

THE STATE
versus
ISAAC MASARE BOSHA
and
KUDAKWASHE TAZVIVINGA
and
THOMAS SUMA

HIGH COURT OF ZIMBABWE
MAKONESE J
GWERU 21-22, 26-28 MAY 2015

Criminal Trial

Mr *M. Shumba* for the state
Mr *I. Hore* for 1st accused
Mr *K. Manika* for the 2nd accused
Mr *Mabukwa* for the 3rd accused

MAKONESE J: The accused persons were gold panners at the relevant time. The accused persons are facing allegations of murder. The state alleges that on 18 October 2007 at around 1230 hours and at Munyathi River, Zhombe accused persons wrongfully and unlawfully caused the death of the deceased, Tinos Karuka by striking him with sticks, axes and a stone all over the body intending to kill him or realizing that there was a real risk or possibility that their conduct may cause death and continued to engage in that conduct despite the risk or possibility. The accused persons all pleaded not guilty to the charges.

The state tendered into the record of proceedings Exhibit 1, the summary of the state case. In brief the allegations are that on the fateful day accused persons and other villagers proceeded to Munyathi River in search of the deceased whom they alleged had assaulted accused two's brother. The group of people were armed with axes, knives, sticks and other weapons. It is alleged by the state that accused persons located the deceased at some point along Munyathi river and on seeing the accused persons the deceased fled. The accused persons gave chase and caught up with deceased. Accused three picked up a stone and struck the deceased once on the

head and he fell to the ground. Accused one then struck the deceased on the right ankle with an axe. Accused two grabbed the axe and proceeded to strike the deceased with it on the right leg. The deceased was left bleeding and lying with his face upwards as the accused persons left the scene. The deceased later died as a result of injuries sustained in the assault.

Accused one tendered a defence outline marked Exhibit 2. The accused denied ever participating in the assault that led to the death of the deceased. He stated that on the day in question and at the material time he was on his way from his home proceeding to Munyathi River. He was going to the river to join the other gold panners. Accused one stated in his defence that he was nowhere near the scene of the assault and that he only arrived at the river when the deceased had already been assaulted.

Accused two tendered his defence outline, marked Exhibit 3. He averred that he knew the deceased as a local gold panner who was wanted by the police to answer to allegations of having assaulted his brother, one Taurai Tazvivinga. He further indicated that on the relevant day he had been summoned by one Lazarus Denhere to assist in the capture of the deceased person. Accused two stated that a multitude of people totaling between thirty to forty people joined Lazarus Denhere and proceeded to deceased's shack. He stated that on seeing the mob approaching him the deceased fled. Deceased was apprehended by the group of persons and he observed that deceased had been assaulted by several people who had gone ahead of him. Accused two denied any involvement in the assault of the deceased.

Accused three tendered his defence outline, marked Exhibit 4. He averred that he joined the group of people that was tasked by Lazarus Denhere to apprehend the deceased who was wanted by the police in connection with an assault case. He indicated that Sikirwai Mpofu led the group of persons that chased after the deceased. When deceased was apprehended he was heavily assaulted and sustained serious injuries. Accused three indicated that the mob dispersed in different directions once they realized that deceased had been seriously injured. Accused three denied having participated in the assault of the deceased in any manner whatsoever.

The next documentary Exhibit 5, is the Post Mortem Report filed under number 561/559/2007. The report was compiled by Dr I Jekenyia at Mpilo Hospital on 22 October 2007. The pathologist concluded that the cause of death was:

- (a) Brain haemorrhage
- (b) Skull fractures
- (c) Assault trauma.

The other injuries reflected in the Post Mortem Report are:

- (a) 2cm through and through wound of the right upper lip (end)
- (b) 3cm vertical wound on the side of the left eye
- (c) 4cm wound (transverse) just above the right eyebrow. The wound passed through the bone causing multiple fractures and also right anterior fossa multiple fractures.
- (d) Multiple superficial wound of the right ankle.

On other remarks, the Post Mortem reveals that severe force was used in inflicting the injuries.

The state opened its case by leading evidence from Onesmo Mhloro. He testified that he was known to the deceased who was related to him as a cousin. He knew all accused persons as gold panners who operated along Munyathi River. This witness advised the court that he saw accused one in the company of one Lazarus Denhere. He observed accused assaulting deceased's wife. Accused one was in the company of several other people. The witness testified that accused one confronted Innocent Mhloro and that later they were directed to where the deceased had been left injured and bleeding. The witness confirmed that he did not witness the assault upon the deceased. He did not know who had inflicted the fatal injuries upon the deceased. The court found the evidence of this witness to be easy to follow, but nothing much turns on his evidence. Whilst the court makes no adverse findings concerning the testimony of this witness, the evidence did not assist in providing the court with any evidence linking the accused persons to this offence.

