THE STATE
versus
PAUL DUBE
and
JINOGO DUBE

HIGH COURT OF ZIMBABWE
MOYO J
HWANGE 17-19 NOVEMBER 2015

Criminal Trial

Miss N. Ngwasha for the state
Mr Muvhiringi for the 1st accused
T. Mukuku for the 2nd accused

MOYO J: In this matter two accused persons faced a charge of murder, it being alleged that on 20 April 2005 at Paul Dube's homestead Mucklenuck Scheme, they killed Livison Nyoni.

At the close of the state case the second accused person was discharged. We stated that our reasons would follow in this judgment. We shall deal with that later.

The state tendered the following exhibits.

- The state outline was marked Exhibit 1.
- The post mortem report was marked Exhibit 4.
- The first accused person tendered a defence outline which was marked Exhibit 2.
- The second accused person tendered a defence outline which was marked Exhibit 3.

The state called two witnesses who gave *viva voce* evidence.

First to testify was Van Dube. He arrived at accused one's bar on the night in question, accused one called him inside to join them in drinking beer. In no time a stone hit the window pane, it came from outside. Then a metal object was also thrown. This person hurled insults mentioning one's mother's genitalia. This person was the decased. The deceased then came to the entrance of the bar as if he was coming into the bar. This is the room that the witness, John Nleya and

accused one were in. The deceased approached carrying stones and a metal bar. Accused one, John Nleya and himself stood up and moved backwards.

- Accused one sat on a stool, the kind carved in villages.
- Accused one ran towards another room.

He did not run towards the exit.

- Accused one then came back again where the witness and others were.
- Accused one then threw a stool at the deceased and he fell on the ground, the stool broke.
- Accused one then went to where the deceased had fallen and he kicked him.

Accused one threw the stool at deceased as deceased was entering the room where the witness and accused one were. The witness hid in a corner and did not see what happened outside. The stool hit deceased behind the right ear.

Miriam Ngwenya told the court that deceased threw stones on the day in question and the he carried a metal bar which he used to assault accused two. She confirmed that there was a fight between accused one, two and the deceased although she did not see the accused strike deceased with a stool.

The evidence of Mkhokheli Moyo the officer who attended the scene and recorded warned and cautioned statements from accused persons was admitted into the court record as per the state summary. The evidence of Dr. S Pesanai, the Dr who prepared the post mortem report, Exhibit 4, was also admitted into the court record in terms of section 314 of the Criminal Procedure and Evidence Act [Chapter 9:07].

At the close of the state case both accused persons applied for discharge in terms of section 198(3) of the Criminal Procedure and Evidence Act *(supra).* The application by accused two was granted as there was absolutely no mention of his name in relation to any harm that had been done to the deceased. On the other hand, accused one's application for a discharge at the close of the state case, was dismissed for this court found that he does have a case to answer as the first state witness Van Dube had told the court that he had seen him assault deceased with a stool on the head.

In his defence outline accused one denies ever assaulting deceased with a stool or at all and states that he in fact hid from the deceased and did not retaliate in any manner.

Accused one says when deceased emerged, which is the critical part of this whole case, deceased threw stones and him, (accused one) Van Dube and John Nleya hid.

He said deceased then realized that none of the stones he threw while he was outside, hit them, and he then moved to the verandah, at the verandah, he picked a stool, he says deceased moved towards them picked a stool and threw it at accused one. He dodged and the stool missed him. When deceased stood by the entrance, thats when these people who were with accused one, left the house, when they passed the deceased that's when accused one saw him in a bending position. Deceased then stood up and left the building. He said in the house he sat on a stool that he normally used. Accused one said in trying to defend himself he ran and hid by the corner. Accused one called Jinogo Dube as a second defence witness. His evidence did not assist the court much as he was not in the room where accused one and Van Dube were.

