

THE STATE

Versus

ENOCK NCUBE

IN THE HIGH COURT OF ZIMBABWE
MAKONESE J with Assessors Mrs Moyo and Mrs Mashengele
BULAWAYO 30 & 31 JANUARY 2018

Miss S. Ndlovu for the state
T. Dube for the accused

MAKONESE J: The accused person has been arraigned in this court on a charge of murder in contravention of section 47 of the Criminal Law (Codification and Reform) Act (Chapter 9:23). The state alleges that on the on the 5th of September 2011, and at Imvelo Ranching Compound, Plumtree in the Mangwe District, the accused unlawfully and intentionally stabbed and killed Norman Maseko, a male adult aged 25 years at the time of his death. The accused pleads not guilty to the charge. In his defence outline, accused avers that on the day in question he was indeed at Imvelo Farm where there was a party being hosted by one Misheck Sibanda. As the night progressed copious amounts of alcohol were consumed by the accused, the deceased and other persons. Accused was involved in an altercation with one Mandlenkosi Maphosa. Accused admits that he was involved in a fist fight with Mandlenkosi. The fight was stopped by Misheck Sibanda. Accused alleges that he was thereafter assaulted by several persons, before he fled the scene. Accused denies stabbing the deceased and denies ever engaging in an exchange of blows with the deceased. Accused further denies ever carrying a knife on the day in question. His version is that deceased was stabbed by someone else as there were several other persons involved in the scuffle. As regards the knife which was allegedly used in the commission of the crime, accused stated that he had no knowledge of such knife.

The state tendered the outline of the state case into the record of proceedings as exhibit 1. The affidavit of Constable Nicholas Sibanda who conveyed the body of the deceased to the United Bulawayo hospitals was tendered as exhibit 3. The post mortem report number

601/597/2011 was produced as exhibit 4. With the production of these documents the trial commenced. It is important to indicate that before the commencement of the trial the state and defence counsel advised that the murder weapon, being the knife could not be produced as part of the evidence as it had been accidentally destroyed by the police.

The state called its first witness Misheck Sibanda to testify. This witness was central to this case as the murder occurred at his compound at Imvelo Farm. He hosted the fundraising party event that subsequently resulted in the tragic death of Norman Maseko (the deceased). His evidence was to the effect that between 0200 hours to about 0300 hours on this fateful day, the accused and one Mandlenkosi Maphosa were involved in a misunderstanding over a girlfriend. The witness stepped in between the deceased and Mandlenkosi and managed to stop the fight. During the commotion, one Reason who was heavily intoxicated staggered and fell on the music system (DVD player) causing it to crush to the ground. This sound system belonged to the deceased, who was enraged by the damage caused to his DVD player. Deceased believed that the accused had caused the damage to his music player and immediately attacked the accused person. Misheck Sibanda once again intervened and stopped the fight. It is evident that most of the persons attending the function were drunk. The deceased went behind the house to switch off the generator as it was clear that the fights had spoiled the function. The witness stated that at the stage, he observed the accused removing his trousers and pulling out something which he then hid behind his back. A little while later Misheck states that accused pulled up his trousers again and announced in a threatening tone that none should come near him. The deceased then charged from the back of the house and engaged the accused in a fight. The witness heard deceased utter words to the effect that “the boy has stabbed me” (referring to the accused). Misheck states that the deceased lifted up the accused and threw him to the ground and stamped upon his body several times. The witness observed the deceased collapse to the ground. He shouted out to his wife to bring some water. The deceased got up as soon as water was poured over him. The deceased, however, fell down a few metres outside the farm compound. The deceased never got up again and died as a result of the injuries sustained in the stabbing. The witness gave his evidence well but a few lingering questions remained unanswered. Under cross-examination, the witness admitted that he did not observe the actual stabbing. The witness

indicated that although he had noticed the accused place his hand behind his back he did not notice a knife. From his account it cannot be inferred that accused was seen on the night in question in possession of a knife. The witness conceded that the lighting was not that good as the generator that provided lighting had been switched off. From the evidence of this witness, it cannot be said with absolute certainty that the accused caused the fatal stabbing.