The second state witness was Innocent Mhloro. This witness is also related to the first witness who is his brother. The deceased was a cousin to the witness. The evidence of this witness is substantially similar to that of Onesmo Mhloro. He confirms that he was at Munyathi river panning for gold on the relevant day. He was confronted by accused one who indicated that the deceased was badly injured. He gave him directions to where he was to find the deceased. Both Onesmo and Innocent Mhloro eventually got to the scene where they found the deceased

lying on the ground. They observed that the deceased had serious injuries on both legs and on the face. It is worthy to note however, that the injuries observed by the two witnesses were not reflected on the Post Mortem Report. It is highly unlikely, in my view that, the pathologist would have failed to observe the injuries observed by the two state witnesses. There is a likelihood that the state witnesses exaggerated the injuries they said they had observed on the deceased. It is safer for the court to rely on medical evidence obtained by a pathologist independently and based on an examination carried out in terms of section 278(3) of the Criminal Procedure and Evidence Act [*Chapter 9:07*]. After a close analysis of the evidence of Onesmo Mhloro the court finds that his evidence was of low probative value to the court. His evidence does little to assist in linking each of the accused persons to the offence.

The state then led evidence from its key witness, Sikirwai Mpofu. The witness testified that he was into gold panning. On the day in question he was fishing along Munyathi river when he was approached by accused persons. The accused persons indicated to the witness that they intended to apprehend the deceased who was wanted by the police in connection with allegations of assault. The witnesses complied. The witness testified that when they got to where the deceased was positioned, he got up and fled as soon as he saw the group of people walking towards him. The witness and the accused persons gave chase and Sikirwai Mpofu led the chase. The deceased did not go far before he was caught by this witness who grabbed him by the back of his shirt. The witness stated that he released the deceased who then went round a tree before he stopped. It was then that accused three picked a stone and struck the deceased on the right side of the head. The deceased fell to the ground and immediately thereafter, accused one who had arrived at the scene, grabbed an axe and struck the deceased on the back of his right leg. The witness said he observed accused two striking the deceased on the back of the left leg after grabbing the axe from accused one. Sikirwai Mpofu indicated that upon observing that deceased had been assaulted, he left the scene when he realized that what had happened to the deceased is not what had been agreed upon. He said that he had gone back to his fishing point.

The court notes that the evidence of Sikirwai Mpofu was material to the state case. His evidence was the only available eye witness account of what transpired when the deceased was located. The state conceded that in this case the court is essentially dealing with single witness

evidence. The law on this aspect is settled in our jurisdiction. In terms of section 269 of the Criminal Procedure and Evidence Act it shall be lawful for the court to convict on the evidence of a single witness. The relevant section provides as follows:

“It shall be lawful for the court by which any person prosecuted for any offence is tried to convict such person of any offence alleged against him in the indictment, summons or charge under trial on the single evidence of any competent and credible witness. -----.”

In the case of *S v Nathoo Supermarket* 1987 (2) ZLR 136 (SC), GUBBAY (JA) stated at page 138 as follows:

“It is, of course permissible in terms of section 253 of the Criminal Procedure and Evidence Act [Chapter 59] for a court to convict a person on the single evidence of a competent and credible witness. The recognized test is whether his evidence is found to be satisfactory in every material respect.”

In this matter, the provisions of section 269 of the Criminal Procedure and Evidence Act apply with equal force and the court must be satisfied that in all material respects, the evidence of Sikirwai Mpofu is credible and satisfactory.

I now proceed to analyse the evidence of Sikirwai Mpofu. His account from the outset must be approached with caution, regard being had to the fact that in 2007 he was arrested together with the accused persons and others on allegations of the murder of deceased. It is common cause that soon after the death of the deceased the police arrested fourteen persons for the assault and murder of the deceased. At some stage, during 2014, the state indicted the accused persons for trial. It is not clear why charges were dropped against all the other accused persons. The court was not advised how Sikirwai Mpofu had been turned into a state witness. The court was basically left in limbo on this aspect. The state proffered no explanation and the witness himself said he did not know why charges against him had been dropped. It is the court's view that Sikirwai Mpofu's explanation of why he had left the scene after deceased had been assaulted was not entirely convincing. He said he had left the scene after he had succeeded in apprehending the deceased. He is the one who led the group that confronted the deceased. He is the one who got hold of the deceased. He said after observing that the deceased had been injured he decided to leave the scene of the crime. He said he went back to his fishing point. This behavior is neither normal nor reasonable. One would have expected the witness to go and

summon assistance for deceased to receive treatment. The witness's behavior suggests that he was not prepared to be associated with the fatal injuries inflicted upon the deceased person.

The state argued that Sikirwai Mpofu was not an accomplice and referred to section 195 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. The section provides as follows:

“accomplice” means a person other than the actual perpetrator of a crime-

- (a) Who incites or conspires with an actual perpetrator to commit a crime, with the result that a crime is subsequently committed; --.”

The court was not convinced that on the evidence led, Sikirwai Mpofu should be treated as an accomplice. His degree of participation appears to have been limited to the apprehension of the deceased. It shall not be necessary to deal with the law regarding accomplice evidence in great detail.