Analysis of the evidence

Van Dube was a consistent witness who struck the court as being truthful. So was Miriam Ngwenya. We have found Van Dube to be a truthful witness for the following reasons:

He gives a logical explanation for what transpired when deceased came to the entrance of the house they were in on that day. He says deceased came to the entrance, armed with stones and iron bars, that they all hid in corners and accused one who went to hide but later came back took his stool and hit deceased on the head, causing him to stagger and fall on all fours before recollecting himself and leaving. It is at this juncture that they also left the room. We say Van Dube's evidence is logical because initially they all hid from deceased, accused one come back, hit deceased with a stool he had been sitting on and deceased fell on all fours enabling them to then go out through the entrance. Accused one confirms that on the day in question he indeed sat on a carved wooden stool.

We will now move to show why we prefer Van Dube's testimony as opposed to accused one's testimony in this respect. Accused one says deceased emerged carrying stones and a metal bar. They hid but then, for some unknown reason, while deceased was still standing near the entrance, the other three ran out that is, John Nleya, Gladys Nkiwane and Van Dube. If deceased was still standing by the entrance hurling insults and armed, these three people having hidden from deceased, would then not ordinarily run to him again on their way out. The only logical

conclusion is that the three people decided to run out when deceased had been incapacitated by the assault with the stool and had fallen down as per Van Dube's account. It would not make sense for the three people to hide from an armed deceased only to then run towards him when he was still standing there armed? They should have run towards deceased and past him when they realized that he had been incapacitated by the assault with the stool. Again, accused one says deceased was armed with metal bars and stones, but that when he got to the veranda he took a stool and threw it at accused one missing him. This is also illogical, for deceased was already armed with stones and metal bars but he decided to pick the stool instead. Asked by the court what had become of the stones and the metal bars when deceased picked the stool, accused one said that deceased had since put down the stones. This is illogical for why would an already armed deceased, put down his weapons only to get a stool instead?

Also, accused one confirms that when the three people went out deceased was now on all fours as these people passed him but he does not know what had happened. This also confirms Van Dube testimony that deceased fell after the assault with the stool on the head. The post mortem report states that the deceased had a scalp haematoma.

The medical dictionary defines a scalp haematoma as a condition in which there has been bleeding between the scalp and the skull, and the blood is trapped under the scalp forming a blood filted bulge. This is consistent with Van Dube's evidence that when the deceased was hit with a stool on the head, there was no open wound.

Also, accused one who seems to have been so scared of deceased and who had decided to hide also, for some unknown reason as others went out, he remained in the house and went to sleep. This is consistent with Van Dube's testimony that accused one had already hit deceased with a stool on the head causing him to fall, and therefore he must have then seen no reason to flee as deceased had been taken care of and was no threat any more.

It is for these reasons that we hold that Van Dube's testimony is the one that the court should rely on as it is the satisfactory one of the two versions.

Single witness' testimony

Counsel for first accused person submitted that Van Dube's testimony is that of a single witness and that the court should exercise caution in dealing with it.

In the case of Sauls and others 1981 (3) SA 172 (A) the South African Appellant division held that there was no rule of thumb to be applied when deciding upon the credibility of a single witness testimony. The court must simply weigh the evidence and consider its merits and demerits. It must then decide whether it is satisfied that the testimony is truthful despite any shortcomings defects or contradictions in it. The approach in the Sauls case was adopted in the following cases:

Nyabvure vs *S* SC 23/88; Worswick v *S* SC 27/88; and *Nemachena* v *S* SC 89/86.

In the case of *State* v *Banana* 2000 (1) ZLR 607 (SC) it was held that corroboration is no longer essential in the evidence of a single witness, and that all that is required is for the court to be satisfied that the complainant is a credible and reliable witness. If she is, conviction can be founded on her evidence even if it is not corroborated. In our case, we even have corroboration as per the post mortem report which observed that the deceased had a scalp haematoma which in this court's view is consistent with the assault on the head as described by Van Dube.

Defence counsel submitted that there are discrepancies between the state summary and the witnesses' testimony.

In this regard, before we even assess the discrepancies which this court finds are not even on material respects. In the case of *Ephias Chigova* v *The State* 1992 (2) ZLR 206 (a) 213 C KORSAH JA as he then was concluded that:

> "The complainant's credibility is not to be assessed on apparent conflicts between her *viva voce* testimony and a summary of the case which is obviously prepared by someone else."

