

THE STATE

Versus

MNCEDISI NCUBE

And

MBONGENI NKALA

IN THE HIGH COURT OF ZIMBABWE
MANGOTA J with Assessors Mr Mashingaidze and Mr Dhewa
BULAWAYO 6 AND 20 FEBRUARY 2024

Criminal Trial

E Kanengoni, for the state
Ms S .V Drau, for the 1st accused
K. Mpofu, for the 2nd accused

MANGOTA J:- The accused persons are charged with murder as defined in Section 47 of the Criminal Law (Codification and Reform) Act, (Chapter 9:23) (“the Act”). The allegations against them are that, at about 11 am of 12 December, 2021 and at Umzingwane River, Carmen Farm, in Esigodini, they unlawfully caused the death of one Lawrence Khumalo, the deceased, whom they assaulted with stones and wooden sticks at the back of his head. The allegations are, further, that, when they assaulted the deceased in the manner described, their intention was to kill the deceased or that they realized the existence of a real risk or possibility that their conduct may result in the death of the deceased and they proceeded to engage in the said conduct despite their realization of a real risk or possibility.

The accused persons deny the charge. Although they gave separate defence outlines, the substance of their defences boils down to one and the same thing. They state that, on the day of the unfortunate incident, they were at Carmen Compound drinking when one Thobani Khumalo approached and informed them that the deceased had stabbed him. They state that they decided to confront the deceased to tell him to compensate his victim failing which they would effect a citizens’ arrest upon him and take him to the police. It is their statement that, as they approached him, they were aware that the deceased had a knife with which he stabbed their friend Thobani Khumalo. The second accused person states that he picked up a small stone which could fit into the palm of his hand as a way in which he could protect himself

from a potential attack from the deceased. The deceased, they claim, ran away from them into the bush and in the direction of Umuzingwane River with them chasing after him. They allege that, as they approached the river, they called upon the deceased to stop but he continued to run away from them towards the river. It is their statement that he continued to run until he fell into the river where he drowned. They state that they tried to rescue him but they failed. They aver that they went home where they told the second accused's father what had happened. It is their claim that the second accused's father accompanied them to the local police post from where a policeman proceeded with them to Esigodini Police Station. They state that, on their way to the same, they met police officers from Esigodini who arrested them.

The State which is dominus litis produced, with consent of counsel for the accused persons, the following exhibits:

- a) The post mortem report which relates to the deceased;
- b) The first accused person's confirmed warned and cautioned statement- and
- c) The second accused person's confirmed warned and cautioned statement.

These were marked exhibits 1, 2, and 3 respectively.

The State led evidence from two witnesses. These are one Sikhangezile Sibanda and one Doris Loreen Magaya, a member of the Zimbabwe Republic Police who, at the time, was stationed at Esigodini Police Station and who, with the assistance of one other, recovered the body of the deceased from Umzingwane River. She is the investigation officer of the case.

The State moved us to expunge from the record the statements of two of its witnesses namely one Marvelous Khumalo and one Esinathi Nyathi. These were so expunged from the record. It applied, in terms of Section 314 of the Criminal Procedure and Evidence Act (Chapter 9:07) to have the statements of the following four (4) of its witnesses admitted into the record with the consent of counsel for the accused persons:

- i) Thobani Khumalo;
- ii) Admire Ncube;
- iii) Themba Maplanka- and
- iv) Dr. S, Pesanayi.

The statements of the above-mentioned four witnesses were admitted into the record, with the consent of counsel for accused persons, as part of the case of the State which, with that, closed its case.

Section 47 of the Act defines the offence which the State preferred against the accused persons. It reads:

- “(1) Any person who causes the death of another person-
- (a) Intending to kill the other person; or
 - (b) Realising that there is a real risk or possibility that his or her conduct may cause death; and continues to engage in the conduct despite the risk or possibility, shall be guilty of murder”.

