

THE STATE
vs
GIFT MAHASO

HIGH COURT OF ZIMBABWE
MAWADZE J.
MASVINGO, 27th September, 2021

Criminal: Application for Discharge at close of the Prosecution case

ASSESSORS

1. Mr Mutomba
2. Mr Chikukwa

Ms M. Mutumhe, for the State
J. Mpoperi, for the accused

MAWADZE J: The applicant (hereinafter the accused) made an application in terms of s 198(3) of the Criminal Procedure and Evidence Act [*Cap 9:07*] for a discharge at the close of the prosecution case.

The accused is facing a charge of murder as defined in s 47(1) of the Criminal Law (Codification and Reform) Act [*Chapter 9:07*].

The charge is that on 3 January 2020 at Mtilikwi canal the accused caused the death of Elphas Sengamai by unlawfully and intentionally pushing him into the canal causing him to drown.

The facts surrounding this case are as follows;

The now deceased was aged 38 years. The accused was aged 37 years. They were both part of about 200 temporary sugar cane cutters camped at Kyle Primary School in Hippo Valley. After work they would go to bath at nearby Mtilikwi canal. From the evidence both accused and the now deceased seemed to know each other. No evidence was led as regards any possible dispute between them.

The State case is that on 3 January, 2020 the accused proceeded to the said canal to bath. Later the now deceased and his friend Samuel Zimhunga also proceeded to the same canal to bath.

The uncontroverted evidence is that this Mtilikwi canal is 5 metres wide and 3 metres deep. Its edges are rough and flat. At the material time it was full to capacity and its current very strong. The sugar cane cutters had been advised not to bath inside the canal but would use buckets to fetch water and bath near the canal. They were not allowed to enter into the canal or to swim in it.

The State alleges that as the now deceased was bathing at the canal his friend Samuel Zimhunga went to a nearby bush to relieve himself. It is alleged that upon return Samuel Zimhunga observed the accused approaching the now deceased from behind and grabbing the now deceased's arms. The accused is said to have pushed the now deceased into the canal and in the process the accused also fell into the same canal. He, the accused was rescued by Tryson Chauke and Israel Mushati who reacted to the distress call. The now deceased was swept away and his lifeless body was later retrieved about 1.2 km downstream trapped at Siphon 13 inlet gate. Accused was later arrested.

The accused denies having any hand in the now deceased's death inside the canal.

In his defence outline the accused said contrary to the allegations by the State he, the accused actually went to bath at the canal with the now deceased. The accused said whilst at the said canal it is the now deceased who suggested that both of them should swim in the canal. The accused said in fact the now deceased was the first to dive into the canal and tried to swim across the canal. The accused said the now deceased failed to hold on to a shrub at the edge of the canal and was swept away. The accused said he too was being swept away but was rescued by Tryson Chauke and Israel Mushati.

The accused denied pushing the now deceased into the canal. He said he had no cause to do so. This is the same version the accused gave in his confirmed warned and cautioned statement Exhibit 2.

The evidence of Tryson Chauke and Dr B. Dhlandhlana was admitted in terms of s 314 of the Criminal Procedure and Evidence Act [*Cap 9:07*]. *Viva voce* evidence was led from Samuel Zimhunga, Israel Mushati and the Investigating Officer Ass Inspector Nomore Tembo.

The post mortem examination was done by Dr B. Dhlandhlana and he compiled Exhibit 1 the post mortem report. The cause of the now deceased's death is not in issue. It is drowning.

Tryson Chauke's evidence simply confirms that he and Israel Mushati rescued the accused after which the accused informed him that the now deceased had drowned in the canal.

Israel Mushati just like Tryson Chauke did not witness how the accused and the now deceased ended up inside the canal. He only heard Samuel Zimhunga calling for help saying some people had fallen into the canal. As a result he rushed to the canal with Tryson Chauke and managed to pull the accused out of the water. The accused told them the now deceased had drowned but they failed to locate the now deceased as the current was very strong. He said he never got time to ask the accused what had happened as the accused was whisked away shortly thereafter by an ambulance.

Ass Insp. Nomore Tembo's evidence again does not explain how the now deceased drowned. He was simply told by Samuel Zimhunga what had happened which caused him to arrest the accused. He carried out formal investigations. The accused denied the charge and he is unable to tell which version is possibly true.

It is the evidence of Samuel Zimhunga (Samuel) which is critical to the State case.

Samuel was deceased's friend. He had worked with the now deceased as sugar cane cutters for 3 years. He was not known to the accused.

On 3 January at about 15.00 hrs he said he left their base at Kyle Primary School with the now deceased going to bath at the canal. They had buckets. He said upon arrival at the canal the now deceased and accused exchanged greetings as they seemed to know each other. Accused was already bathing. He said he and the now deceased moved to a different spot from the accused. The now deceased then fetched water from the canal and started to bath. Meanwhile Samuel said he went to relieve himself at a nearby bush and was away for ten to fifteen minutes.

Samuel then explained how he said the accused pushed the now deceased into the canal.

