

THE STATE**Versus****JOWMAN NDLOVU**

IN THE HIGH COURT OF ZIMBABWE

MAKONESE J with Assessors Mr W. Matemba & Mrs C. J. Baye

GWERU 30 JANUARY & 3 FEBRUARY 2020

Criminal Trial*Ms N. Chikuni* for the state*M. Jaravani* for the accused

MAKONESE J: The accused appears in this court on a charge of murder in contravention of section 47(1) of the Criminal Law Codification and Reform Act (Chapter 9:23). The state alleges that on the 9th of June 2018 and at a bush near Dhlamathuli, Nkomozabo Village, Chief Malisa Silobela. The accused unlawfully caused the death of Nobukhosi Nomo by striking him with an axe and stone on the head several times intending to bring about his death. The accused denies the allegations. He raises the defence of alibi and avers that he was nowhere near the scene of the crime on the alleged date.

It is not disputed that deceased's body was retrieved from a disused copper mine shaft on the 10th June 2018. Neighbours were alerted and a report was made to the police. Investigations were carried out leading to the arrest of the accused on 11th June 2018. As a result of indications made by the accused, a cellphone, black jacket, a blood stained stone and cash amounting to \$1,50 was recovered.

The state tendered an outline of the state case. It shall not be necessary to repeat the entire contents of the state outline. It now forms part of the record. In his defence, the accused tendered into the record an outline of his defence case. He totally denies the allegations against him. He averred that on the day in question and at the material time he was at Cross Roads Business Centre along the Kwekwe – Nkayi Road. He departed from his residence around 0700 hours. He spent the whole day at the shopping centre and only left for his homestead around 1800 hours. He alleges

that he did not make the indications voluntarily. He was “shuttled” between the scene of the alleged offence and his place of residence, and then back to the police station. At each place where the deceased’s property was retrieved, accused alleges that this was preceded by a narration by the arresting Neighbourhood Watch Committee member of the events relating to observations that had been earlier made. He further alleges that he was physically assaulted by the police and was verbally intimidated. Accused denied any knowledge of the axe that had been recovered at the scene of the crime and linked to the commission of the murder. Accused dissociated himself from the black cell phone recovered from his room and positively identified by the deceased’s wife. Deceased’s wife identified the black jacket and cellphone as belonging to the deceased.

The state produced a confirmed warned and cautioned statement recorded by the police at Criminal Investigations Department Kwekwe on the 9th July 2018. The statement was confirmed by a magistrate on the 7th August 2018. The statement reads:

“I do not admit to the charges levelled against me. On the day in question I never went to the shops. I was surprised to see a member of the neighbourhood watch committee arriving in the company of many people carrying knobkerries and an axe accusing me of having killed a person from Abigoyili. I went with them to Silobela Police Station where I was detained and later taken to CID. That is all.”

The state tendered a post mortem report compiled by Dr Sanganai Pesanai at United Bulawayo Hospitals on 1st June 2018, following an examination of the remains of the deceased. The pathologist concluded that the cause of death was:

- (a) Severe brain damage
- (b) Multiple compound fracture
- (c) Assault

The examination revealed that the deceased had multiple fractures on the head. Brain matter was oozing out of the skull. The body was in a state of early decomposition. An axe with a broken handle recovered at the scene was produced by the state as an exhibit. Its weight is 0.069kg. The blade is 13cm long. The width of the blade is 8cm. The circumference of the axe head is 10cm. A blood stained stone weighing 1,697kg was also tendered into the record as an

exhibit. A black Chinese phone with dual sim card was also produced as an exhibit. The last exhibit is a black blood stained jacket recovered through indications made by the accused.

The state led oral testimony from its first witness **PETER NYATHI**. He resides in Nkomozabo Village, Silobela. He is known to the accused. He knew the deceased during his lifetime. On the 10th June 2018 he was walking along a path leading to a borehole. He saw a trail of blood and some bone fragments. He observed some foot prints. With the assistance of other villagers the trail of blood and foot prints led this witness to a disused copper mine shaft. A further search led to the recovery of the lifeless body of the deceased from the mine shaft. The deceased's body had brain matter oozing out. The witness observed that deceased's legs were tied together with a piece of wire. There was a huge stone and log tied around the deceased's body. The deceased had several fractures on his head. The injuries were deep. There were consistent with injuries inflicted by an axe. An axe with a broken handle was recovered from the scene. It was handed to the neighbourhood watch committee member for the area. It was observed that the deceased had no shirt on his upper part of the body. He had no shoes. The witness confirmed that a report was made to the police leading to the arrest of the accused. The witness identified a black jacket and stone which had been recovered through indications made by the accused. The body was quickly identified by the villagers. It was confirmed that the deceased was **NOBUKHOSI NOMO**, a local villager. The witness gave his evidence well. He was not contradicted in any material respects by accused's defence counsel under cross examination. The witness denied that accused has been forced to make indications. The witness testified that accused walked around the scene making indications. The witness and other villagers stood some distance away from the accused and the police details during indications. He refuted suggestions that accused was being told what to indicate. In any event, the witness pointed out that no one other than the accused himself, knew exactly where the deceased had been murdered. No one knew where the black jacket and stone had been hidden. We found this witness to be credible and reliable. The next witness for the state was **MAPHIOS MAPFUMO**. He is the neighbourhood watch committee member for the Nkomozabo Village. He was well known to both the accused and the deceased prior to the commission of the offence. The witness together with other villagers followed the foot prints that led them to the disused mine shaft. The broken axe was identified. It belonged to one

