**THE STATE**

**Versus**

**NTANDO NYATHI**

**And**

**CREGY NCUBE**

**And**

**THABANI NCUBE**

**And**

**SIPHEPHILE NCUBE**

**And**

**SILUNGILE NCUBE**

IN THE HIGH COURT OF ZIMBABWE
DUBE-BANDA J with Assessors Mr Mabandla and Mr Dewa
Bulawayo 23 & 24 October 2024

**Criminal trial**

*K. Jaravaza* for the State
*T. Nyapfumbi* for the 1st accused
Ms. *S. Sithole* for the 2nd accused
*T. Solani* for the 3rd accused
Ms. *T. Mafa* for the 4th accused
*M.E.P. Moyo* for the 5th accused

**DUBE-BANDA J:**

[1] This is an application for a discharge in terms of s 198 (3) of the Criminal Procedure and Evidence Act [Chapter 9:07] ("CP & E Act"). The accused are charged with the crime of murder as defined in section 47 (1) of the Criminal Law [Codification and Reform] Act [Chapter 9:23] ("Criminal Law Code"). It being alleged that on 5 June 2017 the accused persons wrongfully, unlawfully and intentionally killed and murdered Thengile Nyathi ("deceased") by assaulting him with open hands and kicking him all over the body intending to kill him or realising that there is a real risk or possibility that their conduct may cause the death but continued to engage in that conduct despite the risk or possibility.

[2] The accused persons pleaded not guilty to the charge.

[3] The prosecutor produced a post mortem report compiled by Dr S. Pesanai at United Bulawayo Hospitals ("UBH"). The Pathologist concluded that the cause of death was: intracranial haemorrhage; blunt force trauma head; and assault. In addition, the prosecutor produced confirmed warned and cautioned statements of the accused persons. Furthermore, the prosecutor sought and obtained admissions from the accused in terms of section 314 of the CP & E Act. The admissions relate to the evidence of certain witnesses as it is contained in the summary of the State Case. Three witnesses testified for the State i.e., Faith Sibanda; Sitshengisiwe Ncube and Thalitha Dube.

[4] Applications for discharge at the end of the State case are governed by s 193 (3) of the CP & E Act. It provides that:

> "If at the close of the case for the prosecution 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 convicted thereon, it shall return a verdict of not guilty."

[5] Over the years the trite principle has been established that "no evidence" in terms of the s 193 (3) means no evidence upon which a reasonable court, acting carefully, may 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 s 198(3) has been considered in a long line of cases in this country. The settled position is that a court shall discharge the accused at the close of the case for the prosecution where (a) there is no possibility of a conviction other than if the accused enters the witness box and incriminates himself – *Prosecutor General v Musvaire & Ors* 2018 (2) ZLR 838 (H); (b) there is no evidence to prove an essential element of the offence – *Attorney-General v Bvuma & Another* 1987 (2) ZLR 96 (S), 102; (c) 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 (d) 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.

[6] The question is whether the credibility of the State witnesses has any role to play when a discharge is sought in terms of s 198 (3). Whilst it is settled that a court shall discharge at the close for the case for the prosecution where the evidence of the State 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.

[7] In general, the position seems 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 upheld 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); *S v Hlambelo* (HB 251 of 2020; HC CRB 100 of 2020) [2020] ZWBHC 251 (8 October 2020); *Muridzo v The State* HH 229/22.

[8] I now turn to consider, in the light of the evidence presented by the prosecution whether a case for a discharge in terms of s 198 (3) has been made. The point of departure is that there is evidence in the form of a post mortem report that Thengile Nyathi died and that the cause of death was intracranial haemorrhage; blunt force trauma head; and assault. In respect of accused 1 there is evidence of Ernest Ncube admitted in terms of s 314 of the CP & E Act that he beat the deceased with an open hand once on the face and also struck him with a stick on his back. In addition, in his confirmed warned and cautioned statement received as an exhibit he admitted that he beat the deceased once with an open hand.

