

THE STATE
versus
NOBERT NSINGO
and
NKOSIKHONA MPOFU

HIGH COURT OF ZIMBABWE
MOYO J
BULAWAYO 16-17, 20, 27 AND 31 JULY 2015

Criminal Trial

Ms *E. Munyeriwa* for the state
S. Mguni for the 1st accused
S. Collier for the 2nd accused

MOYO J: The two accused persons face a charge of murder, it being alleged that on 23 June 2013, the two accused persons in the company of another three who are at large assaulted the deceased Solomon Ndlovu at Mbizingwe Business Centre resulting in his death on 25 June 2013 at the United Bulawayo Hospitals.

Two witnesses were called who gave *viva voce* evidence for the state. These are Lancelot Ndlovu, the deceased's son and a neighbour Pilate Dube. The evidence of the rest of the state witnesses is as contained in the state summary and was admitted in terms of section 314 of the Criminal Procedure and Evidence Act [Chapter 9:07]. The documentary exhibits tendered were the state summary which was marked Exhibit 1, accused one's defence outline which was marked Exhibit 2, accused two's defence outline which was marked 3, the stones that were used to assault deceased which were marked Exhibit 4, the soil that was uplifted from the area that deceased was assaulted on which was marked Exhibit 5, first accused's confirmed warned and cautioned statement which was marked Exhibit 6, second accused's confirmed warned and cautioned statement which was marked Exhibit 7, the affidavit of the police officer who identified the deceased's body to the pathologist which was marked Exhibit 8 and the post mortem report which was marked Exhibit 9.

The facts of this matter are largely common cause hence the court will take a blanket approach in narrating same and only zero down on the issues for determination so as to resolve

the conflict between the state case and the defence case where such conflict arises. The two accused persons together with their accomplices who are at large were drinking beer at Ndwangu bottle store on the date the fatal assault was perpetrated on the deceased. The first and second state witnesses were sent to the shop that is, this Mbizingwe Business Centre on 23 June 2013, to collect some money from a Mr Nkala.

This they did and in the process they had an altercation with the two accused persons. We will not delve into the subject matter of the altercation for the witness give a different account of the altercation to that given by the accused persons, but what is clear is that indeed there was an altercation between the two groups at the shops resulting in a scuffle.

The first and second witnesses subsequently ran away and went back home, but in the process they lost the money which they had been sent to collect. When they got home having lost the money that they had been sent to collect, they reported the loss and the scuffle they had with the second accused person to the deceased who is the father to Lancelot Ndlovu the first state witness, naturally their father then went back with them to the shops to enquire about the problem that resulted in the loss of the money. As he got to the shops with the first and second state witnesses, he sought to enquire as to what had transpired from the shopkeeper since he had sent his boys to collect some money and then they were attacked and ended up losing the money. It is at this stage that the accused persons together with the other three who are at large, then attacked the deceased and the two state witnesses. One Tshwapo used a catapult in the attack causing the two witnesses and the deceased to run in different directions.

We will put aside for now the question of whether the two accused persons participated in this attack or not as it is an issue for determination by this court which we will deal with once and for all when we assess the accused persons' culpability or otherwise in this matter.

After fleeing in different directions, the two witnesses could hear the deceased who had run following the path home screaming, and they could hear the sound of beatings presumably of the deceased by the accused persons and their counterparts. It is common cause that the deceased was severely assaulted and later died from these injuries at the United Bulawayo Hospitals on 25 June 2013.

The accused persons' version of events is that the altercation involving the deceased when he come back to the shops with the two state witnesses did not involve them, but the three

who are at large and that they only intervened to assist the deceased and stop the assault by the other three. They admit that they had an altercation with the two witnesses when they initially came to the shops before coming for the second time with the deceased but that instead of them causing trouble at that stage it is in fact the two state witnesses who caused trouble resulting in the scuffle that occurred between them. We will deal with the resolution of this conflict between the accused persons and the two state witnesses (that is as to what actually transpired on that issue on the day in question) when we deal with the issues of credibility.