It is our finding therefore that accused one did assault the deceased in the manner alleged by Van Dube.

The defence counsel has submitted that because of the stab wound it cannot be conclusively held that deceased died from the assault by accused one with a stool.

At this juncture we will assess Exhibit 4 being the post mortem report. The doctor noted on the history that it is said deceased was assaulted with a stool (wooden) on the head then stabbed with a knife on the chest. The doctor also, during the internal examination noted a scalp haematoma.

The cause of death is then given as

a) haemorrhagic shock

b) stab wound

c) assault

When the Doctor gave these three causes of death he had been given the history of the matter as stated in the post mortem report. The Doctor gives three causes of death, the third one being assault.

The Oxford Advanced learner's English dictionary defines assault as

"a physical attack on a person."

The doctor lists assault as the third cause of death and assault is defined as a physical attack on a person and hitting a person with a stool on the head is an assault. The doctor being aware of the history that deceased had been hit on the head with a wooden stool and that he had been stabbed, decided to list assault as the third cause of death without eliminating one of the two assaults. This court therefore does not have the power to start excluding one assault and leaving the other. Again, the defence being aware that they would want to challenge if the assault with the stool could be excluded from the causes of death, nonetheless admitted the evidence of Doctor. S Pesanai, and that meant they did not require the doctor to be called to clarify issues that they could have had with the postmortem report. The court cannot get into the Doctor's shoes to start determining which assault could have caused the death for the court is not in a position to assess the degrees of the two. If the defence wanted to have the other assault excluded from the term assault it was incumbent upon them to have the Doctor called instead of admitting his evidence so that they would ask him to explain the significance of the two assaults in relation to the death of the deceased.

There are many theories with regard to the concept of causation in the criminal justice system. In terms of the theory of adequate causation, an act is the legal cause of a situation if, according to human experience, in the normal course of events, the act has the tendency to bring about that type of situation. This is as per the case of *S* v *Daniels* 1983 (3) SA 275 (A). In *R* v *Loubser*, 1953 (2) PHH 190 RUMPFF J declared that, in the eyes of the law, an act is the cause of the situation if, according to human experience, the situation will flow from the act.

If an act of the accused is of a kind which is unlikely to cause death, and there is an intervening act, or event then that event can be considered as breaking the causal chain. In *S* v *Tembani* 2002 (2) ALL SA 373 the South African courts endorsed the English approach that

> "If at the time of death, the original wound is still operating and a substantial cause of death, the death is a result of the wound, even if another cause was also operating. Only if the second cause is so overwhelming so as to make the original wound merely part of the history may it be said that death does not flow from the original wound."

In *S* v *Mokgethi* 1990 (1) SA 32 (A) the Appellate Division per VAN HEEDERN JA, discussed the various approaches to legal causation and held that all the available theories could be used to assist in the main enquiry which is simply whether or not there is a sufficiently close nexus between the accused's initial conduct and the ensuing consequence, or whether the consequence is too remote for the purposes of founding criminal liability.

It is thus our finding that the post mortem report observes a scalp haematoma, and gives assault as a cause of death, it does not specifically exclude the assault on the head with a stool and the cases that we have alluded to show that with legal causation if an act is a natural consequence of the accused's actions as per human experience then it can be found to be the cause of the consequence whether there is another action that later ensued. Hence the fact that deceased was later stabbed does not alter the normal human experience that a person can die from an assault on the head with a stool.

Defence counsel tried to get the state witnesses to comment on the nature, degree and extent of the injury to which the witness confirmed that he did not see any open wound but that obviously would have nothing to do with the seriousness or otherwise of the wound. Neither would his opinion on the seriousness or otherwise of the wound be of any relevance to this court as he is not an expert in that area.

