

THE STATE  
**versus**  
TSHAYIZO MPOFU  
and  
KELVIN GWIZI

HIGH COURT OF ZIMBABWE  
MATHONSI J  
BULAWAYO 15 AND 16 JUNE 2017

**Criminal Trial**

*T Hove* for the state  
*K Dube* for the accused persons

**MATHONSI J:** The events giving rise to the charge of murder being preferred against the two accused persons occurred 9 years ago at a time when accused one was 18 years old and accused two was 19 years old. They both reside at Zvamdere B, Bunja Area in Fort Rixon. They have been brought before this court on a charge of murder it being alleged that on 17 April 2008 at Divas Mpofu's homestead Fort Rixon they attacked and killed Mlamuleli Mkwananzi who was then aged 33 years.

The state alleges that the deceased had been hired to play music at a party when, following some disagreement with Thulani Mpofu, the accused one's brother, a fist fight erupted between the two. The two accused persons joined the fight on the side of Thulani Mpofu forcing the deceased to exit the hut where he had been playing music and take flight into the night. He ran into a nearby maize field but the two accused persons hunted him down and beat him to death. They then fled the scene leaving the deceased's body lying in the field where it was discovered by a search party of villagers two days later. Both accused persons pleaded not guilty to the charge.

In his defence outline accused one stated that on the night in question, there was a fight between the deceased and his brother as well as some other people at the party. He intervened to assist his brother Thulani Mpofu. He did that by trying to restrain the deceased but by then the deceased was already injured in the fight. The deceased fled when he tried to restrain him.

Accused one denied assaulting or pursuing the deceased when he fled and did not see where the deceased fled to. This is because the crowd of people obstructed his view.

The accused two's defence outline is worded in virtually the same terms as that of the accused one except that where the accused one says the deceased fought his brother, Thulani Mpofu, accused two says the deceased fought his uncle. Where accused one says he intervened to assist his brother the accused two says he intervened to assist his uncle Thulani Mpofu by restraining the deceased. Therefore their defences are the same.

The body of the deceased was examined by Dr Sanganai Pesanai, a pathologist based at United Bulawayo Hospitals on 21 April 2008 who compiled a post mortem report produced in court in terms of s278(2) of the Criminal Procedure and Evidence Act [Chapter 9:07]. The doctor observed a laceration on the scalp. When he made an internal examination he observed scalp haematoma, a depressed skull fracture of frontal left parietal region, frontal left parietal, frontal bone, a fractured right parietal bone and haemorrhage in the brain. The doctor remarked that the post mortem was consistent with injuries caused by heavy blunt object and concluded that the cause of death was subarchnoid haemorrhage, multiple skull fractures due to assault.

The state led evidence from five witnesses starting with Florence Nyoni the wife of the deceased. She stated that on the day in question her husband had left home going to play music at Divas Mpofu's homestead where there was a beer party. Apparently the deceased was a deejay who used to be hired to perform at such functions. When he did not return home for three days she set about looking for him. His body was later found in the field of Divas Mpofu.

Nyoni stated that her husband had a history of conflict with accused one. He was in a relationship with a lady who was also dating accused one and had actually impregnated that woman. When she was in labour the lady had come to their home and delivered the child there.

The deceased had however sent her away after that promising to build a separate homestead for her. On the day that the deceased died he had earlier on been seen carrying that woman's child. Nyoni went on to say that the deceased and accused one had been fighting over that woman. On one occasion he had been hired to perform at Mkwanzani's homestead where there was a beer party. He had later arrived home in top flight. Panting and perspiring he had

narrated that accused one had chased him from the beer party all the way to the water tank just outside their homestead obviously intending to harm him.

The evidence of Nyoni concerning the feud between the two suitors was not contested. In fact to a large extent though hear say, it was corroborated by accused one himself who, although denying the feud, stated that he was aware of the woman in question even though Nyoni had not divulged the name of that person. One then wonders how accused one would relate to that story unless if it was true.

Divas Mpofu is the paternal uncle of accused one and a relative of accused two, one of his sons married the latter's maternal aunt while the former is the son of his younger brother. He confirmed that on 17 April 2008 he was hosting a beer party at his home. He hired the deceased as a dee jay to play music at the party. As a result of his close relationship with the two accused persons Divas Mpofu was heavily conflicted and therefore found himself between a stone and a hard place.

It was obviously difficult for him to directly incriminate what he referred to as "my boys."

The witness however confirmed that a fight erupted at the party between the accused persons and the deceased. He was emphatic that it is accused one who caused the fight and that it is him who went away with the deceased. Of course that piece of evidence had to be forced out of him in cross examination ironically by counsel for the accused persons when, in the heat of the moment, the old man forgot the script and let the cat among the pigeons. Prior to that he had tried to play a balancing act. While not coming out clearly about what he himself had witnessed electing to claim that he had fallen asleep in the kitchen when the fight occurred only to wake up and find that the two accused persons and the deceased had disappeared into the night, Mpofu had also asserted that it was common knowledge among those that attended the party that the two accused persons had run after the deceased as he fled.

