicated to the witness that it appeared from the testimonies of other witnesses that the car had stopped for a third time when the deceased and the accused threatened to fight. The witness was however adamant that the truck had only stopped twice. He admitted that although he had attempted to, the accused had not assaulted him. Counsel also suggested to the witness that when interviewed by the police, the deceased had advised them that he had not been pushed by anybody but that he had fallen off the vehicle on his own. To that Langton insisted that the deceased had somewhat lost his reasoning because he was saying yes to every question put to him by the police officers. It was again suggested to the witness that it was impossible for accused to have pushed the deceased because there were other passengers sitting between them in the car. Langton explained that the accused had stood up from his side and pushed his way through the other passengers to push the deceased. He had actually stepped on Prudence's child in his bid to do so.

2. Tinashe Herodhe (Tinashe)

He said he had no relationship with either the accused or the deceased save that he used to play football with the deceased. The deceased used to stay at a farm close to the farm where the witness worked. He supported the testimony by Langton that the accused had, in the midst of their disagreements, stood up in the vehicle, pushed through a cluster of other passengers to the other side. He then pushed the deceased off the moving lorry. During cross

examination, the witness denied being a friend of the deceased as had been suggested by counsel. He insisted that the accused had forced his way across the truck to get to where the deceased was sitting. He corroborated the evidence of Langton that the accused had actually stepped on someone's child when he was trying to reach the deceased.

3. Lloyd Mushonga

The deceased was not only his friend but was also a relative. He was also a passenger aboard the lorry on the fateful night. He corroborated the testimonies of the first two witnesses that the accused pushed the deceased out of the lorry after a misunderstanding. He added the detail that accused had literally forced his way to reach the deceased. In the process he had stepped on one of the passengers' children. He denied the suggestion that the deceased had perched himself precariously on the side board of the truck. Instead, he said the deceased was seated securely in the car. He added that the accused appeared drunk and that he had actually seen the accused drinking earlier. He stated that it was preposterous for the deceased to have stated that he had fallen off the vehicle on his own because he clearly had been pushed by the accused.

4. Moses Kuimba

He is the police officer who was assigned to investigate the case after it had been referred from Tavydale base. Initially it was a report of disorderly conduct in public. It was escalated to murder after Nyabira Police advised him that the victim of the disorderly conduct had actually died from his injuries. He then attended the scene. The deceased had fallen onto a gravel road. The car had only stopped approximately forty metres from the point of impact. From the indications the deceased and the accused had been sitting on the opposite sides in the lorry. When it was suggested to him that the accused denied having pushed the deceased, the investigating officer said he could not dispute that because there were witnesses who had indicated so. Under cross examination, the officer explained that at the time the deceased was allegedly pushed off, he was now seated on the front part of the loading box but opposite where the accused was seated. Initially the deceased had been seated at the back adjacent to the accused's sitting position. He conceded that there were other passengers between the protagonists. He admitted that the deceased was sitting on the edge of the board of the truck's loading box and not inside as suggested by the other witnesses.

With the above evidence, the prosecution closed its case.

The defence case

The accused testified in his defence. He also called Tafadzwa Chabata and Kimpton Shava to testify in support of his defence. We begin with the accused's evidence.

