THE STATE
versus
LAST MBIZI

HIGH COURT OF ZIMBABWE
MUTEVEDZI J
HARARE, 22 & 23 February, 11 March, 24 April & 5 July 2022

Assessors
Mrs Chitsiga
Mr Shenje

Criminal Trial

Ms S Masokovere, for the State
T Tabana, for the accused

MUTEVEDZI J: The accused was charged with the offence of Murder as defined in s 47 (1) (a) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] (herein after the Criminal Law Code). In summary prosecution alleged that on **23 August 2020** along Hunyani River in Mhangura, the accused unlawfully and with intent to kill, stabbed Mika Adriana (herein after the deceased) with a knife in the abdomen. The deceased later succumbed to those injuries.

The accused pleaded not guilty to the charge. His defence outline indicated that he and the deceased were artisanal miners – a term loosely used in Zimbabwe to refer to subsistence miners who work on mining pits with little if any resources. They plied their trade on the banks of the Hunyani River in Mhangura. He said on the fateful evening both him and the deceased had consumed large amounts of intoxicating cane spirits. They were both inebriated. They were warming themselves besides a fire. The deceased suddenly became aggressive and charged at him with a glowing piece of wood. The accused says a scrimmage ensued with him trying to disarm the deceased of the knife that he was wielding. The accused said he noticed, in the commotion, that the deceased's abdomen was rended by his own knife. He was disemboweled and the intestines were left protruding. The accused then left the scene.

The State opened its case by applying for the formal admission of the testimonies of some of its witnesses into evidence in terms of s 314 of the Criminal Procedure and Evidence

Act [*Chapter 9:07*] (herein after the Code). With the consent of the defence, the evidence of the following witnesses became an uncontroverted part of the prosecution's case:

1. *Duncan Jonasi* - the nurse who was the first medically trained person to attend to the deceased at a local clinic in Mhangura
2. *Philip Kajowe* - the arresting police detail
3. *Trymore Biason* - the investigating officer

The prosecutor also applied to tender the post-mortem report compiled by a Doctor *Yoandry Olay Mayedo*, a forensic pathologist who examined the remains of the deceased at Parirenyatwa Hospital on 1 September 2020 to determine the cause of the deceased's death. He also applied to tender the accused's warned and cautioned statement which was confirmed by a magistrate at Guruve on 4 November 2020. The two documents were in the absence of any protestations from the defence, duly admitted and taken as exhibits. *Viva voce* evidence was led from two witnesses namely *Major Mukwati*, and *Macdonald Mukono.* Below we provide the highlights of the witnesses' testimonies.

Major Mukwati *(Herein after Major)*

He was both the deceased and the accused' fellow subsistence miner in the same location. He resided at the same crude and temporary camp with the two. He said the deceased and the accused practically slept under the same shelter- which the court understood to be an equally make shift structure. On the day in question, the witness and others went to the shops ostensibly to replenish their food supplies. We note ostensibly, because later on in his testimony it became apparent that they also imbibed alcoholic beverages. On their way back to the river bank, they met the deceased. The deceased accompanied them back to base. Along the way, a misunderstanding arose between the accused and the deceased. It would appear the ruction was about cigarettes. The deceased refused to give the accused cigarettes. The misunderstanding lasted about 20 minutes. It would have been laughable if it had not led to the death of a human being. Because it did, it's no laughing matter. When the argument subsided at the tents, the witness says he then asked his 'room-mate' called *Tatenda* go and get glowing embers from the accused and deceased's shelter which was about 13 metres away, so that they could light up their own fire. *Tatenda* went. He found the deceased seated. When he stood up the intestines protruded from his belly. Tatenda shouted to the witness for help. When he arrived, the witness applied crude first aid to the deceased. He shoved back the intestines

into the stomach and bandaged the wound with a piece of cloth. The deceased told him that he had been stabbed by the accused person and that he was dying and will be with the accused wherever he will be. The deceased was complaining of feeling cold. The witness made a fire and sat beside it with the deceased all night through to the next morning. At daybreak he proceeded to report to persons he called village officers. He was assured that the village head and the police would be advised.

The witness's evidence only gave the court the background to the dispute between the accused and the deceased. He did not personally witness the assault on the deceased. The only aspect of his testimony which we found material is his recital of the statement made to him by the deceased before he died.

