

THE STATE  
vs  
GODFREY KABHEKI,  
GRACIANO PHIRI  
and  
PAYMORE GANDI

HIGH COURT OF ZIMBABWE  
SMITH J,  
HARARE, 13, 13, 15, 16, 17, 22, 23 & 24 May, 2002

Mr *Wamambo* for State  
Mr *D Mushuma* for 1st accused  
Miss *T Hove* for 2<sup>nd</sup> accused  
Mr *G Mabuye* for 3<sup>rd</sup> accused

SMITH J: The accused were charged with murder, in that between 5 and 6 January 2001 at 48 Broadlands Lane, Emerald Hill, Harare they unlawfully, and with intent to kill, murdered Edith Dickens (the Deceased), who was 82 years of age by strangling her. The accused all pleaded not guilty. The State alleges that the three accused and one other, who was granted bail but absconded, connived and planned to steal some goods from the Deceased between 5 and 6 January 2001. They broke into her house and strangled her. They tied an electric cord around her neck and then tied her to a coffee table. She died from asphyxia due to the strangulation.

In his defence outline accused 1 avers that the Deceased was live and well at lunch time on 6 January, when he left the premises, and that she was killed sometime in the afternoon of that day, whilst he was away. Accused 2 and 3, in their defence outlines, say that they were nowhere near Avondale or Emerald Hill on 5 or 6 January 2001.

Accused 1 and 2 made indications at No 48 which were recorded on a videotape. Accused 2 also made a warned and cautioned statement that was confirmed before a magistrate in terms of s \_\_\_\_\_ of the Criminal Procedure and Evidence Act [Chapter \_\_\_\_\_]. All the accused in testifying, denied any involvement

in the murder of the Deceased. Accused 1 claimed that he was assaulted and that he made the indications under duress because he feared being further assaulted. Accused 2 claimed that when he first saw Accused 1 after his arrest he noticed that Accused 1 had been assaulted because his face was all swollen. He also claimed that he saw Accused 3 being assaulted and heard him crying out. He was threatened that he too would be severely beaten if he did not co-operate with the police and that is why he made his warned and cautioned statement and the indications. When he was before the magistrate he did not tell him of the threats that had been made because the police told him that, if his statement was not confirmed, they would fetch him and assault him severely.

If the indications made by Accused 1 and 2 can be admitted as having been made freely and voluntarily, then there can be no doubt that the three accused were part of the gang that was responsible for killing the Deceased on the night of 5 or early hours of 6 January, 2001. The two Accused indicated how Accused 1 opened the gate to admit the other three onto the premises and led them round to the back of the house. Accused 2 then indicated how they entered the house, and then showed what he did whilst inside and said that the other three were responsible for manhandling the Deceased, dragging her from her bedroom, along the passage and into the lounge, where they left her dead or near death. From looking at the video showing the two Accused making indications, it would appear that they were acting freely and voluntarily. Neither of them looked scared of the police. They both appeared to be perfectly natural when making the indications. Neither of them ever looked at any of the policemen to make sure that he was doing what was expected of him. Accused 1 said that he was assaulted and that was why he agreed to make indications. Was he a truthful witness? I do not think so for a number of reasons. He

claims that the Deceased was alive and well in the morning of 6 January and went shopping, and that a gardener at a house across the road, No 69, saw her return from her shopping. However, he did not tell the police at the time, so that they could question that person. He has made no attempt to call that person as a witness and did not even mention him in his defence outline. On the other hand, he went out of his way to report to Tichaona Chataza, the gardener next door to 48, at 1 p.m. on 6 January, that he was going off duty. He said that Chataza was the first person he saw and that it was his custom to tell one of the neighbours whenever he was going off duty. Moreover, Accused 1 stood at the gate and whistled, and his employer told him that someone was at the gate whistling, so he went outside to see what Accused 1 wanted. Why would Accused 1 do that if everything was normal? Accused 1 identified two people, one being his brother, whom he had met during the afternoon, and was prepared to call them as witnesses. Why was he so determined to establish the time he left the premises and that he had been far from the scene during the entire afternoon? When making indications, he said that on his return he realised that something was wrong and so he went across the road to tell the person living there and that person told him that the Deceased had been killed and that Jack had gone to call the police. Yet when giving evidence, Accused 1 did not mention this. He said that it was Dorothy Manemo, the maid from next door, who told him the Deceased had been killed. He also said that Dorothy had stood with him near the front gate, he at 48 and she at 48A on the other side of the wall. Yet Dorothy, when she gave evidence, said that she did not see Accused 1 on the night of 6 January until after the police had arrived. It was not put to her in cross-examination what Accused 1 would say about seeing and speaking to her. She would have no reason to lie against Accused 1. Furthermore, it is stated in the post-mortem report that the body of the

