

STATE  
Versus  
GRACE MUDZENGI

HIGH COURT IF ZIMBABWE  
MUZOFAJ  
CHINHOYI 19,20 September,11,13,25 October, 2 & 20 November 2023

Assessors:     1. *Mr Chivanda*  
                  2. *Mrs Mawoneke*

### **Application for discharge at the close of the State case**

*T. H. Maromo*, for the State  
*C. Bare*, for the accused

**MUZOFA J:** [1] The accused is facing one count of murder in contravention of s 47 (1) (a) and two counts of attempted murder in contravention s189 as read with section 47 (1) of the Criminal Code respectively. She was jointly charged with one Faison Tomu ‘Faison’ who has since absconded. This judgment therefore relates to the accused only.

[2] On the first count, the allegations are that on 16 May 2019 the accused, acting in common purpose with Faison caused the death of Gashirai Chigoya by spiking his drink with poison known as clofenvinifos and cypermethrine with intent to cause his death or realizing that death may ensue but persisted in the conduct. On the second count it is alleged that on the same date the accused and Faison unlawfully and intentionally attempted to cause the death of Tsitsi Muchohonyi by administering the same poison to Tsitsi Muchohonyi.

[3] On the third count, the allegations are that on the 17<sup>th</sup> of May 2019 at a place near Dalston Farm, Chinhoyi, the accused acting in common purpose with Faison unlawfully and intentionally attempted to cause the death of Tsitsi Muchohonyi by covering her with a blanket and strangling her intending to cause her death or realising that death may result but continued to do so despite the possibility.

[4] The accused denied all the three counts. She dissociated herself from Faison’s conduct. She explained her association with Faison as a purely prophet and client relationship. She said she engaged Faison for prayers to restore her relationship with her husband, the deceased.

### **The State Case**

[5] The state produced a total of 15 exhibits. Exhibit number 5 was Faison’s confirmed warned and cautioned statement in respect of the murder charge. In that statement he gave a chronology of how he got to know the accused and eventually how he was sent by the accused to the deceased.

[6] Five witnesses gave oral evidence. The State intended to call a sixth witness but it failed to locate him. It had to close its case without the evidence. During the course of trial, allegations of interference from accused's relatives were raised. The court had to withdraw the accused's bail to safeguard witnesses. One witness explained how she was threatened by the accused's mother. Unfortunately, she did not file a police report. She also said she received an anonymous call from a male person threatening her not to give evidence.

[7] In court the witness she expressed her fear of the possible repercussions for giving evidence. It dawned on us that our system does not have sufficient mechanisms for witness protection after giving evidence. The only recourse is to report to the police. In this case she was afraid of non-natural repercussions as she suspected that the accused and her mother may resort to this.

[8] That as it maybe, the evidence placed before us from both the exhibits and the oral evidence can be summarised as follows.

[9] The accused was married to the deceased and were living in Harare. Their marriage was on the rocks. The deceased had left her and was now living with Tsitsi the complainant in the second and third counts in Gweru. Faison was a self-styled prophet. He is at the centre of this case.

[10] Obviously the accused was not happy, she wanted the deceased back. According to the State it appears she wanted both the deceased and Tsitsi dead. So, the two connived to execute their demise. The accused gave Faison information about the deceased, how he had a problem leg, his life history and all that mattered in his life. She then gave him some poison to give the deceased.

[11] Faison had to find a way to get to the deceased. So, he called the deceased over the phone and introduced himself as Prophet Gibson from Nyanga. He told the deceased some snippets of his life. Although the deceased was initially doubtful, he was prevailed over to give Faison a chance to exorcize the bad spirits tormenting him. Faison had the unprecedented guts to insist that he wanted to fulfil his God given mandate to assist the deceased when he well knew that all this was a fallacy.

[12] The deceased finally sent money for Faison to travel to Gweru. When he arrived in Gweru Faison continued in his false prophetic pronouncements and told the deceased more about his life. So convinced was the deceased about the 'seer's ability that when the deceased reported to Tsitsi he said the prophet knew his stuff. He had told him so many things about his life.

[13] Faison offered to help the deceased resolve his problems. He invited deceased to accompany him to Biri dam in Chinhoyi for cleansing. The deceased accepted this invitation hook line and sinker. The deceased and Tsitsi intended to travel to Murehwa for a funeral so they drove to Biri dam enroute to Murehwa.

[14] Faison had to make the whole process look authentic, when they were about a few meters from Biri dam Faison asked the deceased who was driving to stop the car. He gave them instructions how the process will go. They were advised to confess their sins otherwise the 'holy waters' would be ineffective. They were also advised that the 'holy water' may cause them some discomfort, that's how it worked.