We now move on to assess the evidence of the state and the defence with regards to the issue of credibility.

1) Lancelot Ndlovu

He told the court what transpired on the day in question, that the two accused persons in fact started the conflict that resulted in the scuffle that led to the loss of the money. That they then went to call the deceased who when they came back sought to enquire from the shopkeeper as to what had happened causing the accused persons and the other three at large to attack the two witnesses and the deceased and causing them to flee in different directions. After fleeing he heard deceased screaming and sounds of beatings, he then went towards the place where deceased was screaming and he saw all the five accused persons beating the deceased who was lying on the ground. This witness was asked the following questions:

Q: How did accused 1 and 2 hit him as he lay there?

His answer was:

A: Accused 1 was throwing stones to assault deceased and accused two kicked deceased and when he saw me he rushed towards me”

This witness said it was at night but he could see from some distance because there was moonlight. He said he was at a distance which he estimated to be of the same length with the distance from the witness’s stand to the dock. He said at this juncture accused two then saw him and said here is one of them causing him to run away again.

Nothing much arose during the cross-examination of this witness and although he said he was bitter about his father’s date and that he hated the accused person’s actions, during cross-

examination nothing was elicited from him on the facts to show that he was lying. The court finds that he told the truth. It is naturally acceptable that you would not like a person's actions if they resulted in one's father's death.

Pilate Ncube

Pilate Ncube also gave a similar account to the first witness's account but he stated that all the accused persons surrounded the deceased while he was being beaten, and he could not be drawn to say exactly what accused one and two did specifically due to the distance he was at, when they saw him and he fled again. He said when he approached the scene where deceased was being assaulted as he was approximately at a distance that could be from the witness's stand to the witness's bench outside the court room, that is when the accused persons saw him and said here is one of them causing him to flee. Nothing much arose on the cross-examination of this witness.

Accused 1

The first accused person told the court that he did not participate in the beating of the deceased but that the other three who are at large did and that he only sought to stop the assault on the deceased. The first accused person's version of events in court differed materially from the information he gave to the police when the events of the day were still fresh in his mind. He also failed to explain or demonstrate to the court how he assisted the deceased on the day in question. His confirmed warned and cautioned statement read as follows:

"I do admit to the charge of murdering Solomon Ndlovu. I was there when all this happened. We arrived at the business centre in the evening and bought beer. I had a misunderstanding with Lancelot Ndlovu whom I slapped, he went away and later came back with the now deceased Solomon Ndlovu, who was armed with a wire which he used to assault my colleagues. Learnmore Sibanda then called me after he had fallen down and I kicked him on his back two times with booted feet.

Thembinkosi Moyo and Andile Dlamini were still kicking him all over the body. The now deceased Solomon Ndlovu was pleading with Learnmore Sibanda not to kill him. The now deceased was bleeding from the head. I saw Thembinkosi Moyo, Learnmore Sibanda, Andile Dlamini and Nkosikhona Mpofu holding stones but I did not see them using the stones. The now deceased was then taken to the hospitals by Lancelot Ndlovu.

After that we went home and parted ways, with each of us heading home. At last I went to Fort Rixon.”

The first accused’s defence outline and the version he gave in court can only be lies or show that the first accused’s version of events cannot be trusted for he is capable of telling different stories on the same issue. It is for this reason that the court will find that the first accused person was not a credible witness and therefore the evidence adduced by the state witnesses as against him stands uncontroverted. The first accused’ version of what transpired when they intervened to assist deceased also differs materially from that of the second accused.

