

THE STATE

VERSUS

MABUTHO MTAMBO

AND

LANGELIHLE MOYO

AND

PHIKISANI NDLOVU

IN THE HIGH COURT OF ZIMBABWE
MATHONSI J
BULAWAYO 15 NOVEMBER 2011

Mr W. Mabhaudhi for the state
Mr H. Malinga for the 1st accused
Mr H. Shenje for the 2nd accused
Mr S. Sibanda for the 3rd accused

Criminal Trial

MATHONSI J: The three accused persons are charged with murder, the allegations being that on 19 August 2011 at Britwell North Mine in Siganda, they wrongfully, unlawfully and intentionally killed Christopher Mudenda (the deceased).

The Accused 1 and 2 pleaded not guilty to murder but offered a limited plea of guilty to culpable homicide while Accused 3 pleaded not guilty and did not offer a limited plea like his co-accused.

The allegations are that Accused 3, who owns the mine in question, was missing his gold ore and set about making inquiries as to who had stolen it. He enlisted the assistance of Accused 1 and 2, both employees of his who were security guards at the mine, and state witnesses 2, Simiso Nxumalo, who was employed as the mine foreman, to track down the suspects. They suspected that the deceased was involved in the theft.

It is alleged that they drove to the deceased's homestead and apprehended him. On the way back to the mine, they tied the deceased's hands with shoe laces and brought him to the mine where he was made to lie down and the accused persons assaulted him using switches. At some stage the deceased broke loose and fled into the bush but the Accused 3 instructed Accused 1 and 2 to give chase and apprehend him.

It is further alleged that when Accused 1 and 2 caught up with the deceased, they further assaulted him until he fainted. They could not bring him back to the mine camp for that reason. The accused persons took the deceased to Sikhuni Clinic where he pronounced dead on arrival.

In his defence outline Accused 1 stated that himself, Accused 2 and 3 collected the deceased and took him to the mine intending to interrogate him about the theft which had occurred at the mine. Accused 2 tied his hands with shoe laces and the accused persons assaulted him on the buttocks and back with switches. The assault did not take long and the force applied was minimal.

He stated further that when they stopped the assault, the deceased managed to break free and fled but they gave chase. When they caught up with him they tripped him to the ground. The deceased lost consciousness and was pronounced dead on arrival at Sikhuni Clinic.

Accused 2 stated in his defence outline that he and his co-accused sought after the deceased intending to investigate a case of theft of gold ore. He stated that after arresting the deceased they took him to the mine where they assaulted him on the back and buttocks with sticks using moderate force. The assault was deliberately directed at the back and buttocks in order to inflict minimal pain and not to kill the deceased.

He admitted that he conducted himself "recklessly" by assaulting the deceased without regard to the possibility of serious injury arising from his actions.

Accused 3 submitted a lengthy defence outline. The import of it is that he was informed by his foreman, Simiso Nxumalo, that some gold ore had been stolen from the mine. In the company of his co-accused and Nxumalo they proceeded to question the deceased who admitted having stolen the gold ore and they drove back to the mine.

Accused 3 stated that on the way back, one of his co-accused who were seated with the deceased, tied him with a shoe lace unknown to him and without his instructions. He claimed that they were using a van with himself and Nxumalo seated in the cabin while Accused 1, 2 and the deceased sat at the back in the load box.

On arrival at the mine, he left them by the vehicle as he proceeded to interrogate Abednego Moyo and to drink water. When he returned to the vehicle, he found Accused 1 and 2 assaulting the deceased with switches as he lay on the ground. He did not condone the assault and ordered the two to stop it and asked the deceased to get up.

The deceased offered him a goat as compensation for his gold ore which he could not accept. He then decided to take the deceased to the police at Siganda but as he turned his back to get into the car the deceased took to his heels with Accused 1 and 2 in hot pursuit. He denied ever instructing Accused 1 and 2 to chase or assault the deceased but stated that he was the voice of reason stopping the assault.

Accused 1 later came running to report that the deceased had fainted and wanted water to resuscitate him. Upon arrival at the scene he found the deceased lying down unconscious. Accused 3 denied ever assaulting the deceased.

The state led evidence from two witnesses namely Abednego Moyo and Simiso Nxumalo.

It was the evidence of Abednego Moyo that he was employed by the Accused 3 at his mine as a gold digger and had been so employed for three months when the incident occurred. For that reason he did not know most employees at the mine and had never seen accused 1 and 2 until 19 august 2010.

On that date he was at work and was preparing food at the mine camp when at about 1100 hours Accused 3 arrived in the company of Accused 1 and 2, Simiso Nxumalo and the deceased. They were travelling in Accused 3's motor vehicle which was a black saloon in the mould of a Toyota corolla.

