

THE STATE  
versus  
JOHN SCENARA

HIGH COURT OF ZIMBABWE  
MUTEVEDZI J  
HARARE, 25 July 2022 and 23 November 2022

**Assessors**

Mr Mabandla  
Mr Chimonyo

**Criminal Trial**

*M Mugabe*, for the state  
*T James*, for the accused

**MUTEVEDZI J:** *In S v Tevedzayi*<sup>1</sup> TSANGA J painted a graphic picture of the amount of violence going on against women in a lot of homes when she said:

“An increasing number of cases brought before the courts reveal that far too frequently the bedroom has become a deadly environment for women as a result of men’s violent outbursts in the resolution of disputes. Women have been clobbered, booted, strangled, stabbed, or slashed to death by their spouse in the confines of the bedroom, all the while by men who would have the courts believe that but for their wife’s sluttish conduct, their behaviour was out of the ordinary. These cases reveal the depth of a societal problem of violence where violence in the home has become an all too frequent killer. As often happens where there is a cycle of domestic violence, situations rarely get better but get worse.”

Despite listing a whole range of terms which describe how the violence against women is perpetrated the most conspicuous omission HER LORDSHIP made is the verb ‘hewed.’ The axe, an ancient and ubiquitous tool is usually taken for granted yet it has more often than not been employed for murderous purposes across Africa. This case is yet another gruesome illustration of the vulnerability of women in the discourse of gender based violence.

John Scenra, (the accused) faces a charge of murder in terms of s 47 of the criminal Law (Codification and Reform) Act [*Chapter 9:23*] (the Criminal Law Code) after hacking his estranged wife to death in the course of a domestic dispute. The allegations are that in

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<sup>1</sup> HH 206/2018

May 2020 at Mun'ando village, Chief Chiranda in Maramba, the accused unlawfully and with intent to kill or realising a real risk or possibility that his actions may cause death and continuing with that conduct despite the risk or possibility struck Mainness Gonde (the deceased) twice on the head with an axe thereby killing her instantly. He pleaded not guilty to that charge. His defence was that he did not kill the deceased. He was equally shocked by the death of his wife. He added that the blanket and t-shirt (a casual top garment so-called because it resembles a 't' shape when spread) are his belongings which had been stolen from him before his wife went missing. He also alleged that he was severely beaten by the police leading to him confessing to things that he had no knowledge of.

### **The State's case**

The state opened its case with an application for the formal admission into evidence of the testimonies of Peter Sande, Albert Gonde, Abigail Gonde, Edwin Gavanyika and N'qobile Vuma in terms of s314 of the Criminal Procedure and Evidence Act [*Chapter 9:07*] (The CP&E A). With the acquiescence of the defence, the evidence of the witnesses was duly admitted as it appeared in the state's summary of evidence. The prosecutor also applied for the admission of the post mortem report detailing the cause of the deceased's death. The application was uncontested. The report stated that the deceased had died as a result of brain injury, global epidural haematoma, left frontal parietal bone fracture and severe head trauma. When the prosecutor sought to tender the accused's warned and cautioned statement which apparently had been confirmed by a magistrate at Murehwa on 12 March 2021, counsel for the accused sought to object to its production on the basis that the accused alleged that he had been assaulted by the police to make the statement. The objection had no basis given the provisions of s256 of the CP&E A. That section provides that:

#### **256 Admissibility of confessions and statements by accused**

(1) Any confession of the commission of an offence and any statement which is proved to have been freely and voluntarily made by an accused person without his having been unduly influenced thereto shall be admissible in evidence against such accused person if tendered by the prosecutor, whether such confession or statement was made before or after his arrest, or after committal and whether reduced into writing or not: ...

(2) A confession or statement confirmed in terms of subsection (3) of section *one hundred and thirteen* shall be received in evidence before any court upon its mere production by the prosecutor without further proof:

Provided that the confession or statement shall not be used as evidence against the accused if he proves that the statement was not made by him or was not made freely and voluntarily without his having been unduly influenced thereto, and if, after the accused has presented his defence to the indictment, summons or charge, the prosecutor considers it necessary to adduce further evidence in relation to the making of such confession or statement, he may reopen his case for that purpose.

