

THE STATE  
versus  
TONDERAI GANIZANI MAIBIKI

HIGH COURT OF ZIMBABWE  
MAWADZE J  
HARARE, 25, 26, 26 January and 27 May 2016

ASSESSORS: 1. Mr Mhandu  
2. Mr Chiwanda

**Criminal trial**

*H Muringani*, for the State  
*N Chimuka*, for the accused

MAWADZE J: The accused is facing a charge of murder as defined in s 47 (1) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] in that on 8 June 2014 at Village 17 Musengezi in Chegutu the accused unlawfully and with intent to kill TRANOS MATOPE struck TRANOS MATOPE twice on the head with an axe causing injuries from which TRANOS MATOPE died.

The deceased TRANOS MATOPE was working at Lower Biri Mine with his two workmates Lloyd Muchena and Ephraim Maraire. It is alleged that the accused had visited the gold mine looking for employment and stayed with deceased and his two workmates for four days as deceased had promised accused employment at the mine.

The State alleges that on 8 June 2014 the deceased and his two workmates went to Corn Snow Milling Plant to process gold and that accused accompanied them. It is alleged that deceased and his two workmates processed 21grams of gold which they sold and shared the proceeds excluding the accused who was not yet part of their syndicate. The State alleges that the deceased then bought a work suit from one JONAS MUZADZAWANDA at the mill after which his two workmates left for their rural homes leaving accused and the deceased who later went to Lower Biri Mine at about 1800hrs.

The State alleges that between 1800hrs and 2200hrs while at Lower Biri Mine the accused took an axe and attacked the deceased twice on the head and deceased died. The accused is said to have proceeded to steal the deceased's work suit, pair of safety shoes and US\$80. The accused proceeded to Mujeri Bottle Store where he met deceased's two workmates who saw him wearing the worksuit and safety shoes. According to the State deceased's body was only discovered the next morning on 9 June 2014 at about 0830hrs after which a report was made to the police. The post mortem report shows the cause of deceased's death as brain damage arising from skull fracture caused by an assault.

In his defence outline the accused said he had only met the now deceased for five days at Musengezi in June 2014 but had no personal relationship with him. The accused said after staying for five days at Musengezi he then left for Chegutu on 4 June 2014 where he stayed with his brother selling roasted maize. The accused said he was shocked to be arrested on 25 July 2014 on allegations of having killed the now deceased. The accused said he was severely assaulted by the Police who forced him to admit to the charge. The accused said the work suit trousers found at Glenside Farm in Selous was his which he had left in April 2014. The accused said Police forced him to make indications on 28 July 2014 and that as a young man he gave in to Police pressure and underhand tactics.

During the trial the State produced the following exhibits;

Exh 1- is the Post Mortem Report compiled by Dr MAURICIO GONZALEZ who examined the deceased's body on 13 June 2014. The evidence of Dr Gonzalez was admitted in terms of s 314 of the Criminal Procedure and Evidence Act [*Chapter 9:07*]. As per post mortem report the now deceased had injuries on the left temporal area which was 5cm long and another on the orbital area 2cm long. The Doctor observed the deceased's skull was fractured and that the frontal bone was also fractured causing damage to the brain. The Doctor concluded that the cause of death was brain damaged arising from the frontal and temporal fractures caused by an assault.

From the evidence led it is not in dispute that the deceased was struck twice with an axe on the head. In fact the axe blade remained embedded in the head. This caused the skull fracture and brain damage which is the proximate cause of deceased's death.

Exh 2 – is a very detailed confirmed warned and cautioned statement by the accused. We are not placing any probative value on this statement. While the confirmed warned and cautioned statement is admissible upon its mere production by the Prosecutor in terms of a 256 (2) of the Criminal Procedure and Evidence Act [*Chapter 9:07*] the accused in our view

has successfully challenged this statement. It is the accused's contention that this statement was not made freely and voluntarily without undue influence. The onus is on the accused to prove on a balance of probabilities that this statement was not made freely and voluntarily without undue influence See *Judges Handbook for Criminal Cases* by Professor G Feltoe 1<sup>st</sup> Ed 2009 at p 64.

