

THE STATE
versus
PREACHER NGWENYA
and
VELILE LENGELANI MPOFU

HIGH COURT OF ZIMBABWE
MOYO J
HWANGE 8 NOVEMBER 2018

Criminal Trial

M Munsaka for the state
Ndlovu for the 1st accused person
T Nkala for the 2nd accused person

MOYO J: The two accused persons face a charge of murder, it being alleged that on 10 July 2017 at Insuza acting in common purpose they assaulted the deceased Thulani Ncube who died instantly as a result of the injuries sustained in that assault.

The following was admitted into the court record

- the state summary
- the first accused's defence outline
- the second accused's defence outline
- the first accused's confirmed warned and cautioned statement
- the second accused's confirmed warned and cautioned statement
- the post mortem report. It gives the cause of death as
 - 1) subarachnoid haemorrhage
 - 2) depressed skull fracture
 - 3) blunt force trauma

- 4) assault
- the iron rod that was allegedly used in the commission of the offence.

The evidence of Norman Moyo and Dr S Pesanai was admitted into the court record as it appears in the state summary.

Polite Ndlovu and Dr S Pesanai gave *viva voce* evidence for the state. First and second accused persons gave evidence for the defence.

The facts of this matter are largely common cause. The two accused persons the deceased and the two state witnesses who gave *viva voce* evidence were all commuter omnibus crews belonging to rival commuter buses. A misunderstanding ensued amongst them involving the two minibuses that they used in their trade. Bekithemba Mpofu (the second state witness, was the driver of the other vehicle while the two accused persons were his conductors. On the other hand Nhlalo Moyo owned the other motor vehicle and the first state witness Polite Ndlovu and the deceased were his conductors. A misunderstanding occurred at Insuza Business Centre where they had stopped and found each other. The source of the misunderstanding is not material to the issues to be determined by this court but the issue concerned customers and encroachment on each other's routes.

Later in the day the motor vehicle driven by Bekithemba Mpofu with the second accused as conductors, found the motor vehicle driven by Nhlalo Moyo with deceased and Polite Ndlovu as conductors parked next to the road. Due to the earlier misunderstanding, the accused persons then decided to disembark and go to Nhlalo Moyo's motor vehicle, while the accused persons say on one hand that the intention was to talk to the other group, that is not what the facts on the ground show, for accused one had a knife, accused two armed himself with an iron rod, they then went to Nhlalo Moyo's car, despite their driver Bekithemba Mpofu's pleas that they should let him talk to Nhlalo only if they find Nhlalo Moyo's motor vehicle blocking the road. Nhlalo Moyo's motor vehicle was apparently besides the road and he was therefore not blocking it.

Bekithemba's motor vehicle could have easily proceeded without any incident. Accused persons were clearly in a combative mood when they disembarked, for they did not even want for the vehicle to stop completely. They also went to Nhlalo Moyo's car and when accused two

was about to stab Nhlalo Moyo's vehicle tyres, the second state witness Bekithemba rebuked them.

It is then that they went to the fireplace and found Polite and the deceased. Accused one then asked about what these two were up to, and they told him to talk to Nhlalo the motor vehicle owner. Accused one then struck deceased with a log he had gotten from the fire. Polite told the court that accused had aimed deceased's head but was hit in the arms when he used the arms to ward off the blow. Accused one hit deceased twice. Deceased fled, accused two pursued deceased carrying an iron rod. Accused two followed but it is not clear up to what stage. Accused two then hit deceased with the iron bar on the back of his head. Deceased fell and died instantly. Whilst accused two had pleaded self defence and provocation, such defences were not part of the evidence adduced by the defence and in fact defence counsel for accused two conceded that he is culpable and had the requisite legal intention. In relation to accused one, there is a legal question as to whether he is equally culpable as the second accused who dealt the final blow.

Section 196A of the Criminal Law Code of and Reform Act [Chapter 9:23] as amended by the General Laws Amendment Act No. 3 of 2016 provides that:

Accused one was in the vicinity of the crime scene in circumstances that implicate him because both accused disembarked the motor vehicle in a combative mood.

- Accused 1 wanted to stab Nhlalo Moyo's vehicle tyres
- accused 1 accosted deceased and hit him twice with a log when deceased had done nothing.
- Accused 1 also pursued deceased to a certain extent
- Accused one thereafter accosted Nhlalo Moyo and grabbed him by his collar before Bekithemba intervened and advised the two that they had killed deceased.
- Accused one saw that accused two carried an iron rod and in his own words he said they were going to fight, so he was aware the accused two could use the rod.
- He thus participated in prior conduct that as a team with accused two when they accosted the other group in a violent manner.

Accused one's conduct falls squarely within the purview of participatory conduct provided for in terms of our law, for liability as a co-perpetrator. Accused one is therefore equally culpable homicide as accuse two.

We then proceeded to analyse what the accused persons are guilty of.

Accused persons accosted deceased, who did not fight back, hit deceased twice with a log, he fled pursued him and hit him at the back of his head with an iron rod. This means that as he was hit deceased was still fleeing, he was never a threat to anyone. Accused persons acted recklessly in the circumstances, in that the deceased suffered a depressed skull fracture, died instantly and the nature of the weapon used was such that the accused persons must have foreseen the death of the deceased as a real possibility.

It is for these reasons that both accused persons are found guilty of murder with constructive intent.

Sentence

The accused persons are convicted of murder. They are both first offender. They are both family men and bread winners. Accused one had partaken alcohol at the material time. Accused two tried to conduct first aid on the deceased. He also prayed when he realized deceased was not responding. The two accused persons however acted in a rowdy manner on the day in question. They were the aggressors as they accosted deceased's group by the roadside. They armed themselves and therefore were ready to fight the other group. Deceased was not violent, and was in fact fleeing at the time he met his death. This court frowns at the loss of life over petty disputes. The dispute between these two commuter omnibuses crews was a petty one and it had subsided by the time the accused persons accosted the deceased group.

Both accused person are youthful and therefore immaturity must have reigned on that day. It is for these reasons that both accused persons are each sentenced to 15 years imprisonment.

HB 304-18
HC (CRB) 79/18
XREF INSUZA CR 05/07/17

National Prosecuting Authority, state's legal practitioners
Ndove and Associates, 1st accused's legal practitioners
Dube Nkala and Company 2nd accused's legal practitioners