Needless to say, the statement in question was confirmed in terms of the law. The court could not sustain the defence's objection and was obliged to provisionally accept it. The onus was on the accused to prove that the statement was either not made by him or that it was not made freely and voluntarily. Because the prosecutor had sought and obtained the formal admission of the evidence of virtually all his witnesses and out of an abundance of caution, he called the *viva voce* testimony of *Joeseph Mtombeni*, the police officer who recorded the accused's warned and cautioned statement. *Mtombeni* said he was the investigating officer in this case. When the case was assigned to him, he proceeded to Mtawatawa to investigate. The body had already been retrieved from the river by ZRP Mtawatawa officers and taken to the local morgue. When he inspected it he noted that it was wrapped in a blanket and black t-shirt inscribed with the words g-tel. his investigations revealed that the blanket and clothing apparel were suspected to belong to the accused. That led to the arrest of the accused. After the arrest the officer said he went through the formalities of recording a warned and cautioned statement from the accused. Having been properly warned and apprised of his rights thereof the accused proceeded to make his statement. The officer denied assaulting the accused or intimidating him in any way to make the statement. Even under cross examination by counsel, he remained steadfast that there was absolutely no influence on the accused person when he made the statement. It became clear that the accused had indeed voluntarily made the statement which had subsequently been confirmed by the magistrate. There was no hint of coercion or any other form of undue influence. Quizzed by the prosecutor on the allegation by the accused that his belongings which were found covering the deceased's body had been earlier stolen from him, the officer pointed out that the accused had neither reported to the police nor other village authorities about the theft of those items. With that the state closed its case. The court will later revert to deal with the evidence of confession contained in the accused's warned and cautioned statement.

### **The defence case**

The accused elected to testify in his defence. In addition to his defence outline earlier in the trial, the accused added that he had separated from his wife in January 2020. Thereafter he used to see her in the neighbourhood. He added that when these allegations arose, the police had forced him to explain to them how he had killed his estranged wife. They took him to Murehwa police station where five detectives who included officer *Mtombeni* interviewed and assaulted him. He said he ended up confessing to killing the deceased because he realised he could get killed if he did not do so. Yet he knew nothing about that death. He explained to

them that there had been a break in at his home in January 2020 during which the blanket and t-shirt had been stolen. He confirmed that he had subsequently been taken before a magistrate for confirmation of the statement. He did not raise the issue of the assault with the magistrate because *Mtombeni* had advised him against doing so. We pause here to comment on the accused's allegations against the propriety of the recording of the statement. It is curious that the defence is not alleging any impropriety regarding the confirmation of the statement. We note that the confirmation of an extra curial statement is an elaborate procedure carried out before an authority completely detached from the police. One of the critical aspects of the process is that the court requires all police officers to leave the courtroom. The proceedings are literally held in camera. The magistrate explains to an accused person the law, the purpose and the consequences of confirmation of the statement. Assaults by the police are specifically dealt with in the proceedings. A standard template is used by the courts to ensure that crucial issues are not overlooked. We note from the statement in question here that some of the questions that the accused was asked by the magistrate and the answers he gave were:

Q. Did you make the statement?

A. Yes

Q. Did you do so voluntarily without having been influenced, encouraged or forced by the police or anyone else to make the statement?

A. Yes

Q. Has the police or any other person whosoever held to you any promises or other inducements or to any other person either in connection with your release from custody, trial, and sentence or in regard to any other matter whatsoever to make the statement?

