

COLGATE DUFFEN MUDENDA

VERSUS

THE STATE

IN THE HIGH COURT OF ZIMBABWE
MAKONOSE J
HWANGE 20 MARCH 2012 AND 5 APRIL 2012

Criminal Trial

Mr K. Ndlovu for the state

Mr. T. Khumalo for the respondent

MAKONESE J : The accused is facing a charge of murder, it being alleged that on the 4th of may 2011 and near Gillian Mudimba's kraal, Sikaputa 2 village, Binga, the accused did wrongfully, unlawfully and intentionally kill and murder Innocent Mudimba a male adult. The accused pleaded not guilty and claimed he was implicated.

The deceased was aged 19 years at the time he met his death and he resided at Gillian Munkuli's homestead, Sikaputa Village 1, Binga. On the 3rd of May 2011 at about 2000 hours the deceased retired to bed with his young brother Pronounce Munkuli. At about 0400 hours the following morning Pronounce Munkuli awoke and discovered that the deceased was not on the bed and the bedroom door was slightly open. A few minutes later the deceased entered the hut stumbling, clutching his neck with both hands and fell to the floor writhing in agony. The deceased's young brother tried to ascertain what had happened but the deceased did not respond. Seeing this he called out to his grandmother who was sleeping in another hut. When the elders entered the bedroom hut they discovered that the deceased had died. He had a deep cut on the throat from which he was bleeding profusely. A report was made at Binga Police Station. The police attended the scene and conveyed the deceased's body to Mpilo Hospital in Bulawayo for a post-mortem examination. On the 9th of May 2011, following investigations police from Criminal Investigations Hwange arrested the accused in connection with the offence.

This is a case where there is no direct evidence linking the accused to the commission of the offence. The case against the accused is based on the written confession he made to the police in his warned and cautioned statement which was recorded at Hwange Police Station by Detective Constable Sibanda on the 12th of May 2011.

The confession reads as follows:

"I Colgate Duffen Mudenda do admit that I killed deceased person. I was in the company of Bhilo, Chiyanembo, Peter, Petros and Mr Daniel. Chiyanembo, Daniel and Peter entered the hut. I remained outside watching for anyone who would be awake by then. At this homestead there are several houses but they entered into the hut and lifted the deceased and took him to the kraal. Bhilo held the deceased body from the back while Petros collected dripping blood into an empty sugar plastic. Chiyanembo stabbed the deceased on the wind pipe (oesophagus) with the knife while I also held him from the back. After that Mr Daniel and Chiyanembo lifted the deceased's body and placed it in the deceased's bedroom hut. After that each of us left for his homestead. I then followed Mr Daniel so that he gives me some money that we were promised after successfully killing someone. Mr Daniel gave me US\$700-00. Out of that money I gave \$50-00 to my junior wife to buy her blanket at Sinamatelele of which she did. I then used \$50-00 in drinking beer and in gambling school. When the rumour had spread that I killed a person, I then took the remaining \$600-00 and hid it underground in the mountain area of Bulawayo Kraal."

The Law on Confessions

In terms of section 256 of the Criminal Procedure and Evidence Act [Chapter 9:07] an accused person may be convicted of an offence on the single evidence of a confession if the confession is confirmed in material respects or if the offence is proved by evidence other than such confession to have been actually committed.

In the Supreme Court decision of *Freddy Ndlovu and Nelson Ndlvou v The State SC 136/04* the learned judge GWAUZA JA at page 7 of the judgment dealt with the approach to adopt in dealing with confessions. She cited with approval the case of *S v Tsorayi 1985(1) ZLR 138* at page 142 wherein the learned judge in that case quoted with approval a passage from *R v Sylees (1913) 8 CR App R 233* at page 236 as follows:

"--- the first question you ask when examining the confession of a man is, is there anything outside it to show it was true? Is it corroborated? Are the statements made in

facts true? Is it consistent with other facts which have been ascertained and which, in this case, (are) proved before us?"

In the case of *Freddy Ndlovu and Nelson Ndlovu v The State (supra)* the learned judge held that there was ample corroboration in the evidence of the other witnesses, as well as the post-mortem report.

In the case cited by the State, that of *R v Becker* 1929 AD 167 it was held that a confession is an unequivocal acknowledgment of guilt the equivalent of a plea of guilty before the court of law. In crimes requiring *mens rea* the statement will not amount to a confession unless it excludes the possibility of a defence.

See also the case of *R v Xulu* 1956 (2) SA 288(A).