Jafary Mhingiro

He began his testimony from the same premises as his defence outline. The point of divergence with the state's summary of the case commenced at the point when he said he and the deceased jumped from the car after the other passengers demanded that the driver should stop the vehicle. He said the deceased jumped down first and then asked him to follow suit so that they could fight. The accused said he deliberately jumped to the other side because he did not want a physical brawl with the deceased. Once on the ground the deceased appeared to advance towards him. At that point he jumped back into the car and asked the driver to drive off and leave the deceased behind. The deceased however also quickly got back into the vehicle. The accused said he did not check how the deceased was seated in the car. He added that because the deceased was his enemy, he did not sit near him. It was only a while later that he heard that someone had fallen off. He did not see how and did not know it was the deceased. At the time Langton and the others assisted the deceased back onto the lorry, Langton threatened that he was going to incriminate the accused for causing the deceased's fall from the vehicle. And true to his threat, when a police officer arrived at the scene aboard a commuter omnibus which was travelling in the opposite direction and inquired what had happened, Langton advised him that it was the accused who had pushed the deceased off the moving vehicle. In his view, only passengers from a farm called Berea supported Langton's outrageous allegations yet there were many others who said it was all lies. He was as a result, bundled into the front of the lorry and driven to the police base. On arrival, the deceased disembarked from the lorry on his own. He was assisted by Langton to sit on a bench. He could speak on his own but when asked by the officers to explain what had transpired and before the deceased could answer, Langton quickly interjected and said the accused had pushed him. Despite that the deceased told the police that he had not been pushed but had fallen on his own. He was asked about the issue three times. On all the occasions, he insisted that he had not been pushed. It was for that reason that the police officers allowed the accused to go home that night. The accused said he was only arrested after the officers who were investigating his case were pressured by their seniors. He was advised by Elfias Mabondo that he had been instructed by his seniors not to produce the statement which he had recorded from the deceased on the night he was brought to the police base. He said he was not drunk because he had not taken any alcohol. The accident happened between 1900 and 2000 hours.

It had become dark. The lorry was full with passengers. He said it wasn't true that he had pushed through other passengers and stepped on a child in a bid to accost the deceased. He knew Langton only in the sense that he was employed by a farmer called Mashandu. Langton was also aware that the accused worked at Gondi Mine where he was an artisanal miner. He had known the deceased for about six months prior to the incident. He said when he saw the deceased before he fell off, the deceased was seated on the edge of the loading box with nowhere to properly cling to. He (accused) was seated on the floor of the truck. Under cross examination, the accused said he was sure the witnesses who falsely incriminated him did so because they were angered by his utterances that they feared death like women. Further, he suspected that the witnesses were influenced by Langton Meki. They were all from Berea Farm. Traditionally the people at Berea Farm are known for their support of each other at all costs.

Tafadzwa Chabata (Tafadzwa)

He was on the same vehicle as all the witnesses and the accused. He described the beginning of the commotion in the same way that all the others did. He added however that after the resumption of the journey after the first stop, the accused on one hand and Langton and the deceased on the other resumed their argument which they had earlier started. After about 200-300 metres, the accused stood up intending to confront the deceased. The witness said he restrained the accused. Other passengers also advised him against attempting to cause a physical brawl in a moving vehicle. The accused relented and sat. A while later the witness said he saw a person falling off the lorry. When the police officer in the commuter omnibus arrived, someone advised him that the accused had pushed the deceased out of the vehicle. The witness said he was taken aback and realised that the accused could be incriminated in something he had not done. It was for that reason that he decided to accompany the accused to the police. At the police base, the officers asked the deceased to explain what had happened. Another person who had accompanied the deceased then jumped in to say that the deceased had been pushed out of the car by the accused. The deceased interjected to say that he had fallen off the car on his own. The deceased could walk and talk on his own although he complained of chest pains. The officer asked him three times and inquired if the deceased was in his sober senses. He confirmed that indeed he was. The witness confirmed the sitting arrangement in the lorry which was earlier described by the investigating officer. He denied the allegation that the accused pushed aside other passengers to reach the deceased from the other end of the truck. He did not know of any prior animosity between the two camps. The

argument had started in the car. During cross examination, he denied knowledge of local rivalries between the neighbouring farms and or mines. He said he had seen the deceased for the first time that day. He and the accused however worked at the same mine. Despite that relationship he argued that he was simply telling the truth of what transpired on the night in question.

Kimpton Shava (Kimpton)

He is an artisanal miner who resides at Netherfields Farm in Mazoe. He said he is not related to the accused but they usually work together. He also knew the deceased as someone who occasionally came to his workplace. He said on the lorry the accused and the deceased pushed and shoved each other. They stepped on other passengers' children. They were restrained, would calm down but would start all over again. The witness said he and one Tafadzwa finally managed to restrain the accused who sat down. After a short while, he said they heard that someone had fallen off the car. He did not see the accused push the deceased out of the car as alleged. The witness believed that the deceased fell off the car because he wasn't sitting securely in the lorry on the bumpy gravel road.

