

THE STATE

Versus

WILLIAM HLAMBELO

IN THE HIGH COURT OF ZIMBABWE

DUBE-BANDA J with Assessors Mr Ndlovu and Mr Bazwi

HWANGE CIRCUIT COURT 7 and 12 OCTOBER 2020

Criminal trial

Mr. B. Tshabalala, for the state

Ms L. Mthombeni, for the accused

DUBE-BANDA J: The accused is charged with the crime of murder as defined in section 47 of the Criminal Law [Codification and Reform] Act [Chapter 9:23]. It being alleged that on the 26 May 2019, at M.H. Bottle Store, Lonely Mine, Inyathi the accused unlawfully struck Hero Mkandla (deceased) with an axe on the head and once on the thigh, intending to kill him or realising that there is a real possibility that his conduct may cause the death but continued to engage in that conduct despite the risk or possibility.

The accused pleaded not guilty to the charge. He was legally represented throughout the trial. The State tendered an outline of the state case. It shall not be necessary to repeat the entire contents of the state outline. It now forms part of the record. The accused tendered into the record an outline of his defence case.

The State produced a confirmed warned and cautioned statement recorded by the police at ZRP Inyathi on 3rd January 2020. The statement was confirmed by a magistrate on the 4th March 2020. The statement reads:

I deny the charge levelled against me of killing Hero Mnkandla because I am not the one who struck him with an axe. Hero Mnkandla and Nkanyiso Mpofu were refusing to leave the bar whilst I was telling them it was time to close. I tried to plead with them but they refused stating that the bar is not mine and the money they are spending at the M.H. is way too much, I even get paid with the one they spend at the bar. I advised that it was now late and everyone has left save for the two of them. I reminded Hero that he once requested to sleep inside the bar stating that he was very drunk the following morning he had stolen phones, money and beer. As I was still talking to them Hero took out some money and pressed the

slug I took the balls and threw them inside. Hero then dragged me by my trousers and took out a knife. When he tried to stab me I got hold of his hand and fell him down. Nkanyiso came armed with an axe when he tried to strike me he missed and hit a torch which was on the head and it fell down and there was darkness in the bar. Hero was still grabbing me by my trousers Nkanyiso tried to axe me I dodged by using Hero as my shield. I did not notice how many times he assaulted him because it was dark.

The state tendered a post mortem report compiled by Dr Juana Rodriguez Gregori at United Bulawayo Hospitals on 17 September 2019. Following an examination of the remains of the deceased, the pathologist concluded that the cause of death was:

1. subdural haematoma
2. skull bones fracture
3. severe head trauma

State case

The state led oral testimony from two witnesses. The first to testify was Nkanyiso Mpofu. He resides at number 12 Fetkill Village 8, Lonely Mine, Inyathi. He knows the accused as a local, he usually sees him at the shops. The deceased was his friend. On the 26 May 2019, at around 1930 hours the witness and the deceased went to M.H. bar for a beer drink. At around 2100 hours the bar person closed the bar. She said those with drinks must finish their drinks and leave the bar. The witness was seated on top of the mini-soccer machine and the deceased was standing at the door. The patrons were using torches as a source of light. The accused entered the bar, looked at all directions as if he was looking for someone, produced an axe and struck the deceased on the head and thigh. Accused opened the door and left. Patrons left the bar running. The witness called out the deceased's name several times but he did not respond. When he got closer to the deceased he noticed that he had a deep cut on the head that was bleeding. The witness tried to get help from the people who worked at the bar, he could not get any help. He later went home to inform his mother, and proceeded to inform the deceased's grandparents. The deceased was ferried to hospital in Inyathi and later to Mplilo Hospital, Bulawayo. He was treated and discharged. The deceased later died on the 6 September 2019, at his rural home.

The second to testify was Trust Jim Pandeni. He resides at his own homestead, Decide Village 1, Naleni, Inyathi. He knows both the accused and the deceased, they are local village

people. On the 26 May 2019, at around 2000 hours, the witness was at the M.H. Bar, where he was drinking beer. The deceased and his friend Nkanyiso Mpofu, entered the bar and started insulting patrons using vulgar language. The deceased drew an okapi knife from his pocket, and started to sharpen it on the floor. The deceased and his friend were lifting up the mini-soccer machine and hitting it on the floor. The witness left the bar as the environment was getting violent. He did not see the accused.

