THE STATE

Versus

FANUEL MBEDZI

IN THE HIGH COURT OF ZIMBABWE
KABASA J with Assessors Mr Damba and Mr Mashingaidze
BULAWAYO 9 AND 10 JULY 2024

Criminal trial

T. M. *Nyathi,* for the state
A. Duri, for the accused

KABASA J: - The accused appeared before us charged with murder as defined in section 47(1) of the Criminal Law (Codification and Reform) Act, [Chapter 9:23]. He pleaded not guilty to the charge

The state's case is that on 28 March 2020 at around 1800 hours the now deceased was at a party at Mayele Mbedzi Store Maware Beitbridge. He was in the company of his young brother Tamson Gumbo. The accused was also at that party. At around 0030 hours the accused accosted Tamson threatening to assault him because he considered him as a person who is from a village of arrogant people. The now deceased went towards the two whereupon accused let go of Tamson and invited the now deceased to go and talk. The now deceased was not seen alive again as at 0200 hours one Nosta Nyoni stumbled on his lifeless body lying in a pool of blood with severe head injuries.

The accused's home was subsequently searched and a pair of Converse All Star tennis shoes were recovered on top of the bedroom roof. They had blood stains. The blood stains thereon were subjected to a DNA test which concluded that it belonged to the now deceased.

In his defence the accused denied knowing the now deceased and equally denied being at the party on the night in question. He also denied being the owner of the tennis shoes and stated that on that night he was at home with his wife and children.

In an endeavor to prove its case, the following exhibits were tendered into evidence with the defence's consent:-

a) A postmortem report

b) DNA test result form

c) Black Converse All Star tennis shoes

d) A 16, 8 kg stone

e) A 13, 55 kg stone

The evidence of four witnesses was also admitted as it appeared on the summary of the state case in terms of section 314 of the Criminal Procedure and Evidence Act [Chapter 9:07]. These witnesses are:-

Nosta Nyoni

Honesty Mapiki Moyo

Doctor Chamunorwa Chagonda and

Collen Masimirembwa

Nosta Nyoni is the one who stumbled on deceased's body and thereafter alerted the people she had left at this party.

Honesty Mapiki is one of those people who attended the party. He knows the accused as they are former classmates. He knew the deceased as a local villager.

On the night in question he saw the accused at the party and greeted him. The accused took exception to the fact that Honesty held his shoulder and accused Honesty of being arrogant. Honesty decided to walk away but the accused followed him. The witness managed to escape after the accused was restrained by other patrons.

Doctor Chamunorwa Chagonda is the one who conducted the postmortem on 30 March 2020. He observed the following:-

A stab wound lateral right thigh

Crush injury to the face involving left frontal, left maxilla and left orbit.

He concluded that the cause of death was severe head injury secondary to crush from hard object.

Collen Masimirembwa is the forensic scientist who conducted the DNA analysis and received the following samples:-

The deceased hair

Boulders with blood stains

Black all-star converse shoes

Black high cut converse shoes

Blue Luxion Kulca shoes

He concluded that the blood stains on the boulders and black all-star converse shoes were the deceased's.

The state subsequently led evidence from 3 witnesses. The first witness was Tamson Gumbo, the now deceased's brother. His evidence was briefly that he was at this party when a man who had red overalls held him at the time he went to relieve himself and asked him where he was from. A certain lady he did not know asked this man to let him go which he did. The witness's brother then approached and he was dancing. He bumped into this man who then asked him where he was from before asking him to talk. The two left together and that was the last he saw of his brother. He later saw him lying dead.

This witness is now 22 years old so in 2020 he was around 18. This probably explains his lack of coherence when relating the events of that night. We got the impression that he is not very sharp and was not the easiest of persons to extract information from.

We however were in no doubt that he was at this party on the night in question and was able to see that the man who accosted him and later left with his brother had red overalls and a hat. He however could not identify him.

The identity of this man became clear with the evidence of the second witness. The second witness is the deceased's aunt. Her evidence was to the effect that she saw the accused

three times on 28 March 2020. She first saw him in the company of three Mbedzi siblings going to a football match. She then saw him when he was buying some beer and the third time around 2300 – 2400 hours when she was going to relieve herself. At one of these occasions she saw the accused holding Tamson and she asked him why he was holding "the child". He then let him go. Shortly thereafter news of the deceased's death filtered through. She went to where the body was and confirmed that he was dead. She directed the police to accused's home after she confirmed that she knew the person who was wearing red overalls and a hat on the night of the party.

She went with the police to accused's home and they recovered a pair of tennis shoes on top of the roof.

The witness's evidence was clear and straightforward. She only related what she observed and did not seek to exaggerate. She candidly admitted that she did not see who killed the deceased.

