

**THE STATE**

**Versus**

**ADMIRE MAKONI**

**And**

**BRIGHTON MUNYIRI**

**And**

**PETER ENOCK MANYUCHI**

**And**

**McINTOSH NHAWU**

**And**

**TAPIWA LIBERTY MAUPA**

**IN THE HIGH COURT OF ZIMBABWE**

**BERE J with Assessors Mr J. Sobantu & Mr P. M. Damba**

**BULAWAYO 23 FEBRUARY, 8 APRIL, 19 MAY & 12 & 13 JULY 2016**

**Criminal Trial**

*W. Mabhaudi* for the state

*Mrs J Magosvongwe* for 1<sup>st</sup> accused

*H. Chimbetete* for 2<sup>nd</sup> accused

*W. Ndongwe* for 3<sup>rd</sup> accused

*S. Mguni* for 4<sup>th</sup> accused

*Miss T. Ndlovu* for 5<sup>th</sup> accused

**BERE J:** On 25 February 2013 and at Shangani Business Centre in Matabeleland South, the deceased Mandlenkosi Sibanda, then 27 years old lost his life through assault. Exhibit I, the post mortem report gave the cause of death as – 1. Subarchnoid Haemorrhage caused by a blunt object used against the deceased's head.

When this matter was brought to court, there were 5 accused persons who were alleged to have been responsible in causing the deceased's death. However, as the trial unfolded it became

clear that there was no evidence linking 3 of the accused to the deceased's death. The evidence suggested that the two remaining accused persons had participated in the killing of the deceased.

The brief allegations as put forward by the state are that on the day the deceased lost his life there was a tribal commotion pitting the Ndebele speaking group on one side and the Shona speaking on the other side. The violence that erupted at the business centre which was sadly characterised by tribal undertones led to the deceased being brutally assaulted twice on the head with a concrete slab weighing 29,255kgs, 40cm in length and with a width of 15cm. When the murder item was presented in court, the police officer struggled to raise it. We marked it exhibit 2. The allegations against the accused persons were that they had participated in the assault that led to the death of the deceased person.

In his defence outline, accused 4 maintained that he was only at the scene as an innocent by-stander who had nothing to do with the death of the deceased. He said that he observed what happened on the evening in question from a distance and that he witnessed one Dylan crush the deceased to death with the murder weapon. He also stated that Dylan was in the company of one Simbarashe, both of whom had not been arrested.

The 5<sup>th</sup> accused gave an almost similar defence outline and blamed Dylan and Simba Sigogo as the two individuals who assaulted the deceased to death. The 5<sup>th</sup> accused told the court that he observed all what happened from a distance and that personally he had nothing to do with the assault.

During the hearing of this case the evidence of Justine Tinarwo, Enos Ndebele, Sidingumuzi Ncube, Vincent Phiri, Constable Simon Mbivi, Polite Marufu, Hebert Sengwi and Doctor Sanganai Pesanai was uncontested and consequently was admitted into the record of proceedings as summarised in the State Summary in terms of section 314 of the Criminal Procedure and Evidence Act [Chapter 9:07].

In addition to the above-referred evidence the state sought to rely on the evidence of Mlamuleli Tshuma, Sikhanyiso Nkomo and Tsungai Mapeta, whose evidence was led in open court.

The central enquiry in these proceedings was to identify the persons who assaulted the deceased and caused his death. Virtually all the evidence which was admitted by consent was not of much assistance in identifying the deceased's assailants, so too was the viva voce evidence of Mlamuleli Tshuma who was candid enough to advise the court that he did not see how the deceased was assaulted.

Sikhanyisiwe Nkomo, the proprietor of Farai Munashe Shop, which is close to where the deceased was assaulted to death was equally not helpful in identifying the assailants. The importance of her evidence was merely to emphasise the fact that the fight that erupted was underlined by tribal overtures.

The witness confirmed seeing the deceased being struck by a lintel or concrete slab but the darkness disabled her from identifying the assailant or the gang that was behind this tragic assault.