Pretty Mkwanzani is the deceased's young sister who had discovered the body inside a ridge in the field. She observed that the deceased's shoes had been removed and put next to the body. Flies were swarming all over the body suggesting that he had been dead for a long time when the body was discovered.

Pilate Gebeni was an extreme impressive witness most of whose evidence was not challenged at all. He was the only independent witness called to testify on behalf of the state. He is a member of the neighbourhood watch committee who says he is a senior warden in the area. He did not know the two accused persons until he arrested them. He had been at home minding his own business when the local councilor called him to inform him about a missing person in the Bunja area. Acting upon word from the councilor he was on his way to the place when he met someone who informed him that the person had been found dead. He made inquiries from those who had gathered at Divas Mpofu's homestead who told him that prior to the deceased's disappearance he had quarreled with the two accused persons.

The witness stated that he looked for two police officers to accompany him to arrest the accused persons. For two days they searched for the accused persons without success because they had absconded from their homes. They received a tip off from someone who had sighted them at a certain area. When they went there they met a woman who had seen them hiding on a mountain top next to her homestead. They lay in ambush close to a homestead belonging to the two accused persons' relative in the hope they would come down from their nest in search of food. Indeed the two did come down and they arrested them. Although accused one tried to flee he was not given a chance. At that stage the accused two also came and surrendered himself saying he was aware of their crime. Both of them pleaded with them not to harass them as they were admitting the charge.

Gebeni told the court that they did not harass or assault the accused persons but just handcuffed them and took them to the local police base where they were detained overnight. Later they were transferred to Fort Rixon police station. They were brought back by Fort Rixon police the following day for indications. The witness was present when they assisted the police. The two of them pointed to a spot other than that where the body had been recovered as the spot where they had assaulted the deceased. He observed blood splattered all over the place and struggle marks at that point.

I must state though that the state cannot rely on the alleged confessions of the accused persons made in the presence of Gebeni because it has not been stated whether the two had been properly warned and cautioned in terms of the law, before those extra-curial statements were

taken from them. It is trite that before the state can rely upon a confession made to an arresting detail by the accused person, it must establish that the accused person was properly warned of his rights. That legal position now finds expression in s70 of the Constitution subsection (1) (f) of which provides that an arrested person is entitled, as a matter of constitutional imperative, to be informed promptly of his or her rights to choose a legal practitioner to represent him or her and to be represented by such legal practitioner of his or her choice. An accused person also has a right in terms of s70 (1) (i) to remain silent and not to be compelled to give self-incriminating evidence.

In the absence of proof of that all the rights were explained to the accused persons, the alleged confessions cannot be admitted. We will however rely on the other evidence of this reliable witness whom we found to be truthful and worthy of belief. Thulani Mpofo is the brother of accused one while accused two is the son of his maternal aunt. Although he referred to accused one as his brother, accused one later explained that the witness is the son of his father's brother. Due to his close relationship with the two accused persons, just like Divas Mpofo before him, this witness was also conflicted. He also struggled with the natural human inclination to protect his relatives and his duty to tell the truth. For that reason his evidence became blurred in the mist of that conflict of interest.

Be that as it may what can be gleaned from his evidence is that he got himself entangled in a fist fight with the deceased who had rushed onto the fray when the witness tried to restrain two gamblers –Dumisani Mpofo and Khumbulani Dube – who had started fighting over a game of cards. The witness confirmed that he had fought the deceased using fisticuffs. When that happened accused one also tried to intervene. Although the witness had been clear in his statement summarized in the state outline that when accused one joined the fight he assaulted the deceased before himself and accused two chased after him as he ran, he stated in his evidence in court that he did not see what happened as he was still under attack from Mlandeli Mkwanzani, the deceased's brother, and another man called Nyoni. The witness confirmed though that the two accused persons had joined the fight trying to rescue him after the deceased had assaulted him.

Accused one gave evidence. He confirmed that he had been at the party on the day in question and that when the fight started he had been present. When his brother Thulani tried to restrain two people who had fighting Mlandeli Mkwanzani struck him before Nyoni and, the deceased ganged up against Thulani assaulting him. He ran to the hut where the fight was taking place intending to intervene. When he tried to grab the deceased, who by that time was badly injured with blood all over his face, the deceased turned and fled the moment he saw him. Asked why the deceased would run away under those circumstances, he could only surmise that may be the deceased thought he, the accused one, was going to assault him.

