

THE STATE
versus
BHEKIMPILO MOYO

HIGH COURT OF ZIMBABWE
MOYO J
BULAWAYO 10 AND 11 FEBRUARY 2015

Criminal Trial

Mr T. Hove for the state
Mr B. Masamvu for the accused

MOYO J: The accused person faces a charge of murder. It being alleged that on 7 January 2014, at Gwanda Bigben Road, near house number 2904 Spitzkop North, Extension Gwanda, the accused killed one Petros Sibanda.

The following documentary exhibits were tendered. The state outline was marked Exhibit 1, the defence outline was marked Exhibit 2, the accused person's confirmed warned and cautioned statement was marked Exhibit 3, the post mortem report was marked Exhibit number 4.

From the facts, it is common cause that accused, deceased and the first state witness Meluleki Dube drank beer at Crystal Spirits Nite Club at Spitzkop Business Centre in Gwanda from the night of 7 January 2014 to the early morning hours of 8 January 2014. Whereafter they parted ways at 3am when the Nite Club was closing. Accused and deceased went in the direction of their place of residence and the first witness Meluleki Dube went the other direction to his own place of residence. The deceased was later found dead the following morning.

This court has to determine if the accused person is the one who murdered the deceased or not. The starting point would be to note that firstly, accused was the last person to be seen with the deceased alive. Secondly, accused and deceased were tenants in the same house as stated by the first state witness Meluleki Dube.

The post mortem report gives the cause of death as asphyxia, broncho aspiration, head injury, assault. It further states that deceased died of aspiration after being assaulted with stones.

The evidence of Meluleki Dube and Sidingulwazi Ncube confirms that the three drank beer at Crystal Spirits Nite Club until 3am when they parted to go in different ways. It also confirms that deceased and accused went the same route and that in fact they stayed together. From these witnesses' evidence it is also clear that deceased was buying the deer. The evidence of Mgcini Ndlovu confirms that the accused person made indications at the scene of crime freely and voluntarily to the effect that as they walked with deceased, he remained behind and let the deceased walk in front. He then picked a stone and hit the deceased on the back while he held the stone. That deceased fell headlong and he then turned the deceased around. That he searched him and then left him lying facing upwards. Dennis Nkomo confirmed that the accused gave a statement freely and voluntarily and that the statement was subsequently confirmed by a magistrate.

It is important to note that nothing much turned on the cross examination of the four state witnesses. They were not challenged at all in the accounts they narrated to the court. This court can only find that they indeed told the truth.

The evidence of Dr Sanganai Pesanai was admitted into the court record in terms of section 314 of the Criminal Procedure and Evidence Act [*Chapter 9:07*].

The material aspects of accused's defence outline are in paragraphs 3 – 10 and they read as follows:

- “3) The accused person will plead not guilty to the charge and will state as follows:
- 4) he will state that he was drinking alcohol from around 20:30 hours on 7 January 2014 to around 03:00am on 8 January 2014 in the company of the deceased on one Meluleki Dube.

- 5) He will state that around 03:00am he proceeded to Binna Mine alone where he put up until 05:00am.
- 6) He will state that he then proceeded to Blanket Mine to pick gold which he sold and got R3500-00.
- 7) he will state that he then proceeded to Phakama Township at his friend's house Chidyanewako where he slept and was woken by the return of his friend.
- 8) He will state that he went with his friend to the shops as he wanted to buy relish.
- 9) He will further state that he went to see his girlfriend whom he gave R200 and at that time he saw a crowd and he proceeded to the crowd.
- 10) he will state that at the crowd that is when he heard of the deceased's death and at that time he was accused of having killed the deceased. He was subsequently arrested.

The accused person's confirmed warned and cautioned statement reads as follows:

"I do admit to this charge of having killed the now deceased Petros Sibanda which is being leveled against me. I killed the now deceased by striking him twice on the head with a stone and he fell down. After he had fallen down I searched him and took four hundred and fifty rands (R450), which was in his trouser pocket. After taking the money I left him and went away. We had a misunderstanding whilst drinking beer together and moreover I wanted to take the money from him that is why I killed him. I had noticed that he had money when we were drinking beer."

In his evidence in chief accused told the court that infact while at the nite club he sold some explosives to deceased for R500 and deceased paid him right away. He was to deliver the explosives the following day to the deceased. Accused said he also bought beer on the night in question. Although under cross examination this was never put to the state witnesses. We are told for the first time that accused did not go home, after the beer drink because his girlfriend whom he shared with the deceased and another man who is the woman's husband had said accused should not come as her husband was there.

He also says the following day he went to Blanket Mine and he got gold which realized R7000 that he shared with the person who bought the gold. Accused got R3500. He then proceeded to Phakama Township to his friend Chidyanewako's house. They later went to the

shops to buy relish. He then went to see his girlfriend and gave her R200, it is at that time that he saw a crowd, he proceeded to the crowd and that is when he heard of the deceased's death. He was also accused of having murdered the deceased and he was arrested.

