

THE STATE
vs
GIFT MAHASO

HIGH COURT OF ZIMBABWE
MAWADZE J.
MASVINGO, 21ST June, 13th July, 27th September and 22 October, 2021

Criminal Trial

ASSESSORS

1. Mr Mutomba
2. Mr Chikukwa

Ms M. Mutumhe, for the State
J. Mpoperi, for the accused

MAWADZE J: On 27 September, 2021 we dismissed the accused's application for discharge at the close of the prosecution case in case number HMA 50/21. We gave full written reasons for the judgment. This judgment therefore incorporates the bulk of the issues we canvassed in HMA 50/21 especially in relation to the state case. No useful purpose will be achieved by repeating evidence led by the state [especially pages 1 to 4].

The accused is facing a charge of murder as defined in s 47(1) of the Criminal Law (Codification and Reform) Act [*Cap 9:23*].

That charge is that on 3 January 2020 at Mtilikwi canal the accused caused the death of Elphas Sengamai by unlawfully and intentionally pushing him into the canal causing him to drown.

The evidence placed before us provides two diametrically opposed versions as to what caused the now deceased to drown.

The now deceased was aged 38 years. The accused was aged 37 years. They were both part of about 200 temporary sugar cane cutters camped at Kyle Primary School in Hippo Valley. After work they would go to bath at nearby Mtilikwi canal. From the evidence both accused and the now deceased seemed to know each other. No evidence was led as regards any possible dispute between them.

The State case is that on 3 January, 2020 the accused proceeded to the said canal to bath. Later the now deceased and his friend Samuel Zimhunga also proceeded to the same canal to bath.

The uncontroverted evidence is that this Mtilikwi canal is 5 metres wide and 3 metres deep. Its edges are rough and flat. At the material time it was full to capacity and its current very strong. The sugar cane cutters had been advised not to bath inside the canal but would use buckets to fetch water and bath near the canal. They were not allowed to enter into the canal or to swim in it.

The State alleges that as the now deceased was bathing at the canal his friend Samuel Zimhunga went to a nearby bush to relieve himself. It is alleged that upon return Samuel Zimhunga observed the accused approaching the now deceased from behind and grabbing the now deceased's arms. The accused is said to have pushed the now deceased into the canal and in the process the accused also fell into the same canal. He, the accused was rescued by Tryson Chauke and Israel Mushati who reacted to the distress call. The now deceased was swept away and his lifeless body was later retrieved about 1.2 km downstream trapped at Siphon 13 inlet gate. Accused was later arrested.

The evidence of Tryson Chauke and Dr B. Dhlandhlana was admitted in terms of s 314 of the Criminal Procedure and Evidence Act [*Cap 9:07*]. *Viva voce* evidence was led from Samuel Zimhunga, Israel Mushati and the Investigating Officer Ass Inspector Nomore Tembo.

The post mortem examination was done by Dr B. Dhlandhlana and he compiled Exhibit 1 the post mortem report. The cause of the now deceased's death is not in issue. It is drowning.

Tryson Chauke's evidence simply confirms that he and Israel Mushati rescued the accused after which the accused informed him that the now deceased had drowned in the canal.

Israel Mushati just like Tryson Chauke did not witness how the accused and the now deceased ended up inside the canal. He only heard Samuel Zimhunga calling for help saying some

people had fallen into the canal. As a result he rushed to the canal with Tryson Chauke and managed to pull the accused out of the water. The accused told them the now deceased had drowned but they failed to locate the now deceased as the current was very strong. He said he never got time to ask the accused what had happened as the accused was whisked away shortly thereafter by an ambulance.

Ass Insp. Nomore Tembo's evidence again does not explain how the now deceased drowned. He was simply told by Samuel Zimhunga what had happened which caused him to arrest the accused. He carried out formal investigations. The accused denied the charge and he is unable to tell which version is possibly true.

It is the evidence of Samuel Zimhunga (Samuel) which is critical to the State case.

Samuel was deceased's friend. He had worked with the now deceased as sugar cane cutters for 3 years. He was not known to the accused.