The accused closed his case after the witness's testimony.

The common cause issues

1. There was a brawl between the accused and Langton Meki which started when Langton indicated that there was an unusual sound emanating from the lorry's rear wheels
2. The deceased joined the altercation on the side of Langton
3. The dispute became one between the deceased and the accused
4. It escalated to a point where the deceased and the accused jumped out of the vehicle threatening to engage in a physical fight. One was on the right side of the lorry and the other on the left
5. They did not fight. Instead, they both got back into the car and sat on opposite sides of the loading box of the truck
6. The deceased later fell from the truck
7. At the police station, the deceased advised the officers that he had fallen off the vehicle on his own and had not been pushed by anyone.

The issue

This is a case whose resolution turns on the facts. The issue for determination is whether or not the accused pushed the deceased out of the moving vehicle.

Analysis of the evidence

One issue which stuck out in this case is that the witnesses pitched camp. They can be divided into three distinct categories. There are those who supported the version that the deceased was pushed out of the car. They hailed from Berea farm or from communities which neighboured Berea Farm; then there are those who said he fell on his own. They were related to or worked with the accused; the third group was made up of the neutrals. They included the driver of the truck and the police officers. To us this appeared to be one of those cases where the police needed to have done more in their investigations. It must be obvious to any investigating officer that it may be problematic to bring as state witnesses only those persons who appear to have interest in the matter or are in one way or another conflicted. The situation is compounded by the unequivocal admission of sergeant Moses Kuimba, the investigating officer in this case, that he could not from his investigations, say that the accused pushed the deceased off the vehicle because there were witnesses who said the deceased had not been so pushed. There were fifteen or so passengers aboard the truck that night. Not all of them were either known to the deceased or to the accused. There were bound to have been some neutral people whose evidence would not have been coloured by allegiances. The police did not make any follow ups on such people to seek independent testimonies. Instead all that we were presented with are witnesses who clearly fought either from the accused's or the deceased's corners. Such compromised testimonies do not add value to the resolution of matters in court. The credibility and impartiality of aligned witnesses is difficult to support. Whoever calls such witnesses must then do more than ask the witnesses to confirm that they have no reason to falsely incriminate the accused or to falsely exonerate him/her.

Langton, Tinashe and Lloyd were the three witnesses whose testimonies supported that the accused pushed the deceased out of the vehicle. The accused, Tafadzwa and Kimpton all said the deceased fell on his own because he was not sitting securely in the car. The two versions are mutually exclusive. One camp must therefore have lied to the court. It is difficult to tell which said lied.

We wish however to point out from the onset, that the evidence of the accused in respect of him witnessing the deceased's fall from the car was unreliable. He told two different versions about that issue. At the beginning of his testimony, he was clear that at the time both the deceased and himself disembarked from the car intending to fight he had quickly jumped back into the vehicle before the deceased did the same. The accused said he *did not check how the deceased was seated in the car. He added that because the deceased was his enemy, he did not sit near him. It was only a while later that he heard that someone had fallen off. He did not see how and did not know it was the deceased.*

From the above, it is apparent that the accused could not have seen the deceased falling from the car. He could not vouch that the deceased fell on his own. Yet before he concluded his evidence he insisted that the deceased fell from the car because he had seen him seated on the edge of the trailer board with nowhere to properly cling to. This latter description of events is superseded by the former where the accused admitted not having seen how the deceased was seated in the lorry and how he fell. The events could not have happened simultaneously. The accused was therefore not telling the truth in one or both respects of his testimony.