Deceased was in a night-dress. It was highly unlikely that the Deceased would be wearing a night-dress in the middle of the afternoon. Moreover, under cross-examination by Mr *Mabuya*, Accused 1 said that the Deceased was not in the habit of sleeping during the day and that he had never seen her in a night-dress during the day.

As regards Accused 2, he said that he was not assaulted, but when he first saw Accused 1 after his arrest, he saw that he had been assaulted because his face was swollen. He also saw some policemen assaulting Accused 3. He himself was continuously being threatened with assault and he deposed to make his warned and cautioned statement and the indications because, if he did not do so, he would be severely assaulted, and possibly killed, by the deceased.

In his defence outline Accused 2 said that the indications he made were based on his experiences when he broke into the house at No 48 in October, 2000, and he was merely acting out what he had done then. This was put to some of the police witnesses by Miss *Hove* in cross-examination. However, when Accused 2 gave evidence and was cross-examined, he gave a completely different story. He said that he had been acting and made up everything he did and said in order to try to convince the police he was telling the truth so that they would not assault him. He denied that he had been re-enacting what had happened in October. Accused 1 said that he did what the police told him to do while making indications, whereas Accused 2 said that he was merely acting. However both Accused were consistent in some respects. Both said that it was Accused 1, who went to the gate and let them in, and both said that Accused 1 went along the drive to the back of the house whilst the other three walked amongst the flower beds and trees on their way to the back. Both pointed out the same window as the one where a pane of glass had been broken to gain entry, or to pretend that entry had been gained there. The Investigating Officer Chindedza

testified that the window pane had been replaced the following day and that is why, when the video was taken, it did not show a broken window pane.

The warned and cautioned statement made by Accused 2 has a lengthy preamble, in which many so-called allegations are set down. These allegations are allegedly what Accused 2 said. They state that Accused 2, in the company of the other two, went to No 48 because Accused 1 had said that the Deceased had \$75 000 in the house; on their arrival Accused 1 opened the gate; whilst in the house he went looking for electrical goods to steal and then he heard the Deceased yelling for help; he went to where his colleagues in crime were and saw them dragging the Deceased to the lounge' he took some money from the dressing table then saw lights in the house next door being switched on; he yelled a warning to his friends and then he ran away, followed by the others. The statement then contains a few sentences in Shona which were translated as follows -

"Yes, I have understood the nature of the caution. I admit the charge. We committed this offence because we wanted money to use as capital in a fruit buying and selling business although we found nothing in the deceased's house. I did not want her to die. That is all".

Detective Constable Kabasawo, who recorded the statement said that it was in the form he had been taught. I find that difficult to believe. I have never before seen a warned and cautioned statement in that form.

In *S v Kasikosa* 1971 (2) RLR 13 LEWIS AJP criticised the preamble of a warned and cautioned statement because he felt that it may well have deceived the accused person in that case by bulling him into a false belief that the State was accepting as correct his version of the case against him. He felt that that might have had the effect of bringing an improper influence to bear on the accused person. Such considerations do not, however, apply in this case. It was not the police officer who suggested what was set out in the preamble. Accused 2 admitted that it was he, and

he alone, who decided what should be said in the preamble and then stated what was recorded. There is a wealth of detail in the preamble. The details could not possibly have been dreamt up by other police officers. They are clearly recollections by Accused 2 of what actually transpired. Accused 2 does not accused the police of putting words in his mouth. He said that he himself decided what to say and how to say it.

When questioned about his statement and the indications he made, and why he made them, Accused 2 floundered. He was a very poor witness and was very unconvincing under cross-examination. The Court considers that the warned and cautioned statement and the indications made by Accused 2 were made freely and voluntarily and must reflect what had actually happened on the night of 5 January. The only element that might not be 100% true is his account that he had nothing to do with the actual killing of the Deceased. Obviously he would want to distance himself from the actual killing of the Deceased.