After alighting from the vehicle they came to where he was by the fire and questioned him about the missing gold ore. The witness says he told Accused 3 that the gold ore had been taken by the deceased and some other workmates. Whereupon the Accused 3 turned to the

deceased inquiring why he had taken the ore. He ordered Accused 1 and 2 to fetch switches and beat up the deceased which they did.

According to the witness, the deceased was made to lie on the ground and as Accused 1 and 2 assaulted him the Accused 3, who had been standing by the side of the witness, also approached and kicked the deceased once on the rib. Accused 1 and 2 beat up the deceased for a period of about 10 minutes.

Accused 3 then ordered Accused 1 and 2 to stop the assault and he asked the deceased how he was going to compensate him for his gold ore. When the deceased offered a goat the Accused 3 retorted that the deceased was mad because the goat was only worth US\$20-00 when his stolen gold was about 50g.

The switches which Accused 1 and 2 had used to assault the deceased had broken during the first assault. The Accused 3 then ordered them to fetch fresh switches and beat up the deceased for the last time before they could take him to the police

The witness stated that when the deceased was being assaulted he had his hands tied to the front with a shoe lace and was made to lie on the ground facing down. As Accused 1 and 2 started to beat him the second time, the shoe lace had become loose, which enabled the deceased to stand up and flee into the bush. When the deceased had run a distance of about 20m, the Accused 3 instructed Accused 1 and 2 to chase after him and apprehend him and they complied.

After a while they heard the deceased screaming from the direction he had fled. Later Accused 3 and Simiso Nxumalo followed them to investigate what had transpired. After a while, Accused 1 came with a 2 litre container asking for water and this was after Accused 3 and Simiso Nxumalo had already followed into the bush.

Sometime later Accused 3 also returned to the mine camp driving his vehicle and he was also given some water in a 5 litre container and he went away. When Accused 1 returned again for more water, he told this witness and others that the deceased was being pretentious and that they should have assaulted him with a pick handle instead of switches.

The witness and other workers later followed the accused persons into the bush only to find that the deceased was already dead. They assisted the accused persons to carry him into the vehicle before he was driven away in the direction of Sikhuni Clinic.

The witness stated that the switches used to assault the deceased were of medium size and not the type that could kill a person but just enough to discipline him. Even as the fled the scene, he did not have any visible injuries.

This witness gave his evidence very well, his demeanor was perfect, he was confident and his testimony was very clear. His delivery also had an air of dignity and he was not shaken at all under cross examination. He did not attempt to exaggerate anything as shown by his readiness to concede that the switches used to assault the deceased were not the type that could have killed him and that the Accused 3 only kicked the deceased once.

We readily accept his evidence.

Simiso Nxumalo, was the mine foreman employed by the Accused 3. This witness was present when the deceased was abducted at his homestead, tied with a shoe lace and taken to the mine where he was assaulted. He was therefore warned as a suspect witness according to law.

His evidence is substantially similar to and corroborative to that of the first witness. He confirmed that when they went to collect the deceased they were using a saloon family vehicle of the make of a Nissan sunny and certainly not a van.

Simiso confirmed that either Accused 1 or 2 tied the deceased with a shoe lace as they sat with him in the back seat of the vehicle while himself and Accused 3, who was driving were sitting in front.

He confirmed that when they got to the mine, the deceased was ordered to lie down and Accused 3 instructed that he be thrashed with switches by Accused 1 and 2 which they did. As he moved away to light a cigarette the deceased cried out to him as he was 9 paces away asking him to come to his rescue. This prompted him to plead with the assailants to stop the assault which they did.

This witness confirmed that Accused 3 present at the scene of the assault and that when the first assault stopped Accused 3 demanded compensation from the deceased. When he was

offered a goat Accused 3 was not impressed and ordered the Accused 1 and 2 to fetch more switches and assault him more. When they were assaulting him the second time, the deceased escaped. The witness said about 3 minutes had elapsed after the deceased started running when Accused 3 ordered Accused 1 and 2 to give chase, apprehend him so that they could take him to the police station.

He said the scream made by the deceased from the bush was heard after about 20 to 25 minutes after he had run away. When they followed into the bush they found that the deceased had died.

This witness prevaricated as to what report they had given at the clinic and at the police station on how the deceased had died saying that at that stage the police had not asked a lot of questions.

This witness could have easily been an accomplice and charged with the accused persons given his active participation in the events which unfolded on the day in question. There are therefore, inherent dangers of relying on his testimony which must therefore be approached with caution. We are mindful of the fact that he may have wished to falsely implicate others in order to shield himself away from prosecution.

Having warned ourselves of such dangers we are satisfied that such dangers have been eliminated especially considering that most of his testimony has been corroborated by not only the first witness but also, to a large extent, by the accused persons themselves.