A, No

Q. Do you have any injuries?

a. No

From the above exchange, which is just a part of the process it is undoubted that confirmation of a warned and cautioned statement is a procedure which is painstakingly followed by the courts to ensure that an accused person understands the implications and that he/she opens up if the statement was illegally obtained from him. As already said the procedure is carried out in the absence of police officers. Accused persons who are genuine in their complaints more often than not open up to the magistrate and reveal any form of undue influence exerted upon them to make the statement. An accused who deliberately spurns that opportunity can only have themselves to blame for it. It is against that background that we are convinced that in the face of the evidence that is there, the accused's challenge of his warned and cautioned statement is just an afterthought. It may unfortunately have come too little too

late. He failed dismally to discharge the onus on him to prove that he did not make the statement freely and voluntarily.

In his testimony the accused further admitted the allegations that on some day in May 2020 he had followed his estranged wife to his in-laws' homestead where she was staying. He admitted going there around 2200 hours armed with an axe. His explanation was that his wife had taken the keys to the house. He added that he carried the axe to protect himself from hyenas which roamed the area. What counsel for accused must have overlooked is that the evidence of the witnesses in relation to accused's visit at his in-laws' place was admitted without contest. It meant that it was uncontroverted. Where the defence accedes to an application for formal admissions by prosecution or vice versa, there is no opportunity to turn back and seek to rebut that evidence in any way. A party who accepts the admission of particular evidence in terms of s314 binds themselves to that evidence as it. Seeking to challenge it later on deprives the other party of the opportunity to have any lingering questions to be fully answered by witnesses who are better placed to deal with the issue. From that my considered view is that once the evidence is formally admitted without challenge, the party who so admits is estopped from challenging it. As such the accused cannot challenge the evidence of witnesses who described the violence that characterised his visit to his in laws, the threats to kill the deceased which he made and how they finally disarmed him of the axe. He can also not deny that the deceased visited their matrimonial homestead on the day she was last seen alive. He cannot deny that their marriage was a tempestuous one characterised by incessant fights. All those issues are common cause

### **The accused's confession**

The admissibility of confessions in criminal trials is regulated by s 273 of the CP&E A which provides as follows:

#### **273 Conviction on confession**

Any court which is trying any person on a charge of any offence may convict him of any offence with which he is charged by reason of a confession of that offence proved to have been made by him, although the confession is not confirmed by other evidence:

Provided that the offence has, by competent evidence other than such confession, been proved to have been actually committed.

A court is therefore permitted to convict an accused on the evidence of his/her confession that it was him/her who committed the offence in question. The law has however

designed safeguards to ensure the availability of competent evidence independent of the confession which illustrates that the crime to which the accused confesses was indeed committed. The rationale behind that requirement is self-evident. The world over, hundreds of convicted prisoners, some of them awaiting execution, have well after their convictions, been exculpated from wrong doing. Analysis has shown that police induced false confessions are a leading cause for the conviction of otherwise innocent persons.<sup>2</sup> Although largely outside the field of law, the scourge of false confessions raises stinking concerns about false convictions. They influence error in the judicial process and are a major source of false evidence which the courts are eager to latch on to for easy determination of complex cases before them. Needless to say however, false evidence inevitably leads to false convictions. Put simply a false confession entails a situation where a suspected offender confesses to committing the crime under investigation. That can be followed by him/her giving a detailed account of how he did it. Because of those grave consequences, the legislature saw it fit to design safety nets to ensure that an accused can only be convicted on the basis of a confession which is genuine.

Although there are several ways of proving a false confession<sup>3</sup>, it appears that our law only concerns itself with the one which requires courts to ensure that there is independent proof that the offence confessed to was indeed committed. In my view, besides where it can be shown that the crime confessed to was not committed -e.g. where the victim of the alleged murder turns up alive-the other ways in which the truthfulness of a confession can be ascertained are:

- a) When it was physically impossible for the accused to have committed the offence. For instance where it is proved that the confessor was in a foreign jurisdiction for away from the crime scene, at the time the offence occurred.
- b) when the real perpetrator of a crime is later revealed and the fact of his having committed the offence can be objectively established; or
- c) When scientific evidence conclusively shows that the confessor is innocent despite his claim that he committed the offence.