This position is clearly stated by John Reid Rowland in his book *Criminal Procedure in Zimbabwe* at 12-20 in which the learned author stated that once a statement is confirmed it is admissible and that the accused can nonetheless discredit it on the basis that it was not made freely and voluntarily without undue influence.

The record of the confirmation of the extra curial statement exh 2 reveal that the Magistrate asked the accused the following questions and the accused gave the following answers;

“Q Have you understood my explanation

A Yes

Q. Did you make the statement.

A. Yes

Q. Did you make the so freely and voluntarily without having been unduly influenced thereto.

A. NO”

From the above it is clear that the accused disputed before the Magistrate that he gave the statement freely and voluntarily without being unduly without being unduly influenced thereto. On that basis the Magistrate should have not confirmed the statement moreso without probing what the accused meant. While the State has submitted that the Magistrate made an error by recording the accused's answer as “NO” instead of “YES” and that this can be discerned from the other questions later asked by the magistrate and the answers accused gave, our view is that the onus was on the state to call the magistrate to explain this so called error. Without the evidence of the magistrate to that effect it remains a fact that the statement was irregularly confirmed. To make matters worse the statement given to one of the assessors has a different answer recorded.

It would therefore be a miscarriage of justice and a grave error at law for us to rely on this statement in order to found a conviction. In the result no reliance shall be placed on this statement exh 2.

Exhibit 3: is a pair of black safety shoes.

Exhibit 4 (a) and (b): are a work suit jacket and trousers respectively.

The state alleges that exhibits 3 and 4 belonged to the deceased and that accused stole them from the deceased after killing him. The accused on the other hand claims that this property belongs to the accused.

Exhibit 5 (a) and (b): are the axe blade and axe handle. It is not in dispute that exh 5 is the axe which was used to strike the deceased. As per exh 5 (c) the axe blade weighs 0,407 kg and axe handle 0,857kg.

In order to prove the case the state called the follow witnesses.

1. EPHRAIM MARAIRE who was deceased's workmate
2. LLOYD MUCHENA who was also deceased's workmate
3. JONAS MUZADZAWANDA who is the owner of the gold mill and sold worksuit to deceased.
4. DR MAURICIO GONZALEZ who carried out the post mortem
5. LOVENESS MAREBA who is accused's sister in law from whom the work suit jacket exh 4 (a) was recovered.
6. SIPHELANI CHINYANI an employee of Glenside Farm in Selous from whom the work suit, trousers exh 4 (b) was recovered.
7. SHYLET MPOFU a neighbour of accused's parents from whom the pair of safety shoes exh 3 was recovered
8. DETECTIVE SERGEANT LONIOUS SHUMBA (D/Sgt Shumba) who is the investigating officer
9. DETECTIVE CONSTABLE HENDERSON BANDA (D/CST Banda) who first attended the scene of crime and later interrogated the accused after his arrest.

The evidence of TONGAI MUDEKWA was admitted in forms of s 314 of the Criminal Procedure and Evidence Act [*Chapter 9:07*]. He is the person who first discovered deceased's body on 9 June 2014 leading to a report to the police. We now turn to the *viva voce* evidence led.

#### D/CST BANDA

He attended the scene of crime at Biri Mine on 9 June 2014. In his evidence he told the court that the now deceased's body was in a pole and dagger hut without a door. D/CST Banda explained that the now deceased was lying in a pool of blood inside the hut and had a cut on the forehead with the axe lodged or embedded on deceased's right side of the head. The axe handle was near the body.

D/CST Banda said the police started to look for the accused after they gathered information that the accused was the last person to be seen in the company of the now deceased. After accused's arrest he was present when the accused was interrogated and he denied that the accused was forced in any way to make any confessions or indications.

The evidence of D/CST Banda is largely not in issue and we have no reason not to accept it.

EPHRAIM MARAIRE AND LLOYD MUCHENA

In view of the similar nature of the evidence of these two witnesses we found it necessary to deal with that evidence at the same time. They were both workmates of the now deceased and stayed with the deceased at the mine.