Having found the casual link between accused one's actions and the death we then move to assess defence counsel's submission that accused one has available to him the defence of self defence. Whilst the court in assessing whether the accused has available to him the defence of self defence, it should consider the totality of the evidence in the court record. The difficulty that accused has with raising such a defence is that right from the outset, he denied ever assaulting the deceased, and that in fact he hid until when the deceased left. This left the accused person

with not much information as to the circumstances he found himself in and why he chose to act in the manner that he did than any other. Had accused person pleaded self defence right from the word go, perhaps he could be in a position to explain himself and therefore in his evidence he would fully address the requirements of self defence. He would also have been cross examined in this respect and the court would be in a better placed position to assess fully whether such defence is available to him.

The very first problem that accused encounters in establishing this defence is that, he gives the court the impression that he hid from deceased until deceased left thereby giving an impression that he could avert the attack through other means other than hitting the deceased. His being adamant that he never hit the deceased robbed him of a chance to fully explain and exploit the concept of self defence.

The requirements for self defence as enunciated in the Criminal Law Codification and Reform Act [Chapter 9:23] (hereinafter referred to as the Code)are as follows:

1. There must be an unlawful attack that has commenced or is about to commence.

- this is common cause from both the state witness and the accused person's versions.

2. The conduct by the accused must be necessary to avert the attack and that accused could not otherwise escape or avert the attack.

- We do not have this piece of evidence in the court record as it is the accused's own evidence that he in fact managed to hide from deceased and it is also Van Dube's evidence that accused did go to another room but later come back.
- so accused has not shown that he could not avert the attack through other means or escape.

3. The means used in the circumstances must be reasonable,

- because accused disputed hitting the deceased with a stool at all, he then did not manage to show to the court that the action that he took was necessary in the circumstances, like for instance to tell the court what exactly the deceased was doing when he decided to hit the deceased with the stool.

4. The harm or injuries caused by accused should have been on the attacker and should not have been grossly disproportionate to the one liable to be caused by the deceased.

- Whilst the attack by the accused person was on the attacker, we are not shown whether it was proportionate to the attack by the deceased as we are not told what deceased had specifically done to warrant hitting him on the head with a stool.

Perhaps on this respect the court can infer from the evidence of the state witness and then accused that deceased carried a metal bar and stones and therefore he could have used same to attack the accused person.

As stated above, accused did not meet all the requirements for a complete defence of self defence as provided for in section 253 of the Code (*Supra*) and therefore this court cannot hold that such defence is available to him. The accused person did act wrongfully therefore on the day in question. We then proceed to determine what the accused person is guilty of. In our view, it cannot be held that the accused person had the requisite actual or legal intention to commit murder from the facts of this case but he acted negligently in his reaction to the intrusion by the deceased and thereby negligently causing deceased's death. The accused person is accordingly found not guilty and is acquitted on the charge of murder but is convicted of the lesser charge of culpable homicide.

Sentence

The accused person is convicted of culpable homicide in that on 20 April 2005, he negligently caused the death of one Livison Nyoni. The accused person is a first offender, he is married with four minor children. He was provoked by the deceased who was a nuisance on the day in question. He was intoxicated at the time. He is an elderly man aged 63 years. The courts however frown at the loss of life, including the life of those who sometimes became a nuisance to others in the ordinary course of life. Beer drinking should be mercy making. Accused overstepped the mark of self defence as he had successfully hid from the deceased. He should have let the law take its course thereafter by approaching law enforcement agents. There would be chaos in society if these courts send a message out there that a person who becomes a nuisance to others deserves to be killed. Such person still has a right to his life but he should be taken to the appropriate authorities for discipline. Every life is sacred, including the lives of those people who sometimes become a nuisance. The accused person has weighty mitigation in

that he is an elderly man, in the afternoon of his life, he was provoked by the deceased. It is for this reason that the usual sentence for such cases being about seven to ten years, the accused's sentence will be discounted taking into account these weighty mitigatory features. The accused person is accordingly sentenced to 3 years imprisonment.

National Prosecuting Authority, state's legal practitioners
Dube & Company, 1st accused' legal practitioners
Marondedze, Mukuku & Partners, 2nd accused's legal practitioners