Judgment No. HB 117/2003
Case No. CRB 62-3/2003

THE STATE

versus

PRITCHARD PASIPANYANGA NDLOVU

and

ABTON NCUBE

IN THE HIGH COURT OF ZIMBABWE
CHEDA J
BULAWAYO 30 OCTOBER 2003

H M S Ushewokunze III for the state
C P Moyo for 1st accused
Mutsauki for 2nd accused

Judgment

CHEDA J: This is an application for a discharge at the close of the state case in terms of section 198(3) of the Criminal Procedure and Evidence Act. The accused persons were charged with murder and alternatively with public violence to which charge they pleaded not guilty.

The brief facts of this matter are common cause. The accused were part of a group of people, war veterans and villagers who were being resettled in terms of the Government of Zimbabwe Land Reform Programme. On 17 April 2000 a decision was made that they approach the deceased with a view of reasoning with him so that they can share his piece f land. At about 05.30 hours on 18 April 2000 a group of almost 100 people including the 2 accused went to deceased's homestead. On seeing them he opened fire at part of the group resulting in the accused persons sustaining injuries. The accused were then removed from the scene and subsequently taken to Nyamandlovu police station.

Meanwhile the situation at deceased's homestead got out of hand. There was an exchange of fire resulting in the deceased being shot at, stabbed and stored. He died as a result of the injuries he received in this fight. His homestead was also set alight.

The state led evidence from a police office Constable Moeketsi Mhandu. His evidence was that on the day in question he reported for duty at 0700 hours at Nyamandlovu police station and found the 2 accused at the police station. He observed that both of them had serious head injuries and appeared frightened. Mhandu was then instructed by his Officer-In-Charge Albert Dingani Sake to accompany him to the deceased's homestead. On his arrival he met 7 vehicles coming from the direction of deceased's homestead carrying people. One of the passengers shouted "we have killed him". At that stage he did not know who they were referring to but subsequently discovered that it was the deceased.

He proceeded to the homestead and found that deceased had died and had gun shot wounds and various other wounds obviously inflicted by various weapons. It is further his evidence that he did not identify any of the people in those cars nor did he take down the motor vehicle registration numbers. He also did not witness the assault on the deceased.

The state further produced evidence by Inspector Albert Dingani Sake, other police details and Dr Jekenya who carried out the post-morterm. It is pertinent to note Inspector Sake's evidence. The effect of his evidence is that he knew deceased before his fateful day as he was a local farmer. On 10 April 2000 deceased telephoned him and informed him that he had received information that his farm had been marked for occupation by war veterans. In response Inspector Sake advised him to c-operate

with them as had been done by other 10 farmers in the area. However, deceased was not satisfied with this advice and indicated that if the police failed to obey and enforce his High Court order, her would take the matter into his own hands. The above are the facts which I find to pertain to this case. The issue which falls for determination is whether or not from the evidence adduced by the state a prima facie case has been established to justify the 2 accused being placed on their defence as a fact that:

(a) the accused were indeed at deceased's homestead at the time deceased shot at them.

(b) they were not present when deceased was killed as they had been left at the police station by Mhanda and Sake.

(c) They were not at deceased's homestead when it was burnt down.

The court's approach is that should be discharged at the close of the state case if there is no evidence against him or if that evidence does not prove some essential elements of the offence or the witnesses are discredited in cross examination. See *A-G* v *Bvuma* 1987(2) ZLR 96 (SC). This approach was adopted by our courts from the English approach wherein Lord PARKER CJ stated in a practice note ([1962] 1 ALL ER 448)

> "A submission that there is no case to answer may properly be made and upheld – (a) where there has been no evidence to prove an essential element in the alleged offence; (b) when the evidence adduced by the prosecutor has been discredited as a result of cross-examination or is so manifestly unreliable that no reasonable tribunal could safely convict on it.
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> Apart from the general situations a tribunal should not be called upon to reach a decision as to conviction or acquittal until the whole of the evidence which either side wishes to tender has been placed before it. If, however, a submission is made that there is no case to answer, the decision should depend not so much on whether the adjudicating tribunal (if compelled to do so) would at that stage convict or acquit but on whether the evidence is such that a reasonable tribunal might convict. If a reasonable tribunal might convict on the evidence so far laid before it, there is a case to answer.

> On the facts before me, none of the essential elements for murder by the accused have been proved by the state. It is clear that the accused were not present when the deceased was killed or when his homestead was set on fire. If appears that both incidents occurred after deceased had shot them and had been evacuated to the police station.
> With regards to the charge of public violence, the crime is defined by P M A Hunt South African Criminal Law and Procedure Vol II as public violence consists in the unlawful and intentional conduct by a number of people acting in concert of acts of sufficiently serious dimensions which are intended forcebly to disturb the public peace and security or to invade the right of others."

In my view the accused should have been acting in concert with others. The question to be asked in this case is whether the 2 accused who had approached deceased with a view of negotiating a settlement where shot at and subsequently removed from the scene should be held liable for some violent conduct which took place in the absence. This in my view is a positive step in their removal from the act of unlawfulness albeit that involuntary removal.

The question therefore is whether a reasonable man, acting carefully might properly convict on such evidence. This has been our correct legal position. Bearing in mind the facts of this case which are agreed to by both the state and defence counsels I am of the view that no reasonable man acting carefully might properly convict the accused on both the main and alternative. All the conditions for a discharge as laid down in our law have been fulfilled.

It is not necessary for the accused to be placed on their defence and they are entitled to their please of not guilty and are accordingly found not guilty on both the main and alternative charges.

Criminal Division of the Attorney General's Officer state's legal practitioners
Messrs Majoko & Majoko 1st accused's legal practitioners
Messrs Dube, Mutsauki & Associates 2nd accused's legal practitioners