

THE STATE**Versus**

**REASON NKOMO
SHEUNESU NDLOVU
EDWARD NDLOVU
PILATE NKOMO
EPHRAIM NDLOVU
QUBEKANI NDLOVU
FORGET DUBE**

**1ST ACCUSED
2ND ACCUSED
3RD ACCUSED
4TH ACCUSED
5TH ACCUSED
6TH ACCUSED
7TH ACCUSED**

IN THE HIGH COURT OF ZIMBABWE

TAKUVA J with Assessors Mr P. Damba and Mr J.H. Sobantu
BULAWAYO 13, 14, 15 & 26 FEBRUARY 2018

Criminal Trial

T. Hove for the state

H. Shenje for the 1st accused

D. Dube for the 2nd accused

K. Ngwenya for the 3rd, 4th 5th 6th & 7th accused persons

TAKUVA J: The well intended efforts by law abiding villagers in Tshanyaungwe Village in Gwanda to prevent crime and have alleged stock thieves in their community brought to book turned tragic when one of their own was murdered during the exercise.

Pursuant to that death all accused persons except the 2nd appeared before us on a charge of murder as defined in section 47 of the Criminal Law (Codification and Reform) Act (Chapter 9:23). The allegations bring that on the 18th day of March 2010 and at Mfuti, Tshanyaungwe, Gwanda the accused persons assaulted Moses Sibanda all over the body intending to kill Moses Sibanda or realising that there was a risk or possibility that their conduct may cause the death of Moses Sibanda continued to engage in that conduct despite the risk or possibility.

The facts are that on 17 March 2010 the deceased was part of a task force composed of two police officers, several neighbourhood watch committee members and villagers on an operation to curb stock theft in their area. In the course of the operation, four suspects namely Danisa Ndlovu, Kudzanai Ndlovu, Lawrence Ndlovu and Moffat Dube were nabbed. At

approximately 10:00 hours the group assembled at Elijah Ndlovu's homestead to prepare a meal. The accused persons, who had been angered by the suspects' arrest, hatched a plan to attack the task force and free the suspects. Acting in concert and with common purpose, the accused persons launched an attack with stones on the task force causing its members to flee in terror leaving the arrested suspects behind. The accused persons freed the suspects and pursued the task force members into the bush. They caught the deceased whom they set dogs upon and attacked him with an assortment of weapons all over his body. Deceased suffered severe lacerations and bruises all over his body. The deceased was picked up by police officers on the 19th of March 2010 and ferried to Beitbridge Hospital where he died from the injuries a few hours after admission. Other members of the task force namely Jaheni Dube, Themba Ncube and Johannes Phiri suffered serious injuries from the attack. According to the post mortem report the deceased suffered a fracture on the occipital region and the cause of death was; (a) skull fracture, (b) head injury and (c) assault.

The 2nd accused did not turn up for trial and the State applied for a separation of trials which we granted. Thereafter accused 1, 3, 4, 5, 6 and 7 pleaded not guilty as more fully appears in their respective defence outlines filed of record. All accused persons denied participating in the unlawful assault that resulted in deceased's death. They denied being anywhere near the scene of crime. It became clear that the only issue for consideration is that of the identity of the deceased's assailants. In a bid to prove its case beyond a reasonable doubt the State led *viva voce* evidence from nine (9) witnesses namely; Jaheni Dube, Moketsi Moyo, Khumbulani Ncube, Luka Moyo, Johannes Phiri, Thomas Mathonsi, Richard Nkala, Leslie Dube and Christopher Mpofu. The affidavit of Mduduzi Joram and the post mortem report were also tendered by the State and marked exhibits 3 and 4 respectively. Also, the evidence of Frank Mazadza, Elijah Mutero and Dr A. R. Casteinos was formally admitted in terms of s314 of the Criminal Procedure and Evidence Act (Chapter 9:07) "the Act". With this evidence the State closed its case.

At the close of the state case, 1st, 4th, 6th and 7th accused persons were discharged in terms of section 198 (3) of the Act. They were all found not guilty and acquitted due to lack of

evidence of identification as all the state witnesses said they did not see them at the scene on the date and time of the assault on the deceased. It is only 3rd and 5th accused persons who were placed on their defences on the basis of the evidence of two state witnesses who implicated them in the commission of the offence.