Samuel said when he was about 16 meters from the now deceased he observed the accused walking to where the now deceased was. The accused was not saying anything. According to Samuel the accused approached the now deceased from behind. He said the accused held the now deceased firmly by the shoulders. He heard the now deceased saying to the accused;

“Mahaso, Mahaso release me”

By then he said accused and the now deceased were by the edge of the canal. The accused did not release the grip as the now deceased tried to wriggle free.

Samuel said with some high degree of force the accused pushed the now deceased from the back into the canal. He said the accused also simultaneously fell into the canal probably because he lost his balance.

Samuel said he made a distress call and some two men [Trynos Chauke and Israel Mushati] answered his distress call. They used a stick to pull the accused out of the canal. Samuel continued to run along the canal trying to locate the now deceased to no avail. He then went to advise the management what had happened to the now deceased.

Mr Mpoperi for the accused meticulously cross examined Samuel but he stuck to his story.

Samuel discounted the accused’s version that the now deceased had opted to swim in the canal. As the now deceased’s friend Samuel said he knew the now deceased could not swim. Further, he said the now deceased was not a fool who could opt to swim in such a dangerous big canal which was full to capacity with such a strong current. In any case Samuel said all sugar cane cutters were under strict instructions not to swim in the canal or bath in it but to use buckets.

Samuel denied that there was bad blood between him and the accused and was unaware of any such differences arising from the so called labour dispute. In fact Samuel said the accused was not known to him.

Samuel denied that it is the accused who went to the canal with the now deceased, but insisted that both Samuel and the now deceased found accused already at the canal.

When he was probed as to why the accused would act in the manner alleged Samuel said he would not know as he was unaware of any differences between accused the now deceased or what possibly happened when he was away relieving himself. Samuel said none of them had taken alcohol and that the 200 sugar cane cutters at the school had just finished the day's work after being camped at Kyle Primary School for two weeks.

The application by the accused is informed by the legal position as outlined by GUBBAY C.J. in the case by *State v Kachipare* 1998 (2) ZLR 271 (S). In specific terms the accused's view is that there is no evidence adduced by the State on which a reasonable court acting carefully might properly convict the accused (see *AG v Mzizi* 1991 (2) ZLR 321 at 323 B) and/or that the evidence adduced on behalf of the State mainly from Samuel is manifestly unreliable that no reasonable court could safely act on it (see *AG v Tarwirei* 1997(1) ZLR 575 (S) at 576 G).

As I have already said Samuel stuck to his story. He remained consistent, steadfast and unshaken. If he is to be disbelieved it cannot be on the basis of any contradictions.

I am not persuaded at this stage by *Mr Mpoperi's* argument that Samuel as the only witness should be disbelieved simply because of that. It has not been suggested that other than accused, the now deceased and Samuel there were other persons at the scene during the material time. In any case it is trite that a court can return a verdict of guilty on the basis of a single and credible witness on a charge of murder or any other permissible verdict. If there were other witnesses at the scene the accused is yet to say so.

Samuel cannot be said to have failed to explain how he said the accused pushed the now deceased into the canal. If he is to be disbelieved it cannot be due to want of clarity but other reasons. Samuel clearly explain how he said the accused pushed the now deceased into the canal. He said he was just 16 metres away. It was during daylight. Nothing impaired his vision.

Indeed Samuel could only speculate why the accused also ended up in the canal. His reasoning is that as both accused and the now deceased were at the edge of the canal and as accused used a lot of force to push the now deceased, the accused could also have lost his balance in the process. Such an explanation cannot be said inherently improbable or manifestly impossible.

The concession is however made that in shouting for help Samuel did not say accused had pushed the now deceased into the canal. Instead he simply said people had fallen into the

canal. Further it was shown that in his written statement it is not recorded that he, Samuel heard the now deceased saying the following words;

“Mahaso, Mahaso release me”

In my view at this stage these imperfections would not make his evidence manifestly unreliable.

This is a matter in which the accused is obliged to give his version of events if justice is to be done. Such an approach would not amount to boost the State case at all. The accused had to explain what he said happened and his version should equally be tested in cross examination. As things stand the accused was at the place where the now deceased drowned in the canal. Is the accused disputing that Samuel was also present? Does he dispute that it is Samuel who called for help? Was accused aware of the dangers posed by the canal? How did the accused himself end up in the canal? Was the canal not deep, full to capacity and with a strong current? Were cane cutters allowed to swim in the canal? Above all did the now deceased lost his life as a result of accused’s unlawful and intentional conduct or negligence? Better still could it be that there is no foul play at all.

My respectful view is that a *prima facie* case has been proved by the State.

The cause of death is not in issue. What is contentious is how the now deceased ended up drowning in the canal. Samuel has given his version. What is accused’s evidence?

The application by the accused to be discharged at the close of the prosecution case cannot succeed and is accordingly dismissed.

National Prosecuting Authority, counsel for the State.

Saratoga, Makausi Law Chambers, *pro deo* counsel for the accused (applicant)