

THE STATE

Versus

ALBERT NDLOVU

IN THE HIGH COURT OF ZIMBABWE
BERE J
BULAWAYO 12, 18, 19 & 20 & 22 MARCH

Mrs C Moyo, for the state
Miss E Chimombe for the accused

Judgment

BERE J: On an extremely hot day on the 13th of March 2005 the deceased at the initiation of Nelson Dala Tshuma accompanied the latter to the accused's homestead at Dliwampondo Line, Tsolotsho District. The purpose of the visit was for Nelson Dala Tshuma to collect his money which he had been robbed of earlier on by the accused and his now late accomplice one John Mbangiseni Sibanda ("the late accomplice").

At the time the accused was 19 years old and his then accomplice was older than him. The deceased was 55 years at when he met his death and was an active member of the Neighbourhood Watch Committee for the area where he was ordinarily resident. Upon arrival at the accused's homestead the deceased and his companion found both the accused and his late accomplice not at the homestead. Present among other people was the accused's grandmother who voluntarily offered to settle part of the amount in issue to the tune of \$400 000,00 (four hundred thousand dollars) on behalf of the accused person and his late accomplice, after which the two peacefully left the homestead.

Upon their return to the village and on being informed of the deceased's earlier visit and purpose, the two did not take kindly to the fact that accused's grandmother had paid some money to the deceased and his colleague.

The accused tracked down the deceased and his companion and brought the two back to the village where they were ordered to sit down by the accused and his late accomplice both of whom demanded that deceased and Nelson Dala Tshuma return the money earlier given to them by the accused's grandmother who at the time had left to attend a church service.

When Nelson Dala Tshuma attempted to explain what had happened, the accused and his late companion were not prepared to listen and commotion followed.

The deceased had his service handcuffs snatched from him by the two adversaries who in turn used the same to handcuff the deceased himself. They took

turns to indiscriminately assault the deceased using a rubber whip and a knobkerrie whose dimensions were given by the accused as follows: circumference of the knob – 35cm, the length of the handle – 55cm and the width of circumference the handle – 4cm. There were conflicting details of the whip and I will later come back to deal with this issue in my judgment.

Of the two victims of the assault Nelson Dala Tshuma received minimal punishment as the two assailants appreciated he was frail and an epileptic person who not so long ago had had a head operation. The deceased took the bulk of the punishment. The indiscriminate assault on the deceased was prolonged and it rendered him helpless leading to his death. Before his death the deceased had been taken to Bhubhude Clinic and then to Tsholotsho Hospital where he was pronounced dead on admission.

In exhibit 4 (the post mortem) the pathologist's external examination revealed "multiple bruises on the head, chest wall, abdominal wall and back."

The internal examination further revealed "some superficial brain haemorrhages" and "multiple rib fractures on both sides left and right. "Extensive lung contusion and haemorrhage".

In the same exhibit the doctor remarked that "severe forces were used" and concluded that the cause of death was "lung injury, chest trauma, assault."

In his defence to the allegations the accused attributed his conduct and that of his deceased's accomplice to the effect of home brewed hot stuff commonly referred to as "tototo" and accused raised the defence of self-defence.

In his evidence in chief he further tried to shift the blame to his dead accomplice whom he alleged was either directing the assault or in total control of that criminal conduct since he was much older than him. He gave himself as having carried out the assault on the deceased for fear of retribution from his uncle – his deceased accomplice.

The state sought to sustain the allegations by relying on the *viva voce* evidence of two witnesses *viz* Nkosi Costa Sibanda a close relative of both the accused and his late accomplice. Reliance was also sought from the evidence of Nelson Dala Tshuma who was at the centre of the controversy which eventually cost the deceased's life in that it was the issue involving his money which triggered the tragic events of 13th March 2005. In addition the following evidence of the witnesses was accepted by way of admission – Elmon Vundla, Nomvula Ncube, Karidza Misheck, Ezert Dube, Dema Paul, Brian Thando, Soko, Naomi Ndlovu, Auxilia Dhlamini, Adms Ndlovu, Jethro Moyo and Dr I Jekanya. It was also agreed to tender the following exhibits by consent the accused's confirmed warned and cautioned statement (exhibit I), the

affidavit of Dr M Nico (exhibit 2), the affidavit of Cst Bhebe (exhibit 3) and the post mortem report (exhibit 4).

