

THE STATE

Versus

ONISMO MUHLORO

IN THE HIGH COURT OF ZIMBABWE
BERE J
GWERU 2 & 9 FEBRUARY & 19 April 2007

L Masuku for the state
T Chitere for the defence

Judgment

BERE J: On 28 July 2002 the accused, the deceased and the other villagers were at a traditional ceremony at Mushoriwa's homestead, under Village Magaya, Chief Samambwa, Zhombe area.

At around 0330 hours the deceased was stabbed on the right collar bone and he died instantly. Exhibit II, the post mortem report clearly shows the stabbing was so vicious that it reached the deceased's heart and was the cause of the deceased's death.

The enquiry in this case centred on the identification of the hand that was behind the murderous act. The state alleged it was the accused whilst the accused pleaded innocence and maintained that innocence throughout and said he suspects it was one of the key state witnesses Josiah Chiwundura who committed the murder.

All the witnesses who testified are agreed there were many people at the residence where the murder occurred and further that at the time the murder occurred there were some other people other than the three people who gave direct evidence in this trial. The first witness estimated the number of those present to have been around 15 whilst the second witness approximated the number to have been around 20 people. The accused gave a figure of 200 people.

It is significant that none of the two state witnesses actually saw the stabbing take place. The evidence was therefore largely circumstantial evidence. The law on circumstantial evidence is settled. In a nutshell the facts proved must enable the court to make only one reasonable inference. But before that inference can be drawn the evidence presented must have been credible. This is done to avoid arriving at deceptive decisions.

It will be noted from the record of proceedings that although there were many people at the scene of the murder there are only two people who claim to have obscurely seen what happened. The record will further show that the two witnesses are not in agreement as to what happened on material issues.

In the first place the two witnesses whilst agreeing that the deceased and the accused had a misunderstanding in the early hours of the morning in question, the two are not in agreement as to where exactly the misunderstanding and the subsequent fatal assault took place. The first witness in his evidence in chief and throughout cross-examination and questions put to him by the court to seek clarification maintained that the misunderstanding and the stabbing that followed took place at the spot where the second witness Itayi Phiri was operating a radio. Itayi Phiri, the disc jockey could not confirm this. He in fact said this took place at a distance which he indicated to the court and which distance was found to be 8 metres from where he was operating his radio.

Secondly, Itayi makes specific reference to what was clearly an exchange of blows between the deceased and the accused as a prelude to the subsequent stabbing. In fact in his evidence in chief he made reference to the accused having thrown a punch on the deceased and under cross-examination he changed and said it was in fact the deceased who delivered a punch on the accused before the two protagonists started grappling with each other. He said this grappling was followed by the two chasing after each

other. To everybody's surprise, he said despite the place having dawn light he could not tell who was pursuing who.

Josiah Chiwundura on the other hand witnessed no exchange of blows and grappling. He did not see deceased and accused chasing after each other as referred to by the second witness. What he only testified to in his evidence in chief was that he saw the accused and deceased having a misunderstanding but could not hear what they were saying to each other because of the volume of the radio which was being operated by Itayi Phiri. Compare this aspect of his evidence with Phiri's evidence which was to the effect that by this time he had switched off the radio.

Under cross-examination Chiundura took the spicing of his evidence further by suggesting much to our utter surprise that in fact he heard the accused saying to the deceased he did not want to be patronised with the deceased responding "being patronised by who". The state counsel was no doubt taken aback by the prevaricating nature of the witness' testimony to the extent that when he sought to re-examine him there was more confusion.

There were more disparities in the evidence given by the two witnesses. Josiah claimed to have heard the accused repeatedly saying words to the effect that he had told everybody that he would end up at Empress Police Station the following morning. It was only him who was privy to the accused's alleged utterances.

It did present a curious situation that immediately after the stabbing of the deceased, the first witness would immediately shout to others to catch the culprit and no person reacted to such a call. It was even more suspicious that during that time of the day, given where he was Josiah would be able to see blood oozing through the deceased's fingers.

We are particularly concerned that of all the other people – many as they were at the scene these two witnesses who fed us with contradictory evidence were the only ones who

saw what happened. Itayi was very specific and maintained throughout his testimony that there were many people at the scene of the crime. He was however quick to say he did not notice who they were.

Josiah's evidence was less revealing in this respect. He singled out Garikayi Mhuri as one of the three people who was there. But is it not surprising that according to his statement Garikayi purported to have seen nothing hence he was not called as a witness, because his evidence had no probative value whatsoever?

Our view is that there are so many inconsistencies in the state case that make the whole testimony potentially deceptive and certainly dangerous to rely on in drawing the sought inferences. It is certainly not safe to convict on such evidence.

In a criminal case of this nature the onus lies on the state to prove its case. All the accused does is to cast doubt on the state case, and once he does so, he will be entitled to his acquittal.

In the light of the suspicious and porous evidence in this case, it is not necessary in our view to make a detailed analysis of the evidence of the accused. Suffice it to say that the accused's evidence in chief was substantially confirmation of his warned and cautioned statement, exhibit I. He maintained his consistency throughout and the strength of his defence did not even need to be aided by hearsay evidence of his defence witness Constable Chiguvare.

The other witness called by the court was of no assistance to both the state and the defence.

In the final analysis we come to the conclusion that it is not safe to convict the accused person in the light of the totality of the evidence given. The accused must be granted the benefit of doubt.

Verdict – Not guilty and acquitted.

Criminal Division of the Attorney General's Office, state's legal practitioners
Chitere Chidawanyika & Partners, accused person's legal practitioners