The prosecutor sought admissions from the accused in terms of s 314 of the Criminal Procedure & Evidence Act [*Chapter 9:07*]. The accused admitted the evidence of certain witnesses as contained in the summary of the state case. That is, the evidence of Dr Gregori, who examined the remains of the deceased and recorded a post mortem report. The evidence of Nokuthaba Mpofu, the bar lady at MH Bottle store, the scene of the crime. According to her evidence, on the 26 May 2019, at around 2000 hours, she advised all patrons to leave the bar, because it was time to close. The patrons refused to move out. The deceased said she should not close the bar but let them continue drinking. She proceeded to close the door, switch off the radio and the lights and allowed those who needed to finish their drinks to do so. The following morning she learnt that there was violence at the bar and she observed blood stains on the veranda. The evidence of Constable Mushanyu, the investigating officer in this case was admitted in terms of section 314 of the Criminal Procedure and Evidence Act. He visited the scene of crime on the 30 May 2019. He interviewed the witness Nkanyiso Mpofu. He arrested the accused. The witness failed to recover the murder weapon, i.e. the axe. In June 2019, the witness visited the deceased at his home, and observed that he had a deep cut on the head and on the left thigh. The last to be admitted was the evidence of Sergeant Ndlovu, who recorded a warned and cautioned statement from the accused.

This is the State case.

Defence case

The accused elected to give evidence under oath. He testified that he was 39 years old. He works at M.H. Bar. He is a general hand, and his duties entail, amongst others, the collection of empties and making sure that after work the doors of the bar are closed and secured. He knew the deceased during his lifetime. The police had told the bar personnel to close at 8 p.m. On the 26 May 2019, at 8 p. m. they decided to close the bar. The bar lady told the patrons that the bar was closed, and she asked those with unfinished drinks to finish and

leave the bar. She switched off the radio and the lights. She gave accused a hat with a head-torch. Most patrons complied and left the bar. Two patrons remained, i.e. the deceased and Nkanyiso Mpofu.

The accused told the two to leave the bar. Nkanyiso Mpofu said to the accused that the “bar is not yours.” The deceased said they are spending a lot of money at the bar, the accused is paid from the money they spend in the bar. Accused reminded the deceased that previously the deceased said he was drunk and unable to go to his home, he was allowed to sleep in the bar for the night. He woke up at night and stole beer, phones and cash. The deceased proceeded to put some coins in the mini-soccer machine (slug) and the balls came out. The accused picked the balls and threw them back into the machine. While he was putting the balls back into the machine, the deceased got a hold of the accused by his trousers. The deceased was holding an okapi knife, in an attacking position. Accused grabbed the hand that was holding the knife, and stripped him, and deceased fell to the ground. When deceased tried to stand, accused pushed him to the ground.

Nkanyiso Mpofu realised that his friend was being overpowered, he drew out an axe, and tried to strike the accused who was now on top of the deceased. Accused evaded the strike and Nkanyiso Mpofu hit his (accused’s) head torch, it became dark. During the fight that ensued, the accused got on top of the deceased. Accused then realised that Nkanyiso Mpofu had joined the fight on the side of the deceased. He pushed the deceased who was on the ground to be on top of him (accused). The accused heard the deceased say “strike William,” he then realised that Nkanyiso Mpofu had missed him (accused) and struck his friend with the axe. At that point he noted that the deceased was no longer holding him. He left the bar and ran away.

Accused closed his defence case.

Analysis of the evidence

Nkanyiso Mpofu is a single witness in respect of the actual striking of the deceased with an axe. No other witness was present when the actual axing of the deceased occurred. In terms of section 269 of the Criminal Procedure and Evidence Act [Chapter 9:07], an accused may be convicted of any offence of murder on the single evidence of any competent and credible witness.¹It is trite law, however, that, as a result of the danger of relying exclusively

¹269 Sufficiency of one witness in criminal cases, except perjury and treason

on the sincerity and perceptive powers of a single witness, a judicial practice has evolved that such evidence be treated with special care. The cautionary rule originated in remarks made by De Villiers, JP in *R v Mokoena* 1932 OPD 79, to the effect that the evidence of a single witness should only be relied upon where it is “*clear and satisfactory in every material respect*”. However, over the years a more flexible approach to the testimony of a single witness has been generally accepted. This follows the decisions in cases such as *Rv Nhlapo* 1953 (1) PH H 11 (A), *R v Bellingham* 1955 (2) SA 566 (A), *R v Abdoorham* 1954 (3) SA 163 (N), *R v Mokoena* 1956 (3) SA 81 (A).