Both witnesses told the court that the now deceased was their supervisor at the mine. They both told the court that on a date they could not recall but in June 2014 the accused came at the mine looking for work and that the deceased advised accused to wait for the owner of the mine hence they started to stay with the accused in their pole and dagga hut. They both said accused was of no means as he only had clothes he was wearing without any money and that they provided him with food and even cigarettes. By then they had mined some gold ore before accused had come and they later took the gold ore to the mill. They both said accused accompanied them to the mill after which they crushed the gold ore with deceased and obtained gold which they sold and then shared the proceeds excluding accused who was not yet part of their syndicate. They both told the court that they left the mill plant going to their families in the villages leaving accused and the now deceased at the mill plant.

Ephraim Maraire said they all bought work suits at the mill from the proceeds of the gold they sold and that deceased had bought safety shoes before. He said later at night he proceeded to the beer hall in the villages with his colleague Lloyd Muchena to drink beer.

Ephraim Maraire said at about 10 pm he saw accused in the beer hall and asked him where deceased was. In response he said accused said the deceased was at the mine. Ephraim Maraire said he was surprised to see accused wearing a new work suit similar to the ones Ephraim Maraire, Lloyd Muchena and deceased had bought at the mill. He said since he knew accused had no money he inquired from accused where he had got the work suit and in response accused said he had done some piece jobs at the mill after Ephraim Maraire and Lloyd Muchena had left and has raised money to buy the work suit. Thereafter he said accused left in the early hours and he later learnt that deceased had been found dead at the mine.

Under cross-examination he said he was not able to recall the date accused came at the mine but that it was in winter. He said other than the new work suit the accused was also wearing safety shoes similar to the ones owned by the deceased. When it was suggested to him that the work suit accused had was his, Ephraim Maraire said that was not true as accused had come to the mine wearing a torn T/shirt, a pair of jean trousers, a pair of tackie shoes and some pair of “pata pata” only. He said accused had no money at all and that they provided for the accused with food, cigarettes and accommodation.

Lloyd Muchena also said after leaving the accused at 12 noon he went to the village with Ephraim Maraire leaving accused and the now deceased at the mill. He confirmed that later at night he saw the accused wearing a work suit similar to the one they had bought at the mill. He too inquired from accused where he had got the new work suit and the accused said he had raised some money that day at the mill after doing a piece job when they had left. He said accused then left and boarded early morning bus to Chegutu. He too later learnt of the deceased’s death.

Under cross examination Lloyd disputed that accused owned a pair of work suit. He said the accused’s possessions, when he came to the mine was a worn out pair of jean trousers, T/shirts and tackie shoes.

Our assessment is that both Ephraim Maraire and Lloyd Muchena gave their evidence very well and materially corroborated each other. They both explained how they came to know the accused, their stay with him at the mine together with the deceased and the events of the day they went to the mill until they last saw the accused at the beerhall wearing a new work suit before they learnt of the deceased’s death. In our view they did not simply create this detailed story. We find no cause as to why they would involve the accused who for all intents and purposes was a stranger to them. We therefore accept their evidence.

#### JONAS MUZADZAWANDA

He is employed at Casino Investments in Village 10 Musengezi and was selling work suits and safety shoes to various employees in the mining area at the mill. He confirmed selling work suits to Ephraim Maraire, Lloyd Muchena and the now deceased. On the day in issue at the mill he said he did not sell safety shoes to the now deceased. He said accused was a stranger in the area and he recalls him very well. Most importantly he said he did not sell the accused any work suit or safety shoes.

The evidence of Jonas Muzadzawanda reads very well. He disputed selling accused any shoes or worksuit. We find no motive for him to lie in that regard.

LOVENESS MAREBA

She told the court that on a date she could not recall but in June 2014 accused who is a young brother to her husband came to her residence at No 25299 Kaguvi in Chegutu at about 10 00hrs with a work suit jacket which he gave to her husband for use. She said later on 25 July 2014 Police details came with the accused and collected the work suit jacket. She said at the material time she did not know where accused was staying or what he was doing.

