THE STATE
and
WELLINGTON GURUMOMBE

HIGH COURT
MUTEVEDZI J
HARARE, 12 & 13 May & 24 June 2022

Assessors
Mr Chimonyo
Mr Barwa

Criminal Trial- Discharge at close of State Case

T Mukuze, for the applicant
H Muza, for the accused

MUTEVEDZI J: The accused was arraigned before this court on a charge of murder as defined in s 47 (1) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] (the Criminal Law Code). The allegations are that on 27 January 2020 at No. 28307 Unit L Extension, Seke in Chitungwiza the accused caused the death of *Apronia Tenga* by kicking and hitting her several times on the stomach with intent to kill or realising that there was a real risk or possibility that his conduct could lead to death. Despite the existence of that risk or possibility he persisted with his conduct.

The accused denied the charge. His defence was plain. It was that he did not assault the deceased on the day in question or at any other time. The injuries suffered by the deceased if she had any, were not sustained from an assault by him.

To buttress its allegations, prosecution led evidence from Doctor *Lamullelin Mallagai Martinez* whose testimony was formally admitted in terms of s 314 of the Criminal Procedure and Evidence Act [*Chapter 9:07*] (herein after 'the Code'). The testimony was common cause and went largely uncontroverted by the defence. It was simply that on 5 March 2020 at the request of the police, he carried out an autopsy on the remains of the *Apronia Tenga* (herein after "the deceased"). He concluded that the cause of death was acute anemy, uterine rapture and severe abdominal trauma. With the consent of the defence the state also produced the post-mortem report relating to the cause of the deceased's death and the accused's warned and

cautioned statement. *Viva voce* evidence was led from two witnesses namely *Shuvai Machimbidza,* a police officer at the police post where the deceased allegedly made the assault report and *Washington Gurumombe*, the accused person's elder brother. Below I summarise the witnesses' evidence.

Shuvai Machimbidza

Her evidence was unremarkable. It was that on the day in question she was on duty at Kilo Police base. The base is apparently a satellite outpost of Chitungwiza Police Station. She heard a thudding sound outside. She went out to investigate. To her horror, she found the deceased lying down outside. Surprised by that observation, she asked the deceased to go inside so that she could take a statement of what had happened. The deceased couldn't go inside and simply responded by saying that she wanted to rest. The police officer allowed the deceased the requested repose. She continued imploring the deceased to get inside. Later, the deceased opened up and stated that she had been assaulted by her husband after she had busted him with his paramour. She indicated that she had been kicked on the stomach with booted feet and hit with clenched fists. The officer said she noticed that the deceased was in severe pain and that she was heavily pregnant. Because the deceased clearly required urgent medical attention, the witness said she requested her to provide her next of kin's contact details. She was given the deceased's mother's mobile number. She tried to call the number in vain. The deceased told her that the mother was in Mutare. At that point the officer advised the deceased that she wanted contact details of a relative who was close by who could take the deceased to hospital without delay. It was then that the mobile phone number of *Washington Gurumombe,* the second state witness was provided. She called him and advised him to attend at the police base in order to assist the deceased to seek medical attention. Someone whom she thought was *Washington Gurumombe* came and picked up the deceased. She told that person that the deceased needed urgent medical care. The person addressed the deceased as *'Tatenda'* and said he was taking the deceased home to bathe her before going to the hospital because the deceased had soiled herself. She only learnt later that the person was the accused.

Washington Gurumombe

He said nothing of assistance to the court except to confirm that indeed the police had contacted him to attend at Kilo Police base to assist the deceased. Instead of going to the police, he had decided to go to the accused's place to inform him of the request from the police. The accused's place was closer to the witness's house than the police base. It was the accused who then proceeded to pick the deceased from the police base. The witness further testified that he

went back to his house and only returned to accused's place very early the next morning. He found that the deceased was very ill. Together with the accused, they sought a vehicle to ferry the deceased to hospital. She was pronounced dead upon arrival at the hospital.

With the evidence described above, the state closed its case. Soon thereafter, counsel for the accused person moved a motion for the discharge of the accused at the close of the prosecution case in terms of s 198(3) of the Code. The accused's argument was that the state had not led any evidence which implicated him in the commission of the offence. Counsel adverted to the testimony of the first witness as alluded to above. He further argued that as was apparent, that witness's evidence was inadmissible because it is hearsay evidence. If the evidence was deemed inadmissible, the state case was clearly dead in the water. The evidence could only be admissible if it fell within the realm of dying declarations. Unfortunately so he protested, it did not. The state timidly opposed that application on the unsupportable ground that the court could convict the accused on the basis of circumstantial evidence.