Macdonald Mukono *(herein after Mukono)*

He was also a gold panner. He knew the deceased for a very short period because he (Mukono) had arrived at the panning site only three days before the deceased's death. Despite that, he painted a picture of being very close to the deceased. He alleged that the deceased and him slept together, worked together and cooked together. On the fateful day the two of them had processed their ore and got a few grams of gold. They sold the gold and got what he called quite some money. The deceased asked him to accompany him to the shops. He refused as it was late. He tried to dissuade him but failed. On the deceased's return from the shops, the witness said he heard noises and realised that there was a misunderstanding but could not figure out what the shouting was about until the quarrelsome lot got closer to where he was. It was then that he noted that the accused was at loggerheads with *Major*. The deceased was telling *Major* that he did not want to insult an elderly man. Soon after that the deceased picked up another quarrel with the accused. He remained sleeping where he was, about seven metres away. He witnessed the accused and the deceased push each other. He saw the accused's hands outstretched before he (accused) disappeared. After that the deceased sat down. He heard the deceased shout that "I am dying, I have been stabbed by Last!" He was later called by *Major* who advised him that the deceased had been injured. He panicked and went to where he had been summoned. He noted the horror injuries described by the first witness particularly that the deceased's intestines were protruding from the belly. Together with the first witness they tried to assist the deceased. He alleged that everyone at that camp fled except himself and the first witness. We believe this is the reason why even *Tatenda* who appeared to have been first on the scene did not testify. They tried to carry the accused in a bid to seek help. It was in vain

because they could not cross the river as the water level had risen. Another man called *Phinias* later arrived. He offered to go and call for help from the village. Later on the first witness volunteered to go and inform the police. He also mentioned that the accused and deceased got along well before this day. They were both drunk and in his view it is what resulted in the misunderstanding.

This witness also did not personally see the accused stab the deceased. The significant part of his testimony was what he witnessed after the assault and what he heard the deceased shout out.

In his defence the accused added nothing new. He was steadfast on his stance as given in his defence outline.

From the above a number of issues are not contentious. They can be enumerated as that:

a) the accused and deceased were both inebriated
b) A physical scuffle ensued between the two of them pursuant to an earlier verbal misunderstanding
c) during the physical altercation the deceased got injured
d) The accused fled from the scene soon thereafter
e) No one was an eye witness to how the deceased got injured
f) The deceased died from the injuries sustained in that scuffle
g) The cause of death was severe abdominal trauma due to stab wound

The issues

The questions to be answered can be summarised as:

i. Did the accused stab the deceased or the deceased was slit by his own knife as he wrestled the accused? If he did not, the matter ends there.
ii. If the accused stabbed the deceased, was he acting in self-defence?
iii. Can the fact that the accused was drunk be a defence to the charge of murder?

Whilst the first question is clearly factual, its resolution unfortunately turns on the discussion of a legal concept. It therefore partly involved the assessors and partly excluded them. The other two are wholly legal.

In our deliberations we thought it prudent to resolve the factual question first. In that bid, we have already indicated that there was no eye witness account to the actual assault on the accused. We therefore found as a fact that the accused's version could not be discounted

because there was no evidence to contradict it. We were not satisfied beyond reasonable doubt that his version of events is palpably false. Counsel for the accused referred the court to the case of *S* v *Muchemi* HH561/2015 a case which appeared to be on all fours with this one. At p 2 of the cyclostyled judgment the court said:

> "In other words, none of the witnesses was able to explain to the court the circumstances surrounding the actual stabbing of the deceased. Only the accused was privy to that situation. Because of this we can only reject his story if we are satisfied beyond doubt that the accused's story is palpably false…"

The scuffle between the accused and the deceased occurred at night approximately between the hours of **2200** and **2300.** It was pitch-dark. *Major* admitted that the darkness reduced his visibility to a negligible distance. We can add that the fact that he admitted being drunk would have also contributed to *Major's* poor comprehension of what was going on around him. The witness who was sober was *Mukono.* He unfortunately never rose from his sleeping place either to try and mediate between the feuding parties or to witness what was going on. He appeared to us to be that kind of person who is contend with keeping to himself and being oblivious to what will be going on elsewhere- a real introvert- and resultantly a very poor witness.

The only allegation which points to the accused as having inflicted the wound that caused the deceased's death is his statement to *Major* that he had been stabbed by the accused and the shout heard by *Mukono* that the deceased was dying because the accused had stabbed him. There was no argument by the defence that the statements had been uttered. The court also found that those words had indeed been said by the deceased to the witnesses. There is however no gainsaying that the words amount to hearsay evidence. That genre of testimony is generally inadmissible because of its inherent weaknesses. Broken down, hearsay is evidence whose probative value is entirely dependent on the credibility of another person other than the witness giving such evidence. *See* - Schwikkard P.J. & Van der Merwe S.E. *Principles of Evidence,* 3rd Edition, 2009, Juta at p 269.

