

THE STATE
versus
FRANK MBANO
and
GODFREY MBANO
and
MLAMULI MGEZELWA

HIGH COURT OF ZIMBABWE
MATHONSI J
BULAWAYO 6 AND 7 JUNE 2017

Criminal Trial

Ms S Ndlovu for the state
J Ndubiwa for the 1st accused
Ms N Ndlovu for the 2nd accused
Ms B Dube with *Ms T Dube* for the 3rd accused

MATHONSI J: The three accused persons are all mine workers who, at the relevant time in April 2013 they worked at Masiziba Mine in the Ngulubeni area of Plumtree. They have been arraigned before this court on a charge of murder in contravention of s47 (1) of the Criminal Law Code [Chapter 9:23]. The allegations are that on the night of 21 April 2013 near Manyosi Ngwenya's homestead in the Ngulubeni area of Mayobodo Plumtree, they wrongfully, unlawfully and intentionally killed Mpumelelo Moyo (the deceased) who was then aged 26 years and was a fellow mine worker at the same area. It is alleged that following a beer drink at Majojo Business Centre a fight erupted between them and the deceased whom they accused of having earlier assaulted a friend of theirs. The three accused persons are said to have pelted the deceased with stones resulting in his death.

All the three accused persons pleaded not guilty to the charge. Accused one stated in his defence outline that he never assaulted the deceased and did not act in common purpose with the other two accused persons. He was not at the scene where the deceased met his death. He raised an *alibi* that at the time of the commission of the offence he was in the company of his girlfriend

Fidelia Nyoni at her place of residence. He stated further that his said girlfriend, who was lined up as a state witness, cannot be relied upon given that she was once a suspect in the same matter.

Accused two, who happens to be the young brother of accused one, stated in his defence outline that on the day in question he was in a group of colleagues who left the mining site where they worked at about 1400 hours and proceeded to Majojo bottle store to drink beer. Once at the drinking place he and his colleagues drank a lot of Nikolai vodka and he got so plastered he has no recollection of the amount of alcohol he consumed.

Accused two stated that they were drinking alcohol together with the deceased at Majojo bottle store. At some point accused one left them in the company of his girlfriend. After accused one had left they remained drinking until about 1900 hours when, himself and one Edmore Ndlovu decided to retire. On the way they were overtaken by the deceased who was in the company of one Cosmas Maphosa. At that point the deceased confronted Edmore Ndlovu over a previous misunderstanding between them. He struck Edmore with a bottle and Cosmas joined in the beating up of Edmore. He stated that when he tried to intervene, Cosmas armed himself with a knobkerrie which he used to assault the accused two forcing him to take to his heels leaving Edmore at the mercy of the deceased and Cosmas.

Accused two went on to say he called his brother, accused one and informed him about the fight that had occurred between deceased and Cosmas on the one hand and himself and Edmore on the other hand. He says he then proceeded to the mine where his two co-accused found him. They then boarded a Mega bus at 2200 hours heading to Arda along Victoria Falls Road, which bus took them to their destination. He denied being involved in the murder of the deceased which he knows nothing about. He was assaulted by the police who forced him to make a confession.

I should mention that when accused one gave evidence it was at variance with what is contained in the accused two's defence outline. Firstly he stated that accused two had only narrated the events of the assault of Edmore by the deceased when they re-grouped back at the mine that night when accused two says he "called" the accused one and informed him. Secondly, accused one said they boarded Ajay bus in Brunaberg and alighted at Nkulumane Complex before proceeding to their uncle's house in Nkulumane 12. That is at variance with

accused two's version that they boarded the Mega bus which took them to Arda along Victoria Falls Road.

For his part accused three stated in his defence outline that indeed himself and other mine workers who included accused one and two had left the Masiziba mine on 21 April 2013 proceeding to Majojo Business Centre. They drank beer there but as the three of them had previously discussed the prospect of leaving that mine to look for employment elsewhere, he informed accused two that they had to leave later that day, a story completely different from accused one's version that they had actually missed the bus the previous day on 20 April 2013. He left the business centre in order to prepare for their journey. He was in the company of other mine workers.