REQUIREMENTS FOR ADMISSIBILITY OF THE CONFESSION

The general rule is that a confession will be admitted into evidence if it is established that it was made freely and voluntarily by the accused person whilst in his sober senses and without having been unduly influenced thereto.

In *casu* the accused person gave a warned and cautioned statement to the Police on the 12th of May 2011 at Hwange Police Station at around 1400 hours. The statement was recorded in the Tonga language. The police officers who recorded the statement Detective Constable Ndlovu M. attest to the fact that the accused was in his sound and sober senses and understood the contents of his statement. Accused was taken to the Magistrate at Hwange on the 13th of May 2011, where confirmation proceedings were conducted around 1547 hours. Accused admitted making the statement and that he made it freely and voluntarily without having been unduly influenced by any person or authority. The court takes note that such proceedings are held in camera. We are satisfied that the confession was made freely and voluntarily without any undue influence having been brought to bear upon the accused person. We accordingly admit the confession into the record of evidence. We observe that the accused person made a feeble attempt to allege that he was assaulted before he made the warned and cautioned statement. We further made the observation that in his defence outline

the accused gives a bare denial to the charge and did not allege that the a warned and cautioned statement was made as a result of undue influence having been brought to bear upon him. We find the accused's explanations of undue pressure not being credible and reject them.

WHETHER THE CONFESSION CAN BE USED AS A BASIS OF CONVICTING ACCUSED

The State has correctly pointed out that accused person can be convicted on the basis of the confession if two requirements are met:

- (a) there should be evidence *aluide* that the crime was committed, this means independent material evidence which confirms the confession in material respects.
- (b) for the statement to be a confession it should exclude the possibility of a defence. It should be an unequivocal acknowledgment of guilt; the equivalent of guilty before the court of law.

In the case cited by the State, that of *R v Sambo* 1964 RLR 565 and cited with approval in the case of *Edward Dima v The State* SC 129/07 the court stated as follows:

"If the accused mentions facts in his confessions the knowledge of which he only could have come by, by being convicted with the crime, the mention of such facts will, of course, be most cogent evidence to show that the confession is genuine. But even if the accused may have been questioned by the police on these very facts, their mention still has considerable probative value. If an accused freely makes a long statement and all the known facts fit in their proper sequence into the statement, this may often be sufficient reason on which to base a conclusion that the confession is genuine, even if the police may previously have questioned the accused on these facts. Because unless the police put the actual words of the statement into the accused's mouth, if his only knowledge of the true facts has come from the police questioning he is hardly likely to present a coherent and convincing story into which all the known facts dovetail perfectly. A confession of such type will often, therefore, itself prove its genuineness."

CORROBORATION AND CONCLUSION

The evidence of the first state witness Pronounce Munkuli and the second witness Masara Munkuli shows that the deceased died around 0400 hours. When he came back into

the hut clutching his neck with both hands bleeding and breathing heavily, Masara Munkuli observed that the deceased had a deep cut on the throat which injury caused the death of the deceased. Masara Munkuli also testified that a few days after the murder of the deceased the accused come to her house and confessed that he is the one who had killed the deceased. The injuries observed by this witness are confirmed by the post-mortem report tendered in evidence as Exhibit 5 which lists the cause of death as (a) haemorrhage shock (b) neck stabbing (c) murder. The autopsy also noted that there was a 4cm wound across the lower neck just above the left collar bone medial (inner) end. The wound was deep and the left subclavian artery was cut. The wound deepened to the right apex of the chest cavity with a collapsed left lung.

Betty Mudenda who is the accused's junior wife, had her testimony admitted into the record of evidence in terms of the provisions of section 314(1) of the Criminal Procedure and Evidence Act [Chapter 9:07]. Her admitted evidence was that accused was not at home in the early hours of the 4th of May 2011. She said the accused came from the darkness with a lit torch and went past the point where she was pounding grain without talking to her. Immediately thereafter she heard screams from the direction from which the accused had come from. We are satisfied that there is adequate evidence *aluide* proving that the offence of murder was committed. Betty Mudenda's testimony points to the fact that the accused was not at home at the relevant time. The written confession in this case gives details of how the deceased was murdered. The confession is an unquestioned admission of guilt by the accused and he has not raised any defence to the charge in the written confession.

In his defence accused gave a bare denial and stated that he had been implicated. He did not say who implicated him and why. We had no difficulty in rejecting his defence as false.

