

THE STATE  
versus  
JONAH CHIRAMBA

HIGH COURT OF ZIMBABWE  
MUNGWARI J  
HARARE, 15 March 2022, 7 June 2022, 23 & 24 November 2022

Assessors: 1 Mr *Barwa*  
2 Mr *Chokvinga*

### **Criminal Trial**

*H M Muringani with, M Mugabe*, for the state  
*P Kawonde* for the accused

**MUNGWARI J :** The accused faces a charge of murder, in contravention of s47(1) of the Criminal Law (Codification and Reform) Act, [*Chapter 9:23*] (hereinafter called “Code”), it being alleged that he caused the death of Sydney Zuruvi (hereinafter called “the deceased”), by stabbing him with a kitchen knife all over his body thereby inflicting mortal wounds.

The state alleges that on 10 May 2017 the deceased parked his Honda Fit motor vehicle with registration numbers ADN 2231 that he was using as a taxi. The accused approached the deceased and indicated that he wanted to be transported to Chinhoyi town for a fee. He boarded the motor vehicle. Already in the car were other passengers who were unknown to the accused person. They were already seated. The deceased drove the motor vehicle to the intended destination. Upon arrival everyone else disembarked leaving the accused alone with the deceased. The accused then asked the deceased to take him further to Chinhoyi show grounds. On approaching the 4km peg, the accused asked the deceased to stop the motor vehicle and he complied. He instructed the deceased to surrender his car keys but the deceased refused. The accused then drew a kitchen knife from his pocket and stabbed the deceased as he forced himself onto the driver’s seat. He took control of the steering wheel and drove the motor vehicle. As he did so, the deceased bit him on the left shoulder resulting

in him losing control of the motor vehicle which veered off the road and landed in a ditch. When that happened, and as bemused passers-by watched, the accused took to his heels and made good his escape. The deceased was taken to hospital where he later died. In due course a post mortem examination was conducted on the remains of the deceased.

The accused pleaded not guilty to the charge and in putting the state to the proof thereof, he elected to exercise his right to silence in terms of s70 (1) of the Constitution of Zimbabwe setting the stage for a full trial. Albeit without the testimony of the accused person in rebuttal of the state case.

Bearing the onus of proof, it remained for the state to place evidence before the court that the accused person committed the offence for which he was charged.

### STATE CASE

The state placed reliance on some exhibits which were tendered in court, evidence adduced through formal admissions and *viva voce* evidence. As he opened the state case, counsel for the state tendered a copy of the autopsy report prepared by Dr Javangwe, who conducted the autopsy on the body of the deceased and concluded that death was as a result of “haemothorax secondary to penetrating incision wounds, right upper arm allusive and multiple incised wounds.” In lay man’s terms the deceased died of stab wounds. The state also tendered the accused person’s confirmed warned and cautioned statement. Below we reproduce it given the central role it will play in the determination of this case. Under caution, the accused person stated;

“I admit to the charge of murdering the now deceased, Sydney Zurwi. I, in the company of my friend Ranganai Rice who resides in Banket, were in Chinhoyi at the bus terminus patronizing number 1 Beer hall. We then left the beer hall then Ranganai Rice waited by the rank whilst I had gone to purchase a knife in the nearby shop. I then showed him as per prior arrangement, to then use it to carjack a vehicle of our choice. We approached the now deceased where he was parking a red **Honda Fit** registration number **ADN 2231** and indicated to him that we wanted to travel to Chinhoyi town but I wanted to proceed to show grounds at the Banana plantation area and he agreed. Though the now deceased had agreed, there were three occupants who were already in the vehicle, who also were en-route to Chinhoyi. My friend and I embarked on the vehicle and the now deceased drove to Chinhoyi town. My friend disembarked at Chinhoyi ZESA to proceed to our arranged location. The now deceased drove his vehicle and stopped at Karoi bus stop where Mhangura transport is sourced. The three passengers who were initially in the vehicle disembarked siting [ sic] that they wanted to travel to Mhangura. I was the only passenger left in the vehicle. As I initially occupied the back seat, I switched to the front passenger seat, armed with my knife in my pocket. The now deceased drove his vehicle to the Show grounds, about 4km drive. Just after the show grounds, I ordered the now deceased to stop and he complied. I then demanded his car keys and he flatly refused saying it was not possible. I grabbed the now deceased by the t-shirt and I pulled him, he took