The arguments for the admission of hearsay evidence are moored on that it is better to accept impaired testimony because the accused is always afforded an opportunity to expose its deficiencies than to take a chance to compromise the administration of justice by withholding information from the court. In addition in a jurisdiction like ours, the courts are always required to give reasons for their decisions. As such the court where it takes hearsay evidence will have to indicate in its reasons if it discounted or accepted the hearsay evidence. That reasoning led

to the development of possible justifications for exceptions to the hearsay rule. One of those exceptions is the exception of dying declarations. Recently in the case of *S* v *Wellington Gurumombe* HH 405/22, this court discussed the applicability of the exception of dying declarations in Zimbabwean law and made startling findings. Some of those findings were that the applicability of the exception has been distorted by the fundamental changes which occurred in English law. The importance of English law cannot be overemphasised. Section 254 (2) of our Criminal Procedure and Evidence Act [*Chapter 9:07*] which provides for dying declarations was unwittingly made dependent on the practice obtaining in the Supreme Court of Judicature of England. 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).

The changes in England saw all the common law exceptions to hearsay evidence including dying declarations being discarded. The reforms left s 254 without leg to stand on. Its cornerstone is the deceased person's settled hopeless expectation of death yet that is no longer applicable in English law. The case of *S* v *Gurumombe* was ultimately decided without the court debating the issue to finality. There was no need to make a conclusive finding on the applicability or otherwise of dying declarations in Zimbabwe. Instead, after a review of the reforms in England and a discussion of the pitfalls attendant on the reliability of dying declarations, this court arrived at the conclusion that the applicability of the exception of dying declarations in Zimbabwe was at best highly questionable and at worst impractical.

But as expected in a criminal court which largely deals with homicide crimes, it was not long before the need to conclusively deal with the debate confronted this court. It has to be dealt with.

The weaknesses which bedevil the justification of the dying declarations exception are many and fervent. I can do no more that recite the criticisms which I levelled against dying declarations in *Wellington Gurumombe* at p 6 of the cyclostyled decision where I said:

> "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. 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 belief 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.'

That condemnation would apply to the instant case with equal force.

In *casu* it is important to examine the deceased's statement. *Mukono*, witness two in this case, testified that the deceased shouted that *"I am dying, Last stabbed me."* To *Major*, the first witness, the deceased said he had been *"cut by the accused and will be with him wherever he goes"*

The case of *The State* v *Julius Dabeti* HMA 53/18 where MAWADZE J cited the author John Reid Rowland in his work, *Criminal Procedure in Zimbabwe*, 1997 Edition, remains one of the cases where the requirements of dying declarations were crisply summarised. They are 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

In the present case, the deceased was severely injured. In fact he was mortally wounded. His intestines were literally protruding from his stomach. He shouted that he was dying because the accused had stabbed him. He repeated to *Major* that the accused had stabbed him and he

would be with him (the accused) wherever he went. Mr *Tabana* for the accused argued that much as the deceased uttered those words, they do not qualify as a dying declaration because the deceased was not labouring under the apprehension of death. He was taken to a clinic thereafter and his death was not contemporaneous with the declaration.

I understood Mr *Tabana's* argument but he was mistaken. The deceased person need not only expressly advise his audience that he habours the apprehension that he will not survive. That he is hopeless about his chances of survival can be inferred from sentiments of hopelessness such as the words uttered to *Major* by the deceased in this case. It also appeared that counsel was bringing in an extra requirement of contemporaneity between the declaration and the deceased's death. That cannot be correct. Contemporaneity between the utterance and the death is not a prerequisite for the admission of a dying declaration. It is a requirement under the *res gestae* exception to the hearsay rule. In *casu* it cannot be doubted that the deceased at the material time was gravely ill. He advised the two witnesses of the cause of his death. Any man who sees his stomach raptured and his intestines spilling out would be outrageously brave to have any hope of survival. His statement on the face of it, therefore satisfies requirements 1 and 4 above. Needless to say, this is a homicide trial relating to the death of the deceased and had he been alive, he would have been competent to testify at this trial. I find therefore that his statement was indeed a dying declaration.