Whilst at the mine compound accused two arrived with the news that an altercation had ensued during his absence. After they left the mine, they later handed themselves to the police after receiving information that the police wanted them in connection with the murder of the deceased. He stated that he had not been present when the altercation which resulted in the death of the deceased occurred.

The post mortem report compiled by doctor S. Pesanai, the pathologist who performed the autopsy on the body of the deceased was produced in terms of s278 (2) of the Criminal Procedure and Evidence Act [Chapter 9:07]. The said doctor observed the following marks of violence:

“Laceration frontal region (3 x 1) cm and (2x1) cm .

- 1) Compound Frontal skull fracture (4x3) cm
- 2) Depressed skull fracture right parietal region (6x4) cm
- 3) Fractured both anterior and medial cranial fassae.”

A canine tooth was missing which was later found among the stomach contents. It had been swallowed of course. He concluded that the cause of death was:

- “1. Extensive subarachnoid haemorrhage.
2. Multiple skull fractures
3. Blunt Force Trauma
4. Homicide.”

The evidence of five state witnesses who had been lined up to testify was admitted in terms of s314 of the Criminal Procedure and Evidence Act [Chapter 9:07] as it appears in the state outline. It is the evidence of Samkele and Manyosi Ngwenya, Thembinkosi Mloyi, Bernard Ndlovu and Dr S. Pesanai.

Samkele Ngwenya and his father heard the sound of beatings followed by faint sounds of groaning in the bushy area close to their homestead at about 2000 hours. When they went to investigate with the aid of a torch the suspects dumped the body of the deceased and absconded. They then discovered the body lying facing up with the head and face completely covered with blood.

Thembinkosi Mloyi is the elder brother of the deceased who owns a mine in the Ngulubeni area. When a group of people arrived at his compound looking for Cosmas Maphosa he followed them and later found the deceased's body which he identified. He observed at least three deep cuts on the face and head. Bernard Ndlovu is the police officer who attended the scene. He corroborated the evidence of Mloyi in all respects stating that a report had been received by the police at about 2345 hours.

In addition, the state led evidence from two more witnesses. Fidelia Nyoni was at the material time employed as a Tuckshop Keeper at a mine in the Ngulubeni area. The accused one is her loving boyfriend who had impregnated her at that time and she is now the proud mother of a 3 ½ year old child whose father is the accused one and its uncle is the accused two.

Her story is a simple one told by a simple woman who struck us as a reliable person who did not try to add things that she did not witness and did not have a reason to falsely incriminate the father of her child, the child's uncle and their friend. On 21 April 2013 she had left the mine compound in the company of the three accused persons. Her intention was to visit her mother's homestead to deliver provisions for her family. They got to Majojo Business Centre at about 1800 hours where her companions went straight to a beer outlet, bought beer and started imbibing together with the deceased. She whiled up time chatting a lady store keeper next to the beer outlet where the accused persons were carousing.

At about 1900 hours she called accused one and asked him to accompany her to her home which was a walking distance of about 20 minutes away. When she arrived there with her boyfriend she checked him into her room while she went to chat with her mother in the kitchen

as she warmed water to bath. When she returned to collect a pail to bath accused one had surreptitiously stolen out of the room and was nowhere to be found. She was forced to return to the mine compound on her own as she had left her work place unattended.

On the way her attention was drawn to the scene by Samkele Ngwenya and his father who were calling out that they had stumbled onto the body of a person. Upon arrival there she beheld the body of the deceased and told them he had earlier on been drinking beer at Majojo. She later proceeded to the mine compound. The three accused persons later arrived. Accused one called her to where they were and broke the news that they had killed a person. Their clothes were bloodstained. They changed into clean clothes and put the soiled ones in paper bags.