We now turn to analyse the facts before us. Firstly the accused and the deceased resided at the same place of residence where they were both tenants. Secondly, on the fateful day they were last seen together. The accused person's conduct at the material time is found wanting in the following respects:

- 1) He was paid by the deceased R500 for explosives on the night in question, explosives that he was to deliver the following morning. He then however, does not deliver the explosives as agreed, he decides rather to go to Blanket Mine, later to Chidyanewako's house in Phakama to rest there. He behaves in a manner that is inexplicable in that he does not only fail to deliver the explosives as agreed but he avoids his place of residence that he shared with deceased for two days. He never hears of the deceased's predicament in the two days he was roaming Gwanda town. This court takes judicial notice of the fact that Gwanda is a very small town, and Binna, Gwanda town, Phakama, Blanket Mine and Spitzkop where the deceased had been found dead are all parts of a very small and closely knit community. It is surprising therefore that for two days the accused person avoided his place of residence and also never heard of deceased's predicament. Again, he says he never communicated with this girlfriend he apparently shared with the deceased.

Circumstantial evidence

In the Common Wealth Magistrates Handbook it was stated thus:

“means, motive and opportunity one all examples of what is called circumstantial evidence. Where direct evidence of a particular act or state of affairs is not available, one may, and indeed must, have resort to indirect means of establishing facts ----. Since the direct evidence of a witness is open to all the weaknesses of observation and recollection ----evidence of a circumstantial kind may be less contestable and more easily relied on. To show that a defendant had the means, a motive and the opportunity may go some way towards convincing us of his or her guilt. It may raise a *prima facie* case against him or her which he or she is called upon to answer.”

Where the conviction of an accused person depends upon circumstantial evidence and the drawing of inferences from all the established facts, then the inferences sought to be drawn must be consistent with all the proven facts and the facts should be such that they exclude every reasonable inference from them, save for the one sought to be drawn. Refer to the Edwards case 1949 SR 30.

Fortunately in this matter, it is not only circumstantial evidence that is available to establish what could have transpired on the day in question. Circumstantial evidence is relevant and applicable in so far as the events of 7, 8 and 9 January 2014 are concerned. That is in relation to accused having been the last to be seen with the deceased alive, and his conduct in the two days that followed the deceased's death. From thereon we have the following evidence.

Accused person's confirmed warned and cautioned statement

Exhibit 3, the accused person's confirmed warned and cautioned statement gives a clear account of what transpired on the day in question. The accused person clearly accepts that he killed the deceased, how he killed the deceased and the reason why he did. The statement was confirmed in accordance with the provisions of the law at the Gwanda Magistrates Court.

In terms of section 256 (2) of the Criminal Procedure and Evidence Act [Chapter 9:07], a statement which has been confirmed by a magistrate under section 113 of the same Act, must be admitted by the court into evidence on its mere production by the prosecution without any further proof. If the accused person wants to challenge its admissibility the onus is on him to prove its inadmissibility. Exhibit 3 was produced with the consent of the defence.

No effort was made to challenge its admissibility. Even the defence outline shows that the accused person had no qualms with the confirmed warned and cautioned statement. Two police officers were called for the state, one Mgcini Ndlovu gave evidence that the accused made indications to him at the crime scene freely and voluntarily. One Dennis Nkomo told the court that the accused person's statement was given freely and voluntarily and that it was duly confirmed in accordance with the law. These witnesses were never challenged under cross-examination. Their evidence has gone into the court record as the truth. The attempt by the

accused person to challenge the warned and cautioned statement is an after thought and nothing else.

The Post Mortem report

In the post mortem report the Dr concludes that deceased died of head injuries inflicted with a stone. This is consistent with the accused person's warned and cautioned statement. The post mortem report confirmed what the accused person tells us in his confirmed and warned and cautioned statement

Indications made by the accused at the scene of crime

We also have the unchallenged evidence of Mgcini Ndlovu who confirms that accused made indications to him at the scene. That he showed the police that he let deceased move ahead and remained behind picking a stone. That he then caught up with the deceased and hit him with a stone at the back. That deceased fell headlong and how he then turned deceased making him face upwards whilst searching him. The state witness who gave evidence on the indications was not challenged and therefore this court finds that he told the truth.

The differing versions of the accused's confirmed warned and cautioned statement, his defence outline and his evidence in chief can only mean one thing that the accused person did not tell this court the truth. He told lies in a bid to save himself unfortunately a concocted story almost always falls apart. Of particular note is the disparity between his defence outline and his evidence in chief on how he was arrested.

In his defence outline he says that he went to see his girlfriend whom he gave R200 and at that time he saw a crowd and proceeded to the crowd. That at the crowd that is when he heard of the deceased's death and he was then accused of killing the deceased and then arrested.

In his evidence in chief he stated thus:

"I decided to meet my girlfriend who works at an ecocash shop. I greeted her and gave her R200. Some four boys then came breathing heavily as if they had been running so they stood before me and said you are the one who killed Petros. I stood for a while as I didn't understand what they were talking about. As I tried to come to terms with what they were saying I saw a crowd of people."

In the defence outline he sees the crowd first and goes to the crowd before being accused of murder. In his evidence in chief its four boys that first come and accuse him of murder then a crowd comes. It is the finding of this court that the accused is lying. His defence is accordingly rejected. It is this court's finding that accused did kill the deceased in the manner alleged and proved by the state.

We then move on to deal with what the accused person is guilty of.

The accused person picked a stone and hit the deceased at the back of his head so that he could search him and take his money. He therefore wanted to kill the deceased who knew him well so that he takes the deceased's money and so that the deceased would not live to tell the tale. The accused person is clearly guilty of murder with actual intent. We accordingly find the accused person guilty of murder with actual intent.

*National Prosecuting Authority, the state's legal practitioners
Dube-Tachiona & Tsvangirai, accused's legal practitioners*