What exercises my mind however remains the dependence on English law apparent from s 254 of the Code and its ramifications. Much as the exception of dying declarations has been codified in our law, it is noteworthy that the only requirement which appears in s 254 is the apprehension of death. All the other requirements were dependent on the English common law and were popularised by the courts. Their applicability in Zimbabwe was contingent on their applicability in the English Supreme Court of Judicature. The undesirability of taking dying declarations wholesale must have struck the minds of the law makers in England. This court held in *Wellington Gurumombe* (supra) that the English Criminal Justice Act, 2003 supplanted the common law. The dilemma which resulted was whether the Zimbabwean courts were to be guided by the English Criminal Justice Act. In a bid to resolve that, my attention was drawn to s318 of the Code. It provides that:

> **"318 English laws applicable**
> The laws in force in the Supreme Court of Judicature in England which are applied by this Act shall not include any amendment thereto made on or after the 1st June, 1927, by any statute of England."

Clearly therefore the application of the Criminal Justice Act, 2003 to Zimbabwean criminal law is ousted by the above provision. In turn, there is no common law principle which still applies to exceptions to hearsay evidence in England except those that were statutorily retained by s 118 of the Criminal Justice Act. My understanding of the position is that this creates a gap in our law where all but one of the requirements for admission of dying declarations were tied to English common law. Section 318 leaves no doubt in my mind that Parliament did not intend to subordinate the Code to a foreign statute as implied in s 254. What it intended was that our courts had to borrow heavily from the common law practice obtaining in England. That practice has been abolished and replaced by statute whose application in Zimbabwe is prohibited by legislation. The exception of dying declarations in Zimbabwe is therefore only partly regulated by the Code. The courts must turn to the requirements built by the Zimbabwean courts over the years. As already pointed out above, those requirements have inherent shortcomings which at times make the exception of dying declarations unattractive. Fortunately, our Constitution anticipated the dynamism of the common law and provided in s 176 mechanisms to deal with that potential fluidity. It provides that:

> **"176 Inherent powers of Constitutional Court, Supreme Court and High Court**
> The Constitutional Court, the Supreme Court and the High Court have inherent power to protect and regulate their own process and to develop the common law or the customary law, taking into account the interests of justice and the provisions of this Constitution."

The criticisms levelled against the exception of dying declarations heightens my conviction that it is in the interests of justice to develop the requirements for their admission as an exception to hearsay evidence in our criminal procedure. The case at hand is a typical reminder that if care is not taken the courts may arrive at completely unsafe verdicts of guilty grounded on the so-called dying declarations. In addition to all the requirements indicated above, there ought to have been a further requirement or rather a qualification of requirement 5 in that in addition to being a competent witness, the declarant's evidence would have been found to be credible before the court. We have in this case a deceased who is alleged to have been the aggressor, he was stone drunk and appeared to have taken time to realise that he had been critically injured. To accept his version of events on the basis that it constitutes a dying declaration without more amounts to throwing out through the window all the safeguards which for many years have been internally built into our legal system to mitigate against the conviction of innocent people. The evidence of an inebriated person who is fatally injured from a combative scuffle he alleged caused cannot be used as a basis for a conviction of murder.

What is particularly disconcerting is that there is evidence from the second state witness that the deceased had a spat with the first witness immediately before the quarrel with the accused resumed at the camp. That is illustrative of a deceased who was possibly the provocateur in the commotion that led to his death. It was an incentive for him to tailor his version of events so that he is exonerated from blame for his own death.

Against the above background, I find that due to the changes which have resulted from the reformation of the law on dying declarations in England, a gap has been created in relation to those requirements for dying declarations which are not specified in statute in this jurisdiction. It is the duty of the courts to develop those common law requirements in the interests of justice. Consequently reliance on a dying declaration solely on the basis that the declarant was about to die even in the face of evidence that his declaration cannot and must not be relied on becomes ludicrous. It is imperative that there be a further requirement that the declaration must be found to be free from obvious imperfections for a court to rely on it without more.

In the circumstances, the dying declaration in *casu* does not meet that requirement. Even if the deceased were to testify at this trial his aggression, drunkenness and failure to comprehend the severity of the injuries he had suffered from the brawl would have been enough to completely discredit his evidence. I therefore reject it.

Once the above conclusion is arrived at, it means there is no evidence that the accused assaulted the deceased. Assault is an essential element of the offence of murder and its competent verdicts of culpable homicide and assault. The accused cannot be liable for any of those offences. It apparently becomes unnecessary to interrogate the accused's defences of self-defence and intoxication. They could have only arisen if the court had found that the accused had stabbed the deceased.

From the above, we unanimously agreed that we were not satisfied that prosecution proved their case beyond reasonable doubt. Accordingly we find the accused not guilty and acquit him of the charge of murder.

National Prosecuting Authority, state's legal practitioners
Tabana and Marwa, accused's legal practitioners