

Case No. CRB 69/07

THE STATE

VERSUS

KHUMBULANI MOYO

AND

MKHULULI MOYO

IN THE HIGH COURT OF ZIMBABWE

CHEDA J

GWERU 21 MAY, 29 JULY 2008

Mr. L Masuku for the applicant

Mr. B Dube for the first respondent

Mr. T Chitere for the second respondent

Judgment

CHEDA J: The accused are charged with the crime of murder which charge they pleaded not guilty.

The allegations are that on the 24th day of March 2003 at around 1700 hours they unlawfully and intentionally killed one Clemence Ncube.

The state's first witness was Mvelo Ngwenya who told the court that he is related to both accused in that accused one is his brother while accused 2 is his cousin. It was his evidence that on the day in question he was walking home from school in the company of Khulekani Moyo, they were joined by accused one and two. When they got to a place called Mahlathini they saw the deceased. Accused 1 and 2 started insulting deceased who did not respond. Accused 2 started assaulting deceased with an axe on the head while accused 1 assaulted him with a bolted knobkerrie. They continued to assault him until he became weak. Deceased got up and headed for his home. Accused 1 followed him and struck him with a bolted knobkerrie on the face resulting in him falling down. He insisted that accused 1 was armed with a bolted knobkerrie while accused 2 assaulted deceased on the head with the back of the axe. It was also his evidence that they were drunk.

Gladys Mloyi was deceased's wife. Her evidence is that on the 23rd March 2003 she was at her home with deceased when accused 2 passed by and started insulting deceased. She advised deceased to ignore the provocation which he did.

On the 24th March 2003 while on her way from fetching firewood, she met two

accused who started insulting her. They were walking along the road topless.

In addition to insults they threatened her with death. Accused persons appeared drunk. She proceeded home and later received a report of assault from her two minor children who were in the company of deceased when he was driving goats.

She observed that deceased was covered with blood and she rendered first aid.

It was also her evidence that deceased informed her that he had been assaulted by accused 1 and 2.

The witnesses are related to each other and are also related to the two accused.

These witnesses gave their evidence very well and confidently. They were not shaken under cross-examination. The court has no hesitation in accepting their evidence and it finds that they were credible.

Both accused gave evidence. Accused 1's evidence is that he observed deceased picking a stone and threw it at accused 2 but missed. He then separated them and he and accused 2 then used a different road. Later on, he saw deceased running towards them carrying a bolted knobkerrie and threatening to kill them. Deceased struck him and he fell down and had a black out. When he come around he did not know what had taken place but noticed that deceased was now full of blood.

He denied ever assaulting deceased at all.

Accused 2 also gave evidence. His evidence is that, he was involved in an altercation with deceased on the 23rd March 2003 but denies insulting the deceased or provoking him at all.

On the 24th March 2003, he had been drinking with accused 1 and they then decided to proceed home. On their way home they met deceased who was driving goats in the company of his daughters. Deceased threw a brick at him but missed. It is further his evidence that it is the deceased who struck him with a bolted knobkerrie.

He, however, admits striking deceased twice on the head and he fell down and further struck him for the third time.

He categorically denied that accused 1 was involved in the fight.

Accused 1 mentioned that he was assaulted by the deceased and he sustained some injury which he brought to the attention of the police.

In order to clarify this point, the court called Superintendent Mthandazo Siwela who confirmed receiving such a report but could not produce medical records to backup this point. This was not due to accused's fault but to the police. The court therefore, accepts that accused 1 was assaulted and he sustained a certain injury.

The court accepts that while the accused had been drinking prior to this incident and that accused insulted deceased on the 23rd day of March 2003.

It is clear that they were trying to protect each other in that they both denied that accused 1 was involved in that assault.

However, the evidence of Mvelo was so accurate and concise so much that we find that it is a true reflection of what took place. He has no reason to lie against them as they are his relatives. Both accused did not have any reason why Mvelo could have lied against them.

These courts are cautious of evidence by a single witness. This principle was clearly laid down in *S v Banana* 2000(1) ZLR 607(S).

In that case the court made it clear that the correct legal position is that evidence of a single witness must be approached with caution and its merits must be weighed against any factors that militate against credibility. The learned Chief Justice in *S v Banana* (supra) advocated for a common sense approach. He stated that where the evidence of a single witness is corroborated in any way that tends to indicate that the whole story was not concocted, the caution may be overcome as it may be by any other feature that increases the confidence of the court in the reliability of the single witness. Corroboration is not, however, essential.

The court is therefore mindful of the need for caution at all times in determining the credibility of such a witness. His whole evidence should be weighed against all other relevant factors amongst which, is the desire to lie and/or exaggerate. This witness as stated before gave his evidence in a straight forward manner and the fact that he stated that the two accused appeared drunk is to their credit. We therefore find that his testimony is a true reflection of what transpired. His evidence therefore, has ushered in undoubted confidence in the court.

On the day the two accused had been drinking together, they both assaulted the deceased with weapons and he died as a result of the injuries sustained there from. *Mr. Masuku* has argued that both accused should be convicted of murder with actual intent on the basis of the doctrine of common purpose.

The requirements for the doctrine of common purpose are that:-

(1) both accused should have been present at the scene and that

each one or the other was aware of what the other was doing that is his intention.

In casu both were present and assaulted the deceased at the sametime with different weapons. This was observed by Mvelo whose evidence the court accepted as credible.

Accused 1's assertion that he did not participate in this fatal assault is therefore rejected.

Mr Chitere for the accused argued that they should be convicted of culpable homicide. The basis of his argument is that the State has not established who delivered the fatal blow. This argument goes against the doctrine of common purpose in that the requirements is that both should have been present at the time of the attack and that they should have been aware of what the other or others were doing if they were more than one.

Those requirements were in my view fulfilled by the state.

In view of the above and taking into account the circumstances surrounding the commission of this offence we find both accused guilty of murder with constructive intent.

Attorney General's Office, applicant's legal practitioners

Chitere Chidawanyika and partners, second respondent's legal practitioners