The Issue

The sole issue which therefore arises for determination is whether the court must discharge the accused at this stage.

The Law

The law regulating the determination of applications for discharge at the close of the prosecution case is banal. In this jurisdiction it was simplified in *S* v *Kachipare* 1998(2) ZLR 271 (S). The principle which can be discerned from that and other authorities is that where one or more of the following prerequisites exists and an accused makes an application to be discharged at the end of the prosecution case, the court has no discretion but to so discharge him/her. The preconditions are that, an application of this nature will succeed where:-

i. there is no evidence to prove one or more essential elements of the offence charged or
ii. there is no evidence upon which a reasonable court acting carefully might properly convict or
iii. the evidence led on behalf of the state is so manifestly unreliable or has been so discredited under cross examination that no reasonable court can safely act on it.

In this case, the accused argues that there is no evidence to prove a critical element of murder. He contends that he did not assault the deceased. If the deceased died from any

injuries, there is no connection between him and those injuries. There is therefore no nexus between him and the death.

The only evidence linking the accused to the offence is that of the police detail *Shuvai Machimbidza.* It is not debatable that the evidence is hearsay evidence. It can only be admitted by the court under the guise of one or the other of the exceptions to the rule against hearsay evidence. Counsel for the accused correctly identified the exception under which this evidence could fall as that of dying declarations. He however urged the court to disregard the evidence because it did not qualify as a dying declaration for the following reasons:-

a) the deceased's statement was not formally recorded by the police officer
b) it was not made under the apprehension of impending death

Dying declarations are provided for in terms of s 254(1) of the Code. It provides as follows:-

> **254 Admissibility of dying declarations**
> (1) A declaration made by any deceased person upon the apprehension of death shall be admissible or inadmissible in evidence in every case in which such declaration would be admissible or inadmissible in any similar case depending in the Supreme Court of Judicature in England. (underlining is for emphasis).

Ordinarily, it would have been prudent to only discuss the common law requirements for the admissibility of dying declarations. This case however turns not on those requirements alone but also on a discussion of the applicability of the exception itself. The provisions of s 254(1) means that in Zimbabwe, the dying declaration exception to the rule against hearsay evidence has been codified. The legislation of the exception was however left entirely dependent on the practice applicable in the Supreme Court of Judicature in England. That practice, at the time s 254(1) was enacted, was largely anchored on the common law conception of the doctrine. It is that understanding which led to the development of the requirements which the Zimbabwean courts have consistently applied. In the case of *The State* v *Julius Dabeti* HMA 53/18 MAWADZE J citing the author John Reid Rowland in his work, *Criminal Procedure in Zimbabwe*, 1997 Edition, with approval properly summarised the requirements for the admissibility of a dying declaration as that:-

1) at the time the statement was made the declarant must have been dangerously ill and was without hope of recovery
2) the person who made the statement must be dead at the time of the trial
3) the trial must be for the murder or culpable homicide of the dead person
4) the statement must relate to the cause of the death of the declarant's death
5) the declarant must have been a competent witness

6) it matters not that the statement was made orally

I agree entirely with his Lordship that those were the requirements for the admissibility of dying declarations applicable in the Supreme Court of Judicature in England when the common law position still obtained in that jurisdiction.

In my view, the allusion of s 254(1) of the Code to the practice in the Supreme Court of Judicature in England created unintended hurdles. It means that Zimbabwean courts cannot simply apply the principles of dying declarations without regard to the practice in England. Authors Schwikkard P.J. & Van der Merwe S.E. *Principles of Evidence,* 3rd Edition, 2009, Juta point out that in England and Wales the exception of dying declarations has been legislatively jettisoned. That observation is well made because the admissibility of hearsay evidence in English criminal courts is now regulated by the Criminal Justice Act, 2003 [*Chapter 44*] which took effect in 2005 (hereinafter "The Act"). The Act abolished the common law exceptions to the rule against hearsay evidence. That abolition extended to dying declarations. The only exceptions which remain were retained as a result of the preservation clause found in s 118 thereof. They do not include dying declarations. Statements made by persons who died after making such statement and consequently became unavailable to testify can only be admitted under s 116 of the Act which caters for unavailable witnesses. The provision regulates testimonies of all kinds of unavailable witnesses and is not limited to those who are dead. It provides as follows:-

