

THE STATE

Versus

MDUDUZI TSHAKAZA

And

MABUSA MKWANANZI

And

ARNOLD STEWART GONO

IN THE HIGH COURT OF ZIMBABWE
NDOU J (With Assessors J. H. Sibanda and E. R. Nyoni)
BULAWAYO 11 OCTOBER & 1 NOVEMBER 2012

T. Hove for the state
H. Shenje for 1st defendant
H. Malinga for 2nd defendant
T. Mhiribidi for 3rd defendant

Criminal Trial

NDOU J: Accused 1 was aged 49 years and accused 2 25 years at the time of the alleged offence. The now deceased was aged 29 years at the time he met his untimely death. The accused persons are jointly charged with murder it being alleged that on 14 April 2011 at house number 1298 Industrial Site, Beitbridge in the Province of Matabeleland South, they did wrongfully, unlawfully and intentionally kill and murder Simbarashe Gwazvarwa, a male adult in his lifetime there being. The accused persons pleaded not guilty to the charge. Most facts in this matter are common cause. It is beyond dispute that on the night of 14 April 2011 the now deceased was guarding broiler chickens at stand number 1298 Industrial Sites, Beitbridge. The now deceased was attacked with a blunt object by person (s) who wanted to steal the chickens resulting in depressed skull fracture and brain laceration. According to Dr A. R. Casteiianos, who conducted the post mortem on the deceased's body, the cause of death was the depressed skull fracture and head injury. After the attack on the now deceased, broiler chickens were stolen. The issue here is whether the accused persons were those assailants. The state called Clever Gwazvarwa, the deceased's brother. He does not know accused persons. He said on the night in question he was asleep in the house at 1298 Industrial Sites o 14 April 2011 when at around 2am he heard noises emanating from the fowl run where the deceased was guarding chickens. He woke up his mother but she was afraid to go to the fowl

run to investigate. He sought and got assistance of neighbours and they went to the fowl run where they found the deceased lying next to the fowl run. He was injured and they ferried him to hospital by taxi. Under cross examination he said he heard a voice saying words to the following effect (emanating from the fowl run) "You want to mess around with me boy". As he was familiar with now deceased's voice, he was certain that it was not him who was making those utterances. Although there were lights in the fowl run, he was unable to identify the assailants save that he saw appearances of a tall and slim man. We find this witness to be credible. He did not seek to exaggerate his testimony.

Mavis Dongo: She also confirmed what the last witness said that she heard noise from the chicken run and later woke her up. She later examined the fowl run and observed that the mesh wire had been cut and broiler chickens stolen. She also said she does not know the identity of the deceased's assailant. Her testimony does not take the case further but we find that she is a credible witness.

Tendai Mukusha: She is accused 1's sister, i.e. they share the same mother but born of different fathers. She said she knows accused 2 very well as accused 1's friend. She said she is very familiar with both accused persons' voices. She said in the early hours of 14 April 2011 between 2 and 3 am accused 1 knocked at her premises whilst she was asleep. After she realized it was him she told him she would not open for him to gain entry into her house as she had taken her medication and wanted to rest. Accused 1 told her that he had brought her something. She advised him to drop whatever it is that he brought into the room through an opening above her door which he did. She recognized accused 2's voice as he was talking to accused 1 at the time. She said she was familiar with accused 2's voice as he used to frequent her place with accused 1 and she used to prepare meals for them regularly. They used to while away time at her house. She said they used to visit her during the day and not during odd hours like they did on this day. She was adamant that this incident took place on the early hours of a Thursday because she was going to her Thursday church meeting later that day. She was sure it was Thursday morning because of the subsequent events surrounding the parcel accused 1 left at her house. She said she woke up around 5am that morning i.e. after the events narrated above involving the accused persons. She went to the market to order bananas for her business.

When she left she had secured her premises and upon her return she found the two accused persons seated outside her house drinking beer. Accused 1 enquired whether she had seen the parcel or thing he dropped into her house the previous night. She told him that she had not. He told her to check and she indeed checked and discovered that it was a live white broiler chicken. He said she should slaughter it and prepare a meal. She advised him that as it was a Thursday, she was unable to do so on account of her religious belief or church principle that she should not touch any meat on Thursdays. She told accused 1 to slaughter the chicken himself and prepare the meal. She left to go and sell her bananas. When she later returned she found some sadza and chicken meat had been prepared in her pots. She invited her sister's