Loveness Mareba's evidence is not challenged by the accused.

SIPHELANI CHINYANI

He resides at Glenside Farm in Selous. He said he started to know of the accused when accused came at Glenside Farm looking for work. He was not able to recall the date the accused came but said accused was wearing work suit trousers (initially he had said jacket) and gumboots. He said the farm manager asked him to accommodate the accused for the night. He said the next morning he left for work leaving the accused at his house and upon his return he found the accused had gone after stealing his US\$8.00. He said accused had left the work suit trousers. Later he said police came with the accused and collected the work suit trousers.

The evidence of Siphelani Chinyani was not put in issue save for the accused's allegation that he left the work suit trousers at that place in April 2014.

SHYLET MPOFU

She resides at Plot 11 in Chegutu and is a neighbour to accused's parents.

She said on a date she could not recall accused borrowed her bicycle in June 2014 to go to Makute. She said accused disappeared and only resurfaced in July 2014 without the bicycle. This caused her to confiscate a pair of safety shoes exh 3 which accused had. Later she said the police came and collected the shoes. Shylet said she knew the accused as a gold panner. Again the evidence of Shylet Mpofo was not put in issue by the accused.

DETECTIVE/SERGEANT SHUMBA

Detective Sergeant Shumba is the investigating officer and he said that he took over the matter on 9 June 2014. He said police started to look for the accused as the prime suspect after Ephraim Maraire and Lloyd Muchena had revealed that accused was the last person to be seen with the deceased and that they had seen accused wearing a work suit similar to the one deceased had which was missing after the deceased's death. He said he followed up accused's alleged explanation that he had bought the work suit at the Mill and Jonas Muzadzawanda denied ever selling accused a work suit but that he had sold work suits to

deceased, Ephraim Maraire and Lloyd Muchena and other people. He said it is on that basis that the police started to look for the accused who was arrested on 25 July 2014.

Detective Sergeant Shumba said he interrogated the accused and that the accused revealed the following;

- i) that accused had attacked the now deceased with an axe whilst accused and deceased were in pole and dagga hut at the mine leaving the axe embedded in deceased's head and that accused had taken the deceased's US\$80.00, work suit, safety shoes after which accused went to local beerhall where he met Ephraim Maraire and Lloyd Muchena and latter boarded bus to Chegutu.
- ii) that thereafter accused had left deceased's pair of safety shoes with Shylet Mpofo after failing to return her bicycle the accused had borrowed.
- iii) that accused had left deceased's work suit jacket with Loveness Mareba's husband in Chegutu.
- iv) that accused had left deceased's work suit trousers at Selous at Siphelani Chinyani's house.
- v) He said he took accused who led him to the various places stated above where he recovered the safety shoes exh 3, and the work suit exh 4 (a) and (b) and that accused latter made indications at the scene of crime.

Under cross examination he denied that he assaulted the accused. He disputed that he forced accused to make any confessions. He was not able to comment on the confirmation proceedings by the magistrate.

In our view Detective Sergeant Shumba evidence clearly explains how accused was linked to the offence and the investigations he carried out culminating in the recovery of the safety shoes and work suit at various places.

#### THE ACCUSED'S EVIDENCE

The accused told the court that he is a farmer, a fish monger and gold panner. The accused said he either resides at No C 658 Kamba Road in Chegutu or at Plot 45 Oldham farm in Chegutu.

In relation to this case the accused said he visited the mine in question on 29 May 2014 and returned to Chegutu on 3 or 4 June 2014 well before deceased's death. The accused said the purpose of his visit was not to look for a job but was selling fish at the mine where he met the deceased and Lloyd Muchena only.



In his evidence in chief accused said the work suit exh 4 (a) and (b) is his property together with the safety shoes exh 3. In fact accused said he had left the work suit trousers with Siphelani Chinyani in April 2014 well before deceased's death and that he indeed had left the work suit jacket with Loveness and safety shoes with Shylet Mpofu.