Before analyzing that evidence, I need to state what the law is on visual identification. It is trite law that where identity is in issue, the evidence of identification should be approached with extreme caution because human observation is very fallible and experience has shown that genuine errors can easily be made by witnesses. This point was made crystal clear in *S v Mtetwa* 1972 (3) SA 766 at p768 where the court had this to say:

“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 be tested. This depends on various factors such as visibility, lighting and eye sight, the proximity of the witness, his observation both as to time and situation, the extent of prior knowledge of the accused, the mobility of the scene, corroboration, suggestibility, the accused’s face, voice, built, gait and dress, the result of the identification parades, if any, and of course the evidence by or on behalf of the accused. The list is not exhaustive. The factors or some of them are applicable in a particular case, are not individually decisive, but must be weighted one against the other in light of the totality of the evidence and the probabilities.”

Our courts have adopted the above statement as correct – see *S v Dhliwayo and Anor* 1985 (2) ZLR 101 (S) at 107A-D (per DUMBUTSHENA CJ); *S v Ndlovu & Ors* 1985 (2) ZLR 261 (S) at 263G-264E (per GUBBAY JA) and *S v Mutandi* 1996 (1) ZLR 367 (H) at 370E-371F (per GILLESPIE J).

See also *S v Nkomo* 1989 (3) ZLR 117 (SC) at p121B-D where McNALLY JA (as he then was) said;

“Very broadly speaking, the judgment of LORD WIDGERY CJ was to the effect that good identification does not need corroboration or support, but poor identification does. Good identification he defined by examples: (1) a kidnapped person kept for many days in the company of his kidnapper, who identifies him without hesitation months later; (2) a suspect person kept under observation and seen by two policemen several times identified by them six months later; (3) a colleague, known from work for several years, seen clearly stealing a wallet from a locker. ... On the other hand, identification is poor “when it depends solely on a fleeting glance or a longer observation made in difficult conditions”. “Recognition”, he said elsewhere in the judgment “maybe more reliable than identification of a stranger”. In such cases corroboration or support should be required.

In regards to the exercise of caution, GILLESPIE J in the *Mutandi* case *supra* commented thus;

“Caution is not demonstrated by the mere statement that one is aware of the need for caution, where the subsequent assessment shows no more than a superficial comparative assessment of demeanour. The Shibboleth that identifying witness was ‘composed and remained unshaken during cross-examination’ is wholly inadequate as a demonstration of caution. The uttering of any cautionary word must be supported by the demonstration in the reason of or cautious approach; paradoxically, that utterance itself becomes unnecessary where the judgment shows alertness to the real dangers concerning which the cautionary rule in question seeks to address. The properly cautious approach is, I suggest with great respect, exemplified in cases of issue as to identification by the passage from the judgment of McNALLY JA in *S v Nkomo* 1989 (3) ZLR 117 (S) at 120F-123D.”

Finally in *S v Gomera* 2002 (1) ZLR 591 (H) CHINHENGO J (as he then was) held that “where the accused raises an alibi, that defence is in effect a denial of identification and the onus to disprove the defence lies on the prosecution.”

Turning to the evidence of identification of accused 3, Edward Ndlovu, the state solely relied on the evidence of Johannes Phiri. According to Phiri the 3rd accused was not known to him prior to the incident but he saw him at the scene and it is accused 3 and his group who attacked him severely on the day in question around 1500 hours after he returned to the scene to “investigate”. He said he participated in an identification parade where he positively identified Edward Ndlovu because he had a “vivid memory of his facial features”. The witness said he did not know Edward Ndlovu’s name until it was revealed to him by Jaheni Dube at the

identification parade. Further, he said the assault by this group was vicious as he was first struck on the forehead with a stone and later an axe was used to fracture his leg. This was after he fled but could not outpace members of this group. Subsequently, he learnt from his colleagues that the deceased had been severely assaulted. He had not witnessed the assault on the deceased since he was disoriented during the attack. When asked under cross-examination what peculiar features on Edward's face enabled him to identify him at the identification parade, the witness could only say "his facial features and a clean shaven head".

Analysis

Johannes Phiri's identification of Edward Ndlovu can be categorized as poor in that firstly, it depends solely on a fleeting glance made in very difficult and stressful conditions. Secondly there is no corroboration, instead there is positive rebuttal of his evidence *vis-a-vis* the identification parade in that the investigating officer, one Christopher Mpofu said that the witness had been specifically instructed not to pick Edward Ndlovu because the witness had seen him in the company and custody of the police prior to the identification parade.