[15] Faison prepared the 'holy waters'. He drew some water from the dam and washed the deceased's leg. He then took a small bottle from his bag and prepared some 'holy waters'. He gave each a bottle with the 'holy water' to drink. The deceased downed his drink. He immediately had diarrhoea and general body weakness which subsequently led to his death. Tsitsi took a small quantity of the poison. She was affected but it did not kill her. This formed the basis of the second count the attempted murder on Tsitsi. The deceased had taken the whole bottle.

[16] When the deceased fell sick Faison did not take him to the hospital for attention but dumped him somewhere in the Chinhoyi Farms. He drove the better part of the night with Tsitsi. Along the way he tried to strangle Tsitsi which conduct forms the second count of attempted murder.

[17] According to the state the accused is an accomplice to the murder since she provided all the information and poison to Faison so that he can commit the offence.

The State then closed its case.

### **The Application For Discharge**

[18] At the close of the state case Mr Bare applied for the discharge of the accused in terms of s198(3) of the Criminal Procedure and Evidence Act.

[19] It was submitted that the state failed to prove a *prima facie* case against the accused. The accused was implicated by Faison and Faison has since absconded. The investigations officer gave evidence that Faison indicated that he was given the concoction by the accused to administer to the deceased. It was medicine for the deceased's ailing stomach. He, Faison did not know this was poison. So, no evidence links the accused to the two counts of attempted murder on Tsitsi.

[20] In respect of the murder charge the only evidence was again from Faison. The other witnesses were not there when Faison eventually administered the poison. On that, it was argued that Faison's statement is highly improbable considering the circumstances of this case. The court must not accept it. Surprising the accused's legal practitioner did not address his mind to whether or not Faison's statement was admissible in the first place.

[21] In the absence of Faison's evidence, the state case will hang on nothing. It will crumble. The accused must not be placed on her defence hoping to bolster the state case.

[22] The state opposed the application. It argued that, the accused was the link to the deceased. She equipped Faison. The story of the deceased's death would be incomplete without the mention of the accused's role. Further that, those who equip perpetrators of offences must be found liable as if they committed the offence by their hand.

[23] Further, it was submitted that despite Faison's absence the court can convict the accused. Faison was given instructions by the accused. He simply executed the plan. The accused committed the offence by Faison's hand.

### **The Law**

[24] Both legal practitioners set out the applicable law in this case. In terms of s198 (3) of the Criminal Procedure and Evidence Act the court shall return a verdict of not guilty if

at the close of the case for the prosecution it considers that there is no evidence that the accused committed the offence charged or any other offence of which he might be convicted thereon.

[25] At this stage the court must consider whether the state has established a *prima facie* case against the accused. In other words, if the accused is muted and the trial continues can the state still prove its case. It then calls on the court to consider the admissibility and credibility of the evidence placed before it.

[26] In this case the state relies heavily on the statement by Faison. Faison was a co accused. The issue that arises is the admissibility of Faison's confirmed statement in view of s 259 of the Criminal Procedure and Evidence Act which provides,

**'Confession not admissible against other persons**

No confession made by any person shall be admissible as evidence against any other person'.

[27] It is only a confession made outside court usually to a person in authority that is not admissible. However, evidence given at the trial by one accused is evidence against the co accused, if it incriminates the co accused it is admissible. See *R v Zawela & Anor* 1937 AD 343, *S v Maulana & Anor* S-61-94<sup>1</sup>.

[28] Section 259 of the CPEA is not cast in stone. Two exceptions exist. In *S v Sibanda*<sup>2</sup> the court expressed the exceptions as follows.

"It is only in two exceptional situations that an extra curial statement may be admitted not only as evidence against its maker but also as evidence against a co-accused implicated thereby. The first is where the co-accused, by his words or conduct accepts the truth of the statement so as to make all or part of it a statement of his own.

The second exception applies in the case of conspiracy. Statements of one or two conspirators made in the execution or furtherance of a common desire are admissible in evidence against any other party in the conspiracy. See *R v Miller and Anor* 1939 AD 106 at page 115; *R v Mayet* 1957 (1) SA 492(A) at 495F."

[29] The first exception requires the court to consider whether the co accused who has been implicated in the confession associates himself or herself with the confession in her evidence or by conduct. This requires the court to make a value judgment based on the evidence from the co accused.