In similar vein counsel for the accused attacked Langton's evidence for being fraught with inconsistencies. For instance he said Langton accepted that he had told the police that the accused slapped him during the altercation but in court he changed that story and said the accused had not physically assaulted him; that he had contradicted himself as to the number of times that the truck had stopped as a result of the brawl. In our view whether or not there were any such inconsistencies is neither here nor there. It is so because the issues in question are immaterial. What appears critical to us is that Langton throughout, must have felt that he was directly or indirectly responsible for the plight which the deceased found himself in. The altercation was instigated by Langton's not so kind reaction to the insults by the accused that he (Langton) feared death. He resented the accused as shown by what transpired. Soon after the deceased fell, the evidence is that Langton once more did not take kindly to that. He threatened that he was going to ensure that the accused was going to be held responsible for the deceased's injuries. In our view Langton had the motive to falsely incriminate the accused if any allegation were to be made, as it later was, that he did. When it was alleged that at the police, Langton spoke on behalf of the deceased, he did not deny it. He simply said he did it for a reason. But his reason for doing so was not supported by any tangible evidence. He believed that the deceased could not speak for himself because he had become confused. The

other people who were present however did not notice any confusion in the deceased. We were told that officer Elfias Mabondo asked the deceased three times what had happened to him. The deceased coherently answered that he had fallen off the lorry on his own and had not been pushed by anyone. Langton urged us to accept that the deceased could only say *yes* to any question that he was asked. But that is in direct conflict to what appeared to have happened on the ground. Soon after the deceased had fallen from the truck, Langton asked him if he had been injured but the deceased said he wasn't. When they had taken him back into the car, Langton once more asked the deceased the same question. The deceased insisted that he wasn't. Those answers were not *yes* responses like the witness wanted us to believe. When the police officer asked the deceased to explain how he had been injured, Langton is said to have intervened and made the explanation himself. The deceased interjected and corrected Langton. He explained to the police not with a simple *yes* but that he had fallen off the car on his own after *he attempted to create space when he wanted to exchange blows with the accused*. That was not a *yes* or *no* answer. It illustrated that the deceased could properly follow the conversation which was going on. The consistency with which he answered the same question also supports the argument that the deceased knew exactly what he was talking about. Even on the journey from Mazoe to Parirenyatwa, there is evidence that although the deceased was in pain, he comprehended some of what was going on. A person as confused as Langton portrayed the deceased would not have been able to notify his colleagues that he needed to answer to the call of nature, disembark the vehicle, help himself and return. The prosecutor's case in that regard would have had adequate support if the prosecutor had not overlooked the need for the nurse who initially attended to the deceased at Belgown clinic to testify or at least for her statement to be recorded and be made part of the evidence. She could have, from a neutral point of view shed light on the alleged confused state of mind the deceased was in at the time she attended him.

What all this illustrates is the confusion that went on at the back of the truck. As already stated, the truck was full of passengers. There is evidence that the accused and deceased haggled at each other throughout the duration of their argument. They tussled and tried to reach each other's throats as it were. They were restrained, reignited the quarrel and restrained on several occasions. There were other passengers between them as that happened. It was dark and visibility must have been low even in that closely packed truck. Those who supported the accused said he was sober but the witnesses who incriminated him said he was drunk because he had been drinking beer. The same witnesses who supported the accused

said the deceased was drunk. There is a possibility therefore that both the deceased and the accused were drunk. If they were, the court cannot discount the version that the deceased failed to properly hold on to the truck bars and fell out. If anything he supported that version by his own account to the police. The officers who attended to him confirmed that. Langton the deceased's friend confirms that the deceased gave that version to the police but seeks to sanitise it by imputing confusion on the deceased's state of mind. As already stated however, there is no evidence to support the allegation of an unsound mind. In relation to the other witnesses what we simply have is one camp's word against that of the other. Such a scenario does not take the state's case anywhere. The accused and the deceased were both completely irresponsible to fight and scuffle aboard an open and moving truck. The attendant dangers were and must have been obvious to both of them and all their colleagues who supported them. In criminal cases, the accused is not required to prove his innocence. All he must show is that his version of events is reasonably possible. In this instance we have already shown that what the accused says is reasonably possibly true.

It is for the above reasons that we are unable to hold that prosecution managed to prove its case against the accused beyond reasonable doubt. We are in doubt as to the guilt of the accused person. The law enjoins us to resolve that doubt in his favour. **He is therefore found not guilty and is acquitted of the charge of murder.**

B T Kazembe Chikuni Associates, accused's legal practitioners
National Prosecuting Authority, states' legal practitioners