On 3 January at about 15.00 hrs he said he left their base at Kyle Primary School with the now deceased going to bath at the canal. They had buckets. He said upon arrival at the canal the now deceased and accused exchanged greetings as they seemed to know each other. Accused was already bathing. He said he and the now deceased moved to a different spot from the accused. The now deceased then fetched water from the canal and started to bath. Meanwhile Samuel said he went to relieve himself at a nearby bush and was away for ten to fifteen minutes.

Samuel then explained how he said the accused pushed the now deceased into the canal.

Samuel said when he was about 16 meters from the now deceased he observed the accused walking to where the now deceased was. The accused was not saying anything. According to Samuel the accused approached the now deceased from behind. He said the accused held the now deceased firmly by the shoulders. He heard the now deceased saying to the accused;

"Mahaso, Mahaso release me"

By then he said accused and the now deceased were by the edge of the canal. The accused did not release the grip as the now deceased tried to wriggle free.

Samuel said with some high degree of force the accused pushed the now deceased from the back into the canal. He said the accused also simultaneously fell into the canal probably because he lost his balance.

Samuel said he made a distress call and some two men [Trynos Chauke and Israel Mushati] answered his distress call. They used a stick to pull the accused out of the canal. Samuel continued to run along the canal trying to locate the now deceased to no avail. He then went to advise the management what had happened to the now deceased.

Mr Mpoperi for the accused meticulously cross examined Samuel but he stuck to his story.

Samuel discounted the accused's version that the now deceased had opted to swim in the canal. As the now deceased's friend Samuel said he knew the now deceased could not swim. Further, he said the now deceased was not a fool who could opt to swim in such a dangerous big canal which was full to capacity with such a strong current. In any case Samuel said all sugar cane cutters were under strict instructions not to swim in the canal or bath in it but to use buckets.

Samuel denied that there was bad blood between him and the accused and was unaware of any such differences arising from the so called labour dispute. In fact Samuel said the accused was not known to him.

Samuel denied that it is the accused who went to the canal with the now deceased, but insisted that both Samuel and the now deceased found accused already at the canal.

When he was probed as to why the accused would act in the manner alleged Samuel said he would not know as he was unaware of any differences between accused the now deceased or what possibly happened when he was away relieving himself. Samuel said none of them had taken alcohol and that the 200 sugar cane cutters at the school had just finished the day's work after being camped at Kyle Primary School for two weeks.

The accused vehemently and consistently denied the charge.

It is the accused's contention that he had no hand at all in the deceased's death. This is the version the accused gave in his defence outline Annexure 'B' and in his confirmed warned and cautioned statement Exhibit 2 and *viva voce* evidence.

In his defence outline the accused said he in fact went together with the now deceased to bath at the canal contrary to the state case. According to the accused it is the now deceased who suggested that they should instead swim in the canal. The accused said the now deceased dived first into the canal as tried to swim across as the accused followed suit. The accused said they intended to hold on to some shrubs at the edge of the canal and were both swept away. The accused was rescued by Tryson Chauke and Israel Mushati but the now deceased tragically drowned.

The accused denied pushing the now deceased into the canal indicating he had no cause to do so.

In his evidence in chief the accused said he was well known to the now deceased whom he regarded as a workmate and friend since 2018. He maintained that he had no bone to chew at all with the now deceased.

The accused said the only key state witness Samuel is the one whom he had issues with. The accused said this stems from the different opinion he had with Samuel in December 2019 when the accused refused to join a collective job action since the accused and other workers had been paid their wages unlike Samuel and others. The accused said Samuel regarded him as a sell-out hence this could have motivated Samuel to take advantage of this tragic event to falsely incriminate the accused.

The accused maintained that before the now deceased and accused jumped into the canal he had not seen Samuel at all. The accused also denied that both the accused and the now deceased had a bucket, but just towel and soap.

In his testimony the accused conceded that it was against their employer's policy or instructions to bath or to swim in the canal. He however said there were inadequate bathing facilities at the school where they were all camped as almost 200 workers used one tap to bath hence most would bath at the canal. The accused said even some local herd boys would swim in the said canal.