[30] In .... The court accepted the confession by a co accused having found that the

[31] As regards the second exception John Reid Rowland<sup>3</sup> opines that 'If two or more accused acted with a common purpose, however, the statement of one accused would be admissible against the other, as they would be regarded as co-conspirators. But before the statement of one is admissible against the other, it must

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<sup>1</sup> As per Reid Rowland , Criminal Procedure in Zimbabwe , 1997

<sup>2</sup> 1992(2) ZLR 438 (S)

<sup>3</sup> Criminal Procedure in Zimbabwe , 1997 LRF

be proved that the accused acted with a common purpose. It does not matter whether the statements are admitted before the conspiracy is proved, provided that there is sufficient foundation outside the statements to permit the court to examine the statements on the condition that they will later be proved to be admissible. It is also necessary that the statements themselves should, in effect, be made as part of a conspiracy to defeat or obstruct the course of justice.’

[32] Under English law which is the approach also in South Africa ‘the statement must, however be in furtherance of the conspiracy, meaning that the common purpose must therefore be ongoing at the time the statements are made. Statements made to the police about what was done, would be therefore be excluded from this exception. Such statements are made after the fact and not in furtherance of the conspiracy’<sup>4</sup>

[33] It short the second exception applies in cases of conspiracy and the admissible statements are those made in furtherance of the conspiracy.

[34] The statement of a co accused is hearsay and is exceptionally admissible to uphold the rule against hearsay. There is also a high risk that the co accused might intend to shift the blame, curry favour, settle scores or divert attention to another<sup>5</sup>.

### **Analysis**

[35] At this stage the court is required to analyse the state case only. Both the credibility of witness evidence and its admissibility must be considered. The court is at large to consider the defence outline since it is not evidence constituting the defence case. It is just an outline just like the State outline. In other words, the State outline and the defence outline provide information to set the stage for evidence to be placed before the court to prove the averments made therein.

[36] The accused did not directly commit the offence. The allegations are that she committed the offences by Faison’s hand by giving Faison information about the deceased to charm the deceased and cause him to accept any prescription from Faison. The deceased believed that Faison was a genuine prophet who was going to assist him yet the accused was the informant behind the scenes.

[37] The evidence from the State witnesses chronologically explained how Faison approached the deceased. How he enticed the deceased and Tsitsi to Chinhoyi for some cleansing ceremony. Tsitsi was a credible witness she had no reason to exaggerate. If she was vindictive, she could have linked the accused to the deceased’s death since they shared the same man. She did not do so.

[38] The key witness Tsitsi did not implicate the accused. Her narration of events implicates Faison. Faison is the one who approached the deceased, he is the one who gave the deceased the drink and some for her to drink. He is the one who tried to strangle Tsitsi.

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<sup>4</sup> Schwikkard and Van der Merwe 296

<sup>5</sup> See generally article by BC Naude, University of South Africa 2008 ‘The admissibility of extra curial statements by a non-testifying accused’.

[39] Faison's response to the caution in respect of the two counts of attempted murder on Tsitsi he did not implicate the accused. He said the medicine from the accused was for the deceased. He gave the deceased but Tsitsi took it and drank on her own accord. Maybe it explains why he said he then took Tsitsi to a prophet to be treated yet no effort was made to assist the deceased.

[40] We proceed to consider evidence in respect of the murder. The evidence of the accused's involvement was from Faison's warned and cautioned statement. The court must determine if the evidence is admissible. That would not be the end of the matter, even if it is admissible the court must determine if the evidence is credible such that taken in totality with all the evidence before the court a *prima facie* case was established.

[41] Both legal practitioners did not address the admissibility of Faison's statement. It is a confession. A confession is a formal statement that one is guilty of a crime. The statement by Faison begins with 'I admit the charge' and then he narrates in detail what transpired on the day.

[42] In *S v Murphy*<sup>6</sup> the court declined to use a co accused's statement in almost similar circumstances. In that case the accused was jointly charged with other persons for drug dealing. An extra curial statement was recorded from him implicating the other co accused persons. The State then withdrew charges against him and called him as a state witness.

[43] In court the accused recanted his statement recorded as a witness. He gave evidence favourable to the co accused. The state sought to fall back on the witness' extra curial statement. The court ruled the statement inadmissible.

[44] Faison statement does not fall within any of the exceptions. In her defence outline the accused does not associate herself with Faison. According to her Faison had offered to help her. When she spoke to Faison about her life and relationship with the deceased, it was innocent disclosure. She was unaware that Faison would misuse the information.

[45] The issue of conspiracy does not arise. The state tried to adduce evidence of communication through the phone between the accused and Faison while Faison was still with the deceased and Tsitsi but it could not get the witness from the service provider.

[46] It is our finding that Faison's statement cannot be used as evidence against the accused. Without Faison's evidence the state case rests on nothing and it crumbles.

[47] Even if Faison's statement can be used as evidence, it is not credible it contradicted Tsitsi's evidence in material aspects.