Accused two

The second accused person also told the court a version almost similar to that of the first accused person, that is to say they did not partake in the assault but only intervened to assist the deceased person. The second accused person in his confirmed warned and cautioned statement stated that he was assisting the now deceased while the other four were hitting the deceased. In his confirmed warned and cautioned statement he implicates accused number one but in his defence outline and his evidence in chief he sought to exonerate the first accused person as much as is possible. The only issues that accused two’s defence case has are the following:

- 1) In court he told the court that he pulled Thembinkosi who was not holding any stones. In his confirmed warned and cautioned statement he says
“I saw Thembinkosi holding stones but I did not see whether he used them to assault.”
The second accused person is obviously lying on this point.
- 2) In his evidence in court the second accused person told the court that
“I heard that its people fighting I went there, I found deceased having fallen down, I got there with the first accused person we assisted each other in trying to intervene and stop this fight.”

In paragraph 5 of his defence outline the second accused person states thus:

“The second accused person will testify that, at that time, Solomon Ndlovu was chased down and assaulted by Tshwapo Sibanda, Thembelinhle Sibanda and Nduna Dlamini. The first accused and the second accused attempted to intervene to stop the fight whereupon the deceased mistakenly attacked them with a wire.”

Now in court we are never told of this attack by the deceased with a wire on the second accused persons, in fact the version that is given in court is that of a man who had fallen down, was surrounded, bleeding from the head and was helpless. How could he then attack the two accused persons with a wire? In fact in his confirmed warned and cautioned statement the second accused person tells us that the first accused person is the one who assaulted the deceased with a wire that the deceased had brought. In fact the first accused person told us that the three as they assaulted the deceased they were trying to get hold of a wire that the deceased was lying on top of. How could he then assault the second accused persons with it? The second accused person has therefore not told the truth in this court and cannot be found to be a credible witness. He was evasive under cross-examination and he claimed that he did not see many things for instance he could not tell what was being used to assault the deceased. He did not notice whether deceased was injured or not. He did not notice that deceased required medical attention. He did not hear the deceased speak. He did not see how severely assaulted the deceased was. He did not hear Learnmore saying the assault should stop and deceased be taken to the clinic. He did not hear the deceased beg for his life. He did not hear the deceased scream or cry out in pain.

In his evidence in chief he said that after Learnmore came to tell them about the trouble that was outside, he heard noise outside and he heard that it was people fighting. Under cross-examination when he was now denying ever hearing anything he was asked

Q: You said when you got outside you heard noise and from it you could tell that people were fighting.

His answer was

A: No I did not hear anything.

He also said that when he left for Fort Rixon with the first accused who told the court that when they left he had heard about deceased's death, the second accused said he never got to know that deceased had died. Asked by the assessor if when he got to the scene he never heard deceased screaming his answer was that he never heard but he was not listening. Asked further that but was there noise he said "I don't know if there was noise or not"

The second accused person is a terrible liar as evidenced by the extracts we have made from the court record. He is far from being credible at all.

The post mortem report gives the cause of death as

- (1) Head injury
- (2) Lineal skull fracture
- (3) Blunt force trauma
- (4) Homicide

Now we move on to deal with the question of whether the two accused persons did participate in the assault of the deceased person on the day in question. We have already found that the two state witnesses are credible witnesses and we have already found that there are material discrepancies in the defence cases meaning that we have found that both accused persons are not credible witnesses as we have shown herein.

Single witness testimony

Second accused's defence counsel submitted that because only the first state witness alleges that he saw the two accused persons actually assault the deceased, this being the only testimony, this court is dealing with single witness testimony and it therefore should be corroborated.

We however find that in fact this court is not dealing with a case where the evidence relied upon is that of a single witness for it is the evidence of both state witnesses that when they ran in different directions whilst still at the shops, it is all the five accused persons who were chasing them meaning that at the inception of the transaction that saw the deceased being fatally assaulted, both accused persons participated as per the state witnesses' testimony. They were therefore part of the chasing and of the whole transaction that saw the deceased being fatally assaulted.