The three accused persons kidnapped her saying they would not leave her behind to sell them out to the police. They had to abscond with her. By then she was scared stiff and could not bring herself to inquire as to how and indeed why they had killed the person. They later boarded a bus at about 0200 hours the following morning near Brunaberg and alighted at Nkulumane complex in Bulawayo. There they found accused one and two's aunt, their uncle's wife, who had been called to meet them there. The accused persons directed that she be taken by that lady to Cowdray Park while they went to their uncle's house in Nkulumane 12. They subsequently came for her taking her with them to Inyathi where their mother is.

Upon arrival in Inyathi she was powerless and had to lie down under a shed as accused two narrated to their mother about the killing of the deceased. The following day herself and accused one proceeded to Nkayi while accused two and three remained in Inyathi. The two groups later reunited in Inyathi. Later their uncle took them and surrendered them at Central Police Station. She was given money to return home but did not manage to do so as she was arrested at the instance of the deceased's relatives and detained at Luveve Police Station while awaiting Plumtree Police to come to collect her.

Nyoni said she had been arrested because she had run away with the accused persons but later released in the course of investigations. That was later clarified by the investigating officer, Sergeant Ndongera who testified that the confusion arose because police in Bulawayo did not know the facts. As far as Moyobodo police were concerned Nyoni was always a victim who had been kidnapped.

The witness vehemently denied that she was assaulted by the police or that any undue influence was brought to bear upon her to falsely implicate the accused persons. I have already stated that although Nyoni was clearly an unsophisticated rural woman she was a steady witness whose evidence was clear and given with composure and dignity. We found her to be a credible witness whose evidence is worthy of belief.

We are aware that as one who had also been arrested in connection with the same offence her evidence may be viewed with suspicion. However, Nyoni was clearly not an accomplice. An accomplice is a person who has participated or assisted in the commission of the offence together with others. She had not been present when the offence was committed. Instead she was a victim who was kidnapped in order to hide her and prevent her from divulging the truth. Therefore there is no need for her evidence to be treated with caution.

She was made a suspect by error of the Police in Bulawayo and correctly released the moment she got to Plumtree. In any event we are satisfied that the danger of false incrimination which may exist with accomplice evidence is clearly not present in respect of Nyoni's evidence. Her evidence can safely be relied upon as she was kidnapped to prevent her from assisting the police. When the opportunity to do so arose, she fully co-operated even when she was not in danger of being charged herself, all the hallmarks of a reliable witness.

In any case most of her evidence finds corroboration in the accused persons' own evidence.

The same complement cannot, regrettably be extended to the accused one whose demeanor right from the start was terrible. He was loud, shaken and his testimony was clearly over-rehearsed a factor which afflicted his credibility. He tried too hard but try as he could he would not discredit the evidence of his girlfriend. He suggested that Nyoni had falsified evidence incriminating him and his colleagues because she had been subjected to torture by the police. Unfortunately Nyoni herself denied being assaulted and maintained that she voluntarily told both the police and this court exactly what had happened. We reject the suggestion that Nyoni was assaulted or that she falsely incriminated the accused persons.

I have said that accused one's defence took the form of an *alibi*. He said when the deceased was murdered he had been having a nice time with his girlfriend. That *alibi* went up in smoke when the said girlfriend disputed it. She showed in her evidence that the accused one had

crept out of her room while she was chatting with her mother and went away perhaps responding to the call that accused two says he made to him concerning the assault perpetrated on Edmore and accused two.

It is also amazing that accused one elected to dispute that they had travelled with Nyoni to Bulawayo, later to Inyathi and Nkayi. If that was the case, Nyoni would not have been privy to the fact that they had boarded a bus and dropped off at Nkulumane Complex. She would not have known that after dropping off they went to Nkulumane 12 or that they went to Inyathi to his mother. Indeed she would not have known that accused two and three tried their luck at Arda and quickly retreated as the police were inquiring after them. It is for that reason that we say that most of Nyoni's evidence is corroborated by the accused persons themselves.