Accused one denied ever assaulting the deceased or pursuing him as he ran into the night. He stated that his uncle Divas Mpofu has reason to lie against him because there is bad blood between them. They are fighting over cattle. He did not explain. He denied that Pilate Gebeni had arrested him or that he has been present when he was arrested maintaining that he had never absconded to the mountains. He could not explain though why Gebeni would falsify evidence against him. Accused one stated that he was severely assaulted by the police who forced him to confess to the crime. He denied making indications at the scene stating that in fact it is the police who led them to the scene. He confirmed what Gebeni said that he had no visible injuries suggesting that if indeed he was severely assaulted he still did not sustain injuries.

The problem is that accused one was a bad witness. His demeanour was bad, his presentation bad and what he said did not make sense. Starting with his claim that Divas Mpofu had a feud with him over cattle, this was only mentioned during cross examination and does not appear in his defence outline or his evidence in chief. Although he denied that Gebeni arrested him, he could not point to any reason why this independent witness would lie against him and why Gebeni was privy to intimate details not only of his arrest but also of the indications. Perhaps the reason why he tried to distance himself from this witness was because his evidence was impeccable.

Accused one admitted knowledge of the woman who was allegedly the centre of his antagonism with the deceased. If the deceased was his friend as he alleged we see no reason why Florence Nyoni would mention a woman that the accused one already knew about.

Looking at the fracas that played out at Divas Mpofu's homestead if the deceased was the aggressor, how is it that his face was covered in blood? If accused one did not assault the deceased then why is it that upon seeing him he immediately took to his heels? If the accused one intervened in the fight in "aid of his brother", how did he do this by merely restraining the deceased, a person who was already badly injured in the fight? If noone was buying for the deceased's blood as alleged then why would he run all the way out of sight as not to be found until his body decomposed? If the accused persons had not done anything wrong that night, why did they disappear from home for days as they were being hunted? What is it that they were doing at the mountain top when they were sought after? One might even venture to ask, if the accused one did not chase after the deceased as alleged how is it that he was found with a battered head? We reject the evidence of accused one.

The problem with accused two is that he does not have a position of his own. I have already said that even his defence outline is a reproduction of that of accused one. Yet the moment he took to the witness stand he immediately departed from that defence outline. One is therefore left wondering what exactly is happening with him. For instance in his defence outline he stated that when the fight began he intervened in aid of his uncle Thulani who was fighting. In his evidence he denied completely intervening stating that although he had intended to intervene the fight was so intense he just stood and watched.

In his defence outline he stated that he tried to restrain the deceased who was already injured, he did not chase after the deceased and did not see him as he fled because there were many people obstructing his view. In his evidence in court accused two was clear that the moment he stepped out of the house following the accused one, he caught a glimpse of the deceased as he took flight behind the houses.

The accused two's case is stranger than fiction. This is a person who tried very hard to incriminate himself even when there was no evidence pointing to his commission of the offence. It is in that light that we also wonder what it is that he was doing at the top of the mountain with accused one. In fact even the independent witness Gebeni, stated that when they had cornered and arrested accused one, the accused two brought himself to the fray. Surrendering, he immediately made a confession and asked to be handcuffed.

The state case is premised on circumstantial evidence. In the words of BOSHOFF J in *S v Cooper and Others* 1976 (2) SA 875 at 888 *in fine*, quoted with approval by McNALLY JA in *Mugari v Machiri* 1987 (1) ZLR 164 (SC) at 169 D-E;

“When triers of fact come to deal with circumstantial evidence and inferences to be drawn therefrom, they must be careful to distinguish between inference and conjecture or speculation. There can be no inference unless there are objective facts from which to infer the other facts which it is sought to establish. In some cases the other facts can be inferred with as much practical certainty as if they had been actually observed. In other cases the inference does not go beyond reasonable probability. But if there are no positive proved facts from which the inference can be made, the method of inference fails and what is left is mere speculation or conjecture.”

In other words for an inference to be drawn there should be objective facts from which to infer those facts which are sought to be inferred. It is sometimes said that before a court can draw an inference of guilt that inference must be the only one that can fairly and reasonably be drawn from the proved facts and it must be consistent with those proved facts. See *S v Mtetwa* 2014 (2) ZLR 533 (H) 537 A-E. That approach to circumstantial evidence therefore behoves us to examine the proved facts to see whether the inference of guilt can be drawn from them. They are;

1. On the night of 17 April 2008 the two accused person together with other locals who included the deceased and Thulani Mpofo attended a party at Divas Mpofo’s homestead in Fort Rixon.
2. Prior to that the deceased and accused one had developed a serious rivalry over a woman both of whom were dating but which woman had given birth to a child by the deceased. That rivalry had meant that the accused one had previously chased after the fleeing deceased person from a party where he was performing right up to his homestead intending to harm him.
3. On the fateful day the deceased had once again been hired to perform at a beer party and was doing so in the kitchen when a fight erupted between him and Thulani Mpofo, a brother to accused one.