Even if we were to find that indeed this case is on single witness testimony, this court has already found the first state witness to be a credible witness. In the case of *Sauls and others* 1981 (3) SA 172 (A) the South African Appellate Division stated that there was no rule of thumb to be applied when deciding upon the credibility of 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 cases of *Nyabvure vs S* SC 23/88, *Worswick v S* SC 27/88 and *Nemachena vs S* SC 89/86. In the case of *S v Banana* 2000 (1) ZLR it was held

that corroboration is not essential, all that is required is for the court to be satisfied that the complainant is a credible and reliable witness. If she is, a conviction can be founded on her evidence even if it is not corroborated.

We have already carefully examined the state case as weighed against the defence case and found that the state witnesses are credible and the accused persons are not. Even if one were to look for corroboration of the first witness' testimony in abundance of caution whether or not the second accused person participated in the assault of the deceased, there is corroboration in the lies that he told the court. A concocted story falls apart always which is what happened to the defence cases in this matter.

The first accused's confirmed warned and cautioned statement corroborates the first witness's account together with the lies that he told in a bid to build his defence. A confirmed warned and cautioned statement in terms of section 256 (2) of the Criminal Procedure and Evidence Act [Chapter 9:07] must be admitted by the court as evidence on its mere production by the prosecution without any further proof.

Lies as corroboration

Again, in relation to the second accused person, he is a terrible liar, he says one thing in his confirmed warned and cautioned statement, another thing in his defence outline and another thing in his defence in court. His refusal to accept that he made certain observations like noise, injuries what was being used to assault the deceased, his knowledge that deceased had died etc. can all point towards a guilty mind for an innocent man does not have any reason to lie, he simply tells the truth. He simply attempted to lie on the confirmed warned and cautioned statement, the part where he implicates accused one, he says the police forced him to do so, how could the police allow him to deny the charges but force him to implicate accused one? So there is ample corroboration of the first witness's account by the lies told by both accused persons. The authority for the principle that lies by an accused person can amount to corroboration is in *Katerere v S* SC 55/91

For the accused person's lies to serve as corroboration the following criteria must be satisfied, at pp90.

- 1) The lie must be deliberate

- 2) It must relate to a material issue
- 3) The statement must be clearly shown to be a lie by evidence other than that of the witness who is to be corroborated.

Refer to the case of *S v Nyoni* SC 118/90.

We will only assess the aspect of lies as corroboration in relation to the second accused person as the first accused person's culpability is corroborated by the confirmed warned and cautioned statement. The second accused person told the court in his evidence in chief that he heard noise as that of people fighting and the deceased screaming, later he disowned that under cross-examination and said he never heard anything.

In his defence outline he said the deceased attacked him and second accused with a wire, in his evidence in chief he gives a picture of a surrounded deceased who is lying down and is helpless. He said that he never got to know of deceased's death, even if he left with accused one who told the court that at the time they left deceased had died and he was then aware of that fact.

Asked by the assessor if when he got to the scene he never heard deceased screaming, he said that he never heard but he was not listening. Surely you need not listen to hear a person scream. Asked further that but there was noise he said "I don't know if there was noise or not". Surely these are deliberate lies on material facts and there is no other motive to lie in such a manner save to conceal one's guilt and for fear of the truth. It is clear that both accused persons tried to concoct a story to distance themselves as far away as possible from culpability. They also tried to concoct a defence of intervention since it would be difficult for them to explain their presence and participation. The only problem is that a concocted story almost always falls apart. It is for this reason that we find that the lies told by the second accused person on material facts as chronicled in this judgment are sufficient corroboration of the first witness's account that he in fact saw the second accused person partake in the assault of the deceased.

We have already found that the two accused persons had an altercation earlier on the day with the two witnesses, who later came back with deceased, they then joined in the attack that saw the two witnesses and deceased run in different directions, they were part of the group that caught up with the deceased and then assaulted him. This is all one transaction.

