Judgment No. HB 35/07
Case No. HC 15/07

THE STATE

Versus

EDDY MPOFU

And

STEPHEN MPOFU

IN THE HIGH COURT OF ZIMBABWE
BERE J
GWERU 29 JANUARY & 1 FEBRUARY 2007

L Masuku for the state
D C Kufaruwenga for 1st accused
B Dube for 2nd accused

Judgment

BERE J: On 30 March 2002 the deceased one Tapiwa Matanga had a misunderstanding with accused I at some secluded place near Mateka river in Mujeni Village in Lower Gweru. When the two had a misunderstanding, there were no other independent witnesses around except accused II who was also roped into this trial as a co-accused. The deceased was assaulted and left at the scene.

When the deceased was eventually rescued by colleagues he was found to have been assaulted all over his body with the most pronounced marks of assault being a swollen left hand, swollen left side of his head and bruises all over his body. The deceased was rushed to hospital where his condition deteriorated leading to his untimely death on 31 March 2002.

A post mortem carried out by one Dr S Pesanai concluded that the cause of death was (A) celebral oedema (B) head injury (C) assault. The doctor remarked that the swollen brain was due to head injuries as a result of assault.

Whilst admitting to having assaulted the deceased the thrust of accused I's defence was that he was not the one who delivered the fatal blow. He attributed the

proximate cause of deceased's death to an earlier assault on his head with a brick by one Trust.

The position taken by the second accused was complete denial of the assault in question.

The evidence

In its quest to prove the guilt of the two accused persons on the preferred murder charge the state tendered the following evidence by consent: Accused I's confirmed warned and cautioned statement, accused II's confirmed warned and cautioned statement, three sticks (referred to C, D, and E) of varying dimensions. The evidence of Kellie Bheka Mabhena, Philiso Moyo and Dr S Resanai were admitted by way of admissions and as summarised in the state summary.

After hearing *viva voce* evidence from the investigating officer, Sergeant Major Zeblon Ndebele the court accepted three more sticks with different measurements as having been used in the assault.

The evidence of Richard Moyo

The first *viva voce* evidence was given by Richard Moyo a colleague of the deceased in that both were active members of Matshiyakwakhiwe Soccer Club owned by a businessman called Rhamba Mpala.

The most significant aspect of this witness' evidence was that on the day in question he had spent the day in the company of the deceased from the soccer pitch right until after soccer when the soccer players were relaxing in a T35 motor vehicle where they were helping themselves to refreshments purchased by the owner of the club.

The witness denied ever witnessing the alleged assault on the deceased alluded to by the two accused persons. He was emphatic that there was no such fight and if anyone were to suggest that there was, such person would be lying.

He vividly remembered that it was accused I who approached the deceased in the T35 motor vehicle and requested the deceased to accompany him. The later complied. When this witness last saw the deceased being taken by accused I the deceased was in good shape and in total control of himself. There was no problem with the deceased. That the deceased was taken by accused I found support from non-other than accused II who said in exhibit 2 "At the shops Eddy searched for Tapiwa Mutanga (the deceased) and later found him, we then went straight to him. Eddy Mpofy later requested Tapiwa to accompany him…."

The witness approximated that the deceased was taken away around 1800 hours and that two hours or so later he was advised the deceased was requiring assistance.

The witness told the court that on the day of the assault the deceased had played soccer as a goal keeper a fact which was confirmed by all those who testified in this matter the defence witness inclusive.

The witness denied ever seeing either of the accused assaulting the deceased.

The witness testified that when he and one Brian Kembo went to rescue or render assistance at the scene of the assault the deceased disclosed to them that he had been assaulted by accused I and his brother accused 2. There was objection from accused's counsel that the utterances by the deceased was hearsay evidence and therefore inadmissible. I overruled counsel and indicated my reasons would follow in my main judgment. Here are my reasons.