The state then called one Silibaziso Moyo as its second witness. This witness knew the accused as a herd boy and workmate at the farm where they were both employed. The witness also knew the deceased as a farm worker employed at Imvelo Farm. On the 5th of September 2011 Constable Laita and other detectives from Plumtree police station arrived at the farm and showed her a knife. The witness who was rather dramatic and graphic in the manner she testified indicated that she positively identified the knife, which she said belonged to her. Upon being shown the knife, she stated that she recalled that she had earlier lent the knife to her sibling one Kelton Nyathi. When she demanded her knife back she was informed that the knife had been handed over to the accused who had asked to use it. Her efforts to recover the knife from Kelton Nyathi hit a brick wall, when accused stated that he had since lost the knife. She described the knife, indicating that it had a white handle and a blade with an emblem of a crocodile. The knife was blood stained. When cross-examined as to whether she was certain that the knife shown to her was the one used in the murder the witness indicated that she could not be certain. It may very well be, that the knife shown to the witness was the one used in the murder but the fact of the matter is that there was no evidence placed before the court to indicate that, that was the knife used in the fatal stabbing. Further, there was no evidence to prove that accused used that knife to stab the deceased. The evidence of Silibaziso Moyo consequently took the state case no further.

The accused gave his evidence under oath. He stuck to his defence which one can easily describe as a bare denial. His version is that he had a fist fight with one Mandlenkosi Maphosa, following a dispute concerning a girlfriend. He was overpowered in the fight and he ended up on the receiving end. Several persons attending the party joined in the fight and trampled upon him. He sustained serious injuries in the process and does not know how, and who, stabbed the

deceased. He testified that, the following day he learnt from his workmates that the deceased had been stabbed and had died the previous day.

Analysis of the evidence

It is not disputed that accused died as a result of a stab wound, and this is supported by the results of the post mortem report compiled by a pathologist Dr Sanganai Pesanai. An examination of the remains of the deceased conducted by the pathologist concluded that the cause of death was:

- (a) haemorrhagic shock
- (b) stab wound
- (c) assault

An internal examination revealed that there was a perforation of the left ventricle and clots in the pericardium.

It is trite law that in criminal matters the state carries the burden of proof beyond reasonable doubt. The court may not convict an accused person in a criminal trial where the accused proffers a defence which is reasonably possibly true. The principle has been established and settled that even in cases where the accused has been found to be an utterly hopeless liar, the court may not convict unless the essential elements of the charge have been proven in all material respects. The state may not therefore grope in the dark, with the faint hope that somehow evidence will be found to convict an accused person. Where reasonable doubt exists, the accused is entitled to the benefit of that doubt and he must be acquitted. In this regard see *S v Makanyanga* 1996 (2) ZLR 231; *S v Kuiper* 2000 (1) ZLR (1) 113 (s); *R v Difford* 1937 AD 370 and *R v Mlambo* 1957 (4) SA 727 (A).

In *R v Difford (supra)* at page 373 the learned judge remarked thus:

“... no onus 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 is false. If there is any reasonable possibility of his explanation being true, then he is entitled to an acquittal.”

I must say, the state in this matter was left in an invidious position. The only eye-witness, Misheck Sibanda could not confirm that the accused had in his possession a knife at the time of the fatal stabbing. The witness could also not confirm that without any doubt, it was the accused and no one else who stabbed the deceased. Several persons were in attendance at the party that night. There were fist fights that broke out. Evidently, the accused and his companions were somewhat intoxicated. The state could not avail the evidence of the rest of the witnesses mentioned in the outline of the state case. The witnesses could not be located by the police as they had relocated to South Africa, presumably in search of greener pastures. I have no doubt that the state case would have been stronger had further witnesses been called to corroborate the evidence of Misheck Sibanda. In terms of section 269 of the Criminal Procedure and Evidence Act (Chapter 9:07) a conviction on the evidence of a single witness shall be lawful, provided, the state adduces credible and reliable evidence upon which the court may convict. See also *S v Corbett* 1990 (1) ZLR 205 (SC) and *S v Mokoena* 1956 (3) SA 81 (A).

Conclusion

In my view there is substantial doubt as to whether the accused is indeed the one who stabbed the deceased. Accused's defence was not proved to be patently false. No other independent and credible evidence was led by the state to prove the case beyond reasonable doubt. As I have already intimated, the benefit of the doubt must and should in such circumstances, be given to the accused person. In the circumstances, and for the foregoing reasons, it is this court's finding that, the state has failed to prove its case beyond reasonable doubt. In the result, the verdict of the court is as follows:

“The accused is found not guilty and acquitted.”

National Prosecuting Authority, state’s legal practitioners
Mathonsi Ncube Law Chambers, accused’s legal practitioners