When the accused broke into the Deceased's house in October and stole property she was not harmed. Clearly, the thieves were only interested in stealing the TC and other property. They managed to get into the house and leave with their loot without being detected. However, on 5 January, they went to the house because they wanted to steal money. They thought the Deceased had \$75 000. They must have woken her to get her to tell them where the money was.

I have mentioned that Accused 2 was not a very convincing witness. Accused 1 and 3 fell into the same category. Under cross-examination they seemed reluctant to answer the specific questions put. They kept on repeating their earlier testimony. When Accused 1 was being cross-examined about radios in the Deceased's house he said there were many radios. Then he insisted that he had said that there was only one

radio which he had seen when the Deceased had taken it for repairs. He said that in the eleven months he had worked for the Deceased he had never entered the house because she forbade him to do so. The court finds that difficult to accept. It is hard to believe that in all that time an 82 year old lady did all the cooking, housework, cleaning of floors and carpets, etc without once needing help, and that she never needed anything heavy inside the house to be lifted or moved. Accused 1 also said that whenever he left the premises he left the keys to the gate and to his quarters with the Deceased. Then, when he came back, if it was not too late he would whistle and the Deceased would come out and give him the keys. The house is on a large stand and it is set back quite a distance from the road. It is hard to believe that the Deceased would leave her house after dark to go to the gate in order to give Accused 1 the keys to the gate and to his quarters.

The Court is satisfied that on the night of 5 January, Accused 1 opened the gate to let Accused 2 and others onto the property. Then he opened the back door and let them into the house. Accused 2 and others broke into the house and one or all of them then woke the Deceased and eventually she was killed by strangulation.

As was stated by BEADLE CJ in *R v Victor & Anor* 1965 (1) SA 249 (SR AD) at 253,

Generally, an extra-curial statement is only admissible against the appellant who made it : and unless in this case the statement of the one appellant is regarded as admissible against the other, there is insufficient evidence to prove that either is an accessory".

Similarly in *S v Strydom & Ors* 1980 ZLR 364 at 366 FIELDSEND CJ said -

"Starting from first principles, an extra-curial statement by one accused is not admissible against another accused".

GUBBAY CJ expanded on this statement in *S v Sibanda* 1992(2) ZLR 438 (S) at 441-2 -

"It is only in two exceptional situations that an extra-curial statement may be admitted not only as evidence against its maker but also as evidence against a co-accused implicated thereby. The first is where the co-accused, by his words or conduct accepts the truth of the statement so as to make all or part of it a statement of his own. The second exception applies in the case of conspiracy or any crime which was committed in pursuance of a conspiracy. Statements of one or two conspirators made in the execution or furtherance of a common design are admissible in evidence against any other party to the conspiracy. See *R v Miller & Anor* 1939 AD 106 at 115; *R v Mayer* 1957 (1) SA 492 (A), at 494F".

In this case, the only evidence against Accused 3 is the extra-curial statements made by Accused 2 in his warned and cautioned statement and whilst making indications. Neither of these are admissible against Accused 3 and so he must be acquitted.

As regards Accused 1 and 2, their indications clearly establish that they both entered the property at No 48 on the night of 5 January when the Deceased was killed. They were in the group of men, some or all of whom manhandled and then strangled the Deceased. Whilst there is no doubt that they had a common purpose to break into the house and steal some property, there is no evidence to show a common purpose to kill the Deceased. There is no doubt in my mind, however, that they each aided and abetted the other to escape detection. Accused 1, on the morning of 6 January, covered up the fact that the Deceased had been murdered and tried to pretend that everything was normal. He then went out of his way to let the neighbour's gardener know when he was leaving the property. Accused 2 also aided and abetted the others. When, according to his statement and indications, he saw that the Deceased had been, or was being, murdered and he thought that someone was coming, he warned them that someone was observing them or was coming. They then all fled. In *Victor's* case. *supra*, at 252-3, BEADLE CJ said -

"The law is now clear where the evidence shows that one or other of two persons committed a crime, and it is not clear which, and where the evidence further shows that each aided and abetted the other to escape detection after



the commission of the crime, both may be found guilty of being accessories after the fact; for, though a person cannot directly be an accessory after the fact to his own crime., he may be an accessory after the fact when he aids and abets others who are accessories after the fact to his crime."

The court therefore finds Accused 1 and 2 guilty of being accessories after the fact to the crime of murder of the late Edith Dickens. Accused 3 is found not guilty of the charge and acquitted.