

THE STATE
versus
GOODHOPE MAHACHI

HIGH COURT OF ZIMBABWE
MOYO J
GWERU 5, 6 AND 7 FEBRUARY 2018

Criminal Trial

M Shumba for the state
M T Davira with *S R Mafa* for the accused

MOYO J: The accused person faces a charge of murder, it being alleged that on 13 January 2017, he assaulted the deceased Elvis Moyo with a machete resulting in deceased's death. He pleaded not guilty. The state tendered documentary exhibits in the form of the state summary and the post mortem report. The defence counsel tendered the accused's defence outline. All exhibits were duly marked.

The evidence of the following witnesses was admitted into the court record as it appears in the state summary:

The evidence of Albert Taruvinga, Tawonga Pepukai, Lawrence Konde, Gadze Moreblessing and Dr S Pesanai.

Limukani Ncube and Emmanuel Dzitsera gave *viva voce* evidence.

The evidence of Limukani Ncube

- He knew deceased as they hailed from the same home area. On the day in question himself, the deceased and accused met at Mutegude bar in Kwekwe.
- He knew accused in that he was shown him by the deceased at the bar on the fateful day.
- Accused and Courage Sibanda came, inside the bar and had some weapons, the witness was inside the bar at the material time.

- When accused and Courage Sibanda entered the bar, they bought beers and then went outside.
- They had placed the weapons in their pockets and the pockets were bulging such that the witness could see that there were weapons inside the pockets
- They arrived at 11pm.
- This witness specifically denied that he was a gold panner. He said he survived on menial jobs.
- Deceased then indicated to the witness that they should get out and leave as if deceased was sensing trouble.
- The witness and deceased went to stand trial in front of space bar which was already closed.
- They bade farewell to each other.
- Accused then emerged from behind the bar and Courage Sibanda also emerged from a well-lit part, the other side of the bar.
- Accused got to where the witness and deceased were and he questioned deceased as to what it was that he (the witness) was telling accused's wife.

Accused and Courage Sibanda then took out their weapons and indicated that they wanted to grab hold of the deceased.

The witness and deceased fled the scene. Accused and Courage chased after them. Deceased got tired, it is at that point that they caught up with him and started assaulting him.

- He said he did not know accused prior to the fateful day.
- The witness said accused wore a khakhi pair of trousers with side pockets and a khakhi jacket as well as a brown cap.
- The witness said he saw accused for only about three minutes inside the bar.

The sum total of this witness's evidence is that accused came into the bar with Courage Sibanda bought beers then went outside. He wore a brown cap, khakhi jacket and khakhi trousers with side pockets. He later saw accused outside when accused accosted deceased before the witness and the deceased fled with accused and Courage Sibanda in hot pursuit carrying machetes.

Emmanuel Dzotsera

- He was the second state witness
- He knew the deceased prior but saw accused for the first time on the fateful day.
- He said his friend showed him the accused person saying his name was Goodhope.

This witness was also at Mutegude bar in Kwekwe when accused came into the bar. The witness's friend also told the witness that accused's name was Goodhope and was in the habit of carrying a machetes. The witness's friend also told the witness that they should leave. They exchanged greetings with the accused and he indicated that there was someone whom he wanted to kill. He said that accused was alone, when he arrived and spent a while in the bar before Courage Sibanda arrived. The two of them then left. A group of gold panners had also left the bar. The witness and his friend decided to follow accused and Courage Sibanda as accused had said he intended to kill somebody. Outside they saw people being chased. They later learnt of deceased's death.

- He said that he saw one of the people who chased others as the accused person but that he did not have any weapon.
- He said accused put on a black leather jacket, a black leather cap and blue jeans.

When this witness was asked if he had seen someone with khakhi pants, khakhi jacket and a brown cap he said he might have seen someone who was dressed like that but that he could not say who it was. He confirmed that the person who wore khakhi attire was not the accused person. The witness said he Limukani Ncube is a gold panner.

The witness also said that deceased was chased after together with some people, a group of gold panners. This witness confirmed that himself and the first witness were talking about two different people whom both of them nonetheless said was the accused. He confirmed that first witness, deceased and himself were friends. The accused denies having been at the scene at the material time and insists that he left before 10pm. He says he wore a t-shirt, a brown three quarter shorts and a sun hat. He says Courage Sibanda and one Mundebele were the ones that assaulted deceased as they told him this later on at Indarama mine. He says he left for Mutare when he learnt that the police wanted him in connection with the murder as he panicked. He said that he was afraid to go to the police as previously he had been falsely arrested for the theft of a

generator and the police detained him until they arrested the culprits and that in this instance he also feared that he could be met with the same fate.

We now proceed to assess the state case: There are discrepancies in the state case. First witness says he was not a gold panner the second state witnesses says the first witness was a gold panner. First state witness says accused chased after the deceased after he had questioned the deceased about his wife, but the second witness says accused and Courage Sibanda chased a group of people that were gold panners, not just the first witness and deceased. The first state witness says accused and deceased were armed with machetes, the second state witness says he did not see the machetes.

The first state witness says accused wore a brown cap, khakhi jacket and khakhi trousers with side pockets, the second state witness says accused wore a black jacket leather cap, a black leather jacket and jean trousers.

