**THE STATE**

**Versus**

**WILLIAM HLAMBELO**

IN THE HIGH COURT OF ZIMBABWE
DUBE-BANDA J with Assessors Mr Ndlovu and Mr Bazwi
HWANGE CIRCUIT COURT 7 & 8 OCTOBER 2020

**Application for a discharge at the close of the State case**

*B. Tshabalala,* for the state
*Ms L. Mthombeni,* for the accused

**DUBE-BANDA J**: This is an application for a discharge in terms of the provisions of section 198(3) of the Criminal Procedure and Evidence Act [Chapter 9:07]. At the close of the evidence for the prosecution, defence counsel applied for the discharge of the accused. The discharge was sought on the basis that at the closure of the State's case there was no evidence against the accused person which required a reply from him. In terms of section 198(3) of the Criminal Procedure and Evidence Act, [*Chapter 9:07*], the court shall return a verdict of not guilty if at the close of the State case:-

> 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 convictedthereon.

The words 'no evidence' have been interpreted by the courts to mean no evidence upon which a reasonable person might convict. See *S v Khanyapa* 1979 (1) SA 804 (A) at 838F; *S v Heller* (2) 1964 (1) SA 524 (W) at 541G).

The interpretation of section 198(3) of the Criminal Procedure and Evidence Act has been considered in a long line of cases in this country and in South Africa. The legal position is that where the court considers that there is no evidence that the accused committed the offence it has no discretion but to discharge him. See *S v Kachipare*1998 (2) ZLR 271(S), 275; S *v Tsvangirai* 2003 (2) ZLR 88.

The position in this jurisdiction is that a court *shall* discharge the accused at the close of the case for the prosecution where:-

(a) there is no evidence to prove an essential element of the offence – *Attorney-General v Bvuma & Another* 1987 (2) ZLR 96 (S), 102;
(b) there is no evidence on which a reasonable court, acting carefully, might properly convict – *Attorney-General v Mzizi*1991 (2) ZLR 321, 323 B; and
(c) the evidence adduced on behalf of the State is so manifestly unreliable that no reasonable court could safely act on it – *Attorney-General v Tarwireyi*1997 (1) ZLR 575(S), 576.

The question is whether the credibility of the State witnesses has any role to play when a discharge is sought under the section. Whilst it is settled that a court shall discharge at the end of the state case where the evidence of the prosecution witness has been so discredited as a result of cross-examination or is so manifestly unreliable that no reasonable tribunal could safely convict on it, it is clear that such cases will be rare. See *Attorney-General v Bvuma & Another*, (*supra)* at 102,103). This would apply only in the most exceptional case where the credibility of a witness is so utterly destroyed that no part of his material evidence can possibly be believed. See *S v Mpetwa & O*thers 1983 (4) S.A. 262, 265; *Attorney-General v Tarwirei (supra)* at 576, 577.

In generally the position appears to be that, although credibility is a factor that can be considered at this stage, it plays a very limited role. If there is evidence supporting the charge, an application for discharge can only be sustained if that evidence is of such a poor quality that it cannot, in the opinion of the trial court, be accepted by any reasonable court. See *S v Teek* 2009 (1) NR 127 (SC) at 131A-B;*S v Mpetha and Others* 1983 (4) SA 262 (C) at 265; *S v Nakale*supra at 458).

In *casu*, the accused is charged with the crime of murder as defined in section 47 of the Criminal Law [Codification and Reform] Act. It being alleged that on the 26 May 2019, at M.H. Bottle Store, Lonely Mine, Inyathi the accused unlawfully struck Hero Mkandla (deceased) with an axe on the head and once on the thigh, intending to kill him or realising that there is a real possibility that his conduct may cause the death but continued to engage in that conduct despite the risk or possibility.

There is evidence before court, i.e. the post mortem report which shows that the deceased sustained head trauma on 26 May 2019, and was admitted at the hospital and discharged. He later died on the 6 September 2019. The pathologist who examined the remains of the deceased concluded that the cause of death was, subdural haematoma; skull bones fracture and severe head trauma.

The state led oral testimony from two witnesses. The first to testify was Nkanyiso Mpofu (1st witness). His evidence is that:

> On the 26 May 2019, I left home with Hero Mkandla. We went to the shops, at M.H. Bar. The shop keeper said it was 9 p.m. time to close. She said she was closing one door, those with drinks should finish their drinks and leave the bar. I was seated on top of the Slug (mini soccer machine), and Hero Mkandla was standing at the door. The accused came into the bar, looked at all directions, produced an axe and struck Hero Mkandla on the head and the thigh. He opened the door and left the bar. Other patrons in the bar left running.