On the face of it the statement uttered by the deceased person was indeed hearsay evidence because the deceased is no longer in a position to confirm it due to his untimely demise. But not all evidence which is hearsay is inadmissible. There are exceptions to this general rule which make hearsay evidence admissible. In our law a statement which is regarded as *res gestae* "a part of the story" is an exception to the general rule. As L H Hoffman and D T Zeffertt succinctly put it;

"The central notion of the doctrine therefore is that evidence may be admissible either because it is itself a fact in issue or a fact relevant to an issue, or because it is so closely associated in time and circumstance with the translation under investigation that it has a high degree of relevance" (my emphasis)[1]

The legal position is watered down by section 253 of the Criminal Procedure and Evidence Act, Chapter 9:07 which is couched as follows:

253 "Hearsay evidence

(i) …
(2) when evidence of a statement, oral or written made in the ordinary cause of duty, contemporaneously with the facts stated, and without motive to misrepresent would be admissible in the Supreme Court of Judicature in England if the person who made the statement were dead, such evidence shall be admissible in any criminal proceedings or preparatory examination if the person who made the statement is dead or unfit …"[2]

In this case the words uttered by the deceased are relevant to the issue of assault which is central to these proceedings and the person who made it is dead. The statement in issue is therefore clearly part of the "*res gestae*" and as such admissible.

The court carefully followed the evidence of Moyo, cautious of the fact that the deceased was his colleague as a fellow soccer player who obviously must have been pained by the death.

We found the witness to have been a straight forward emphatic and robust in the manner he gave evidence and responded to questions put to him by the defence as well as the court itself. He told the truth.

We did not find weight in the spirited criticism against this witness by counsel for accused I. We do not believe, not for a moment that this witness Rhamba Mpala was speaking through this witness as urged to us by accused I's defence. We are satisfied that his criticism of this witness was unfair. It was no objective.

[1] The South African Law of Evidence fourth edition, Butterworth page 153
[2] Section 253 of the Criminal Procedure and Evidence Act, Chapter 9:07

The evidence of Rhamba Mpala

It was apparent from the evidence of Moyo and all those who testified including the accused persons that this man is an influential member of the St Faith Community. He is highly regarded in the area. Through testimony we could tell that he had his unmistakable affinity towards his soccer players amongst which was the deceased.

The witness did not hide the fact that he was hurt by the deceased's death.

For the above reasons the court had to exercise caution in dealing with his evidence.

Generally, the witness gave his evidence well. He was in control of himself throughout. Except for a few variation his evidence was substantially corroborative of Moyo's testimony.

We found it curious though that he did not know whether or not the deceased took alcohol. This was despite his own disclosure that he regarded the deceased as

one of his employees and that he was literally staying with him as a soccer player. Not only that but they played soccer together and they had been together since he recruited deceased as a goal keeper. Compare his position with the evidence of Moyo on this point. Moyo was forthright when asked whether or not the deceased took alcohol. He said he did and we believe Moyo.

We do not understand how Mpala would have pleaded lack of knowledge of this aspect of the deceased's social life.

Secondly, we are satisfied beyond doubt that all was not well between accused I and the deceased hence the misunderstanding which eventually led to the assault. Accused I was married to Mpala's niece.

If there was a misunderstanding between accused I and the deceased, given Mpala's displayed affinity towards his players, there is no way in our view Mpala would have failed to get to know about it.

Accused 1 disclosed a reasonable explanation for his conflict with the deceased. It is highly unlikely that Mpala would have failed to know about it. We come to the conclusion that Mpala played down this source of conflict. But we are far from being satisfied that he would have allowed this to shield Trust if indeed Trust had assaulted the deceased in the manner alleged. We remain convinced that Mpala would have left no stone unturned in pursuing Trust if he had known about the assault as argued by accused I.

Generally, it is not possible for us to whitewash the evidence of Mpala despite him corroborating aspects of Moyo's evidence.

The evidence of Sergeant Major Ndebele

The officer gave his evidence fairly well. Where he erred he conceded. The most significant part of his evidence was the production as exhibits of the extra three dry switches which were pointed out to him by the accused persons.

He did make a very fair concession which was to the effect that accused II never admitted to having assaulted the deceased. His concession finds support from item 'C' of exhibit 6, the sketch plan and also accused II's confirmed warned and cautioned statement. His evidence added to the numerous calls to exonerate accused II. We did not find anything particularly bad about his evidence. The only difficult with his evidence, just like that of the other state witness, it had apparent short-comings in that it would not take the court to the scene of crime at the time of the assault on the deceased.

The evidence of Accused I

The evidence of the accused I did provide a nexus to the link between the conduct of the deceased and the conduct of the accused. The evidence gave the first hind as to the origins of the conflict between the two.

We are satisfied that what the accused I did was prompted by something. None of the state witnesses could proffer an explanation. This yawning gap in the state case was filled up by the accused person. The accused could not have searched for the deceased for no

reason. This reason was provided by the accused person – he said the deceased had failed to settle a debt involving the first accused's former wife. We accept this.

