THE STATE

Versus

ALBERT NCUBE

AND

ROBERT NYATHI

IN THE HIGH COURT OF ZIMBABWE
CHEDA J
BULAWAYO 22 MARCH 2005 AND 7 MARCH 2013

Mr Mkhwananzi and Mr T. Hove for the state
Mr E. Marondedze and Mr B. Ndove for both accused

Criminal Trial (Application for a discharge at the close of the State case)

CHEDA J: This is an application for a discharge at the close of the state case.

The accused were charged with one count of kidnapping and another of murder. They pleaded not guilty to both counts.

In relation to count one, the allegations against them is that on the 3rd March 2001 at Silverstream Farm, Nyamandlovu, in Matebeleland North Province, they wrongfully, unlawfully and intentionally kidnapped one, Forster Moyo and tied him to a tree for two hours, thereby, depriving him of his liberty and causing him some injuries.

With regards to count two it is alleged that on the 4th March 2001 at Silverstream Farm, Nyamandlovu, in Matebeleland North Province they wrongfully, unlawfully and intentionally killed and murdered one Elizabeth Gloria Olds [hereinafter referred to as "Olds"].

Count one

The State called Forster Moyo [hereinafter referred to as "Moyo"]. His evidence is that at the relevant period he had just been employed by Olds for three months at the said farm. On the 3rd March in the afternoon, while he was passing through his employer's homestead he was stopped by two men who apparently had been lying on the ground in the yard. They

forcibly took him away into the bush where they tied his hands behind a tree and also tied his legs together. He was made to sit in that position with his legs stretched. They left him in that position for an hour. These two men asked him about the set-up at the farm, that is the number of whites in the farm, where the money was kept, the number of guns and where these guns were being kept. He told them that there was one white person, but, he had no knowledge of the guns and money.

After an hour, these men came back and released him with a warning not to tell anybody. He, however, could not keep his ordeal to himself and told one, Fanuel. He then retired to bed.

In the early hours of the 4th March 2001, at about 0400 hours he had sounds of gunfire. He stated that "after hearing the gunshot, I then knew that those were the people who had killed."

It was further his evidence that he was later called by the Investigation Officer George Levison Ngwenya [hereinafter referred to as "Ngwenya"] to identify the accused at Bulawayo Central Police Station. He told the court that Ngwenya, said "we have apprehended those people, we want you to identify them". Ngwenya told him that the people were in a straight line and he told him to go straight and touch him. He then went straight and touched accused one.

This witness did not see who shot Olds as he was asleep at the time. He, however, concluded that it was the accused persons who had killed her as they had come to him the previous day asking about the activities at the farm, the number of white residents, the number of guns and money.

In his evidence in chief and under cross-examination he insisted that it was the accused who had killed Olds. Under cross-examination he admitted that his conclusion was based on suspicion because of his encounter with them the previous day. Further, under cross-examination he told the court that his captors threatened him with death, but, later on changed his story and stated that although they did not threaten him, he came to that conclusion because of fear.

With regards to accused one's identity his evidence was that, he observed that he had short hair and was dark in complexion although he was now lighter because he was now applying skin lightening cream. He admitted that he was in a state of shock at the time. He conceded that he did not take much notice of his facial features, but his complexion and mouthstache.

It is further his evidence that prior to the identification parade Ngwenya took him and stayed with him for nearly two weeks. This was at Ngwenya's expense. During the identification parade he saw people standing in a line, and Ngwenya had told him that accused one was there and that he should go straight to him without moving from one suspect to the other. He also told the court that accused one was dressed differently from others. It is also his evidence that Ngwenya had told him that people who had committed murder where amongst those that had been shown to him.

When pointed out by the defence counsel that accused one was in fact lighter he maintained that it was him although his captor was dark. He insisted that it was accused one who had threatened him with death.

This witness also told the court that before he identified accused one, he was taken up to an office and was told to pick up a suspect before he went down to where the identification parade was being conducted.

The next witness was Ngwenya. His evidence was that he is attached to the Investigating office section in the Zimbabwe Republic Police. At the relevant period he was stationed at Nyamandlovu Police Station. He together with Detective Inspector Hlomayi [hereinafter referred to as "Hlomayi"] attended the murder scene. On the 29th March 2001 he was called to the Criminal Investigation Department, Bulawayo and was part of the team that went to Nyamandlovu to collect Moyo in order for him to participate in the identification parade. Upon arrival he handed Moyo to Detective Inspector Malunjwa. Ngwenya was made to guard Moyo in a different room during the identification process. He did not see what transpired during the identification parade. According to him, Moyo was brought to the identification parade in order to identify the people who had kidnapped him. He did not see Moyo again until he met him in court for trial.