For what was referred to as logistical problems the under weapons, namely the rubber whip and the knobkerrie were not produced despite these items having been given the investigating officers at the time investigations in this matter commenced. As a court we are concerned by what appear to be systematic omission in

the prosecution of murder cases in general. At almost every trial, these exhibits are not being produced – there is one excuse after the another for failure to do so. Sometimes, the reason is with the movement of exhibits to and from the forensic science laboratory. Somewhere along the way the whereabouts of the exhibits is not accounted for. In some cases the court is advised the exhibits cannot be produced because it has not been properly labelled or if it was the exhibit tag would have given in to the passage of time. The exhibit cannot simply be traced. I need no overemphasize the need to ensure that the exhibits particularly in murder cases be produced in court for this is the main reason why these exhibits are secured in the first place. The idea is to enable the court to see for itself the exhibit concerned. It is of valuable assistance to the court in its effort to appreciate the impact or nature of the assault. The court cannot be invited to rely on speculative description of the exhibits by either unsophisticated witnessed or accused persons.

The evidence of the first witness Nkosi Costa Sibanda was quite detailed in almost every material respect of this matter. In general terms, it was well given. The difficult with that evidence was that it was discarded by Nelson Dala Tshuma who was present when the assault was started. This witness was a victim of the assault

together with the deceased. It was this witness who had sought the accompaniment of the deceased to go and collect his money from the accused person's homestead. This same witness was again in the company of the deceased when he was given \$400 000,00 by the accused's grandmother.

As earlier on said, he was one of the main principle witnesses. He, together with the deceased were tracked down by the accused and brought back to the accused's homestead and forced to return part of the money which they had earlier on been given by the accused's grandmother. It was only logical for the court to accept his version where it tendered to differ from that given by Nkosi Costa Sibanda.

Nelson Dala Tshuma was emphatic that he did not see Nkosi Costs Sibanda on the day of the assault, despite the latter's detailed account of the assault itself and his claim that he had seen everything that happened from a vantage point.

That Nkosi Costa Sibanda did not see what transpired was further confirmed by the accused person himself who stated that what Sibanda told the court in such a convincing tongue was as a result of the version given to him by the accused himself and his late accomplice. We make a specific finding that despite his detailed narration of the events of the 13th march 2005, Nkosi Costa Sibanda did not witness the assault.

We will however accept his evidence in so far as the state of both the accused person and his deceased accomplice. We accept his evidence that both the accused and his accomplice were drunk. We accept that this was so because this witness was with the two assailants when they were partaking of "tototo" or home brewed beer which appears to have a high level content of alcohol.

The evidence of Nkosi on the state of the accused and his late accomplice also finds support from Nelson Dala Tshuma and the accused himself.

Nelson Dala Tshuma a frail and epileptic person was the second state witness to give evidence. He told the court how he went to the accused's place in the company of the deceased and how they were paid some money by the accused's grandmother and how subsequently he and the deceased were assaulted for the same money by the accused and his late accomplice.

This witness did not see a bottle being used by the accused's late accomplice on the deceased. It was his evidence that when they got to the accused's homestead having been taken hostage by the accused and his accomplice, the accused was armed with a whip and his deceased accomplice had a knobkerrie whose details he gave as follows: length of the knobkerrie – 96cm, knob – 25cm in circumference and thickness of the handle – 9 cm.

After expressing surprise that the rubber whip had not been brought to court despite a police officer by the name Sibanda having secured it the witness gave the details of the whip which the accused had as follows: length of the whip – 2,5m, handle – 2m and the circumference of the whip – 2,8cm.

The witness' evidence was that once they were asked to sit down at the accused's homestead, there was commotion with him being struck by the accused with a whip twice before the accused was restrained by his late accomplice who reckoned the witness was ill as he had had an operation.

What followed after the accused had been dissuaded from further assaulting this witness marked the beginning of a terrible last journey of the deceased as he became the main focus of the assault.

The witness testified that the accused snatched the deceased's service handcuffs and manacled the deceased himself. This was followed by a heavy strike on the deceased's head by the accused's late accomplice using the knobkerrie whose details have already been given. The deceased was further assaulted with the same knobkerrie on both the left and right rib cages and at the same time being searched for the money.

The accused person complemented his late accomplice's cruel hand by indiscriminately assaulting the deceased using a whip and in doing so was using both hands and doing it so severely.

They two took turns to assault the deceased at will and force marched him through the village. The witness was released after they had just left the accused's homestead. The accused and his deceased accomplice continued to indiscriminately assault the deceased in the manner outlined. The evidence of Nelson well given, a clear account of what transpired and we are unable to find any criticism for it.