Tsungai Mapeta who works as a vendor at the Business Centre gave the court a graphic detail of what happened on the day in question leading to the death of the deceased.

The witness who appeared to be at a vantage point which he initially gave as 100 metres but later changed to 50 metres from the scene of the assault took the court through what actually transpired on the day in question. The witness stated that accused 4 and 5 were part of the Shona speaking gang that was involved in the assault of the deceased.

The witness was adamant that although the accused 4 was present and being part of the group, he did not see him physically participating in the assault. The witness said he clearly saw the 5<sup>th</sup> accused person dragging the deceased from the bar and grab holding him along the veranda before someone in the group tripped the deceased to the ground. The witness was

unable to identify the person who tripped the deceased. To his credit the witness also indicated that none of the two accused persons stoned the deceased. His evidence was that in the height of this commotion he heard words to the effect “let us assault this person, let us assault the Ndebeles”, being uttered. According to this witness, the same instruction to assault the deceased was later repeated by the 5<sup>th</sup> accused person who appeared to have been the natural leader of the group of Shona speakers which was targeting to assault those of Ndebele extraction.

The critical evidence of this witness was that during the commotion, he saw one of those in accused 4 and 5’s group, a man who was wearing a black jacket walk to about 20 metres from the deceased, lifting the concrete slab or lintel which turned out to be the murder weapon, staggering with it and using it to crush the deceased’s head. He said the crushing or assault on the head was done twice by the same man. Both accused persons identified this assailant as Dylan. It is common cause that this Dylan has not been arrested or account for.

Tsungai estimated the gang in which the two accused persons were in to have comprised of between 7 – 8 individuals. The witness was clear that none of the accused persons before the court actually assaulted the deceased. This admission on its own underlined the truthfulness of the witness’s evidence. The witness was clearly not driven by malice or motivated to lie against the two accused persons. When the witness said the two accused persons were part of the gang that assaulted the deceased to death, he must be believed.

Of particular significance to his witness’s testimony is that after this gang had severely assaulted the deceased and left him with death as a certainty, they walked around the business centre looking for other Ndebele speaking individuals to assault. He said upon being confronted by this group which still had accused 4 and 5 in its ranks, it was in fact accused 5 who came to his rescue by identifying him as a fuel dealer and spared him the agony of a possible assault.

Our view is that in deciding who to assault and who not to assault the accused 5’s leadership of the group was put beyond doubt.

In their evidence in chief, both accused were in agreement that the person who did the actual killing of the deceased was one Dylan.

In an effort to exonerate themselves, both accused told the court that when Dylan assaulted the deceased he was in the company of one Simba. The two accused seemed to think that because they did not deliver the decisive strike on the deceased, they could escape liability. I will come back to deal with the legal issues involved in this line of thinking later in this judgment.

It was clear from the testimony of accused 4 that his primary objective was to exonerate both himself and accused 5 from their involvement in the horrific assault that claimed the deceased's life. This accused, in his testimony attempted to remove himself and accused 5 from the scene of the crime by shifting the blame to Dylan and Simba.

Accused 4's witness Fanuel Dhlamini did not help matters for accused's 4 when he said that the accused phoned him and insisted that they meet that same evening of the deceased's assault. The witness was not of much assistance to the accused because he was not at the scene of murder at the critical moment.

The court's view is that the panic phoning of the witness by the accused underlined the accused 4's involvement in the assault of the deceased. This accused's involvement by identifying himself with the actual perpetrator of the murder is reinforced by his continued association with the assailants, even after realising they had literally killed the deceased. Accused 4's fate was sealed when he continued to move or walk around with the gang hunting for other targets to assault.

Comparatively, the 5<sup>th</sup> accused's version did not fair better to the story told by Tsungai. It was clear that the 5<sup>th</sup> accused understandably sought to completely exonerate himself by shifting blame to Dylan and one Simba Sigogo.

The story told by Tsungai was told with an impressive tongue and his credibility was beyond reproach. If he wanted, he would have easily said that he saw both accused persons assaulting the deceased but he chose to remain clean in his evidence. To show his credibility and the absence of malice against the 5<sup>th</sup> accused person he gave him due credit by suggesting that it was the 5<sup>th</sup> accused who told his other gang members that he should not be assaulted because he was a fuel dealer. All this underlines the credibility of his evidence.