He further told the court that accused persons were arrested during a stock theft investigation as they found accused two in possession of a camouflage uniform which they linked to the one which one of the kidnappers was putting on. The weapon that was allegedly used either for the stock theft or murder case was not recovered.

Under cross-examination he told the court that he indeed kept Moyo in his custody as there were no witness facilities at the police station. He, however, denied telling the witness that the reason why he wanted him to participate in the identification parade was in order for him to specifically indentify suspects whom they had already arrested and that the said suspects were in the group from which he was to select from.

The following points are pertinent in his evidence. When being questioned by the defence, he stated that Moyo was lying if he stated that:

(1) he had told him that the suspects were amongst the people in the parade and that he should go straight to accused one and hold him. (my emphasis)

(2) he denied that he was present when Moyo was supposedly told anything by anyone during the identification parade, and

(3) he admitted that no one was seen killing the deceased.

In addition, he stated that what led to accused two's arrest was because of his footprints which led to his motor vehicle which was being pushed by villagers. It is this evidence which had led to his arrest in connection with a charge of stock theft. Both accused were arrested for stock theft, charged but were acquitted. Under cross-examination he admitted that the reason which led to accused's arrest was mere suspicion as there was no evidence which linked them to the said offence.

The next witness was Detective Chief Inspector Stephen Mpofu, [hereinafter referred to as "Mpofu"]. He told the court that he conducted an identification parade on the 29th March 2001 where accused one was a suspect. He told the court that there were nine people on parade who were not similarly dressed. He explained to them that there was going to be one witness only.

He further stated that he explained to Moyo that "the person he may have seen at the scene could be amongst the people he is seeing" He also told Moyo that he should walk from

left to right and the moment he got to the person concerned he should touch him. Moyo indeed walked from left to right and when he got to Accused one he touched him and a photograph was taken.

After the photograph was taken of accused one he asked him if he had any complainants to which he stated that he had none.

The last witness was Collen Dhlamini, who is also a member of the police force and was a photographer at the time. His evidence was solely to do with the photography process under instructions from Mpofu.

The State then closed its case.

The defence applied for a discharge at the close of the State Counsel, a procedure provided for in Section 198 (3) of the Criminal Procedure and Evidence Act [Chapter 9:07] which reads:

> "Section 198 **Conduct of Trial**
> (3) If at the close of the case for the prosecution the court considers that there is no evidence that the accused committed the offence charged in the indictment, summons or charge or any other offence of which he might be convicted thereon, it shall return a verdict of not guilty."

The question that falls for determination is whether or not the State has proved a *prima facie* case against the accused to justify accused being placed on their defences.

An application of this nature begs the question; Is there any evidence of the commission of the offence upon which a reasonable man might convict the accused, see *S v Hartlebury and another* 1985 (1) ZLR 1 (HC). In that case McNALLY J (as he then was) clearly laid down three instances where an accused should be discharged at the close of the state case, where:

(a) there is no evidence to prove an essential element of the offence, see *AG v Bvuma and another* 1987 (2) ZLR 96(S);

(b) there is no evidence on which a reasonable court, acting carefully, might properly convict, see *AG v Mzizi* 1991 (2) ZLR 321 (S) at 323B;

(c) the evidence adduced by the prosecution is so discredited or manifestly unreliable that no reasonable court could safely act upon it, see *AG v Tarwirei* 1997(1) ZLR 575 (S) at 576G.

This approach has been adopted in various cases in our jurisdiction and infact is the current correct legal position, see *S v Tsvangirai and Others* HH-119-03. Now turning to the facts in *casu,* the State concedes that on the charge of murder, there is no witness therefore it sought to rely on circumstantial evidence. It is in this context that accused one is said to have been involved in the kidnapping of Moyo. It is worthy of note that the state's star witness Moyo, completely absolved accused two as he stated that he was not one of the people who kidnapped him and was not at the identification parade.

Moyo's evidence was pregnant with inconsistancies and contradictions *vis-a-vis* other witnesses. It is his evidence that he was with his assailants in the afternoon and had a good look at them. However, when an opportunity to identify them or at least one of them on the 12th March 2001 at Silverstream Farm, Nyamandlovu availed itself he could not do so, despite the fact that the incident was still fresh in his mind.