4. Accused one joined that fight to assist his brother and at some point during that fight the deceased sustained injuries. When the accused one tried to grab him, the deceased immediately fled into the night.
5. The two accused persons disappeared from the party when the deceased fled and when Divas Mpofu was awakened from his slumber both accused persons and the deceased were missing.
6. The deceased went missing from the time he was seen running into the fields and was never seen alive again. His decomposing body was found with head injuries by a search party a few days later, the victim of a vicious attack.
7. The two accused persons immediately disappeared from their homes at the same time and were later sighted having taken refuge at the top of a hill resulting in an ambush being arranged leading to their arrest as they crept out to look for food.

We are pretty much aware that the evidence of Florence Nyoni relating to the previous brushes between accused one and the deceased may be viewed as similar fact evidence which is only exceptionally admissible. The rule against similar fact evidence in criminal cases was succinctly stated by the learned authors L. H Hoffmann and D. T Zeffert, *The South African Law of Evidence*, 4<sup>th</sup> ed, Butterworths at p 55 as:

“The prosecution may not adduce evidence of improper conduct by the accused on other occasions if its only relevance is to show that the accused is of bad character and is therefore, likely to have committed the offence. But similar fact evidence will be admissible if it has a relevance other than by way of this forbidden line of reasoning if its probative force is sufficiently strong to warrant its exceptional reception despite any practical disadvantages and despite its potentiality to prejudice the accused.”

It occurs to us that the evidence of similar conduct in this case is admissible because it is not intended to be used to show accused one to be of inherently bad character but merely to show motive. The probative force of the accused one and the deceased’s previous conflict explains not just the accused one’s actions but also those of the deceased on the night in question. It helps to understand why, a person who was allegedly aiding two other people to assault one person, Thulani Mpofu, would suddenly take flight at the sight of accused one, a circumstance confirmed by even accused one himself. In any event we are not using the alleged cat and mouse game

between them on a previous occasion but have extracted from that evidence relevant aspects relating to motive and the behaviour of the deceased.

What we have set out above are the proved facts from which the state would like us to infer the guilt of the accused persons. It is a factor of circumstantial evidence that motive, means and opportunity are all examples of it. Where the state is able to prove them the court may make an inference of the guilt of the accused persons.

In our view the deceased had had previous brushes with accused one who had exhibited traits of aggression against him previously. When the deceased saw the accused one bearing down on him he took to his heels. Nobody else other than accused one and his brother Thulani had been fighting against the deceased. The accused one had another motive to pursue the deceased being the fight over a woman. Therefore himself and probably the accused two gave chase. The only inference to be drawn is that having been injured already and being chased by people 15 years younger than him the deceased was easily overtaken and beaten to death.

With the evidence at hand we have no hesitation in making a finding that accused one participated in the assault of the deceased at that maize field which led to the death of the deceased. He then took flight into the mountains with accused two. Accused one had the motive, the means and the opportunity as he could not be accounted for that night and days after.

It is the involvement of accused two which has presented us with some doubts. When the fight was ensuing he appears to have only followed accused one because they were drinking together. When he came out he saw the deceased fleeing, but although he also disappeared and was later apprehended with accused one we entertain some doubt over his involvement in the absence of anything else linking him to the commission of the offence. In that regard, the law enjoins us to allow the accused two to benefit from that doubt.

In the result, the verdict of this court is as follows:

1. The accused one is hereby found guilty of murder with constructive intent.
2. The accused two is hereby found not guilty and acquitted.

Reasons for sentence

In assessing sentence we take into account the following mitigating factors: The accused was 18 years old at the time of the commission of the offence. He is now 27 years old. He is a first offender. His family paid compensation of 15 head of cattle to the deceased's family. There has been a delay of 9 years in bringing this matter to trial which means that for all that time the weight of this case has been hanging over his neck presenting immeasurable discomfort. From being a teenager he has grown into adulthood with this case hovering around him. That is some measure of punishment on its own. There can be no doubt that youthfulness played a part in influencing the accused to behave as he did. We will considerably reduce the sentence in consideration of the lengthy delay.

Whichever way though, a serious offence was committed when the accused preyed on a man 15 years his senior thereby showing that our social fabric has been eroded. Where young people have lost all respect for their elders to the extent of not only competing with them over women but to go to the extent of chasing them like wild animals and crushing their heads, we must be really worried. A precious life was needlessly lost and as it is our duty to uphold the sanctity of human life, we must still impose a sentence that underpins society's revulsion at such kind of conduct.

In the result, the accused one is sentenced to 12 years imprisonment.

*National Prosecuting Authority*, state's legal practitioners  
*Shenje and Company*, accused's legal practitioners