[9] The evidence of Faith Sibanda is that accused 1 struck deceased with an open hand on the face. In addition, she testified that accused 2 lifted his hand and struck the deceased, and beat him using hands. She testified further that accused 3 kicked the deceased causing him to fall on a rocky surface. After the kick and the fall, the deceased bled from the nose and mouth. She testified that she saw accused 4 striking the deceased with an open hand, and accused 5 slapped him. Sitshengisiwe Ncube testified that accused 2 slapped the deceased, and accused 3 kicked him causing him to fall on a rock, and he bled on the nose and mouth.

[10] At this stage of the proceedings, the simple question is; on the record is there evidence against the accused persons which requires a reply? My view is that there is evidence in the form of a post mortem report that Thengile Nyathi died and that his cause of death was intracranial haemorrhage; blunt force trauma head; and assault. There is evidence that each accused person either slapped or kicked the deceased. At this stage of the proceedings, the issues of inconsistences alluded to defence counsel, and the weight to be accorded to the evidence of the State witnesses recedes to the remote background. The court will not even begin analyse the probative value of the evidence adduced by the prosecution, because that is a

function to be undertaken at the end of the trial. The decisive point is that there is evidence that incriminates the accused, and it cannot at this stage be said to be of 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 establishes a *prima facie* case and calls for a reply from the accused.

[11] Mr *Jaravaza* counsel for the State submitted that at this stage the evidence shows that the accused might not be guilty of the offence of murder but of the offence of culpable homicide. The view I take is that at s 198 (3) stage this court cannot even begin to analyse whether the evidence might prove murder or culpable homicide, or any other competent verdict. I say so because if the evidence is such that the accused may be convicted of any other offence i.e., a competent verdict, it would not be in terms of law to order a discharge. See *S v Kachipare*1998 (2) ZLR 271(S), 275; S *v Tsvangirai* 2003 (2) ZLR 88. In addition, a court cannot at this stage discharge the accused of the main charge and order the trial to proceed on a lesser charge. Such would be impermissible. Notwithstanding the fact that there might be no evidence to prove the main charge, but evidence to prove a lesser charge, the trial must still proceed to the defence case on the main charge.

[12] Mr *Moyo* Counsel for accused 5 submitted that this court must discharge the accused on the basis that the evidence shows that the slaps amount to a mere triviality or *de minimis non curat lex*. As authority for this proposition, Counsel referred this court to the cases of *R v Maguire* 1969 (4) SA 191 (R.A.D) and *S v Bester* 1971 (4) SA 28 (T). In this country the defence of *de minimis non curat lex* has been codified in s 270 of the Criminal Law Code. My understanding of this provision is that for a court to acquit an accused on the basis that the conduct constituting the crime charged is of a trivial nature, it must have all the evidence, including the defence evidence. The court must examine the totality of the circumstances under which the conduct took place. I am fortified in this view in that these two cases cited by Counsel, the defence of *de minimis non curat lex* was considered at the end of the trial. Without making any finding about the defence of *de minimis non curat lex* it cannot avail the accused at s 198 (3) stage.

[13] Murder being a direct intent crime, it has competent verdicts comprising attempted murder, culpable homicide and assault. The fact that there is *prima facie* evidence of slapping the deceased with open hands and kicking him may render all the accused or some of them liable to any of the competent verdicts of murder if not murder at the end of the day. It would be incompetent and wholly inappropriate to discharge the accused at the close of the State case in

terms of s 198 (3) in circumstances where the state has established a *prima facie* case against them pointing to the existence of a competent verdict. The court finds that the State has established a *prima facie* case against all accused persons, in that the evidence of the State witnesses implicating the accused cannot be said to be of such poor quality that it cannot be relied upon. In the circumstances, the accused have a case to answer, they must therefore be put on their defence. It is for these reasons that this application must fail.

In the result, it is ordered as follows: the application for a discharge at the close of the State case be and is hereby dismissed.

*National Prosecuting Authority*, State's legal practitioners
*Macharaga Law Chambers*, 1st accused's legal practitioners
*Masamvu & Da Silva-Gustavo Law Chambers*, 2nd accused's legal practitioners
*Sengweni Legal Practice,* 3rd accused's legal practitioners
*MlotshwaSolicitors Titan Law,* 4th accused's legal practitioners
*Mathonsi Ncube Law Chambers,* 5th accused's legal practitioners