a screw driver and he stabbed me on my hands. In retaliation I drew my knife and I started stabbing him all over the body several times. The now deceased disembarked the vehicle then I moved over the driver's seat. He then came and sat in the front passengers' seat, where I was initially seated. I made a U-turn, then the now deceased continued struggling with me and I further stabbed him, but he overpowered me then I disembarked from the vehicle. The now deceased then locked himself inside. I smashed the rear windscreen and proceeded to stab him some more. The now deceased started screaming for help. I drove the vehicle then the now deceased bit my shoulder. I lost control of the vehicle and it veered off the road then the left front wheel was punctured by a stone. I fled in the bush once I noticed people coming to the scene. That is all I can say."

As already stated, the accused person's statement was confirmed by a magistrate and was admitted in terms of s 256 (2) of the Criminal Procedure and Evidence Act [*Chapter 9:07*]. The section allows the admission of such a statement on its mere production without further proof. Whilst conceding that prosecution was permitted to so tender the statement in terms of the law, counsel for the accused person indicated an intention to later challenge the admissibility of the confirmed statement on the basis that it was made under duress. As will be shown later, that approach was ill advised. The statement outlines how the accused committed the offence and the weapon he used. It places him at the scene of the crime. The onus therefore shifted to the accused to show, on a balance of probabilities, that he did not make the statement freely and voluntarily or that the confirmation proceedings were irregular.

The evidence of Solomon Manyika, Tatenda Clive Chigondo,(Tatenda) Liberty Hove(Liberty) and Buddington Motsi Zimbudzana(Buddington) was formally admitted in terms of s 314 of the Criminal Procedure and Evidence Act [*Chapter 9:07*] as it appears in the state outline. The evidence of those witnesses established the following relevant facts. Solomon Manyika was a relative of the accused. The relevant aspect of his testimony was that he confirmed being given a dark blue work-suit jacket with light green reflective lines by the accused.

Tatenda, Liberty and Buddington confirmed being police officers who were part of the arresting team. In addition to this, Buddington recovered a blood stained knife, screwdriver and a pair of grey slippers from the deceased's motor vehicle, a red Honda Fit. As a result of that evidence, the state tendered a kitchen knife with a green handle and a star screwdriver with an orange handle. The state also tendered the dark blue work suit with light colored reflectors. These exhibits were admitted as evidence by consent.

The 2 witnesses who gave *viva voce* evidence, namely, Artwell Mwale and Kasmana Chiwambwa were in agreement that on the fateful day they saw the red Honda Fit vehicle

swerve and veer off the road with the deceased loudly instructing them to follow behind as someone wanted to steal his car. When the car ground to a halt they saw a person dressed in a work suit with reflectors and fitting the description of the exhibit produced in court, bolt out of the car from the driver's seat and run away into the darkness. Whilst they saw and assisted the injured deceased person, they both could neither finger the accused as the assailant, nor could they confirm the work suit that was tendered in court as being the one the assailant was wearing although the exhibit fitted the description of the work suit spotted by the assailant. Through these two witnesses it became apparent that the deceased was killed in the course of a robbery. The assailant remained unidentified.

With this evidence the state closed its case. An application for discharge at the close of the state case was made and we dismissed it in an *ex tempore* judgment handed down thereafter.

### **DEFENCE CASE**

As already stated, the accused elected to exercise his right to silence. He neither gave evidence nor answered any of the questions put to him by state counsel in cross examination. The state counsel put relevant questions to the accused which provided him with an opportunity to rebut the state's evidence. He spurned the opportunity and proceeded to close his case. He informed the court that he was fully alive to the consequences of electing to exercise his right to silence and that he was prepared to face any consequence that might accrue therefrom.