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<sup>2</sup> Leo R: Re-thinking the study of miscarriages of justice: developing a criminology of wrongful conviction. *J Contemp Crim Just* **21**:201-23, 2005

[Google Scholar](#)

<sup>3</sup> Leo R, Ofshe R: The consequences of false confessions: deprivations of liberty and miscarriages of justice in the age of psychological interrogation. *J Crim Law Criminol* **88**:429-96, 1998

[Cross Ref Google Scholar](#)

The reasons why an accused may falsely make a confession are varied and many.<sup>4</sup> They cannot possibly be a subject for debate in this judgment except to say as pointed out the police and other investigating agencies' overbearing tactics is one of the major causes. It is also significant that in spite of these realities, it is in very few cases that allegedly false confessions allow the confessor to prove that his confession is false. The situation is particularly so in developing countries where investigations invariably are based on any scientific approach.

MATHONSI J (as he then was) in the case of *S v Frank Mbanjo and 2 ors*<sup>5</sup> related to the requirement in s273 with the following explanation:

“Therefore the court may convict on the basis of a confession either;

- 1) Where there is proof that the crime was committed, although there is no evidence other than the confession to connect the accused with the crime; or
- 2) Where there is direct evidence to confirm the accused's confession, even though there is no direct proof of the commission of the crime”

With the above considerations in mind and in fulfilment of the s 273 requirement the irrefutable evidence before us is that a murder was committed. The deceased did not die of natural causes. The pathologist indicated that death was due to brain injury, global epidural haematoma, left frontal parietal bone fracture and severe head trauma. All of the listed causes suggest an unnatural death. The witnesses whose evidence was admitted without contest all indicated the accused's violent disposition and his threats to kill his wife. They also testified to the accused's attempt to assault the deceased on the day he visited his in-laws and his love to use his axe. The accused was linked to the dead body through his shirt and blanket which were found wrapped around the deceased's body. All that independent evidence neatly ties up with his confession.<sup>6</sup> Regarding the blanket and the shirt, the accused's outrageous explanation was that they had been stolen from him in January 2020 some five months before the deceased disappeared in May of the same year. That suggestion is preposterous because it would mean that the thief who stole the items had been planning to kill the deceased since the

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<sup>4</sup> Gross S, Jacoby K, Matheson D, *et al*: Exonerations in the United States, 1989 through 2003. *J Crim Law Criminol* **95**:523-53, 2005

[Google Scholar](#)

<sup>5</sup> HB154/17

<sup>6</sup> Refer to the case of *R v Taputsa and Ors* 1966 RLR 662

time of the theft in January and that when he did, he would use the stolen items to wrap the body of the deceased. The coincidence is too remarkable to be true. The accused's lies in that regard are compounded by the fact that he never made a report of the theft to anyone. He neither reported to the police nor to any relative or local authority. That again is indicative that it is nothing but a doomed attempt to wriggle out of an offence he confessed to committing. He was in the area in which the deceased died at the material time. In fact he confessed to have met the deceased at the matrimonial homestead on the day she was last seen alive. He led the police to the place where he had dumped the body. No amount of police intimidation or beating would make an accused to prophesise a place where a dead body of a person who was murdered without his knowledge is buried and where the murder weapon was hidden. In his confession he mentioned attacking the deceased after she had demanded money from him. He told her he did not have the money but she then assaulted him. He does not however allege that he attacked the deceased in self-defence. Even if he had, it would have been impossible for him to lay a basis for that given his additional admission that when he struck her with the axe she fell on to the floor. He followed her up whilst she was prostrate on the floor and landed another blow. That did not only show a clear and actual intention to kill her but equally exhibited callousness on his part. Secretly disposing the body to conceal evidence is further testimony of the accused's intention and removes any lingering thoughts that the death may have been accidental or occurred whilst he was defending himself.

### **Disposition**

From the above we are satisfied of the genuineness of the accused's confession. That added to the evidence of witnesses leaves the court in no doubt that the accused murdered the deceased as alleged by prosecution. In the circumstances, the court is convinced that prosecution managed to prove the accused's guilt beyond reasonable doubt. Accordingly the court finds him guilty of the crime of murder as charged.