She is not a stranger to the accused. He is her brother's son. She therefore knew him and would not be mistaken as to his identity. The issue of identification can be fraught with problems depending on the circumstances. However the identification by a witness who is well known to the accused ought not to be looked at in the same manner as the identification of one not known to the witness. The care to be taken as illustrated in *S* v *Nkomo* 1989 (3) ZLR 117 (S), *S* v *Dhliwayo & Anor* 1985 (2) ZLR 101 (3)) is not to be slavishly followed unless the circumstances give the possibility of a positive but mistaken identification.

This witness had seen the accused three times that day and could not have been mistaken as to who she saw and the attire he was wearing. She was therefore able to put a name to the man Tamson only identified by his clothes but could not say who he was.

We were satisfied she was a credible witness with no motive to lie against her nephew.

The last witness was the Investigating Officer. He went to attend the scene and saw the deceased who was about 100 m from the shops. He observed the stab wound on the right thigh and the crushed head which the doctor who conducted the postmortem confirmed as the marks of violence on deceased's body. He also saw the two boulders which were produced as exhibit 4 and 5 and identified them as the ones he recovered at the scene. They were blood-stained, an observation confirmed by the one who carried out the DNA analysis.

The witness was directed to accused's home by the second witness who confirmed that she knew this person who had been described through the attire he was wearing that night, red overalls and a hat. At accused's home he recovered the black tennis shoes on the roof of the bedroom which black tennis shoes were sent for forensic examination. He was present when the doctor extracted the samples that were sent for DNA testing and the samples were handed over to him. He in turn handed them over to the exhibits officer who then took them to Harare for forensic examination.

All the exhibits were produced by consent. The suggestion that the exhibits' chain of custody was not established was a mere play to cloud issues. Once the state tenders exhibits and you have no objection to their production you are effectively saying the admissibility of the exhibits is not in issue. You therefore cannot be heard to seek to challenge the chain of custody especially as late as in closing submissions. In any event even if the police had seizure forms, were they expected to leave these blood stained tennis shoes and go back to station to get seizure forms? Would they have expected to find the tennis shoes on return? This emphasis on formality stems from a failure to appreciate that this was a rural set up where the police had travelled first to the scene and then to the accused's home in order to effect an arrest.

It was this witness's evidence that the accused was not at home when the tennis shoes were recovered. His aunt, the second witness was however present. It can therefore not be correct to suggest that these tennis shoes were recovered elsewhere and not from the roof of accused's one-roomed house. They were obviously hidden for no one keeps shoes on top of the roof. The hiding of the shoes speaks volumes regard being had to the fact that forensic tests found the deceased's blood on those shoes.

This witness gave his evidence well and we were satisfied he was a credible witness.

We did not lose sight of the accused's evidence. In his defence outline he completely denied everything. He repeated the bare denials in his defence. We acknowledge that he has no onus to prove anything and need not convince the court as to the truthfulness of his story. (*S* v *Kurauone* HH 961-15, *R* v *Difford* 1937 AD 370).

He gave an *alibi* in his defence outline. Where an *alibi* is raised it must be investigated and the onus is on the state to disprove it. The point however is that such *alibi* must be raised in order for it to be investigated. Where an accused does not raise an *alibi* so as to allow for

such investigation it only goes to show lack of credibility. Why raise an *alibi* only in the defence outline when such cannot be investigated?

In *S* v *Chimusoro & Ors* HH 699-15 it was held that the onus to disprove an *alibi* rests on the state but such *alibi* must be disclosed fully to allow for proper investigations. (See also *Chibanda* v *The State* HH 772-19)

The accused's bare denial in the face of evidence which placed him at the scene where the offence was committed destroyed the little credibility he had. We have already found as a fact that his aunt was able to identify him. Not only his aunt but a classmate who was also at that party saw him and even greeted him. This classmate had to flee due to the accused's aggressive conduct. The classmate's evidence was accepted. Where a fact relevant to an issue is admitted it is sufficient evidence of that fact. This fact having been admitted in terms of section 314 of the Criminal Procedure and Evidence Act was sufficient evidence of such fact. He was there at that party and his classmate and aunt saw him.

Granted the state case largely hinged on circumstantial evidence. In looking at circumstantial evidence we were alive to the 2 cardinal rules of logic as enunciated by WATERMEYER JA in *R* v *Blom* 1932 AD 202.

> "The inference sought to be drawn must be consistent with all the proved facts and the proved facts should be such that they exclude every reasonable inference from them save the one sought to be drawn."

We have already found that the witnesses who testified were credible. The proved facts therefore are:-

- The accused was at the party on the night of the deceased's death.
- He confronted deceased's brother who he then let go when his aunt intervened.
- He subsequently talked to the deceased and left with him.
- The deceased was not seen again alive until his body was found 100 m away with a stab wound on the thigh and a crushed head.
- The boulders which were blood stained were taken as exhibits.
- A visit to accused's home led to the recovery of tennis shoes which were blood stained.