Elmon Vundla whose evidence was accepted by way of admissions gave a further revealing testimony of the assault on the deceased. It was his evidence that as he was coming from attending a church service he saw two boys assaulting an elderly person using a whip and trampling on him using booted feet. As the witness got closer he was able to identify the assailants, the accused and his late accomplice. At this stage the deceased was lying prostrate and groaning with his hands handcuffed. The witness said on seeing him the accused and his accomplice attempted to run away but he called them and admonished them for what they had done. The witness, on realising the critical condition the deceased was in, arranged for the deceased to be taken to the nearest road from which he was subsequently taken by the police to

hospital where he was pronounced dead on arrival. It is significant the police found the deceased still in handcuffs.

The accused was the last person to give evidence and his evidence was a confirmation of the assault on both Nelson Dala Tshuma and the deceased.

The accused's narration of events was consistent with the evidence of Nelson Dala Tshuma and Elmon Vundla. The only notable addition was the accused's description of the strong safety shoes which he alleged his late deceased accomplice was wearing as well as his home made sandals. The significance of this testimony is that such shoes and sandals could only have caused greater serious injuries in the light of the undisputed evidence of Elmon Vundla who stated that he saw the accused and his accomplice assaulting the deceased using booted feet and a whip.

Another revealing dimension of the accused's testimony was his stout effort to ascribe to himself a subordinate or lesser role in the assault of the deceased. He attempted to show that he was under command from his late accomplice who was much older than him and an uncle who brooked no nonsense from him.

We have not been persuaded to accept or allow this explanation to detain us. We have adopted this approach because of the following reasons. The evidence of Nelson Dala Tshuma which we have accepted wholesale suggests clearly that the accused person was himself quite in control of the situation and that of the two, he was not as drunk as his late uncle. In addition this witness did not hear the late accused's accomplice bellowing instructions then as alleged by the accused person.

Apart from the evidence of Nelson, the evidence of Nkosi Costa Sibanda (which we have accepted) in so far as the state of the accused's accomplice and the

accused himself were, is to the effect that whereas the accused's late accomplice was "dead drunk" the accused was moderately drunk.

We see the evidence of the accused being a desperate effort to shift blame on his late uncle whom he knows cannot wake up from the grave to defend himself.

In any event, there is overwhelming evidence placed before this court that in assaulting the deceased in the manner they did, both the accused and his late accomplice were acting in common purpose. As Butcher and Hunt state in *South African Law and Procedure* Vol 1, 3ed at page 307:

"Where two or more people agree to commit a crime or actively associate in a joint unlawful enterprise, each will be responsible for specific criminal conduct committed by one of their number which falls within the common design."

In assaulting the deceased, the accused and his late co-accused were involved in a joint unlawful enterprise and each must pay for the criminal conduct of the other.

Accused's defence of self defence

There was no evidence in chief led to try and sustain this defence despite its existence in the defence outline. The accused must have realised the futility of pursuing such a defence. In any event, this defence would have gone against the

weight of overwhelming evidence in this case that at the time the deceased was severely assaulted he had already been manacled and as such posed no threat to his assailants.

The other dimension added by the accused person in his testimony was his description of the knobkerrie whose details according to him were as follows: knob – 37cm, length 55 cm, circumference of thickness of handle 4cm.

What is significant is that whether one accepts the details or dimensions of the knobkerrie as given by either the accused person or Nelson Dala Tshuma, the fact remains that knobkerrie was lethal especially when used against a human being, more so on the head and rib cage.

The same can be said of the whip which accused person is alleged to have used. The same can safely be said of the home made sandals and the safety shoes both of which were used against a handcuffed and physically drained victim.

It is also noted that the accused vainly tried to give the impression that he was dead drunk to the extent that he did not know what he was doing. This is inconsistent with both Nkosi and Nelson's evidence who describe him as having been moderately drunk. Apart from that, the accused was able to give a fairly detailed account of what happened on the day in question. His version is largely consistent with the evidence recorded and accepted by the court. It can therefore not possibly be true that he was as drunk as he would want this court to believe.

We accept the cause of death as summarised in exhibit 4 – the post mortem. What is clear to us is that the accused and his late accomplice assaulted the deceased on the day in question in the manner alleged by the state and supported by the accused himself in his *viva voce* evidence and mildly by his warned and caution statement. The assault was persistent and systematic lethal weapons were used. Despite their drunkenness the two must have foreseen that the conduct would result in the death of the deceased and were reckless as to whether that occurred or not. We are satisfied beyond doubt that the accused be found guilty of murder with constructive intent.

Verdict - Guilty of murder with constructive intent.