The accused said when he visited the mine he was wearing a new jean trousers, a white T-Shirt, a brown sweater and a work suit. The accused said police severely assaulted him after his arrest on 25 July 2014 and that he was forced to produce work suit exh 4 (a) and (b) and safety shoes exh 3 which are his items he uses while panning for gold.

The accused said Shylet's husband had sold Shylet Mpofu bicycle and asked accused to accept that accused had disposed of the bicycle and had to leave his safety shoes with Shylet Mpofu.

The accused said while at the mine he stayed with Ephraim Maraire, a nephew of Lloyd Muchena and the deceased in a pole and dagga hut for 2 days. He denied killing the deceased. Under cross examination accused was not sure of the exact number of days he stayed at the mine or whether it was for 2 days or 5 days.

#### ANALYSIS OF EVIDENCE

As already pointed out the cause of deceased's death is not in issue. The deceased was brutally murdered with an axe which was left embedded in his head. The post mortem report is clear in that regard.

The only narrow issue we have to resolve is whether accused is linked to deceased's death. From the evidence led after deceased had been killed his work suit and safety shoes were stolen.

We have already made findings as regards the demeanor and credibility of state witnesses. This would however not resolve the issue as there was no eye witness to deceased's murder.

The State case hinges on circumstantial evidence.

The often cited case of *R v Blom* 1939 AD 188 at 202 – 203 outlines how the court should treat circumstantial evidence in a criminal matter. There are two cardinal principles to be observed which are;

- (a) that the inference sought to be drawn must be consistent with all proved facts. If not, the inference cannot be drawn.
- b) that the proved facts should be such that they exclude every reasonable inference from them save the one to be drawn. If they do not exclude other

reasonable inferences then there must be a doubt whether the inference sought to be drawn is a correct one. See also *S v Tambo* 2007 (2) ZLR 33 (H); *S v Marange & Ors* 1991 (1) ZLR 244 (S).

It is competent for a court to return a verdict of guilty solely on circumstantial evidence. See *S v Shoniwa* 1987 (1) ZLR 215 (S); *S v Vhera* 2003 (1) ZLR 668 (H) at 680C.

We now proceed to apply these principles to this case.

- i) it has been proved that the deceased did not die from natural causes but was brutally killed as per exh I.
- ii) after deceased had been killed his property which include work suit and safety shoes was stolen.
- iii) the accused admits visiting the deceased and staying with him at the mine despite accused's contestations on the dates and the purpose of his visit.
- iv) from the evidence led accused was the last person to be seen with the deceased. This clearly explains why the police started to look for the accused.
- v) the accused disappeared from the mine the very day the deceased was killed. We accept the evidence of Ephraim Maraire and Lloyd Muchena.
- vi) upon his arrest the accused led police to various places in which property similar to that stolen from deceased was recovered being work suit trousers, work suit jacket and safety shoes.
- vii) the accused has been unable to give any plausible explanations on a number of critical issues which are;
  - a) why Ephraim Maraire and Lloyd Muchena would lie about the purpose of his visit at the mine, the clothes accused had, the attire he left wearing and the explanation he gave to them for possessing the work suit.
  - b) why Jonas Muzadzawonda would lie that he never sold accused a work suit or safety shoes.
  - c) why accused led the police to various places in Chegutu and Selous where property similar to deceased's missing property exh 3 and 4 was recovered.
  - d) why the accused at the material time was moving from place to place leaving unceremoniously and abandoning his property with various people.

In our view all the above proved facts lead to only one reasonable inference that the accused committed the offence alleged. The accused had the opportunity to commit the offence as he had remained with the deceased at the mine. The accused's motive was clear that he wanted to steal deceased's money and property. After committing the offence that accused fled from the mine and disposed of deceased's property leaving it with various people. The accused's guilt is beyond any reasonable doubt.

In the result we find accused person guilty of murder with actual intent.

VERDICT:

Guilty of Contravening Section 47 (1) (a) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]:- Murder with actual intent.

*National Prosecuting Authority, State's legal practitioners  
Mawere Sibanda Commercial Lawyers, pro deo, Counsel for the accused*