JOSEPH NDLOVU, accused's father. The witness confronted accused's father who confirmed that the axe belonged to him. He queried how his axe had found its way to the scene of the crime. Accused's father confirmed that the axe was being used by the accused person on the fateful day. The witness indicated that accused's father intended to take the axe. He was advised that the axe was now the subject of an investigation. The witness together with other villagers subsequently arrested the accused at his homestead. The accused was handed over to Zimbabwe Republic Police Silobela. He was a suspect in a murder case. Accused made indications at the scene of the crime in the presence of this witness. Accused led the police to the recovery of a black jacket which had been hidden at a nearby homestead. This witness positively identified the black jacket and the stone used at the commission of the offence. The witness denied that accused was forced to make indications. He confirmed that accused volunteered to show the police the place where he had hidden the jacket and stone.

The witness's account is credible and consistent. The witness was composed and gave his evidence well. He was not shaken or contradicted under cross examination.

The third state witness was **DETECTIVE SERGEANT SHENJERE**. He is a duly attested member of the Zimbabwe Republic Police service with 15 years experience. He was the Investigating Officer in the case. On the 11th of June 2018 he was assigned to investigate a murder which had occurred at Nkomozabo Village at Silobela. He interviewed the accused at ZRP Silobela before taking him to the scene of the crime. Upon arrival accused freely and voluntarily made indications. Accused took the police details to a river known as Dhlamatuli. The river is some 100 metres from the disused mining shaft where the body of the deceased was recovered. When police details arrived for indications the body had already been retrieved from the mine shaft by villagers. The accused made indications to the police pointing out the place where he had met the deceased. The accused's version during indications was that deceased had accosted him alleging that he (accused), was having an extra-marital affair with his (deceased's) wife. The accused alleged that deceased had produced a knife. At that stage accused picked up a stone and struck the deceased on the head. Accused indicated a position 10 metres from a foot path where there were struggle marks. There were blood clots on the ground and some bone fragments. A

trail of blood indicated that deceased had been carried from the place where he was killed before he was dumped into the mine shaft. Through indications made by the accused the police recovered a blood stained black jacket which had been hidden at a nearby homestead. The stone used to strike the deceased was wrapped around the jacket. A black Chinese cellphone with a dual sim card was recovered from a drawer at a house that was being used by the accused just before the commission of the offence. A sum of \$1, 50 (bond coins) was found in the same drawer. The witness denied the suggestion that accused had been forced to make indications. As regards the warned and cautioned statement the witness confirmed that a statement had been recorded by Detective Sergeant Kapfumvuti. He witnessed the recording of the statement. In that statement the accused denied committing the offence. Accused indicated that he had not gone to the shops at the material time on the day of the alleged offence. The witness told the court that the defence of alibi was false in that accused stated in his warned and cautioned statement that he had not gone to the shops at all that day and yet in court his version was that he was at Cross-Roads, Business Centre, Silobela on the day in question. Further, the witness indicated that the accused's defence was rebutted by accused's own father who indicated that on the relevant day, the accused had been using the same axe recovered at the scene by the villagers. The scene of the crime is at or near Dhlamatuli River and not at Cross-Roads. There could be no reason for the accused's father to falsely implicate his own son. The witness gave his evidence in a straight forward manner. He was not contradicted in any material respects under cross-examination. His evidence reads well. We found him to be a credible witness who gave an accurate reflection of the events particularly the indications by the accused and the recovery of the exhibits. This witness crucially testified that Thandiwe Mdlongwa positively identified deceased's black cell phone. The witness indicated that apart from the identification of the phone through its appearance, they had placed the sim card on to another phone and confirmed that the phone contacts on the sim card established that the phone belonged to the deceased. The phone number relating to the sim card belonged to the deceased. This piece of evidence was never challenged by the accused.