The accused's defence was partly built around exhibit I, his warned and cautioned statement. As it turned out his warned and cautioned statement was filled

up with exaggerations some of which could be confirmed by the witnesses called by the defence including the accused himself. Charles Dube, the defence's key witness who was supposed to confirm exhibit I pleaded total ignorance to some of the assertions contained therein. He denied ever giving information to the effect that at one stage he witnessed the deceased being revived by water being poured on him. The witness further distanced himself from the fact that Taurai Matachu and Rhamba Mpala witnessed the alleged earlier assault of the deceased by one Trust.

The court can only conclude that this was a clear stout effort by the accused person to mislead the court. It is conceived that an accused is entitled to lie and that such lies *per se* must not be the basis to find him criminally liable. As rightly observed by DUMBUCHENA CJ (as he then was)[3]

"I should emphasise that an accused's untruthfulness standing by itself is not sufficient for a court to draw an inference of guilt because an innocent accused may falsely deny certain facts because he fears that admitting them would put him in trouble." See also *S* v *Dhladha* 1980[4]

There should be more to the accused's lies in order to find criminal liability. But the accused person was not prepared to accept even the incriminating testimony by his own blood brother. The accused I denied that he assaulted the deceased until he fell down and continued to assault him all over the body even after he had so fallen down. Accused I further denied ever tying the deceased's legs a fact which was clearly alluded to by his co-accused in exhibit 2. Not only this but he denied that he had to look for the deceased until he found him. He tried to give the court the impression that it was the deceased who

[3] S v Gijima 1986(1) ZLR 33 (SC) at p 39
[4] 1980 (1) SA 526 (AD) at 530C-E, (per MILLER JA)

approached him. In this case, there is certainly more to accused's lies. His was clearly a stout effort to mislead the court in

order to poison the court's appreciation of the events of the day. Despite finding in his favour on the question of the alleged debt, we are satisfied that generally he was not candid with the court.

The evidence of accused II

In exhibit II, the accused gave quite a comprehensive explanation of what happened on the day in question. In court, he sought to qualify that by alleging undue influence on the part of the police.

We do not accept the sudden turn around by the accused person for the following reasons. Firstly, the accused person was ably represented literally by two legal practitioners whose professional calibre the court des not doubt. Through his instruction to his counsel, his counsel in his capacity as an honest servant of this court properly advised the court the statement was not being challenged. We have absolutely no doubt when accused's counsel gave that indication he was fully aware of his non-commitant duty both to the court and to his client. We did not read in counsel's position any attempt to either mislead the court or his client because he stood to benefit nothing really.

Secondly, assuming the accused had given his counsel instruction tending to show undue influence in the recording and or confirmation of the statement, those aspects could not have escaped his counsel's attention in his cross-examination of the police officer who witnessed the recording of the statement.

Finally, if the accused had any reservations about exhibit II, he would have echoed those concerns to the presiding magistrate who confirmed the statement almost a year after he had had his statement was recorded. The statement was recorded on 2 April 2002 and was only confirmed on 23 January 2003.

In the light of all these considerations it is only safe for the court to accept exhibit II in its entirety. It is noted by the court that the accused II was testifying against his brother in court and at a time when he would have fully appreciated the seriousness of the allegations. It is therefore conceivable that he naturally felt compelled to exonerate or limit the criminal conduct of accused I. That is understandable.

The evidence of the two defence witnesses

Charles Dube

As indicated this witness was called mainly to confirm that before the deceased was assaulted by the accused I, he had earlier been hit on the head by one Trust.

Contrary to the first accused's assertion in his warned and cautioned statement he denied Rhamba Mpala witnessed the fight. He also could not confirm first state witness was present. The witness could not confirm the alleged revival of the deceased by having water poured on him.

There were so many unsatisfactory features about his evidence. He testified that when the alleged fight between deceased and one Trust took place, there were members of the neighbourhood watch committee and none of them made an attempt to apprehend Trust.

The witness denied ever telling accused II that deceased lost consciousness as a result of the assault on him by Trust yet this aspect was emphasised by accused II in his warned and cautioned statement.

It was observed by the court that according to his own testimony, he was keen to follow the alleged fight, follow the assailant who had allegedly floored the

deceased and suddenly lost interest in the deceased who was supposed to be lying down as a result of the assault. He did not even bother to ascertain whether the deceased was already dead or sustained serious injuries. This to us is a very unusual behaviour.