All these factors, taken together with the fact that his demeanor was very good and that his testimony was clear and convincing, make us accept his evidence. His prevarication about the report made to the police, may have been influenced by the fact that he was also involved in making the report and was reluctant to reveal the true nature of the report. However it does not take away the reliability of his evidence on what transpired before that.

The accused persons also gave evidence. While admitting that he assaulted the deceased, the Accused 1 tried very hard to down play the seriousness of the assault. He was also at pains to exonerate the Accused 3 and tried to give an impression that himself and Accused 2 took it upon themselves to fetch switches, order the deceased to lie down and

assault him without the authority of the Accused 3 even as Accused 3 was 9 paces away from the place of the assault. He said he struck the deceased 7 times as he lay on the ground.

Accused 1 also testified that they had chased after the deceased as he fled on their own without any instructions from the Accused 3. This sharply contradicted what Accused 2 and 3 themselves said as these two readily accepted that Accused 3 gave the instruction for the deceased to pursued.

Accused 1 tried to give an impression that the motor vehicle that they used on the day in question was a van presumably because Accused 3 had stated so in his defence outline. This was proved to be false.

Accused 1 told the court that when he caught up with the deceased, he tripped him to the ground and he fell on a rocky area and hurt himself which caused him to scream. He denied that the deceased was assaulted at that place. It was his evidence that the deceased was still able to talk at that point and that he requested some water to drink prompting them to fetch gallons and gallons of water from the mine camp.

Accused 2 stated that when they got to the mine, the Accused 3 had left them and gone to interview Abednego Moyo a distance away and he only returned to where they were and found that they had assaulted the deceased. He agreed that the deceased had co-operated with them when he was handcuffed and when he was ordered to lie down, but stated that they assaulted him because he was being aggressive. They wanted to discipline him. He struck the deceased 10 times with a switch. Accused 2 confirmed that they only chased after the deceased after Accused 3 had instructed them to do so.

Accused 3 stated that he was angry after learning that his gold ore had been stolen. He first tried to look for a particular neighbourhood watch committee member to assist him apprehend the culprits. He could not find that member but could not seek assistance from any other neighbourhood watch committee member because he knew that the rest were elderly people who hated him. He then decided to use his own security guards in the form of Accused 1 and 2 whom he wanted to act as his body guards to protect him as he went about investigating the theft.

Accused 3 stated that his intention was to apprehend the culprits and then surrender them to the police. His reason for not making a report to the police and letting them do that task, was because he did not have enough fuel.

When the deceased had been apprehended, he had taken him to his mine because he had implicated Abednego Moyo. He wanted to confront Abednego Moyo and then take the two of them to the police. According to him, when the deceased was assaulted he was not present after he had left to interview Abednego Moyo and to drink water. He denied ever kicking the deceased. He also denied ever giving instructions that the deceased be assaulted although he seems to corroborate all the state witnesses except for the instruction to assault.

Accused 3 presented himself as the saviour of the deceased who came to the rescue of the deceased as his security guards were baying for his blood. He confirmed that it is him who instructed Accused 1 and 2 to pursue the deceased as he fled into the bush. He says when he heard the scream he assumed Accused 1 and 2 were assaulting the deceased again and this prompted him to instruct Simiso Nxumalo to follow them as he feared that they would end up killing the deceased.

Unfortunately, when Simiso Nxumalo intervened it was already too late because the deceased had been fatally assaulted.

All the accused persons were not credible witnesses. Accused 1 was under the spell of Accused 3 who is his brother and lifelong benefactor. He says he is the person he looks up to for help each time he has a problem. This explains why he was hell-bent to take the flake for everything arising from the demise of the deceased while shielding away Accused 3.

Accused 2 also tried hard to exculpate Accused 3 and not himself. He claimed that they assaulted the deceased, in the presence of their boss, of their own volition. We find this extremely unlikely. The manner in which they stood akimbo as the deceased fled without doing anything, until Accused 3 bellowed the instruction that they give chase, exposes Accused 1 and 2 as Accused 3's foot soldiers who acted only on the instructions of the Accused 3.

We therefore find as proved that-

- (1) the three accused persons acted in concert when they went to apprehend the deceased at his homestead and caused him to sit in between Accused 1 and 2 in the vehicle.

- (2) they acted in concert when they tied his hands with a shoe lace accusing him of having stolen Accused 3's gold ore.
- (3) Accused 3 was a very bitter and angry man, as he had lost a considerable amount of money.
- (4) they acted together in causing the deceased to lie on his tummy on the ground and assaulted him.
- (5) they were acting together when they chased the deceased into the bush to apprehend him.