Before closing its case, the state and defence agreed that the evidence of the under listed witnesses be entered into the record by way of formal admissions, in terms of section 314 of the

Criminal Procedure and Evidence Act (Chapter 9:07), as it appears in the outline of the state case, namely:

- (1) Onias Moyo
- (2) Thandiwe Mdlongwa
- (3) Joseph Ndlovu
- (4) Ronald Chikanda
- (5) Tafara Mudzanire
- (6) Last Matinha
- (7) Tichaona Mabhunu
- (8) Detective Sergeant Kufamati
- (9) Thembelihle Ndlovu
- (10) Dr S. Pesanai

Defence case

The accused **JOWMAN NDLOVU** elected to give evidence under oath. He adhered to his defence outline and denied any knowledge of how the deceased met his death. He alleged that he had been assaulted by the police into making indications. He however, confirmed that he did make the warned and cautioned statement which was subsequently confirmed by a magistrate. In that statement the accused denied the allegations. He averred that he never went to the shops on the date of the murder. This assertion immediately exposes the accused's defence of alibi, wherein he suggests that he spent the entire day at Cross-Roads, at the shops. If that version is true one wonders why the accused did not mention this in his warned and cautioned statement. The assertion that he did not go to the shops flies in the face of his claims that he was at the shops as Cross-Roads Business Centre at the material time. Accused's father told the villagers and the police that he was the owner of the axe with a broken handle found at the scene of the crime. The accused's father indicated that on the day of the murder, the accused had been using the axe. The accused did not at any stage of the proceedings allege that his father lied when he indicated that the axe was in his possession at the time of the alleged offence. The accused never took issue with

his father's evidence. Accused alleged that he had been assaulted by the police into making indications. This is clearly false. The record from the Magistrate's Court which is now part of these proceedings indicates that when accused appeared for his initial court appearance on the 12th June 2018 he informed the presiding magistrate that he had no complaints against the police. If the accused had been assaulted by the police during indications, he would have brought this to the attention of the magistrate. We are satisfied that the allegations of assault are without substance. These are simply a hoax designed to mislead this court.

Conclusion

It is our specific finding that accused was not a truthful witness. Even when clear evidence of how he led to the recovery of the jacket was placed before him he tried to dispute it. No one knew where the black jacket and stone had been concealed. Only the accused person had information regarding the location of these items. The black Chinese mobile phone was recovered from a house that was being used by the accused just before the murder. The accused failed to give any plausible explanation why that phone, belonging to the deceased had been found in his house. The accused failed to explain why the shoe prints and blood trail led to his house. The accused failed to reconcile his version with the clear evidence given by his father that he was in possession of the axe the day the deceased met his tragic death.

It is our view that although there was no eye-witness testimony, there was sufficient circumstantial evidence to prove the case against the accused. The principles regarding the requirements for circumstantial evidence as laid down in the case of *R v Blom* 1939 AD 188 at page 202 -203 have now been well established in our law. There are two cardinal rules of logic which must be satisfied;

- (a) The inference sought to be drawn must be consistent with all the proved facts. If it is not, the inference cannot be drawn.
- (b) 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.

We find that the state succeeded in proving the guilt of the accused beyond reasonable doubt. The manner in which the offence was committed leads to only one conclusion. The deceased's attacker intended to bring about his death. The undisputed evidence is that the deceased's legs were tied with a piece of wire. The dumping of the body in that mine shaft in that state was to conceal the murder.

Accordingly, the accused is convicted of murder with actual intent.

Reasons for sentence

The accused was aged 20 years and 10 months at the time of the commission of the offence. He is therefore a youthful first offender. He is not married and does not have the usual family responsibilities. The accused has been convicted of murder with actual intent. The murder was committed in aggravating circumstances during the course of a robbery. The only factor that serves the accused from the ultimate penalty of death sentence is his youthfulness. We did not detect any sign of remorse or contrition on the part of the accused throughout this trial. The accused pursued his false defence to the bitter end. This court must take into consideration all the mitigating features of the case and balance these against the interests of justice. We take into account the period of the pre-trial incarceration. The accused spent a period of 1 ½ years in remand prison pending trial. The deceased died a violent death. The accused displayed a high degree of callousness. After killing his victim he sought to conceal the murder by dumping the body in a disused mine shaft. To ensure that the body was not discovered the accused tied the deceased's legs with a wire and placed a stone and a log around the lifeless body of the deceased. This shows that the accused was determined to conceal this crime. Whilst youthfulness is an important factor in assessing sentence especially where the accused shows an element of immaturity, in this case the accused person's resolve in the manner he carefully executed the murder and concealed the body shows a high degree of sophistication. The sentence this court shall impose must reflect the seriousness of the crime. The court must at all times uphold the sanctity of human life.

In the result, and accordingly, the accused person is sentenced as follows:

“Accused is sentenced to 30 years imprisonment.”

National Prosecuting Authority, state’s legal practitioners
Tawona & Jaravani Attorneys, accused’s legal practitioners