In light of the position adopted by the accused person, the issues which fall for determination in this case are the following:

**a. What consequences flowed from the accused's choice to exercise his right to silence**

The right to silence is provided for in terms of s70 (1(i)) of the Constitution of Zimbabwe, 2013. It states as follows:

**“70 Rights of accused persons**

(1) Any person accused of an offence has the following rights—

- (a) ...
- (b) ...
- (c) ...
- (d) ...
- (e) ...
- (f) ...

- (g) ...
- (h) ...
- (i) to remain silent and not to testify or be compelled to give self-incriminating evidence”;

From the above, it is evident that although an accused person has a right to remain silent and not to testify, there are consequences for adopting that strategy in a criminal trial because the Criminal Procedure and Evidence Act (the CP&E A) permits a court to draw certain adverse inferences from an accused’s silence at different stages of the trial. The Act is unequivocal that on the basis of such inferences, the accused’s silence may be treated as evidence corroborating any other evidence against him/her. It is significant to mention that s189 (2) provides that adverse inferences can be drawn if an accused pleads not guilty but, upon being called to give his defence outline, he fails to mention any fact relevant to his defence which in the circumstances existing he could reasonably have been expected to have mentioned. Section 199 of that Act also provides that even if the accused has declined to give evidence in his defence, he can be questioned by the prosecutor or the court. If, without just cause, he refuses to answer such questions adverse inferences may be drawn by the court from the failure to answer the questions. I consider it unnecessary at this stage, to determine whether the right to silence is *ultra vires* the Constitution. It is a constitutional issue which can only be determined after hearing full argument. It is certainly an issue for another day. What obtains is that ss189 (2) and 199 of the CP&E A have not been held to be *ultra vires* the Constitution. They therefore remain law in their present form. Taken as they are, the provisions require an accused person to give reasons in court why he or she wishes to remain silent. The reasons must constitute just cause. Where an accused simply chooses to remain silent for the sake of showing off his or her appreciation of the right to silence, as in the instant case, the court is at liberty to draw adverse inferences against him. His silence will also be taken as evidence which supports the state’s evidence. The accused therefore missed out on the chance to rebut the state’s case. It can only be inferred that he feared implicating himself.

**b. The propriety of the confirmed warned and cautioned statement,**

I have already stated that s256 (2) of the CP&E A allows the admission of a confirmed warned and cautioned statement on its mere production by the prosecutor without further proof thereto. It states 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

Once a statement is confirmed by a court, the onus shifts on to the accused to show, on a balance of probabilities, either that he did not make the statement or that the confirmation of the statement was done irregularly. The procedures adopted in the former and the latter challenges are different. In either case however it follows that the accused person has to give evidence to support his allegations of impropriety. That is unachievable where the accused chooses to remain silent. By remaining silent, the accused missed out on the opportunity to discharge the onus reposed on him. It follows, that there is no basis whatsoever for finding that the accused person did not make the confession freely and voluntarily and that its confirmation was regular. Once that conclusion is arrived at, the contents of the statement become evidence which incriminates the accused.

Surprisingly, after choosing to remain silent, the accused chose to dedicate his written closing submissions to attacking the legality and regularity of his confirmed warned and cautioned statement. He lost sight of the fact that the issue of the admissibility of the statement was an evidentiary one in which he bore the onus to prove whatever irregularity he alleged. The purpose of closing submissions is to sum up the evidence led at trial. It is not to lead fresh evidence. Summing up is carried out after both the state and the defence would have closed the leading of evidence. Seeking to attack the admission of the statement during summing up only serves to expose the folly of the choice to maintain silence during the entire trial. Having already found that the confirmed warned and cautioned statement was made

freely and voluntarily, the matter should end there with the statement being admissible in evidence.

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

Section 273 of the CP&E A 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.