The doctrine of common purpose

The doctrine of common purpose then comes into play. It is our view that the second accused person did fully participate in this whole transaction that relates to the assault and subsequent death of the deceased. We find so for the following reasons: McNALLY JA as he then was had this to say in the case of *Ncube v S* SC 90/90.

“The essence of the doctrine of common purpose is that when two or more persons associate in a joint unlawful enterprise, each will be liable for any acts of his fellows which fall within the common design or object --- (association in a common design or object or purpose is, in this case, the key issue)”

In the case of *Mubaiwa and another v The State* 1992 (2) ZLR 362 (SC). The court held that an accomplice who did not contribute causally to the offence can only be held liable if these requirements are proved:

- 1) he must have been at the scene of the crime
- 2) he must have been aware that the crime was being committed
- 3) he must have made this intention of common cause clear by some act of association of his own.
- 4) he must have had the intention in this case he must have either intended the killing or foreseen the possibility of killing yet acted reckless as to whether or not death ensued.

In the facts before us we have already found that the two state witnesses are credible hence since it is common cause that the accused persons were at the scene and that they were aware that a crime was being committed as they participated firstly in chasing the deceased and the two state witnesses and secondly, in actually assaulting the deceased as per the first witness' account, we find that they had indeed made the intention of common cause clear by their conduct in chasing after the deceased and participating in the assault. This we find irregardless of their degrees of participation.

The first accused person acknowledges that the deceased was badly injured in this assault and therefore they foresaw the possibility of death and yet they acted in association with the other three reckless as to whether death ensued or not.

It is accordingly our finding that both accused persons actively participated in the chasing of the deceased and the two witnesses, and that they subsequently caught up with the deceased

and severely assaulted him. The two accused persons clearly acted in common purpose with the other three who are at large. We thus find that both accused persons acted wrongfully and unlawfully on the day in question.

The verdict

We then move on to consider what the accused persons are guilty of. From the evidence of the first accused person, the deceased was severely assaulted and was bleeding from his head. The first accused person could see this. The second accused person denies ever seeing anything. The deceased lay helpless on the ground, surrounded by five people some of whom were kicking, some throwing stones, he bled profusely and even begged for his life. It was apparent from these facts that deceased's life was in danger.

We now proceed to assess the elements of the crime of murder.

a) Actual intention

Actual intention entails that the accused person desires death, death is his aim or object. There will also be actual intention where death is not the aim and object, but the accused person continues to engage in an activity which he realizes with certainty that death will result.

b) Legal intention

With the concept of legal intention the accused person does not mean to bring about death but he continues to engage in an activity after he foresees that there is a real risk that the activity will result in the death of a person.

Distinction between murder and culpable homicide

Where it is alleged that the accused had legal intention to kill he would usually deny that he foresaw that his actions would result in death.

The question is then, whether as a matter of inference, he did have such foresight despite his denial. He can only be convicted of murder if the only reasonable inference that can be drawn from the facts is that he had the legal intention to kill. If the court draws this inference the court decides that he must have and did foresee the possibility of death".

‘Per Feltoe A Guide to Criminal Law in Zimbabwe 2005 –edition, at page 96.

That takes us to accused one’s testimony who confirmed under cross-examination that the deceased was in a bad state and was bleeding from his head. The state of the deceased as given by the first accused person and the injuries as evidenced by the post mortem report show only one thing that the accused persons continued to engage in an activity after foreseeing that there is a real risk that the activity will result in deceased’s death. From the facts before it, this court finds that a reasonable inference can be drawn from the two accused persons’ conduct as read with the state of the deceased’s injuries on the night in question that, they did have the requisite legal intention to kill the deceased.

The two accused persons are accordingly found guilty of murder with constructive intent.

Sentence

The two accused person are each sentenced to 15 years imprisonment.

National Prosecuting Authority, applicant’s legal practitioners
Webb, Low & Barry, 1st accused’s legal practitioners
Dube, Mguni & Dube, 2nd accused’s legal practitioners