MENS REA

In the case of *S v Mugwanda* 2002(1) ZLR 574(S) the court pointed out as follows:

"For court to return a verdict of murder with actual intent, the court must be satisfied beyond reasonable doubt either that the accused desired to bring about the death of the victim and succeeded in completing that purpose, or that while pursuing another

objective the accused foresaw the death of his victim as a substantially certain result of that activity and proceeded regardless.”

We are satisfied that from the evidence on record, one of the conspirators struck the fatal blow calculated to decapitate the deceased and draw blood from his person. It does not matter who amongst the conspirators actually stabbed the deceased with the knife. They were acting in common purpose in furtherance of a common objective. The accused knew that one of them had a knife with which he was supposed to stab the deceased with to draw blood from him. It was in furtherance of that common purpose that the deceased’s throat was slit causing his death. The action of one of them was the action of all of them.

See the case: *Courage Banda, Ishmael Nyoni, Simbai Chiuna, Teddy Banda, Jowani Matoda Mazhambe v The State* SC 71/05. We are satisfied that the accused person was at the scene of the crime and actively participated in the murder of the deceased in cold blood. There was proper and careful planning of the murder. The plan was put into action and deceased lost his life.

As there is evidence *aluide* proving that the deceased was murdered and having found the accused’s confession to be genuine we are satisfied that the state had proved its case beyond reasonable doubt.

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

*Criminal Division, Attorney General’s Office, applicant’s legal practitioners
Cheda and partners, accused’s legal practitioners*

Defence Counsel address in Extenuation

To be honest enough with the court I have looked at this matter thoroughly and it is my considered view that there are no extenuating circumstances.

Mitigation:

Accused is aged 40 years old and has (2) two wives and nine (9) children. The accused is not employed and owns two (2) head of cattle. He has no savings. I would ask the court to place value on the fact that he confessed to the murder. Accused was implicated by the Businessman who had offered \$700-00. The accused is a poor rural man who went as far as Grade 3 very unsophisticated and easy to manipulate. I would urge the court to exercise mercy.

The State in aggravation

I would refer to *Robert Chungaoma* SC 105/02. This was a criminal appeal to Supreme Court. The learned judge of appeal cited with approval the remarks of Holnes JA. *S v Letso Co* 1970 (3) SA 476 p 5. It remarks were as follows:

Extenuating circumstance are facts bearing on the crime which reads as the moral blameworthiness as distinct for culpability.

The trial court must look at

- (1) whether there are any facts such as intoxication, youth, or provocation.
- (2) whether in the cumulative effect in doing what he did.
- (3) whether such bearing was sufficiently

The trial court exercises a moral judgment. If its answer yes it expresses extenuating circumstances.

- (4) I have argued with the idea that his role may amount to an extenuating circumstances.

For purposes of wrongfulness he cannot escape liability. He did not dissociate himself. I have toyed with the idea. May be the court can put this into the scale as extenuation. I have no direct authority. For the development of the law it's a point worth considering by the court. That's all.

Ruling on extenuation

The accused has been convicted of murder with actual intent. The accused was a conspirator and an accomplice in the murder of one Innocent Mudimba. It is not in dispute that the killing was motivated by ritual killing at the instigation of a businessman one Daniel Mudimba, who committed suicide soon after the commission of the offence. The defence counsel has properly conceded that he has no meaningful argument to advance in extenuation and therefore he has not sought to raise any factors. The state has raised an aspect which it feels might lead to a finding of extenuating circumstances in that the accused person was hired to be part of gang that killed for ritual purposes. The state takes the view that since the accused did not actually deliver the crucial blow that lead to the demise of the deceased that may be considered to be an extenuating circumstances. We have come to the conclusion that the accused was hired to kill. His role was not defined at the outset but he was an active participant. In his confession he states that he held the deceased person from the back whilst his throat was being slit for the purpose of collecting blood from him. The accused's moral blameworthiness is no different to the person who actually stabbed the deceased. As we have said the action of one of the conspirators was the action of all the conspirators. Accused person could have chosen to dissociate himself but he was tempted with money. Such killings are abominable to society and to any right thinking persons. The accused's conduct in confessing in a written statement is not consistent with his action in court on trial where he chose to deny responsibility altogether. His moral blameworthiness is very high. The fact that he did not deliver the blow in our view cannot amount to an extenuating circumstance.

We accordingly find that there are in fact no extenuating circumstances in this case.

Death sentence imposed in terms of the law.

Any reason why sentence of death should not be imposed.

Accused: I understand what has been said. I have nothing to say my Lord.

Death sentence imposed according to Law.