It is submitted by the State that accused one was identified through a properly conducted identification parade process. It is essential that I now examine the circumstances surrounding this process. According to Moyo he was kept at Ngwenya's house for almost two weeks, at Ngwenya's expense prior to the identification parade.

The inescapable question at this juncture is, why would a police officer go out of his way to host a witness under those circumstances. The most important factor, however, is the contradiction between Moyo on one hand and two police officers, Ngwenya and Mpofu on the other. Moyo told the court that when he got to the office, Ngwenya told him that <u>they had arrested the people who had kidnapped him and were in the parade</u> (my emphasis). As a result of this information he went straight to accused one and touched him. Ngwenya denies having spoken to him about the suspects or about how he was expected to behave at the parade. Mpofu on the other hand told the court that Moyo approached the parade from left to right and he did not tell him that the suspects were definitely in the parade but that <u>they maybe there.</u> (my emphasis)

This is a clear contradiction which goes to the material and root of the matter. One wonders why three people, present at the same time and during the same incident would come out with three different versions of what took place. It is strange that there can be three

different truths on the same incident. Infact this is impossible. My conclusion is that f*alsus in uno, falsus omnibus* (false in one thing, false in everything). The State is basing its case on circumstantial evidence. This is basically that:

(1) first accused was seen by Moyo in the vicinity of the murder scene and that he is one of the two people who kidnapped him;
(2) accused one was identified by Moyo at the identification parade;
(3) accused two's motor vehicle tyre marks were seen sometime after the murder;
(4) the cartridges of the ammunition of the firearm that was picked up at the scene of the murder is similar to the cartridges of the ammunition that was picked up at the scene where a bull was killed; and
(5) that accused one was found in possession of an army uniform

I now move on to examine the above points as raised by the defence counsel.

1. **Accused one at the scene of the murder**

Moyo's evidence is that he saw accused one in the company of another man when they were kidnapped him. He later identified accused one at the identification parade, but, emphatically said that accused two was not the man he had seen with accused one. He admitted that during the kidnapping he was terrified and confused.

2. **Identification Parade**

At the identification parade, Ngwenya told him what to do after hosting him in his house for nearly two weeks. He identified accused one by his complexion.

In my view this type of identification is faulty in that Moyo did not have time to observe his assailants due to his mental state, that he was told that the suspects were present in the parade and that accused one was not dressed in similar clothes with others. These courts have a defined guideline with regards to identification of suspects. Due to the possibility of mistakes I find the principles laid down in the case of *Mutters & Anor* v *S* S-66-89 and *Makoni & Ors* v *S* S-67-89 binding. I also find the remarks by HOLMES JA in *S v Mthetwa* 1972 (3) SA 766 at 768 A-C persuasive where the learned Judge sated:

> "Because of the fallibility of human observation, evidence of identification is approached by the courts with some caution. It is not enough for the identifying witness to be honest; the reliability of his observation must also be tested. This depends on various factors such as lighting, visibility and eyesight; the proximity of the witness; his opportunity for observation, both as to time and situation; the extent of his prior knowledge of the accused; the mobility of the scene; corroboration; suggestibility; the accused's face, voice, build, gait and dress; the result of identification parades, if any; and of course the evidence by or on behalf of the accused. The list is not exhaustive. These factors, or such of them as are applicable in a particular case, are not individually decisive, but must be weighed against the other, in the light of the totality of the evidence and the probabilities."

Infact this is the approach adopted in *Mutters and another and Makoni and others v S (supra).* The relevant questions that the court should ask itself include the following –

a) For what amount of time did the witness have the accused under observation?
b) What was the distance between the witness and the accused at the time of observation?
c) What were the lighting conditions at the time?
d) Were there any objects in the way which would have prevented or obscured observation?
e) Does the witness have good or poor eyesight? Does he wear glasses and did he have them on at the time?
f) Did the witness see clearly the accused's face or only the rest of his body?
g) Had the witness known the accused previously and if he had, how well had he known him?
h) If the accused has no distinctive facial or other features, how can the witness be certain of the identification?