> **116 Cases where a witness is unavailable**
> (1) In criminal proceedings a statement not made in oral evidence in the proceedings is admissible as evidence of any matter stated if—
> (a) oral evidence given in the proceedings by the person who made the statement would be admissible as evidence of that matter,
> (b) the person who made the statement (the relevant person) is identified to the court's satisfaction, and
> (c) any of the five conditions mentioned in subsection (2) is satisfied.
> (2) The conditions are—
> (a) that the relevant person is dead;
> (b) that the relevant person is unfit to be a witness because of his bodily or mental condition;
> (c) that the relevant person is outside the United Kingdom and it is not reasonably practicable to secure his attendance;
> (d) that the relevant person cannot be found although such steps as it is reasonably practicable to take to find him have been taken;
> (e) that through fear the relevant person does not give (or does not continue to give) oral evidence in the proceedings, either at all or in connection with the subject matter of the statement, and the court gives leave for the statement to be given in evidence.

What this means is that the common law requirements which attached to the admissibility of dying declarations in England no longer apply. What is critical are the new legislative prerequisites. These can be singled out from the provision as that:

i. the evidence attributed to the dead person must have been admissible coming from that dead person's mouth
ii. the person must be dead and
iii. the person who made the statement is identified to the satisfaction of the court

In England, there clearly has been massive improvement of the common law exception after a realization of the futility of hanging on to the antiquated practice. For purposes of illustrating that dying declarations are an anachronism, it is necessary to briefly state the rationale behind their admissibility.

The rationale behind dying declarations

Stripped to its bare bones, a dying declaration is a statement made by a declarant who is unavailable to give evidence- presumably because of his/her death-who made the statement under a belief of certain or imminent death-the so-called settled hopeless expectation of death!. As already indicated, it is evidence that would ordinarily be inadmissible on the basis that it is hearsay evidence.

As the *Lordham Law Review*, Vol. 38, Issue 3, Article 5, 1970 illustrated, dying declarations were previously admitted on the grounds of necessity and reliability. The argument for necessity is that there is no third party present to be an eye-witness to the fact because the usual witness available in all other crimes has been gotten rid of. The words of the victim before his death were accorded some revered status. As for reliability, the courts, in the most arbitrary and brazen judicial shamelessness, simply conspired to agree that impending death created in the human being, a state of mind in which the person's declarations must be viewed as devoid of ill-intentions to lie. That thinking is supposedly anchored on the fear of divine retribution that a man who goes to meet his creator with lies on his lips will no doubt face the almighty's full wrath.

The Fallacy of Reliability

As I will endeavor to show below, this kind of thinking cannot continue to be a basis for legal decisions in a modern world. The reformation which took place in England appears to have been motivated by the realization that courts could not continue basing their decisions on a centuries old religious relic with absolutely no scientific grounding. In the modern world the constitutions of most countries have liberalized religion unlike in the past where religious beliefs were dogmatic and the law and religion were almost inseparable. Now, citizens believe in different things. Others believe in nothing. They have different religious convictions. Some are Christian, some are Muslim, and some are Hindu whilst others are atheist. The approach

adopted by the English can only be salutary in my view. To believe that every ranting of a dying man is reliable solely on the conviction that no-one on the point of death should be presumed to be lying"[1] is a puerile argument. It has nothing to do with the law but everything to do with outdated religious persuasions. A mortally wounded individual in excruciating pain may be prone to all kinds of imagination. That person's story may simply focus on his/her side of the narrative and ignore the other side. Worse still the person to whom the dying declaration is told may be discomposed at the time to the extent of paying little if any attention to the blubbering of the gravely ill person.

I point all these criticisms merely to illustrate the wisdom behind dumping the common law approach to dying declarations. The critical point though is that the English Criminal Justice Act, 2003 has supplanted the common law position. The common law requirements are no longer appurtenant.

The unfortunate and possibly unintended consequence of s 254(1) of the Code is that it was made dependent on the practice in England. By extension it became subservient to the Criminal Justice Act, 2003 - a statute of a foreign jurisdiction! The reality of that position is that when the English abandoned the common law exception of dying declarations the Zimbabwean position was simultaneously altered. But like an old toy, this exception to hearsay evidence continues to be sporadically brought into play when it is required. It is safely returned to the old toys' box where it can be retrieved when it is necessary to do so instead of being sealed into a coffin and be buried.

Applicability of dying declarations exception

Given the above reality, the Code dictates that this court is obliged to follow the current trend in England. The three requirements for admissibility of an unavailable witness are that the evidence attributed to the dead person must have been admissible coming from that dead person's mouth; the person must be dead; and that he is identified to the satisfaction of the court.