### The legal issues involved

It is not in dispute that the person who actually struck the deceased to death is not before the court. But it is also clear that those who identified with his common objective to assault the Ndebeles are before the court, that is, accused 4 and 5.

In the court's view it does not matter that the two did not actually do the killing of the deceased. As stated by Burchell<sup>1</sup>

“Where two or more people agree to commit a crime or actively associate in a joint unlawful enterprise, each will be responsible for specific criminal conduct committed by one of their number which falls within their common design.”

The court's position is that the two accused persons' criminal liability in this case stems from their being accomplices to the actual crime committed by the unaccounted Dylan. For clarity's sake section 195<sup>2</sup> defines an accomplice as

“a person, other than the actual perpetrator of a crime (c) who

- (i) knowing that an actual perpetrator intends to commit a crime; or
- (ii) realising that there is a real risk or possibility that an actual perpetrator intends to commit a crime;

renders to the actual perpetrator any form of assistance which enables, assists or encourages the actual perpetrator to commit the crime”

1. South African Criminal Law and Procedure Vol I, 3rd ed at p 37

2. Section 195 (c) of Criminal Law (Codification and Reform) Act [chapter 9:23]

From this definition, the support can be in material form or in the form of an encouragement or mere comradeship alliance. Our view is that even rendering moral support would suffice.

The evidence as accepted by the court suggests that the two accused persons as accomplices knew that the common objective of the gang was to assault or punish those of Ndebele extraction. They must have appreciated or realised that in the process of carrying out this unlawful enterprise, the actual perpetrator of the crime Dylan might end up committing a more serious crime like the one he eventually committed. The crime he committed was within the parameters of the group's common objective.

The two accomplices' fate was sealed when even after witnessing the horrific murder of the deceased they continued to move around with the gang hunting for more potential Ndebele speaking victims.

Both accused persons in their evidence confirmed that given the nature of the murder item, there was no way the deceased would have survived after being struck with it, not once but twice on the head.

Tsungai confirmed that he had never seen a human being being punished in the manner he witnessed on this day.

From the moment Dylan staggered to lift the lintel or concrete slab, death of the deceased must have been at the back of his mind and indeed the execution was carried out to perfection.

Under such circumstances the verdict can only be one – death was intended.

**Verdict** – Both accused are found guilty of murder with actual intent.

### **Sentence**

In sentencing the accused persons we will take the following into consideration:

For both accused we accept that despite being single they have the usual family responsibilities and that this is their first criminal conviction. The two have spent 3 years and 4 months in custody awaiting sentence.

It is also mitigatory that none of them delivered the actual strike that robbed deceased of his life.

In aggravation, we accept this was a senseless and brutal murder. Wherever death occurs, as courts we have an obligation to constantly emphasis the sacredness or sanctity of human life.

We are particularly concerned with the tribal undertones that characterised this murder. Anyone who advocates tribalism is an enemy of this nation. Such thinking has long been thrown into the dustbin of history and as courts we would be failing in our duties if we do not condemn such kind of thinking. It must be nibbed from the bud and there is no better way of doing so than through imposing deterrent sentences to discourage those of a like mind.

We are convinced that throughout these proceedings and in particular that even after conviction there is no sign that the accused are remorseful. The loss of any human being through the hand of a fellow human being must never be taken lightly.

**Sentence – Each accused is sentenced to 30 years imprisonment**

*National Prosecuting Authority*, state's legal practitioners  
*Danziger & Partners* 1<sup>st</sup> accused's legal practitioners  
*Coghlan & Welsh*, 2<sup>nd</sup> accused's legal practitioners  
*Ncube & Partners*, 3<sup>rd</sup> accused's legal practitioners  
*Dube, Mguni & Dube*, 4<sup>th</sup> accused's legal practitioners  
*T. J. Mabhikwa & Partners*, 5<sup>th</sup> accused's legal practitioners