The deceased died as a result of injuries sustained as a result of the assault perpetrated on him by the Accused 1 and 2 during the time that he was in the custody of the three accused persons.

Accused 3 presented a defence that he dissociated himself through out from the conduct of the Accused 1 and 2. The state witnesses we have already believed stated that not only did Accused 3 give orders for the deceased to be assaulted, he also kicked the deceased once.

In addition to that, we draw attention to the provisions of s196 of the Criminal Law Code [Chapter 9:23] which provides:

- “(1) Subject to this section where-
 - (a) 2 or more persons knowingly associate with each other with the intention that each or any of them shall commit or be prepared to commit any crime; and
 - (b) any one of the persons referred to in paragraph (a) (“ the actual perpetrator”) commits the crime; and
 - (c) anyone of the persons referred to in paragraph (a) other than the actual perpetrator (“the co-perpetrator”) is present with the actual perpetrator during the commission of the crime;The conduct of the actual perpetrator shall be deemed also to be the conduct of every co-perpetrator, whether or not the conduct of the co-perpetrator contributed directly in any way to the commission of the crime by the actual perpetrator.
- (2) If the state has established that 2 or more persons
 - (a) were associated together in any conduct that is preparatory to the conduct which result in the crime for which they are charged; or
 - (b) engaged in any criminal behaviour as a team or group prior to the conduct which resulted in the crime for which they are charged;

and that they were present at or in the immediate vicinity of the scene of the crime in circumstances which implicate them directly or indirectly in the commission of that crime, then it shall be presumed, unless the contrary is shown, that-

(c) they knowingly associated with each other for a criminal purpose;”

Looking at this provision, Accused 3 cannot escape liability for the conduct of Accused 1 and 2 which is imputed upon him as well.

The final issue to be determined is whether the state has proved a case of murder. The evidence led on behalf of the state is to the effect that the accused persons thrashed the deceased using switches which could not be expected to cause his death. The witnesses said they wanted to force the deceased to confess and when he confessed they wanted him to offer more than the goat that he offered. Eventually they would take him to the police.

We do not have any reliable evidence of what transpired in the bush when Accused 1 and 2 caught up with the deceased. There exists a lingering doubt as to whether they assaulted him using different weapons from the switches that had been used earlier or that he sustained fatal injuries due to the fall. That doubt must certainly benefit the Accused persons.

The doctor who conducted the post mortem report observed the following marks of violence;

- “(a) Multiple bruises with whip lashes all over the body especially the back
- (b) Blood from the tongue, mouth and nose.”

He concluded that the cause of death was multiple injuries and multiple assaults.

In our view there is no evidence upon which we can safely convict the accused persons of murder with constructive intent.

What we have is a case of accidental or negligent killing as shown by the manner in which the accused persons desperately tried to revive the deceased.

In the result, all accused persons are found not guilty and acquitted of murder. They are all found guilty of culpable homicide.

Reasons for sentence

In considering sentence we have taken into account all that has been said in mitigation. All accused persons are first offenders.

All of them are youthful persons. Accused 1 is only 20 years old, Accused 2 22 and Accused 3 27 years old.

Although young Accused 3 has done very well for himself and the surrounding community as he employs about a 100 people.

This offence will therefore disturb this project. Accused 3 has two wives and 2 young children.

We consider that compensation has been paid to the family of the deceased in the form of US\$10 000-00 and a beast in order to appease the family.

The deceased was certainly not a saint. He had stolen gold ore and was unable to fully compensate for it. Accused 3 has suffered double loss.

We are mindful of the fact that not only have you lost your gold ore you have also compensated the family large sums of money which we cannot ignore.

This was an accidental killing as opposed to a deliberate one. You tried to render first aid to no avail and co-operated with the law enforcement agents. You have spent sometime in custody, about 8 months while awaiting trial.

Against that should be considered that a precious life was unnecessarily lost under circumstances which could have been avoided.

You took the law into your own hands and decided to engage in vigilante justice which should be suppressed at all costs. This country should pride itself for the respect of the rule of law. We cannot allow gangs of people to patrol villages want only apprehending people and meting out their own form of justice. That is dangerous and unacceptable.

There is therefore a need to remind communities that human life must be respected and that law enforcement agents must be summoned whenever there is a problem, instead of resorting to kangaroo courts at the mines.

Sentence

7 years imprisonment of which 3 years imprisonment is suspended for 5 years on condition that you do not during that period commit an offence of which violence is an element and for which you are sentenced to a term of imprisonment without the option of a fine.

Effective: 4 years imprisonment.

Criminal Division, Attorney General's office, the state's legal practitioners

Job Sibanda and Associates, 1st accused's legal practitioners

Shenje and company, 2nd accused's legal practitioners

SKM Sibanda and partners, 3rd accused's legal practitioners