This witness testified that after the attack, he remained at the bar for the purposes of helping the deceased who was his friend. He noticed that the deceased could not wake up. He then started looking for assistance. The next witness for the state was Trust Jim Pandeni (2nd witness). He left the bar before the axing took place. He does not know who axed the deceased.

The prosecutor sought admissions from the accused in terms of s 314 of the Criminal Procedure & Evidence Act [*Chapter 9:07*]. The accused admitted the evidence of certain witnesses as contained in the summary of the state case. That is, the evidence of Dr Gregori, who examined the remains of the deceased and recorded a post mortem report. The evidence of Nokuthaba Mpofu, the bar lady at MH Bottle store, the scene of crime. According to her evidence, on the 26 May 2019, at around 2000 hours, she advised all patrons to leave the bar, because it was time to close. The patrons refused to move out. The deceased said she should not close the bar but let them continue drinking. She proceeded to close the door, switch off the radio and the lights and allowed those who needed to finish their drinks to do so. The following morning she learnt that there was violence at the bar and she observed blood stains on the veranda. The evidence of Constable Mushanyu, the investigating officer in this case was admitted in terms of section 314 of the Act. He visited the scene of crime on the 30 May

2019. He interviewed the witness Nkanyiso Mpofu. He arrested the accused. The witness failed to recover the murder weapon, i.e. the axe. In June 2019, the witness visited the deceased at his home, and observed that he had a deep cut on the head and on the left thigh. The last to be admitted was the evidence of Sergeant Ndlovu, who recorded a warned and cautioned statement from the accused.

*Ms Mthombeni* for the accused argued that the state case is riddled with inconsistences. It is contended that there are differences in the sequence of events as testified by the Mpofu (1st witness) and Pandeni (2nd witness). It is said the 1st witnesses narrated events in a contradictory manner. He is criticised for saying he did not see the deceased carrying a knife, when the 2nd witness says the deceased had an Okapi knife. The 1st witness is further criticised for denying the allegation that him and the deceased insulted the patrons at the bar. It is said he testified to issues that are not in the outline of the state case. The state is criticised for having presented the oral testimony of one witness (who witnesses the axing), when they were many patrons in the bar at the material time. It is contended that the fact that the state had one witness cast strong doubt and suspicion on the state case. It is argued that the 1st witness is not reliable and credible.

*Mr Tshabalala* for the state, made a concession that the state has not established a *prima facie* case against the accused, he is therefore entitled to a discharge. It is contended that the prosecution hoped to anchor its case on the testimony of the Trust Jim Pandeni, however, he has not given the evidence the state hoped he would place before court. It is argued that the concession is anchored on the following: the evidence of the 1st state witness is not corroborated; the 2ndwitness deviated from what the state expected he would testify on; the only oral evidence is of the 1st witness who is himself implicated by the accused; and that there is no independent evidence that supports the evidence of the 1st witness.

At this stage of the proceedings, the issue is certainly not whether the State has proved its case beyond reasonable doubt as to justify a conviction. The issues of corroboration, the unavailability of what *Mr Tshabalala* calls an independent witness; the reliability and credibility of the Nkanyiso Mpofu are not of concern to this court at this stage. This court will not at this stage analyse the probative value of the evidence adduced by the state. I take the view that counsel for the state and counsel for the accused, drifted and argued as if the issue

before court is the guilt of the accused beyond reasonable doubt. The proceedings are not at that stage yet. The issues they raised might well be argued at the end of the trial.

At this stage of the proceedings, the simple question is; on the record is there evidence against the accused person which requires a reply from him. I take the view that indeed there is evidence before court, i.e. the post mortem report, which shows that the deceased died as a result of the injuries he suffered on the 26 May 2019, at M.H. Bottle Store, Lonely Mine, Inyathi. There is evidence that places the accused at the scene of the crime. There is evidence that implicates the accused in the commission of the offence of murder. According to Nkanyiso Mpofu, it is the accused who axed the deceased. It cannot be said at this stage that the evidence of the Nkanyiso Mpofu is of such poor quality or manifestly unreliable as required by case law for it to be rejected outright. This court cannot ignore this evidence at this stage of the proceedings. It is on record. Simply put, this evidence calls for a reply from the accused. There is a *prima facie* case against the accused, which requires an answer.

In conclusion, I take the view that the concession made by the prosecution was not properly taken.

In the result; this application for a discharge is accordingly refused.

*National Prosecuting Authority,* state's legal practitioners
*Dube, Nkala and Company*, accused's legal practitioners