It is no longer a requirement that the declarant must have been laboring under an apprehension of certain or impending death. Yet in Zimbabwean law, the requirement for the apprehension of death is intrinsically tied to s 254(1) which defines a dying declaration as a statement made by any deceased person upon the apprehension of death. The anxiety of death is the cornerstone upon which the edifice of dying declarations is built. I perceive this to mean that the removal of that requirement from English law leaves s 254(1) without any foundation. I read the provision to require that there be apprehension of impending death. In fact if that

fear of a looming demise is removed, the reliability of the entire concept falls off. The abolition of the common law exceptions to hearsay evidence in England created discord between the Zimbabwean Code and any reference that the applicability of s 254(1) is predicated on the practice in the Supreme Court of England. Had s 254(1) only made reference to the practice in England, its applicability would have been salvaged in some way. Unfortunately it does not just define a dying declaration as an ordinary statement but as "a declaration made by a deceased person under the apprehension of death. It is not possible to sever that part which relates to the apprehension of death without mutilating the entire provision. In the end what is undeniable is that our Criminal Procedure and Evidence Act urgently requires amendment to remove reference to English Law and set out its own requirements for admissibility of dying declarations, possibly in the manner that our courts have previously outlined. I however suggest that the criticisms levelled against the whole concept be taken on board if and when the legislature deems it necessary to amend this law. As it stands its applicability is highly questionable at best and impractical at worst.

Application of the law to the facts

For purposes of deciding the instant case, it would seem that it makes no difference whether the dying declarations exception to the rule against hearsay evidence is still applicable as previously stated by our courts or not. The statement allegedly made by the deceased in this case was that "she had been assaulted by her husband after she had busted him with his paramour and that she had been kicked on the stomach with booted feet and hit with clenched fists."

The above statement falls far short of a dying declaration when examined against the common law prerequisites. It fails the first requirement that it must have been made by a declarant who was under the apprehension of death. The precondition that the declarant must have been afraid of death is statutory in Zimbabwe (by virtue of s 254) whilst it used to be at common law in England. If the statutory position is accepted, it becomes clear that there is no suggestion in the deceased's statement that she entertained the belief that she had been mortally wounded. She did not think that she was gravely ill and did not make any reference to death. On that basis the statement would not qualify as a dying declaration. It would therefore become unnecessary to examine its compliance with the rest of the requirements. The matter must simply end there.

If, on the other hand, it were to be accepted that this court should follow the practice in England as suggested by the provisions of the Code, the danger is that the court will go against the clear and unambiguous prescription in s 254(1). The section demands that whatever comparison can be made has to begin from the premise that the statement was given under the apprehension of death. If it wasn't all the other issues about admissibility and inadmissibility do not and cannot arise.

The paradox is that on the basis of the law relating to unavailable witnesses applicable in England now, the statement would, without reference to s 254(1) of the Code, be admissible because the statement in issue was made by the deceased. It certainly would have been admissible coming from her mouth and she has been identified to the satisfaction of the court. Yet accepting the proposition of apprehension of death is contrary to the practice in England where it has been scrapped as a condition of admissibility and entirely left out of the statutes.

Disposition

In the end the inescapable conclusion is that the statement made by the deceased to police officer *Shuvai Machimbidza* in this case does not meet the requirements of a dying declaration. It therefore cannot be admitted as such. Once that conclusion is arrived at, it follows that the evidence by the police detail that the deceased told her that she had been assaulted by the accused person is hearsay evidence which the court is obliged to disregard. I intimated earlier on that the evidence of *Shuvai Machimbidza* is everything with which the state hoped to incriminate the accused. There is no link which has been established between the accused and the injuries which led to the demise of the deceased. Section 70(1)(i) of the Constitution is pertinent. It stipulates that:

> **70(1)** any person accused of an offence has the following rights-
> (h) to adduce and challenge evidence,
> (i) to remain silent and not to testify or be compelled to give self-incriminating evidence

If the accused were to elect to exercise his right in terms of that provision, putting him on his defence in the circumstances would be an exercise in futility. There is just no evidence to establish assault. It follows that an essential element of the offence of murder has not been established against the accused. In terms of the 4th schedule to the Criminal Law Code the permissible verdicts for murder are culpable homicide and assault. The evidence adduced in this case is also not sufficient to establish the essential elements of these competent verdicts. As required by s 198(3) of the Code the accused is entitled to be discharged at the close of the

prosecution case. Accordingly it is ordered that the accused be and is hereby discharged at the close of the state case. He is found not guilty and is acquitted of the charge of murder.

National Prosecution Authority, State's legal practitioners
Manokore Attorneys, accused's legal practitioners