It is in the context of the definition of the crime, as stated in the foregoing paragraph, that the court shall examine the case of the accused persons. For the State to succeed, it must prove beyond reasonable doubt, that the conduct of the accused persons is the effective cause of the death of the deceased. Failing such proof, the accused persons cannot be convicted of murder. They may, depending on evidence which the State adduces, be convicted of another crime which is not murder but which is born out of the circumstances of their conduct.

The above-stated matter finds its basis in the trite position of the law which is to the effect that the onus to prove the guilt of an accused person lies on no one else but on the State: *S. v Moyo*, HB 153/22. There is, in contrast, no onus on the accused person to prove his innocence.

It is for the abovementioned reason, if for no other, that the court was pleased to remark in *S v M*, 1946 AD 1023 that:

“The court does not have to believe the defence’s story, still less does not have to believe it in all details, it is sufficient if it thinks that there is a reasonable possibility that it may be substantially true...”

The quoted dictum rhymes with the thinking of the courts which have developed the theory that it is better for a guilty person whose case the State fails to prove to be allowed to go scot-free than to convict and punish an innocent man.

S v Solano, 1985 (1) ZLR 62 which followed the reasoning which was established in *Miller v Minister of Pensions*, (1947) 2 All ER 372 (KB) lays down the standard of proof which the State must establish for it to secure the conviction of an accused person. It states at

pages 64 F- 65 B that the State must prove the case beyond reasonable doubt. It goes on to define the meaning and import of the phrase when it states that:

“Proof beyond a reasonable doubt does not mean proof beyond a shadow of doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence ‘ of course it is possible; but not in the least probable, the case is proved beyond a reasonable doubt, but nothing short of that will suffice”.

It is on the strength of the above-mentioned sources of law that the case of the accused person shall be considered. Questions which arise from the evidence of the State are whether or not it proved its case against the accused persons and, if it did, whether or not its proof of the same is beyond reasonable doubt. Short of that, the accused persons are entitled to their acquittal or may be convicted of an offence which is lesser than that of murder the charge of which the State preferred against them. We proceed to consider the evidence of the State.

The only eye-witness to the events of 12 December, 2021 which the State called is one Sikhangezile Sibanda who runs a shop at Carmen Compound. Her testimony, in simple terms, was that she was coming from the river when she found that there was a commotion at Carmen Compound. She alleged that she found the deceased having an altercation with one Roster. The deceased, she claimed, drew out a knife and stabbed Roster on the latter’s right-hand shoulder. She averred that the accused persons started fighting the deceased. She alleged that they were trying to intervene between the fight of the deceased and Roster who had been stabbed. She said, as they were fighting, she was nursing Roster who had been injured. The accused persons, according to her, were having an altercation with the deceased who was running into Umzingwane River. She said they threw stones and sticks at the deceased. She stated that she was about 40 meters from them when that occurred. She estimated the distance which exists between Carmen Compound and Umzingwane River as being 400 meters. The river, it was her evidence, is a big one. She described the sticks which the accused persons threw at the deceased as having been 2 centimetres in diameter and 2 meters long. The stones which the accused persons used were 15 centimetres in diameter, according to her. The accused persons, she claimed, continued to throw stones and sticks at the deceased who ran away from them as they chased after him. The accused persons, it was her evidence, did not return to Carmen Compound when they pursued him.

The evidence of the witness leaves a lot to be desired. Her initial statement is that the accused persons were fighting with the deceased. Her second statement is that they were trying to intervene between the deceased and Roster. Her third statement is that, as the accused persons and the deceased were fighting, she was attending to the wound of Thobani Khumalo whom the deceased had stabbed. She states that the accused persons threw stones and sticks at the deceased. She did not specify, in her evidence-in-chief, if the stones and sticks landed on the person of the deceased let alone the part of the latter's person which they hit, if ever they did. She only stated, and at our instance, that the second accused person struck the deceased's back once around the waist area with a stone.