We also find it strange that accused one claims to have made his way to the mine compound from his girlfriend's home at 20:25 hours presumably using the same route used by Nyoni but in his case he was unable to bump into the group gathered by the Ngwenyas who had come across the deceased's body. When Nyoni came a while later she did. The inference is obvious. We reject the evidence of accused one as demonstrably unreliable and extremely false.

Accused two also gave evidence. In doing so he tried hard to tailor make his evidence to match that of his brother, accused one and made a mess of it. In the process he contradicted himself quite sharply. While in his defence outline he had stated in paragraph 9 that he had been present when a fight erupted between the deceased and Cosmas Maphosa on one hand and himself and Edmore Ndlovu on the other during which he tried to intervene to save Edmore from being assaulted but earned himself a beating with a knobkerrie from Cosmas, in his evidence in chief accused two recanted that statement. He stated that Cosmas advanced at him menacingly with a sjambok but did not assault him. That notwithstanding not taking a chance, he still took to his heels leaving his friend to his own devices.

That piece of the accused two's evidence not only contradicted his defence outline in a big way it also contradicted that of the accused one who was adamant that his young brother had informed him that he had been assaulted by Cosmas during that squabble. It is significant though that accused two stated that after the assault he had made a phone call to accused one, who at that stage, we know was at Fidelia Nyoni's homestead. During that phone discussion he had informed the accused one about the assault at the hands of the deceased and Cosmas. In our

view this explains why accused one disappeared from Fidelia's homestead leaving without even bidding his future mother in law farewell, something which is unAfrican as it is strange.

Accused two stated that when he ran away from the deceased and Cosmas he went to the mine compound where he found accused three and other mine workers who were working on their shafts. Accused one then joined them and said they were supposed to leave going to work at a mine at Arda. Accused three begged to come with them and they allowed him. This however contradicts accused three's version that he is the one who had told accused two that they were supposed to leave that day. Of course when he gave evidence accused three tried to wriggle out of that contradiction by suggesting that he had made the request on a previous occasion.

Although accused two had stated in his defence outline that they had boarded a Mega bus going to Arda and the bus took them to their destination, in his effort to match the evidence of his brother, he changed that story. In his evidence he said they boarded an Ajay bus and alighted at Nkulumane terminus. He did not bother to explain the glaring contradiction in those two accounts. He also could not explain why Fidelia was privy to details of their travel and why she would lie against him.

Accused two was clearly unreliable and appeared to live under the shadow of his brother. The contradictions in his testimony I have mentioned mean that we can only reject his evidence as being false.

Accused three took off at a tangent promptly denying any knowledge of the deceased only to quickly change to say he knew him by sight. But this is a person that he spent quite sometime with while consuming beer on the day in question. He stated that he had left the drinking place at the shops with Mvelo Sibanda earlier than others because he wanted to prepare for the journey. He could not explain why there was a contradiction in their versions about who initiated the trip and when he made the request to be included.

In respect of the evidence of Fidelia Nyoni, he was in chorus mode only able to say "It is a lie" and nothing more. To most of the pertinent questions put to him during cross-examination he resorted to saying that he could not answer the question. Apart from that accused three was clearly shaken and evasive which was not helpful to his cause at all. Nothing could be gained from his evidence.

There can be no doubt that the case of the state hinges on circumstantial evidence because no witness saw the accused persons assault the deceased. Samkele and his father did not identify the culprits in the dark as they dumped the body and made good their escape. It is now trite that means, motive and opportunity are all examples of circumstantial evidence. Where it is shown that the accused person had the means, a motive and the opportunity, the court may be persuaded that the accused is guilty.