The second state witness says there could have been a third person who wore khakhi on the day in question. The state case is thus torn apart because the court cannot tell what really transpired here because the two witnesses are describing the same event with so much disparity. Whilst witnesses cannot be expected to have a photographic memory, this court is wary of the fact that in issues of identification caution must be exercised as witnesses are not immune to mistakenly pointing at a wrong person altogether as the person that they saw.

Before one even moves to consider the principles of identification we already have a serious problem with the observations as made by these two witnesses on the day in question.

In *Musakwa v S* SC 1/95 the court held that the bold assertion by the witness that he or she is certain that she has identified the right person should not be accepted at face value.

The objective basis of his or her identification must be carefully probed. The witnesses should be asked by what features they made their identification. The witness should be questioned as to the height, build, complexion and apparel of the person observed. In *Madziwa v S* SC 191/90 it was held that weak evidence of identification is not made any more reliable by the mere fact that the accused was in the vicinity at the time and lied about this fact, as even an innocent person can lie out of a sense of panic. In the judges handbook Professor Feltoe states that identification evidence can be very unreliable and that it must be treated with caution..

In this case no evidence was adduced that an identification parade was conducted and yet where the state case is likely to hinge on identification evidence then identification parades should be held wherever possible. A question that remains is why was an identification parade not conducted in this case as the witnesses were seeing the accused person for the first time? Again the first state witness says he observed accused for about three minutes inside the bar, that is a short time for a careful observation of an accused's features to have been made. To make matters worse, accused wore a cap on the night in question according to both witnesses. Even if the second state witness says his friend told him that accused was Goodhope, but the person that his friend referred to as Goodhope was wearing a black leather jacket and a black leather cap together with jeans. This is the person that the second state witness was told was Goodhope. But the person who chased the first state witness together with Courage Sibanda allegedly wore a khakhi jacket, khakhi trousers and a brown cap? Could it still be the same person that the second state witness was told is Goodhope and had seen as the accused? This question remains unanswered.

The only proven fact by the state in this matter is that the accused person did go to Mutekude bar on the day in question, however it is not clear as to whether he was still there at the material time.

This case seems to have been poorly investigated in that, firstly the police do not say anything about Courage Sibanda, where is he, was he ever sought after? The accused person has no confirmed warned and cautioned statement and the admitted evidence of the investigating officer does not mention the recording of any statement from the accused. It was crucial as we would like to know if accused mentioned this Courage Sibanda and Mundebele as the assailants in his statement to the police and if they did pursue that aspect. We are in the dark as to what the police did or failed to do in this matter.

In the case of *S v Mthethwa* 1972 (3) SA 766 (A) at page 768, HOLMES JA had the following to say on identification;

“Because of fallibility of human observation, evidence of identification is approached by these courts with some caution. It is not enough for the identification witness to be honest, the reliability of his observation must also be tested. This depends on various factors, such as lighting, visibility and eye sight, 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, built, gait and dress, the result of identification parades, if any, and of course, the evidence by and on behalf of the accused. 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 light of the totality of the evidence and the probabilities."

For the state to discharge the onus on it in criminal matters it must adduce evidence that proves the accused's guilt beyond any reasonable doubt. The question that immediately arises is has the state done so in this case? We find that there are numerous questions that are unanswered in this matter.

- 1) Did the first state witness see accused wearing what he alleges, on the day in question.
- 2) Was the person seen by the second state witness the accused person?
- 3) If the answer to both the above is yes, so why are the two state witnesses describing the same person differently?
- 4) What about the person wearing khakhis that the first witness saw as the accused and whom he says is the one that chased them and assaulted deceased?
- 5) Who was this person, for the second state witness confirms that there might have been such a person as described by the first state witness?
- 6) What was the motive for the chase of deceased and others? First state witness says accused questioned deceased about his wife and then chased after the two of them.

The second state witness says the accused came inside the bar and the group of gold panners went out and that the people who chased others outside were chasing a group of gold panners not deceased personally.

The state counsel submitted that state witnesses are bound to make human error, in their observations, submitting that the court should not worry about the differences in clothing as described by the two witnesses. But that submission leads to a question that if human error can lead to witnesses describing two different people but claiming that such persons are the accused person as per their observation, how can the court trust that this human error is not leading to the conviction of an innocent person? The only fact that the state has proven is that accused was indeed at the bar as per accused's own admission, but the mere fact that he was at the bar is not

proof beyond a reasonable doubt that then he is the assailant. The other factor against the accused is that he fled Kwekwe for Mutare for unsatisfactory reasons which could raise a suspicion on his part, but can this aspect be the sole basis of the state case? That an accused fled the town and went away to another? This fact was only going to have a complimentary effect on other real evidence adduced by the state and the state has adduced manifestly unreliable identification evidence that cannot be patched together by the fact that accused fled Kwekwe. That accused fled Kwekwe raises a suspicion on his role in the murder of the deceased but it is not proof beyond a reasonable doubt. It remains, that a suspicion and nothing else. This court convicts on the basis of real evidence, and not suspicions it is for these reasons, and the numerous questions we have shown that are present in the state case and remain unanswered by the facts before us, that we are not satisfied that the state has proved its case beyond a reasonable doubt. That accused is the only person who could have assaulted deceased on the night in question, is a difficult and unsafe conclusion to make on the facts before us. The accused person is accordingly found not guilty and is acquitted.

National Prosecuting Authority, state's legal practitioners
Dzimba, Jaravaza and Associates, accused's legal practitioners