- The boulders, tennis shoes and deceased's hair were submitted for DNA testing.

- The blood on the boulders and on the tennis shoes were the deceased's.

This in our view is beyond the realms of mere coincidence. If the accused did not know the deceased and had never seen him, how does he explain the blood on tennis shoes recovered from his home which blood belongs to the deceased?

In *Muyanga* v *The State* HH 79-13 the court had this to say:-

> "… in a circumstantial case no individual fact can prove the guilt of the accused. Where the state's case depends either wholly or in part on circumstantial evidence, then the court is asked to reason in a staged approach. The state first asks the court to find certain basic facts established by the evidence. Those facts do not have to be proved beyond reasonable doubt. Taken by themselves they cannot prove the guilt of the accused. The court is then asked to infer or conclude from a combination of those established facts the guilt of the accused."

We are of the considered view that there is no other reasonable inference that can be drawn from a totality of the facts found to be proved.

The circumstantial evidence is incapable of explanation by any other hypothesis than that of guilt of the accused. It is consistent with his guilt and inconsistent with his innocence. (*R* v *Edwards* 1949 SR 30, *S* v *Shoniwa* 1987 (1) ZLR 215 (S)).

The circumstantial evidence coupled with the accused's bare denial and lack of credibility in denying his presence at the party, having a confrontation with deceased's brother and the recovery of the tennis shoes at his home only point to his guilt.

We got the impression that he is one person who has very little respect for the truth. He chose to say very little, which he is entitled to, but where one chooses that route the evidence against them must be of such a nature that their silence or bare denial makes the state case limp. Where the state case is strong a bare denial or silence hardly ever achieves the desired result on the part of the accused.

After a careful consideration of all the evidence, we were left in no doubt that the deceased met his death at accused's hands. He stabbed him on the thigh and crushed his head with boulders weighing 16, 8 kg and 13, 55 kg. What possible intention could he have had other than to kill?

This is a case where the accused set out to kill and succeeded in doing so. (*S* v *Mugwanda* 2002 (1) ZLR 547 (S), *S* v *Tomasi* HH 217-16).

We are accordingly satisfied the state has proved its case beyond a reasonable doubt and accordingly find the accused guilty as charged.

Sentence

You stand convicted of murder which you committed on 28 March 2020 at Mayele Mbedzi Store Maware Beitbridge. You had first accosted deceased's brother who you let go after your aunt told you to let go of the child. The deceased then approached where you were and bumped into you whilst dancing.

You pulled deceased away on the pretext that you wanted to talk to him and killed him by stabbing him on the thigh and crushing his head with huge stones.

In assessing sentence we have considered that you are a first offender, married with 3 minor children. You were the sole breadwinner for your family.

At the time the offence was committed in 2020 you were 29 years old. At 29 you were relatively youthful. It has taken all of 4 years to finalise the matter.

You have been in pre-trial incarceration for a year.

In aggravation we considered that the deceased died a painful death. He was only 24 years old and had done nothing to justify your reaction. His loved ones expected to see him after the party he had gone to attend. The news of his death, especially in these circumstances must have devastated them. We were not able to hear what impact the death had on them as the state was not able to get victim impact statements from them.

Life is precious and people must respect the sanctity of life. No one has the right to take another's life.

You do not appear contrite as if the deceased's death was a non-event. He was in the prime of his life and whatever dreams he had were snuffed out when you decided to end his life.

You did not assist at his funeral and you left him out in the open after killing him in a most gruesome manner.

We are cognizant of the fact that in sentencing you we ought not to adopt a vengeful attitude. The punishment must fit the offence, you the offender and be fair to society. (*S* v *Shoniwa* 2003 (1) ZLR 314 (H), *S* v *Ngulube* 2002 (1) ZLR 316 (H)).

Whilst at 29 you were relatively youthful, you were however not a teenager who can be described as impressionable and not given to rational thinking and appreciation of irresponsible behavior and conduct. You are not the youth spoken of in *S* v *Zaranyika & Ors* 1995 (1) ZLR 270, *S* v *Ndoziva* HH 43-11.

Granted too harsh a sentence is as ineffective as a too lenient one (*S* v *Ndlovu* HB 46-96), the court must however not allow maudlin sympathy for an offender to cloud its mind and thereby fail to assess an appropriate sentence.

The approach of mercy or compassion or plain humanity gives a balanced and humane approach to sentencing (*S* v *Rabie* 1975 (4) SA 855, *S* v *Harington* 1988 (2) ZLR 344. In striking such balance however sight should not be lost of the need to impose a penalty that speaks to the seriousness of the offence lest members of the public lose confidence in the justice system.

Given the manner in which you killed the deceased, crushing his head with boulders, a lengthy term of imprisonment is called for.

You are accordingly sentenced to 25 years imprisonment.

National Prosecuting Authority, state's legal practitioners
Pundu & Company, accused's legal practitioners