In *R v Nhlapo* 1953 (1) PH H 11 (A), it was stated that the cautionary rule may well be helpful as a guide to the right decision, it naturally requires judicious application and cannot be expected to provide, as it were automatically, the correct answer to the question of whether the evidence of the crown witness should be accepted as truthful and accurate. The court added that it does not mean that an appeal must succeed “if any criticism, however slender, of a witness’s evidence were well founded”. In *R v J* 1966 (1) SA 88 (SRA), the court expressed the view that the cautionary rules are “no more than guides, *albeit* very valuable guides, “which assist the Court in deciding whether the Crown has discharged the *onus* resting upon it”. The court added that the exercise of caution should not be allowed to displace the exercise of common sense. And once a judicial officer has anxiously scrutinised the evidence of a single witness he should not be ‘swayed’ by fanciful and unrealistic fears. The courts have stated that there is no rule of thumb test or formula to apply when it comes to a consideration of the credibility of a single witness. The trial Judge will weigh his evidence, or consider its merits and demerits and, having done so, will decide whether it is trustworthy and whether, despite the fact that there are shortcomings or defects or contradictions in the testimony, he is satisfied that the truth has been told.

It shall be lawful for the court by which any person prosecuted for any offence is tried to convict such person of any offence alleged against him in the indictment, summons or charge under trial on the single evidence of any competent and credible witness:

Provided that it shall not be competent for any court—

- (a) to convict any person of perjury on the evidence of any one witness as to the falsity of any statement made by the accused unless, in addition to and independently of the testimony of such witness, some other competent and credible evidence as to the falsity of such statement is given to such court;
- (b) to convict any person of treason, except upon the evidence of two witnesses where one overt act is charged in the indictment or, where two or more such overt acts are so charged, upon the evidence of one witness to each such overt act;
- (c) to convict any person on the single evidence of any witness of an offence in respect of which provision to the contrary is made by any enactment.

According to Nkanyiso Mpofu, he knows the accused as a local person as he usually sees him at the shops. He said the accused walked into the bar, looked at all directions as if he was looking for someone, then struck the deceased on the head and thigh and then left. The evidence shows that the accused was employed at the bar. Nkanyiso Mpofu did not tell the court that the accused was employed at the bar. We know from the evidence of Pandeni that the deceased and Nkanyiso Mpofu, entered the bar and started insulting patrons using vulgar language. The deceased drew an okapi knife from his pocket, and started to sharpen it on the floor. The deceased and his friend were lifting up the mini-soccer machine and hitting it on the floor. The Pandeni left the bar as the environment was getting violent. The evidence of Nokuthaba Mpofu shows that after the bar was closed, the deceased refused to leave the bar. The evidence of Pandeni reveals that the situation at the bar was very violent, the violence was caused by the deceased and Nkanyiso Mpofu. The violence occurred before the accused entered the bar. We know from the evidence that there was a fight at the bar before the axing of the deceased. Pandeni saw the deceased drawing out an okapi knife, this must be same okapi knife that accused says deceased produced intending to stab him.

Nkanyiso Mpofu says nothing about the violence they caused at the bar. He says absolutely nothing about the violence that he and deceased caused at the bar. He says nothing about the okapi knife in the possession of the deceased. He does not tell the court that the accused worked at the bar. He merely says he knows the accused as a local person. He created a bizarre situation, of an accused just entering the bar, without saying anything, axing the deceased and then leaving the bar. It is Pandeni a state witness who told the court that the violence at the bar was caused by the deceased and Nkanyiso Mpofu. They insulted patrons using vulgar language. The deceased was seen by sharpening an okapi knife on the floor. We take the view that Nkanyiso Mpofu was not candid with this court. His evidence cannot be truth of what happened at the bar, which resulted in the axing of the deceased. He was an untruthful, unreliable and untrustworthy as a witness.