son to eat the sadza and the chicken meat while she ate sadza and milk. She said the accused persons were still drinking beer at that stage. She was cross examined at some length. We are satisfied that she gave her testimony very well. There is no reason why she would create a story that her brother and accused 2 came to her place with a chicken at 2 – 3 am. We hold the view that she is a credible witness. We are equally satisfied that she knew both accused persons very well to the extent that she can reliably identify them by their voices. Accused 1 is her brother so there is no question of mistaken identity of his voice. In any event, the enquiry he made about the chicken the following morning rules out any possibility of mistaken identity of accused 1. Accused 2, as alluded to above, used to frequent her place in the company of her brother accused 1. The following day she found them together at her house drinking beer. They spent the day together as was the norm. She said accused 2 was a frequent guest at her place of abode with accused 1. She regularly prepared meals for them. On some occasions they bathed at her house. Admittedly because of fallibility of human observation, evidence of identification is approached with some caution. It is not enough for the identifying witness to be honest, the reliability of human observation must also be tested – *S v Mthethwa* 1972 (3) SA 766 (A) at 768. As far as accused 1 is concerned, there is no question of mistaken identity as indicated above. She knows his voice very well and he confirmed in the late morning that day their earlier conversation over a chicken. The issue has to be considered carefully in respect of accused 2. She only identified him by his voice as he spoke to accused 1. The extent of her prior knowledge of accused 2 is that she has known him for around three months prior the offence. Accused 2 frequented her place in the company of accused 1. They socialized at her place and she on many occasions prepared meals for them. She said on some occasions accused 2 even bathed at her house. With such a background, she obviously can reliably identify accused 2. In our view she reliably identified him by his voice on the early morning in question even though she did not see him. She later saw him the same day at her house drinking beer with accused 1. Accused 2 was also present when accused 1 told Tendai about the chicken he left the previous night. The degree of Tendai's previous knowledge of accused 2 is sound and reliable. She had a good opportunity for a correct identification of accused 2 by his voice from the above-mentioned circumstances – *R v Dlodlo & Ors* 1962 (1) SA 307 (A) of 310. Tendai's impression cannot be doubted. It was unusual for the accused persons to visit her place at that odd hour of the night which made it likely that Tendai's impression would be preserved. There is no question of mistaken identity.

Lameck Siwaya testified but his testimony is basically that after the death of the deceased he counted his chickens and discovered ten were missing and that mesh wire had been cut. We find that he is a credible witness.

Accused 3 was acquitted at the close of the state case.

Accused 1 testified. He made a very poor showing as a witness. He told falsehoods on why his sister Tendai Mukusha would falsely implicate him. He created a fictitious story about friction between them over cattle inherited from their late mother. All this was not put to Tendai when

she testified. This is a creation of accused 1's imagination. If there was such friction he would have not frequent her place for meals. We find that accused 1 is a hopeless liar.

The same applies to accused 2 who also testified. He could not explain why Tendai would claim that she knew him very well. He is merely distancing himself from accused 1 because of this matter. He is not a credible witness. The accused persons generally tried to distance themselves from the chicken because of this case. It is beyond dispute that the state is relying on circumstantial evidence. The credible proven facts in this matter are the following. The deceased was assaulted by person (s) who were stealing broiler chickens which he was guarding on the wee hours of 14 April 2011. Some ten chickens were stolen. Deceased died as a result of the injuries sustained later that day whilst in hospital.

The accused persons arrived at Tendai Mukusha's house between 2 and 3 am and left a live broiler chicken. The accused persons returned later that morning and associated themselves with the broiler chicken by words of accused 1 to Tendai and latter by slaughtering it and eating it. The accused persons spent the 14 April 2011 at Tendai's house drinking beer together. The accused persons told lies about this visit to Tendai's house. They told lies about their knowledge of each other. They told falsehoods on why Tendai would create the story she told the court.

It is trite law that the possibility of error in direct evidence lies in the fact that the witness may be mistaken or lying. All circumstantial evidence depends ultimately upon facts which are proved by direct evidence, but its use involves an additional source of potential mistake in its reasoning. The inference which it draws may be a *non sequitur*, or it may overlook the possibility of other inferences which are equally probable or at least reasonable possible – *South African Law of Evidence* – Hoffman & Zeffert 3rd Ed at p 464 and *R v Bloom* 1939 AD 188 at 202 – 203. In the latter case the court referred to two cardinal rules of logic which govern the use of circumstantial evidence in a criminal trial:

- “(1) The inference to be drawn must be consistent with all the proved facts. If it is not, then the inference cannot be drawn.
- (2) The proved facts should be such that to 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 correct.” *S v Vhera* 2003 (1) ZLR 668 (H); *R v Sibanda* 1963 (4) SA 182 (SR).

We have stated the proved facts above. In our view, the cumulative effect of these various proved facts all point to the same conclusion of guilt of the accused persons. The evidence before us as a whole furnishes sufficient proof that it is the two accused who dropped a live broiler chicken at Tendai Mukusha's place in the unusual hours between 2 – 3 am after

the attack on the deceased and theft of live chickens occurred an hour or so earlier. The accused lied about their possession of the chicken and their whereabouts. They must have stolen the chicken from where deceased was guarding and attacked him when he disturbed them during the theft. It is not clear how deceased was attacked save for the resultant injury. This seems to us to be a borderline case between murder with actual intent and murder with constructive intent. The accused persons are entitled to benefit from the doubt and be convicted of the lesser of the two. Accordingly, we return a verdict of murder with constructive intent for each accused persons.

The court found extenuating circumstances and heard submission in mitigation.

Sentence

Each: 20 years imprisonment.

Criminal Division, Attorney General's Office, state's legal practitioners
Shenje & Company, 1st defendant's legal practitioners
Job Sibanda & Associates 2nd defendant's legal practitioners
D. W. Mhiribidi & Company, 3rd defendant's legal practitioners