[48] Faison indicated that the accused gave her two bottles which had a drink commonly called a Pepsi drink to give to the deceased. About the poison, Tsitsi said along the way they bought some Pepsi drink and offered one to Faison. Faison did not drink his. When they got to Biri dam, Faison took what he called holy water from a small bottle which he mixed with the Pepsi drink. Thereafter he poured the concoction into two bottles.

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<sup>6</sup> 2023 (2) SACR 341

[49] At the scene of crime 2 by 500mls empty Pepsi plastic bottles, 1 by half full Pepsi plastic bottle and a 1 by 100mls bottle with black substance residue was recovered. These are the samples that were recovered and sent for examination by the Government analyst.

[50] What was recovered from the scene confirms Tsitsi's evidence that Faison took a small bottle that had some holy water and after infusion with the Pepsi drink he divided the contents to make the holy waters. The probabilities of the case are that Faison prepared the final concoction to give to the deceased at Biri dam contrary to what he wanted everyone to believe that he was given the concoction by the accused. If he was given the two bottles by the accused, why would he reconstitute the 'medicine' given to him by Tsitsi? The only inference is that he is the one who knew what he was administering to the deceased and Tsitsi.

[51] It becomes doubtful whether it is the accused who gave Faison the concoction or Faison made his own. Also, if indeed the accused gave Faison the 'medicine' whether Faison administered the medicine or something else pretending it was from the accused.

[52] Some salient features are worth noting. If Faison was the prophet who was engaged to assist the accused to restore their marriage why would he be given some medicine by the accused to treat the deceased? Ordinarily a prophet is the one who would assist the supposed client. Faison admitted in his statement that he was a prophet although not prophet Gibson. Obviously, Faison was a fake prophet. This is clear from the background to this case. Although he 'prophesied' about the deceased's life and condition, all this information was gathered from the accused.

[53] According to Tsitsi Faison had undertaken to heal the deceased's leg. The deceased used to walk with the aid of a crutch. At Biri dam, he washed the deceased's leg with water from the dam. He then took both to a hill to finish off the evil plan.

[54] He advised each of his clients to confess since the 'holy waters' would not work if they did not. Before giving them the 'holy waters' he advised them that they would sweat and feel some discomfort. If Faison was given the medicine by the accused did, he know the side effects of the medicine? Faison did not even state that the accused advised her to take the deceased and Tsitsi to Biri dam. Infact, he said he received that from the spirit.

[55] Faison's conduct after administering the concoction to the deceased and Tsitsi is not synonymous with an innocent mind as he wanted to portray himself to be. After realising that the deceased had died, he must have dumped his body along the road. As if that was not enough, he generated a false entry in a diary peddling some hogwash about Tsitsi and how the deceased committed suicide. He even claimed the deceased's motor vehicle that the deceased had given it to him. He also took the car keys, the registration book and some money. If Faison was an innocent prophet, of which he was not, he must have gone to the police and bare it all about the accused. He did not. He has lied through and through. There is a high probability that he could be shifting the blame or that he took advantage of the situation. There is no basis to accept his version as gospel truth. Why should he be believed now?

[56] In his statement Faison said he was given the concoction to administer to the deceased. He had no instructions to administer to Tsitsi. Tsitsi took it on her own accord.

Tsitsi denied this. Despite this contradiction what emerges from this is that the accused had nothing to do with the attempt on Tsitsi's life through the 'holy waters'. Similarly, the attempt on Tsitsi's life through strangulation had nothing to do with the accused. These land themselves squarely on Faison's feet.

[57] Section 199 of the CPEA in our view exonerates the accused in respect of the second and third counts. It provides that where an actual perpetrator commits a crime different from the crime, they agreed on but the accomplice realised the risk that the additional crime maybe committed. The accomplice can be found liable for the acts by the main perpetrator.

[58] To our mind one such scenario envisaged by the law makers could be a conspiracy to commit robbery. The accomplice provides a firearm. The accomplice does not necessarily go to the scene of crime. When the actual perpetrator eventually executes the plan, a murder is committed. In those circumstances the actual perpetrator's conduct is imputed on the accomplice. It would be reasonably foreseeable that the firearm may be used and cause death.

[59] Even if for a moment we accept that the accused gave Faison the poisonous medicine. The question is could she have realised that Faison would administer it to Tsitsi? Also, that could she have realised that Faison would strangle Tsitsi. In both instances we do not think so. There was no realisation that any attempt on Tsitsi's life may be made.

[60] The State failed to prove a *prima facie* case against the accused to warrant her being placed on her defence.

Accordingly, the accused is found not guilty and acquitted on all the three charges.

*National Prosecuting Authority*, the state's legal practitioners

*Claude, Petronellah & Nomazulu at Law*, the accused's legal practitioners.