I cannot improve on the pronouncement of HUNGWE J regarding the use of circumstantial evidence in *S v Mtetwa* 2014 (2) ZLR 533 (H) at 537 A-E that:

“Because circumstantial evidence requires the drawing of inferences, it is incumbent for this court to restate the process involved in analyzing that evidence and what a court must do before returning a verdict of guilty based solely on circumstantial evidence. Initially, the court must decide, on the basis of all the evidence, what facts, if any, have been proven. Any facts upon which an inference of guilt can be drawn must be proven beyond a reasonable doubt. After the court has determined what facts, if any have been proven beyond a reasonable doubt, then it must decide what inferences, if any can be drawn from the facts. Before they may draw an inference of guilt however that inference must be the only one that can fairly and reasonably be drawn from the facts, it must be consistent with the proven facts, and it must appear that the inference of guilt of the accused is the only one that can fairly and reasonably be drawn from the facts, and that the evidence excludes beyond a reasonable doubt every reasonable hypothesis of innocence. If there is a reasonable hypothesis from the proven facts consistent with the accused’s innocence, then the court must find the accused not guilty. If the only reasonable inference the court finds is that the accused is guilty of a charged crime, and that inference is established beyond reasonable doubt then the court must find the accused guilty of that crime.”

See also *Mugari v Madhiri* 1987 (1) ZLR 164 (S) at 169 D-F.

If we leave out for now the confession of the accused persons these are the proved facts;

1. On 21 April 2013, the three accused persons together with Nyoni and the deceased were at Majojo Business Centre where the accused persons and the deceased were consuming alcohol.
2. Later that night, there was a fight between the deceased, Cosmas Maphosa, Edmore Ndlovu (a homeboy of accused one and two) and accused two during which the deceased assaulted Edmore and Cosmas assaulted the accused two.

3. The accused one had gone to his girlfriend's home and was waiting for her to take a bath before escorting her back to the mine compound where she had left her work place unattended.
4. Accused two called accused one to inform him that there had been a fight between the two groups.
5. Accused one then unceremoniously left her girlfriend's home without bidding anyone farewell.
6. Soon thereafter, as Nyoni was finding her way back to the mine compound she found a group of people standing sentinel over the deceased's body and inquiring as to his identity.
7. The deceased had been murdered in the most brutal manner by people who were carrying his body into the bush when the Ngwenyas confronted them forcing them to take to their heels.
8. The three accused persons came to Nyoni at the mine compound with their clothes blood stained before they took off those clothes and forced her to abscond with them from that locality.
9. The accused persons boarded a bus to Bulawayo and were not arrested until they surrendered themselves to the police in Bulawayo ably assisted by their uncle more than two weeks later on 7 May 2013.
10. Upon their arrest they made confessions to the police and later recanted their confessions once they got to remand prison.

Those are the facts, excluding the confessions made to Nyoni, which have been proved beyond reasonable doubt. What are the inferences that may be drawn from those proven facts? In our view it can reasonably be inferred from those facts that after the deceased and Cosmas had assaulted the accused two forcing him to run away and call his brother for reinforcement, his brother, accused one then abandoned his girlfriend and rushed to the aid of his boys and the three of them set about to exert revenge. The other reasonable inference is that they then beat the deceased to death and tried to hide the body before being disturbed by the Ngwenyas.

Therefore even without the confession made to Nyoni, the only reasonable inference that can be drawn from the proved facts is that the three accused persons committed the offence and then took flight. But then that is not the only evidence that we have. Over and above that we have the confession that accused one made to his girlfriend and the one that they all made to their mother in Inyathi in the presence of the girlfriend to add the icing.

In terms of s273 of the Criminal Procedure and Evidence Act, the court may convict an accused person on the basis of a confession made by the accused person, even though the confession is not confirmed by any other evidence provided that the offence has been proved to have been committed by competent evidence other than the confession. Therefore the court may convict on the basis of a confession either;

- 1) Where there is proof that the crime was committed, although there is no evidence other than the confession to connect the accused with the crime; or
- 2) Where there is direct evidence to confirm the accused's confession, even though there is no direct proof of the commission of the crime.