Clearly therefore it is permissible for a court to convict an accused solely on the basis of his confession of having committed the offence charged. The only requirement flowing from s273 is that there must be competent evidence besides or in addition to the confession which shows that the offence to which the accused is confessing was actually committed. In fulfilment of that requirement, the state led evidence in this case which established that the deceased's death was as a result of " haemothorax secondary to penetrating incision wounds, right upper arm allusive and multiple incised wounds. We have held that those terms in ordinary language meant that the deceased died of stab wounds. The police officers who participated in the investigation of the offence recovered numerous implements which tended to corroborate the doctor's findings that the deceased died from stab wounds. Those implements included a knife and a screwdriver. The two witnesses who gave oral testimonies also indicated how they helped the deceased after he shouted for help and intimated that someone wanted to rob his vehicle. At the end of the day, like we indicated earlier, there cannot be a doubt that the offence of murder was actually committed. The only issue was the identity of the murderer.

In the case of *R v Taputsa and Ors* 1966 RLR 662 A at 667E it was held that the effect of a provision such as the one under section 255B, which was in all material respects similar to s 273, is that where there is independent evidence proving that the offence was committed the court may satisfy itself of the genuineness of the confession by the accused that he committed it or took part in it from the nature of the confession itself. In more recent times, MATHONSI J (as he then was) in the case of *S v Frank Mbanjo and 2 ors* HB154/17 explained the provision in the following terms:

“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”

See also the case of *Warren Hazvienzani Katiro v The State* HH229/18. *In casu* there are various issues which confirm the genuineness of the accused’s confession. He described the make and model of the deceased’s vehicle as a Honda Fit, he stated the use of a screwdriver and a knife during the commotion which followed his attempted hijacking of the deceased’s vehicle. The police found all these to be true. The accused indicated that the deceased screamed for help and that he (accused) then bolted into the bush. The two witnesses who testified in court gave the same evidence. They saw the assailant bolting out of the deceased’s motor vehicle. The person was wearing a dark blue work suit with light colored reflectors. A similar dark blue work suit was recovered from a relative of the accused Solomon Manyika who stated that accused had given him the work suit.

The genuineness of the accused’s confession cannot therefore be doubted. It is only where there is no evidence *aliunde* proving that the offence was committed, that the court must in addition, go outside the confession and be satisfied that the confession is confirmed by other evidence. In other words there must be confirming evidence which corroborates the confession in a material respect. As illustrated, it is not necessary to do so in this case because there is evidence outside the confession which shows that the offence was committed.

The combination of the accused’s confession and the proven facts seal the fate of the accused. In the admitted confirmed warned and cautioned statement he goes into detail on why and how he committed the offence. His evidence therein corroborates the proven facts. In it he confessed to having identified the deceased as the target for the robbery of his motor vehicle the red Honda Fit. He narrated how he had armed himself with a green kitchen knife



that he specifically purchased for this purpose. He detailed how he stabbed the deceased with the green kitchen knife after he refused to hand over his car keys. He explained how the two fought for control of the car and detailed how it veered of the road just as witnesses Artwell Mwale and Kasmana Chiwambwa narrated to the court. These intricate details which the accused provided in his confirmed warned and cautioned statement leave the court with no doubt that he was indeed the assailant in this murder.

### **Disposition**

Given the above, we are convinced that the State managed to prove its case beyond reasonable doubt. The accused is therefore found guilty of the charge of murder.

### **Sentence**

In passing sentence the court considered all the mitigating factors as availed to us by counsel for the accused *Mr Kawonde* and aggravating factors as submitted by *Mr Mugabe* for the state.

Counsel for the accused submitted that the accused is 26years old unmarried with 1 dependent child aged 8 years. At the time of the commission of the offence he was 21 years old signifying the markings of a youthful offender. He spent 5years in prison before his trial. Indeed the accused had suffered pre-trial incarceration of 5 ears. He was arrested in June of 2017. His trial commenced before NDEWERE J on 27 September 2018 and never really progressed. The reasons for such non progression are not captured in the record. After the discharge from duty of NDEWERE J this matter commenced afresh before this court on 15 March 2022. We find that it is through no fault of the accused that the delays were occasioned. The enduring of a trial de novo cannot be viewed lightly. The period of pre-trial incarceration is substantial and we will accord sufficient weight to such time spent in custody.