Thirdly, the witness testified that Jaheni Dube told him accused 3's name is Edward Ndlovu but Jaheni in his evidence under oath denied knowing Edward Ndlovu.

Fourthly, the witness failed to point out any distinctive facial features on Edward's face that made him easily recognizable. Finally, when asked whether Edward Ndlovu was in court, the witness confidently pointed at accused 1 whose name is Reason Nkomo.

For these reasons, we find that the evidence of Johannes Phiri purportedly to have identified the 3rd accused during the attack on his is untrue, misleading, manifestly unreliable and more importantly inconsistent with evidence of the rest of the State witnesses. Further, the 3rd accused's alibi that he was at Sukwi Village on the day in question was never challenged, controverted or disproved by the State. There is no credible evidence of an identification parade.

Similarly, the 5th accused (Ephraim Ndlovu) is linked to the offence by the evidence of one witness, namely Jaheni Dube (Jaheni). This link is based on visual identification by Jaheni. According to this witness when they got to Elijah Moyo's homestead, the deceased and himself lay under a scotch cart whilst food was being cooked. All of a sudden he heard shouts of "beat them, beat them" and as he got out he was struck on the head with a stone and stabbed with a metal object on the abdomen. He fled into the bush, crossed a stream and observed the group assaulting the deceased from afar. When asked by the State Counsel whether prior to the assault he knew the 5th accused, he said he knew one Ephraim Dube and he then pointed at Reason Nkomo claiming that he was Ephraim. He said he 1st met Ephraim in 2007 at Hwali Bus Centre and thereafter he would see him occasionally at business centres and at cattle sales. The witness claimed to have told the police that Ephraim was involved in the assault leading to his arrest. Thereafter he said he positively identified accused 5 at an identification parade in Gwanda. Asked about the identity of the person who assaulted him and the deceased at the scene, he said it was Ephraim. All in all he claimed to know Ephraim by "sight" although he conceded that he rarely interacted with him.

Under cross-examination, Jaheni said he recovered his 38 goats in the custody of Kudzanayi who implicated Ephraim in the theft of his goats. After the assault he filed a report at Zezani Police Station leading to Ephraim's arrest by members of the Criminal Investigation Department. The witness said he did not know Ephraim's home until it was pointed out to him by Kudzanayi. Ephraim's village is approximately 25 km away from the witness' village. He does not know Ephraim's parents or any of his siblings.

In our view Jaheni's identification of accused 5 is far from being good for the following reasons;

- (1) His knowledge and alleged interaction with the 5th accused is bald and generalized.
- (2) Despite claiming to have known Ephraim Ndlovu for some three years prior to the commission of the offence, he did not know his surname. It is strange that 2 grown up men would refer to each other by first names.

- (3) He mistakenly identified accused 1 Reason Nkomo as Ephraim Ndlovu in court. It was only after it was pointed out to him that he was mistaken that he moved closer and touched Ephraim's hand. This is proof beyond any doubt that he did not know Ephraim Ndlovu well before the crime was committed.
- (4) Due to the threatening situation, the witness did not get ample opportunity to observe his assailants. The witness said as he got up he was immediately hit on the head with a stone and simultaneously stabbed. He then fled for dear life.
- (5) Notwithstanding Jaheni's claim that he positively identified accused 5 at an identification parade in Gwanda, the investigating officer directly dismissed this as false by stating that the 5th accused person was never subjected to an identification parade. In this regard, we accept Christopher Mpofo's evidence and reject that of Jaheni.

In the result, we find that Jaheni was mistaken as to the identity of the person who assaulted him and the deceased. What comes out clearly from the evidence is that after the arrest of Sheunesu, he told the police the names of his accomplices whom they proceeded to arrest. Thereafter, the police committed a monumental irregularity by parading the suspects before State witnesses during the process of conducting indications. Not only that, the police also allowed witnesses to discuss and exchange notes on the identity of accused 3 and 5. This all happened before the aborted identification parade was conducted. We must point out that it is proper and desirable to hold an identification parade where a witness is not well known to a suspect and the defence is one of an alibi.

For these reasons we find that the State has failed to prove beyond a reasonable doubt that accused 3 and 5 murdered the deceased. Consequently, both accused persons are found not guilty and acquitted.

*National Prosecuting Authority, state's legal practitioners
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