3. **Accused two's motor vehicle tyre marks**

Accused two was implicated in this matter on the basis that his motor vehicle tyre marks had been seen where a bull had been killed. Both accused were arraigned before the courts but were acquitted. No other evidence with regards to the tyre marks was produced. In my view identification of an accused on the basis of footprints or even tyre marks should specify the features of those marks or prints and the strength of the inference to be drawn should

depend on the degree of accurate detail to be ascribed of the total combination, see *R v Madesane* 1932 TPD 165 at 166. It is for that reason that the state failed to secure a conviction for the charge of stock theft. That evidence was not found to be acceptable then and it is indeed not acceptable now as it falls far short of the principles in *Madesane* case (*supra).*

4. **Cartridges found at the scene**

Moyo's evidence is that accused one was armed with an AK assault rifle. The cartridges picked up at the murder scene and at the stock theft scene are similar. However, the evidence led in court by Ngwenya is that the type of ammunition they recovered from both scenes were similar. Under cross-examination he conceded that the said ammunition could have been fired from any of the following rifles, AKM, SKS, and AK Yugoslavia. In view of this, it is clear that there is no safety in concluding that the cartridges found at the murder scene were from accused one's AK rifle which Moyo says accused 1 was armed with.

5. **Possession of an army uniform**

Accused one admitted that upon his retirement from the army he was allowed to take his army uniform. The army uniform was not produced in court and it was also uncontroverted that many people including serving army officers are using their uniforms. There is therefore no legal basis to find that it is the same uniform one of the perpetrators was putting on.

Mpofu conceded the following facts during cross-examination:

(1) that there were 9 people who participated in the parade and accused one was the 6th in that line;

(2) that accused one was the only one from the cells. (he was obviously not well turned out);

(3) that he told Moyo that one of the suspects may be in the parade, and

(4) that it was possible for someone to see what was going on at the parade ground from the office where Moyo and Ngwenya were.

His evidence is a serious, major and material contradiction to that of Ngwenya

and Moyo. As already pointed out *(supra)* one or all of them are not being truthful or are genuinely mistaken about what actually transpired as state before. It is impossible to have three different truths about one incident.

The state case hinges its case on circumstantial evidence. Our law with regards to circumstantial evidence was ably laid down in the celebrated case of *R v Blom 1939 AD 188* at 202 – 203. The learned Judge, WATERMEYER JA stated:

> "In reasoning by inference there are two cardinal rules of logic which cannot be ignored.
> (1) The inference sought to be drawn must be consistent with all the proved facts. If it is not, the inference cannot be drawn.
> (2) the proved facts should be such that they exclude every reasonable inference from them save the one sought to be drawn.
> If they do not exclude other reasonable inferences, then there must be a doubt whether the inference sought to be drawn is correct."

The cogency of circumstantial evidence usually arises from the number of independent circumstantial evidence which all point to the same conclusion, see Hoffman – *South African Law of Evidence* 2nd Ed. P423. The inference drown from those circumstances must exclude all other reasonable inferences and a distinction should be made between inference and conjecture or speculation.

It is now settled law in our jurisdiction, that where at the end of the state case, there is no evidence upon which a reasonable court might convict, the court has no discretion, it must discharge the accused, see *S v Kachipere* 1998 (2) ZLR 271(S) at 276G where GUBBAY C J remarked:-

> "Hence, so far as the law in Zimbabwe is concerned, there is no longer any controversy as to whether a court may properly refrain from exercising its discretion in favour of the accused, if at the close of the case for the prosecution it has reason to suppose that the inadequate evidence adduced by the State might be supplemented by defence evidence." See also *S* v *Tsvangirai (supra)*

I must now consider the evidence presented by the State in this matter. There is no evidence proven beyond reasonable doubt that firstly, accused two was involved in either count. Accused one was poorly identified due to the flawed identification process as there are glaring material contradictions by the state witnesses.

This has led to the witnesses being discredited to an extent that they cannot be relied upon. The State has, therefore, failed to lay sufficient ground for the justification of putting accused on their defences.

As the State has in my view failed to make a *prima facie* case against accused, it cannot be allowed to proceed to a defence case in the vain hope that its otherwise weak case may be supplemented by the defence. The accused can not be put on their defence with a calculated view of bolstering the State case. The onus of proof on the prosecution remains very high and will always be within the state's enclosure. The State cannot hope to secure a conviction on the basis of hoping that accused may implicate each other under cross-examination.

In conclusion, I am overly persuaded by the defence's argument that there is no evidence which a reasonable court acting carefully might properly convict the accused.

In light of the above the only irresistible conclusion I come to is to grant the application and both accused are acquitted on both charges.

Criminal Division, Attorney General's Office, applicant's legal practitioners
Marondedze, Mukuku, Ndove and Partners, respondents' legal practitioners