In his evidence the accused was consistent in explaining how the now deceased drowned.

It is the accused's evidence that the water in the canal was not visibly flowing and the current seemed still. He said after the now deceased jumped first he too jumped into the canal from a slightly different position but both of them realised that the current was too strong and failed to hold to nearby shrubs. They were both swept away as they called for help. The accused said he was rescued some 100 meters from where he had jumped into the canal. Upon being rescued he advised those who rescued him that the now deceased was also in the canal. It is at this stage the accused said he saw Samuel the state's star witness.

The accused maintained in his evidence that he had no reason to push the now deceased into the canal, worse still for him to also fall into the same canal. In fact the accused said the now

deceased was of smaller stature and slim hence the accused could have simply overpowered the now deceased forcing him into the canal without the accused himself falling into the same canal.

The accused's evidence did not change its colour even under cross examination.

While the accused conceded that it was against standing instructions to swim in the canal he maintained that just like other local herd boys he and the now deceased believed it was safe to swim in the canal.

When Samuel's version was put to him the accused insisted that that he had no issues with the now deceased which could have caused the accused to act in the manner alleged.

A sober analysis of the two versions by the state and the defence demonstrates that there is nothing to choose between the two versions. Samuel's version of events is not inherently improbable. The same can be said of the accused's version. If one gives an analogy of a football match the teams would be evenly balanced and the result is a draw!

Be that as it may, in a criminal matter the burden of proof lies with the state. The threshold of that onus is proof beyond reasonable doubt. On the other hand the accused has no onus to prove his innocence. All the accused has to show is that his version of events may be probably true.

In casu, it is indeed probable that Samuel may have harboured a grudge against the accused. It was never disproved that there was some labour unrest in December 2019 as the accused said.

Another important aspect in this case is that Samuel the key witness when he raised alarm did not shout out that the accused had pushed the now deceased into the canal. Instead as per those who answered to Samuel's distress call all what Samuel said was that some people had fallen into the canal. Why was Samuel not able to contemporaneously specify what he said happened, that is that the accused had forcefully pushed the now deceased into the canal.

It is common cause that in his statement Samuel never stated that he heard the now deceased uttering the following word;

"Mahaso, Mahaso release me".

If such words were uttered why are they not in Samuel's statement as this is clearly critical evidence. Samuel had no explanation for such an omission.

Lastly, we find it highly improbable that the accused would plan to force the now deceased into the canal but would end up drowning too. While Samuel alleges that the accused simply lost

his balance as he pushed the now deceased into the canal. We find this explanation to be palpably incredible. So if Samuel is to be totally believed the accused virtually wanted to commit suicide!

Indeed when the accused was rescued he volunteered information that the now deceased had also drowned and was to be rescued too. If at all the accused had pushed the now deceased into the canal why would he want his victim rescued as that same victim would reveal what the accused had allegedly done.

The most problematic aspect of the state case is the lack of motive in this case for accused to cause deceased's death. Why would the accused act in the manner alleged. Samuel suggest no reason. No such reason is advanced by the state. We equally find no such possible motive.

In our view the state has not managed to discharge its evidential onus. We equally disagree with the state that the evidence before us shows that the accused negligently caused the now deceased's death. It has not been shown or proved as a fact that the accused pushed the now deceased into the canal. The accused's version remain probable and possibly true.

As was aptly said in *R v Difford* 1937 AD 373;

“no onus rests on the accused to convince the court of the truth of any explanation he gives. If he gives an explanation, even if the explanation is improbable, the court is not entitled to convict unless it is satisfied, not only that the explanation is improbable, but that beyond reasonable doubt it is false. If there is any reasonable possibility of his explanation being true, then he is entitled to an acquittal”

The evidence before us fall squarely within the learned Judge's remarks *supra*. The accused should be given the benefit of doubt in this case.

Consequently we find the accused not guilty and he is acquitted.

VERDICT: NOT GUILTY and acquitted.

National Prosecuting Authority, counsel for the State.
Saratoga, Makausi Law Chambers, pro deo counsel for the accused (applicant)