For the prosecution, counsel urged the court to make a finding that the accused committed the murder in aggravating circumstances. He suggested that in addition to the murder having been committed in the course of a robbery the accused premeditated the commission of the murder. For this purpose the court invited submissions from counsel for the accused. He declined the offer to address the court on the said.

It is a requirement that following a conviction of murder the court must decide on whether the murder was committed in aggravating circumstances. Both Counsels for the state and the accused must therefore address the court in relation to that aspect before resorting to the generalised submissions in mitigation and aggravation. If the court does not find any aggravating factors it thereafter proceeds to consider the generalised factors. Such circumstances are set out in Section 47(2) and (3)) of the Criminal Law Codification and Reform Act [*Chapter 9:23*].

Firstly, what aggravates this crime is that this was a murder committed in the course of a robbery .Had the motor vehicle not been involved in an accident which caused the accused to abort the mission of stealing the deceased's Honda fit motor vehicle he would have made off with it. Such was his determination to take it that, he stabbed the deceased with a kitchen knife multiple times hoping to intimidate him and make him acquiesce and relinquish hold over his motor vehicle. He smashed the windscreen to the car and stabbed the deceased countless times. The deceased did not give in, but the essential elements for robbery had been established. They are therefore aggravating.

Secondly, the accused clearly pre-planned the robbery which resulted in the deceased's murder. According to his own confession he set out to steal the deceased's motor vehicle and purchased a green kitchen knife for this purpose. He even went through the motions of educating his "friend Ranganai Rice" who is not before this court how to execute the "car jack". Armed with the kitchen he identified the target and approached the unsuspecting deceased. When the deceased refused to hand over the motor vehicle, he stabbed him hoping to leave him for dead and succeed in making off with the motor vehicle. He did not. From the evidence before the court it is clear he was prepared to succeed at any cost, including the demise of the deceased as he did not hesitate to use the knife that he had purchased upon the deceased. He did so callously leaving the deceased to die a very painful death. There can be no doubt therefore that this murder was premeditated as envisaged in s 47(3) (a). From these 2 factors, it is accepted therefore that this murder was committed in aggravating circumstances as envisaged by s (47) (2) and (3) of the Code.

In aggravation too, a life was lost under extremely tragic circumstances in which the deceased was subjected to a surprise attack. The accused person directed his blows everywhere including the vulnerable parts of the body the body, giving the deceased no chance to survive. The autopsy indicated that the body of the deceased had multiple stab wounds. It is the duty of this court to remind members of society that the sanctity of human

life must be upheld at all times. That can only be done by imposing sentences that reflect society's revulsion at such kind of conduct.

It is equally disconcerting to note that throughout the trial the accused did not show any signs of remorse. He exposed himself for not being contrite and as someone eager to escape liability by whatever means possible. The combination of aggravating circumstances increases the accused's moral blameworthiness to heightened levels.

S47(4) of the Criminal Law (Codification and Reform) Act [*Chapter 9.23*] provides for the sentences a court can pass after a conviction for murder where it finds that the killing was committed in aggravating circumstances. In such instances the court only has 3 options, namely to pass a sentence of death or imprisonment for life or some determinate prison term which is not less than 20 years. Our discretion relating to sentence is therefore constricted by the aforesaid section. As rightly pointed out by *Mr Mugabe* the aggravating circumstances far outweigh the mitigating.

Were it not for the fact that the accused has endured a significant period of incarceration of 5years we would have sentenced him to 30 years imprisonment. We have taken this into consideration and accordingly the accused is sentenced to **25 years imprisonment.**

*National Prosecuting Authority, State's legal practitioners*  
*Kawonde and Company, accused's legal practitioners*