I now turn to deal with the cogency of the evidence of Sikirwai Mpofu. It cannot be denied that Sikirwai Mpofu was an interested party in this matter. The court must observe that if the evidence of this witness is expunged from the record, there is no other independent evidence upon which the court would rely upon. The state case falls or stands on the evidence of this witness. There are however some glaring aspects of his evidence which the court must not overlook.

- (a) It is not disputed that the deceased was attacked by a mob of people.
- (b) It is not disputed that apart from Sikirwai Mpofu no other witness saw the accused persons assaulting the deceased in the manner described.
- (c) Sikirwai Mpofu quickly disappeared from the scene of the crime as if to disguise his role in the assault of the deceased.

From the above analysis it is difficult to come to the conclusion that the evidence of the single witness is credible in every material respect.

The state then led evidence from Benard Gwaku. He is a constable in the Zimbabwe Republic Police. The witness was called by the state ostensibly to correct an impression that had been created by state witnesses that the statements made by them in 2014 had not been made by those witnesses. It emerged during cross-examination of state witnesses that the statements that

were supplied to defence counsel were signed in 2014. Such statements were purportedly recorded in 2007. The witness told the court that in fact he had typed the statements after copying the details from the original statements. He stated that the only thing he had changed were the surnames of the accused persons. He then made the startling revelation that he had signed the statements on behalf of the witnesses. This was a clear forgery of the signatures of the witnesses. The evidence of Benard Gwakuke dented the state case and in the end it left the court with more questions than answers.

I must observe here that the manner in which matter was investigated and handled by the police leaves a lot to be desired. The prosecution of an accused person in a criminal trial is premised on the fact that the state has secured evidence sufficient to sustain a case. The exercise must never be seen as a fishing expedition.

Defence case

Accused persons all gave evidence under oath in their defences. Accused one's defence was that he was never at the scene of the crime and that he only arrived at the river after deceased had already been assaulted. At the material time he was at his house. He denied ever participating with Sikirwai Mpofu or anyone else in the assault of the deceased.

Accused two denied taking part in the assault of the deceased. He however admitted joining the group of persons that confronted the deceased for the purposes of apprehending him. Accused two said he saw Sikirwai Mpofu leading the chase of the deceased. He was then followed by Lazarus Denhere. Accused two says he noticed Sikirwai Mpofu striking the deceased with a stick. The deceased fell down and several people then took turns to assault the deceased. Accused two says that he left the scene when he realized that the situation had gone out of hand and that the deceased was badly injured.

Accused three testified that he was also requested by Lazarus Denhere to assist in the capture of the deceased. He confirmed that the deceased had fled upon realizing that a group of people were approaching him. He indicated that he observed Sikirwai Mpofu leading the group of persons that chased after the deceased. He indicated that Sikirwai Mpofu managed to get hold of the deceased and they both fell to the ground as the chasing crowd caught up with them. The

deceased was assaulted by several people before Lazarus Denhere restrained the crowd from further assaulting the deceased. He denied assaulting the deceased in any manner.

Analysis of the evidence

What can clearly be discerned from the evidence of both the state witnesses and the accused persons is that on the day in question there were hordes of people panning for gold along the Munyathi river. It is common cause that the deceased had previously assaulted accused two's brother, one Taurai Tazvinga.

It is also evident that at some point that day Lazarus Denhere had gone along the river inviting various persons to join him and assist in the capture of the deceased person. The court was informed that Lazarus Denhere is now late and that he was arrested with the first group of fourteen suspects. The court notes that the said Lazarus Denhere played a central role in the events leading to the assault of the deceased. The court must determine whether from all the evidence presented in court the state had discharged the onus of proving its case beyond reasonable doubt in respect of all the accused persons. The law demands that the state proves all the essential elements of the charge beyond a reasonable doubt. The court may not convict the accused persons on the basis that the defence version cannot be believed. This principle has been reasserted in several cases in our jurisdiction.

See the case of *S v Mupatsi* 2010 (1) ZLR 529 (H), where the court cited the comments of GREENBERG, J in the leading case of *R v Difford* 1937 D 370 at 373, where he stated as follows:

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

See also, *State v Katsiru* 2007 (1) ZLR 364. *In casu*, it is beyond dispute that scores of people who were panning for gold along Munyathi River on the day in question were invited to confront the deceased for the purpose of apprehending him. It is common cause that the deceased was apprehended and severely assaulted by several people. He later succumbed to the

injuries he sustained and later died. The court is not convinced that the state proved beyond a reasonable doubt that the accused persons perpetrated the assault and caused the death of the deceased. The state relied on the single witness evidence of Sikirwai Mpofu, which fell short of providing an account that was credible and satisfactory in all material respects. In my view, the danger of false incrimination was not eliminated, and in the event, the benefit of doubt must and ought to be given to the accused persons.

In the result, the accused persons are found not guilty and acquitted of the crime of murder.

National Prosecuting Authority's office, state's legal practitioners
Hore and Partners, 1st accused's legal practitioners
Jumo Mashoko and Partners' 2nd accused's legal practitioners
Passmore Mabukwa, 3rd accused's legal practitioners