We cannot say the evidence of Nkanyiso Mpofu is clear and satisfactory in every material respect. As a result of its shortcomings and defects we are not satisfied that the truth has been told. We cannot say his evidence is truthful and accurate. We take the view that he is not a credible witness as anticipated by section 269 of the Criminal Procedure and Evidence Act.

It is trite law that in a criminal trial the *onus* is on the State to prove the commission of the offence beyond reasonable doubt and that there is no *onus* on an accused person to prove his innocence. This court is alive to the basic principles to be applied in dealing with the version of an accused. In *S v Kuiper* 2000 (1) ZLR 113 (S) at 118B-D:- the court said the test to be applied before the court rejects the explanation given by an accused person was set out by GREENBERG J in *R v Difford* 1937 AD 370. At 373, the learned judge said:-

noonus rests on the accused to convince the court of the truth of any explanation he gives. If he gives an explanation, even if that explanation be improbable, the court is not entitled to convict unless it is satisfied, not only that the explanation is improbable, but that beyond any reasonable doubt it is false. If there is any reasonable possibility of his explanation being true, then he is entitled to his acquittal.

Similarly, in *R v M* 1946 AD 1023, DAVIS AJA said the following at 1027:

And, I repeat, the court does not have to believe the defence story; still less has it to believe it in all its details; it is sufficient if it thinks that there is a reasonable possibility that it may be substantially true.

The accused has given a version. He works at the bar. There is evidence from Pandeni that the deceased and Nkanyiso Mpfu caused violence at the bar and insulted patrons using vulgar language. There is evidence from Pandeni that the deceased was in possession of an okapi knife. He sharpened it on the floor. The violence caused by the two, i.e. Nkanyiso Mpfu and the deceased caused the witness Pandeni to leave the bar. He left the bar because he thought the deceased and Nkanyiso Mpfu belong to a group called “*amabhabhazi*” gangs who assault people at night.

The accused gives a version about the circumstances that resulted in the axing of the deceased. The deceased put some coins in the mini-soccer machine, got the balls, but accused threw the balls back into the machine. Then a fight started. Deceased produced an okapi knife, this must be the same knife Pandeni says deceased was sharpening on the floor. Accused testified that it is not him who axed the deceased. He avers that during the commotion, the fight, in the dark Nkanyiso Ndlovu missed the accused and axed the deceased. We are not making any finding that Nkanyiso is the one who axed the deceased.

All we are saying is that the explanation given by the accused cannot be said to be false beyond a reasonable doubt. He has no *onus* to convince the court of the truth of any explanation he gives. If there is any reasonable possibility of his explanation being true, then he is entitled to his acquittal.

The state in cross-examination did not challenge the version of the accused in any material respects. The accused was asked a mere thirteen questions. The first eight questions did not go to the heart of the matter. The last five questions were the following:

Q. ²You did not see the first witness strike the deceased? You are assuming? A. ³ I saw the axe when it hit the torch. I heard the deceased say hit William. It was dark. Q. Nkanyiso Mpofu saw you hit the deceased twice. A. He did not see me. Q. He says he saw you with his torch strike the deceased. A. No one had a torch. Q. I put it to you that you are the one you struck the deceased. A. Is not me. Q. By striking the deceased you saw that he could die? A. I did not strike him.

The accused's version remains unchallenged and intact. He was not discredited in cross-examination. It cannot be said that the accused's version is false beyond a reasonable doubt.

The conduct of the accused after the fight at the bar is somewhat bizarre. He runs away and leaves two people at the bar, one who previously had stolen beer, cash and phones. He does not report the matter to the police. He does not alert his workmates of the fight and that he left people inside the bar. This conduct raises a suspicion that he might be the killer of the deceased. But suspicion is not proof. Our law requires proof beyond a reasonable doubt for a conviction to follow. In our law there can never be a conviction anchored on a suspicion, strong as it might turn out to be.

There are gaps in the evidence of the state case. The state did not discharge the burden of proof to prove its case beyond a reasonable doubt. When all the evidence has been assessed, we are satisfied that the state failed to prove its case beyond a reasonable doubt, and consequently we find the accused not guilty on the charge of murder.

Verdict: Not guilty and acquitted.

²Question.

³Answer.

National Prosecuting Authority, state's legal practitioners
Dube, Nkala and Company, accused's legal practitioners