See *S v Tsorayi* 1985 (1) ZLR 138 (H).

Whichever way there is a safety valve in this case because there is proof that the crime was committed. There is the confession made to a reliable witness Nyoni, who has passed it on to the court entitling the court to conviction on it. Apart from that we have direct proof of the confession even though there is no direct proof of the commission of the offence, again entitling the court to convict on that basis. So either on the basis of the confession it is safe to convict the accused persons as their guilt has been proved beyond a reasonable doubt.

We have agonized about the involvement of accused three because his role has not been as clearcut as the other two accused who must have harboured an intention to exert revenge and his confession was not particularized clearly, regard being had to the fact that the confession of an accused can only be used against that accused person only. But then this is a person who appears to have associated with the other two accused before the commission of the offence when they went to drink beer and when they were with the deceased at the shop. The moment a

conflict arose between the two groups he was the recipient of the news that Edmore had been assaulted and left at the mercy of the deceased.

Immediately after the deceased was killed, the accused three was in the company of accused one and two when the confession was made. By his own admission he was urging them to hurry so that they escape. He associated with them as they planned and undertook the journey obviously taking flight after the commission of the offence. He is one of those who was seen by Fidelia with bloodstained clothes. Therefore we make a finding that he clearly participated in the commission of the offence.

There can be no doubt that the injuries sustained by the deceased were inflicted by people who gave him no chance to survive. We however accept that when the accused persons did that they were exerting revenge after he had assaulted one of their own. The fight took place at night at a time when they had not set about to kill him from the beginning.

In the result all the three accused persons are hereby found guilty of murder with constructive intent.

Reasons for sentence

In considering sentence we take into account the accused persons' personal circumstances. They are all first offenders. Accused one was aged 24 at the time of the offence. He was therefore fairly youthful which may have influenced his sense of judgment. He is the father of two minor children.

Accused two was aged 21 years at the time. He was therefore youthful as well which affected his judgment. He is the father of two minor children.

Accused three was aged 29 years at the time. He was certainly not youthful and should have guided his younger co-accused persons.

They were all gold panners in that area along with the deceased. On the night in question they had consumed large quantities of alcohol which may have impaired their reasoning capacity. From the circumstances of the offence it is apparent that they had all set about going home when the deceased and Cosmas followed them intending to assault their colleague. They indeed assaulted both Edmore and accused two despite his ill-advised denial. Therefore the

deceased started the fracas which led to his death. We take into account that after taking flight they eventually surrendered themselves to the police.

However, a life was lost under extremely tragic circumstances when the deceased was subjected to a gang attack. The accused persons directed their anger and indeed their blows at the most vulnerable part of the body, the head giving the deceased no chance to survive. They were going to dispose of his body had Samkele Ngwenya and his father not disturbed them underlining their evil intent.

After committing the offence they absconded kidnapping an innocent woman who was then pregnant in their attempt to obliterate evidence. There can be no doubt therefore that their moral blameworthiness is high. Although they eventually surrendered to the police it was not at their instance. The fact that they have contested the matter all the way means that they are not even contrite.

Loss of life at mine compounds is now a real problem in this country. These mine workers clearly have no respect for human life. It is the duty of this court to remind them that the sanctity of human life must be upheld at all times. That can only be done by imposing sentences that reflect society's revulsion at such kind of conduct.

This court will always discount the number of years accused persons spend in remand prison while awaiting trial. In this case the three accused persons have been in prison for four years. We will credit that period to them. This is a matter in which the accused persons should have been sentenced to 20 years imprisonment. We will however discount the period spent in prison.

According each accused person is hereby sentenced to 16 years imprisonment.

National Prosecuting Authority, applicant's legal practitioners
Mashayamombe and Partners, 1st respondent's legal practitioners
Kossam Ncube and Partners, 2nd respondent's legal practitioners
Mathonsi Ncube Law Chambers, 3rd respondent's legal practitioners