The witness' demeanour in the witness both was far from convincing and we are not able to attribute this to his alleged lack of sophistication. It was apparent to us he was

merely thriving on rehearsed evidence. We would tell he was merely echoing someone's views.

Our unanimous view is that the witness was not truthful – he was up to mislead the court and that explains why his evidence could not confirm what it was supposed to confirm. It was evidently rehearsed evidence and we reject it in its entirety.

The evidence of Tarirai Maposa Muchucha

This witness was called by the defence on the eleventh hour of the proceedings. In fact, prior to leading of all the evidence, the witness had not been interviewed by the defence counsel. He was only interviewed after all the other evidence had been recorded.

Evidence obtained under those circumstances is potentially deceptive and required extreme caution as it falls in the category of what may be referred as "late evidence". It can easily mislead the court because the witness has clearly an unfair advantage over all the other witnesses. This is particularly where the witness has not had a prior statement recorded. He has at this stage an opportunity to know what other witnesses would have said and would almost certainly know the areas which he is expected to either confirm or rebut.

It was for these reasons that we had to be extremely cautious in dealing with his evidence.

We noted he was both young and intelligent and was 18 years old but was 13 years old at the time of the incident which he was called to testify on.

The only thing he could remember was that on the day in question there was a soccer match and when he left to pen goats he saw Trust (a fellow villager but his surname he does not know), jumping the gate into and out of their homestead. Trust is supposed to be staying in his village but said he did not know his surname. He could not tell the time Trust rushed to his (witness') home although he was able to say he must have left the soccer pitch around 4pm to pen goats.

This is a rural set up and the witness' homestead according to his testimony is about 500 metres from the township and he does not even know the local owner of Matshiyakwakhiwe shop.

The record of proceedings is there for all those who want to follow the rest of his evidence to see the apparent inconsistencies. The record will show the young man was simply not interested in the proceedings.

It was clear to us that he appeared as if he was forced to testify in these proceedings. The court had to remind him to take the proceedings seriously. His demeanour was miserably poor and in our view it would be extremely dangerous to rely on his evidence. The court is better off without it completely.

Synthesised analysis of evidence

Having carefully looked at all the evidence adduced in this court we were able to make the following factual findings.

That accused I had a misunderstanding over a debt with the deceased which was long overdue. As a result of this the accused person went to St Faith Business Centre to look for the deceased. They found him and accused I called the deceased to Rhamba Mpala where deceased was having refreshments with his soccer colleagues one of whom was Richard Moyo. Accused I took the deceased away. When the deceased was taken away he was in good condition and in control of himself.

Accused one had a misunderstanding with the deceased over a debt. It is clear the deceased's inability to settle this debt triggered anger from the accused I. This anger was worsened by the explanation given to the accused by the deceased that if accused wanted his money, the accused was supposed to enquire from some other people who had nothing to do with the debt in the first place. To add salt to injury the deceased made it clear he would not be able to settle the debt. Naturally the accused I must have been annoyed and

as he puts it he then decided to effectively deal with or punish the deceased person so that he would not do it again.

We also make a finding that there was never a prior fight and or assault on the deceased prior to him being assaulted by the accused I.

When the accused I set out to punish the deceased he assaulted him all over the body and when he did so he assaulted him all over the body using the six exhibits all over his body as confirmed by exhibit II.

We are also satisfied that the use of the tendered switches was followed by a fight between the deceased and the accused. It was only when the deceased was over-powered that switches were used. This is clear from exhibit II which makes reference to the deceased having been assaulted and falling down followed by assaults with

switches all over the body in that seated position and that it was these assaulted which caused fatal injuries to the deceased.

We make a finding that the first accused person, was no ordinary person but a trained soldier and that any reasonable person placed in the position of the accused I would have foreseen the possibility of the deceased's death ensuing from persistent random assaults in the manner done by the accused. The accused certainly the bounds of punishing the deceased. The totality of the evidence presented to us (lacking as it did direct evidence on the assault itself) would not sustain a conviction on murder charge.

Accused 2 – There is overwhelming evidence which demand that accused 2 be granted the benefit of doubt. It would appear he was an overwhelmed but innocent bystander.

Verdict – Accused I

Not guilty and acquitted of murder but guilty of culpable of homicide

Accused 2 – Not guilty and acquitted.

Criminal Division of the Attorney General's Office the state's legal practitioners
Dzimba, Jaravaza & Associates, 1st accused's legal practitioners
Gundu & Mawarire, 2nd accused's legal practitioners