

THE STATE  
**versus**  
TAMISON SIBUYUNI MULEYA

HIGH COURT OF ZIMBABWE  
MOYO J  
HWANGE 8 NOVEMBER 2019

### **Criminal Trial**

*Miss M Munsaka* for the state  
*T Nkala* for the accused

**MOYO J:** The accused person faces a charge of murder it being alleged that on 4 March 2017 he assaulted Lubhu Munsaka at a beer drink resulting in deceased's death either on the same day or the following day being 5 March.

The state case is based on the evidence of two witnesses one Raymond Mudenda and Dolphas Ncube.

It is common cause that on 4 Mach 2017 deceased, accused, the two state witnesses and one Jameson drank beer at Dolphas Ncube's homestead. What is not clear is what really transpired at the material time.

Raymond Mudenda says whilst at Dolphas Ncube's homestead with accused drinking homemade brew popularly known as "tototo" the deceased came, into the homestead. Deceased was deaf and dumb. Accused called deceased to come and sit next to him. They used sign language with deceased. They then continued drinking beer together. The witness then saw accused pick a hoe assaulting deceased and he enquired as to why accused assaulted deceased. He said he did not hear any conversation between accused and deceased. Himself (Dolphas) and others were also talking so they did not hear. He says when he questioned why accused assaulted deceased, accused said he may end up assaulting the witness as well. The witness said accused struck deceased on the head and twice on the back with a hoe handle.

He heard of deceased's demise the following day and he went to the scene. He found a crowd of people and police officers.

He went closer to where deceased's body was covered by his jacket. Deceased had no other injury save for the one in the middle of the head. He concluded that the sore was from the injury he had sustained in the attack by the accused. The scar was in the same position that the witness had seen the hoe handle landing on deceased's head. He did not tell the police about the assault on the deceased by the accused the day before he was found dead.

Asked why he did not tell the police about the assault on 5 March he said he thought that it was not important as he thought the police had full information. Asked how the police got to know that he could have information in relation to deceased's death he said that the relatives of the deceased at the funeral are the ones that said deceased drank beer at Dolphas' Homestead. It was possible that Dolphas could have killed him. The witness said Jimmy is the one who said that accused killed the deceased at the funeral. This witness said he did not witness any quarrel between accused and deceased.

Dolphas Ncube was the next state witness, he confirmed the beer drink and said he saw accused and deceased in a quarrel with deceased saying "voetsek" to accused and accused hitting deceased with a hoe handle on the head. He later heard of deceased's death, went to the scene and he says he told the relatives about the assault on the deceased on 5 March.

He was also assaulted on 12 March at the funeral after Jimmy implied that something had happened to the deceased at his homestead.

He did not volunteer any information to the police. He told the court that it was an oversight.

The investigating officer was the next state witness; he took over investigations from somebody else but confirms that the matter was initially treated as a sudden death matter. He says the witnesses said they were not fourth coming earlier on as they feared that accused would bewitch them. The investigating officer says he was then told that there was a scuffle between accused and deceased. Jimmy Nkomazana who seems to be a crucial link in the state case was never called to testify.

The documentary evidence was tendered in the following manner, state summary, defence outline, post mortem report and the accused's confirmed warned and cautioned statement. They were duly marked. The hoe handle was also tendered as the weapon that was allegedly used and it was also marked.

The evidence of Sibongile Nyoni and Dr Ivan Betancourt was admitted into the court record as contained in the state summary. Accused for himself denied assaulting the deceased in the manner alleged or at all.

#### Problems with the state case

- 1) The witnesses gave different accounts of the event. One says there was quarrelling, one says there was not.
- 2) One says the deceased was assaulted three times one says twice. Raymond says Jimmy said he was there seated behind a hut, Dolphas said Jimmy was not there, then later under cross examination he said Jimmy was there.
- 3) Raymond said he is the one who queried accused's conduct of hitting deceased, Dolphas initially said that, then later under cross-examination when he was asked as to why he did not enquire himself he said he enquired also and accused had threatened him.

Both witnesses did not tell the police about the assault on 5 March 2017 at the scene, although Dolphas says he told the relatives. Our conclusion is that he is lying that he told the relatives the reason being that up to 12 March 2017 the relatives were still looking for information on deceased's death until when they said to him he should tell them what had happened as deceased had been at his homestead. They went to the extent of assaulting him. If he had told them on 5 March they would not assault him on 12 March at the funeral. The relatives would have also relayed the information to the police who were not going to treat the matter as a sudden death when someone had said deceased was assaulted.

The state should have called Jimmy Nkomazana if it wanted to bridge the gap in this case and not to seek to have the court guessing. The investigating officer was told by the witnesses that they feared witchcraft but that is not what they said for themselves in court one says he told the relatives, one said it was an oversight, the investigating officer says it was witchcraft so there

is no explanation given for failure to promptly report the accused's alleged actions of assaulting the deceased. It would appear the witnesses only implicated the accused upon being assaulted by the deceased's relatives.

On these facts this court cannot find that the state has discharged the onus of proving that accused did assault deceased, for the witnesses only came up with the story after being assaulted and having been made suspects in the matter. They also gave different versions in court. They also had a motive to save their own skins now that the relatives were accusing them. The court also found Dolphas' demeanor in the witness box highly questionable. It is for these reasons that the accused person is found not guilty and is acquitted.

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