The court is left to wonder what she really meant to convey to it. Surprisingly, the State persuades us to believe that unbelievable story as having been well told. We cannot do so given the various positions which she adopted in her evidence.

Section 314 of the Criminal Procedure and Evidence Act remains the State's second way of proving the guilt of the accused persons. The section reads, in the relevant part, as follows:

“(1) In any criminal proceedings, the accused or his legal representative or the prosecutor may admit any fact relevant to the issue and any such admission shall be sufficient evidence of that fact”.

It is on the strength of the contents of the section that the State moved us to admit into the record the evidence of its above-mentioned four witnesses. The admission into the record of the evidence of the witnesses was with the consent of counsel for the accused persons.

The question which begs the answer is whether or not the witnesses' evidence, as admitted into the record, is able to take the case of the State any further than where the first witness left it. Thobani Khumalo's evidence was simply that the deceased stabbed him with a knife and the accused persons chased after the deceased. Admire Ncube states that he went to fish at Umzingwane River and that, as he was fishing, he saw the deceased's body lying down lifeless at the river bank and he reported the matter to the police. Themba Maplanka, a member of the Zimbabwe Republic Police force, states that, on 14 December 2021, he accompanied Doris Loreen Magaya to Umzingwani River to investigate a murder report. His companion and him found the body of the deceased floating in the water with maggots covering the body. Dr Pesanayi, a medical practitioner who was stationed at United Bulawayo Hospitals at

the time, states that he, on 6 January, 2022, did a post mortem of the deceased and recorded his findings in the post mortem report which the State tendered as exhibit 1 in this case.

Nothing therefore turns on the evidence of witnesses for the prosecution. The allegations which the State preferred against them are that they assaulted the deceased with stones and sticks and, in the process, they caused the deceased's death. However, the evidence, as filed of record, does not show that any stone or stick which they had ever landed on the person of the deceased. Sikhangezile Sibanda's statement which is to the effect that the second accused person struck the back of the deceased with a stone around the latter's waist area appears to be an after-thought on her part. If it was not, she would have made mention of that matter in her evidence-in-chief and not as a response to our probe of her testimony. She is, in any event, not a credible witness at all. Her story is fraught with inconsistencies and/or contradictions which make it hard, if not impossible, to believe.

The post-mortem report which the State tendered as part of its evidence in the case does not assist it either. The doctor who examined the remains of the deceased could not ascertain the latter's cause of death. The observed matters leave the case of the prosecution hanging in the air, so to speak.

Whilst the deceased may have died from the assault which the accused persons allegedly perpetrated on him, if they did, the possibility that he died as a result of him having drowned in the flooded river cannot be ruled out. The possibility may be more probable than it is fanciful.

Circumstantial evidence which the prosecution led cannot, in our view, leave only one explanation as having been the cause of the death of the deceased. Proof of a matter on the basis of circumstantial evidence was settled in a number of law text-books and case law authorities. Its meaning and import is that the inference which is sought to be drawn must lead to only one explanation and not more.

In casu, the inference cannot be drawn. Proof of the guilt of the accused persons cannot be established on the basis of circumstantial evidence. It cannot for the simple reason that there is another possible, if not probable, explanation for the death of the deceased.

The State, in its view, failed to link the accused persons to the death of the deceased. In the circumstances of the evidence which it placed before us, it is not necessary for us to consider the defence of the accused persons. That exercise would have been necessary where, at the close of its case, the State had established the guilt of the accused persons. However, where, as *in casu*, its case has fallen to pieces in the manner that it appears in its evidence as filed of record, delving into the respective defences of the accused persons will be an exercise in futility. It will not assist the State to prove their guilt when it failed to do so from the evidence of its witnesses.

The accused persons are, in the premise, found not guilty and are acquitted of the charge.

National Prosecuting Authority, state's legal practitioners

Pundu and Company, 1st accused's legal practitioners

Webb Low & Barry Incorporating Ben Baron & Partners, 2nd accused's legal practitioners

