THE STATE
versus
MELUSI NDLOVU alias JAMES
JABULANI PHAKATHI

HIGH COURT OF ZIMBABWE
MOYO J
BULAWAYO 25 AND 26 JULY 2017

Criminal Trial

K Ndlovu for the state
J Mhlanga for the respondent

MOYO J: The accused in this matter faces a charge of murder, it being alleged that sometime in 2001, he and his co-accused who is still at large killed the deceased Dumisani Andrew Mbatha on the night of 24 to the morning of 25 March 2001.

The facts of this matter are not clear as all the pertinent facts in the state summary were not stated in court in *viva voce* evidence by the witnesses.

Monday Sibanda was the first state witness, he told the court of how the accused, accused's brother and deceased came from Republic of South Africa and visited him in Pangani Filabusi, and that they went to Bulawayo accompanying deceased there, who would then proceed to Plumtree which is his home area. He told the court that the accused and his brother came back around 5pm and slept over in Filabusi whereafter they then proceeded the following day to the Republic of South Africa. He told the court that he did not know of anything that links the accused person to the deceased's death as whilst at his place all was well amongst the trio.

This evidence is materially different from what is attributed to the witness in the state summary. The state counsel did not take his witness there so that he could confirm to the court what he told the police. It remains a mystery therefore how the state summary differs from the witness's *viva voce* evidence in material respects as the state counsel did not explore these disparities so that all is laid bare for the court.

Nonetheless the defence counsel did question this witness during cross examination about the differences between the state summary and his *viva voce* evidence of which the witness was adamant that what he told the court is his testimony and nothing else.

Sikhumbuzo Moyo told the court that accused, accused's brother and the deceased came to his place of residence in Nketa sometime in 2001 and they were following up on a loot from an armed robbery the four of them had committed in the Republic South Africa. He said that he is the one who had remained with the money when they fled. He told the court the deceased had seen that he was accosted by the police with the money. He said that when the accused, his brother and deceased asked him about the money he told them that he was apprehended by the police who took the money before releasing him to go back to his country. He said the police gave him R5000-00 when he asked for some money to travel back home. He then told the court that he told the accused and his brother that deceased had seen that he was apprehended and the accused then said that deceased should have told them about that fact before they left the Republic of South Africa. Again this witness left out the pertinent issues attributed to him in the state outline. The state counsel again did not probe this witness further in this regard so that the court is appraised of the basis for the disparities.

Surprisingly the state counsel neither sought to impeach his witnesses especially the first witness nor did he make any application to expunge the evidence that his witnesses had clearly departed from in the state summary. A proper approach would have been to produce the witness statement and then have the witness a declared hostile to enable the state counsel to cross examine them in a bid to establish the truth.

Our criminal justice system is adversarial in nature, meaning that the state must be on its toes to establish the guilt of an accused person. The court plays a neutral role and cannot therefore assist the state counsel in the prosecution of his case as that would mean that the trial is unfair against the accused and biased in favour of the state. The state counsel should have done more in this case to prosecute this case especially when he heard his witnesses departing from the material aspects of the state case wherefrom a reasonable suspicion was formulated and upon which a prima facie case would be established.

It would appear a reasonable suspicion was formulated against the accused person on the basis of the facts as contained in the state summary which facts the state never alleged in its case

before this court. We thus have a state summary which has certain evidential aspects which were not supported by the witnesses in their *viva voce* evidence.

The third state witness was the police officer whose main thrust was to tell the court that the accused had been on the run since 2001. He did not seem to have any factual basis for this neither could he substantiate it through precise facts. He seemed to tell the court his opinion and his evidence seemed to suggest that he believed that the police in Filabusi had failed to locate the accused. We are not told of the precise efforts that were made with specific dates. He could not be drawn to tell the court with precision how the accused was on the run.

Those were the material aspects of the state case. Documentary evidence had been tendered with the state summary being Exhibit 1, the defence outline being Exhibit 2, the accused's confirmed warned and cautioned statement as Exhibit 3, the affidavit of the police officer who identified deceased's body to the pathologist as Exhibit 4 and the post mortem report as Exhibit 5.

The evidence of Kennedy Charamba, William Mutero and Dr S Pesanai was admitted into the court record in terms of section 314 of the Criminal Procedure and Evidence Act [Chapter 9:07].

The state case hinges on the evidence of these three witnesses. At the close of the state case the defence counsel made an application in terms of section 198 (3) of the Criminal Procedure and Evidence Act (*supra)* to the effect that this court should discharge the accused person at the close of the state case as the state has not adduced any evidence laying a *prima facie* case against the accused that proves the essential elements of the offence of murder or any other competent criminal charge. The state counsel opposed this application and submitted that the court should draw an inference that when the accused persons left Sikhumbuzo Moyo's place they were unhappy that deceased had not told them that the witness had been apprehended by the police in the Republic of South Africa.

This case primarily hinges on circumstantial evidence as submitted by both counsel.

In the case of *R* v *Blom* 1939 AD 188 the court had this to say on circumstantial evidence.

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 for the one sought to be drawn. If they do not exclude other reasonable inferences, then there must be a doubt whether the inference is correct.

In the case of *S* v *Shaw* 2011 ZAKZPHC 32 a decision of the Kwazulu Natal High Court, this is what the court had to say on circumstantial evidence in a murder trial.

> "On the facts, many permutation of possible inferences arise to fire the imagination of any murder mystery writer. However, speculation and fantasizing about facts not proved or selecting some reasonable inferences and ignoring others is firmly disallowed."

The court went on in that case to define circumstantial evidence as follows:

> "circumstantial evidence is any fact from which a fact in dispute may be inferred. Such facts have to be proved by direct evidence. Conclusions drawn from evidence not proven or admitted are speculation not an inference. The challenge is to draw the most reasonable inferences from the proven facts to establish the guilt of the appellant beyond reasonable doubt, without overlooking the possibility of other equally probable or reasonably possible inferences
>
> This approach to circumstantial evidence constrains adjudicators of fact from over zealously exercising their imagination by filling the information gaps to construct theories to explain their conclusions. Such creative enterprises risk overlooking inconsistent circumstances or assuming facts which have not been proved or cannot legitimately be inferred."

The judge in the *Shaw (supra*) case referred to the case of *R* v *Mlambo* 1957 (4) SA 727, a murder case in which the state had not established the cause of death and the guilt of the appellant rested on circumstantial evidence, the majority of the then appellate division held that other indications of an intent to kill had to be very strong if they are to make up for serious deficiency and leave no reasonable doubt and that inferences cannot be drawn from conjecture or speculation. The judge in the *Shaw* case *(supra*) went further to quote an Australian case on circumstantial evidence, the case of *Shephered* v *R* 1990 HCA 56, where the High Court of Australia confirmed that in cases based on circumstantial evidence, *juries* cannot use a fact as a basis for inferring guilt unless that fact is proved beyond reasonable doubt.

In the *Shaw* case *(supra),* the court had to ask itself this question:

> "Does the circumstantial evidence elevate the possibility that the appellant shot the deceased intentionally to a certainty? In other words do the material circumstantial facts, viewed cumulatively establish this as the only reasonable inference? To answer this question the facts and inferences have to be assessed."

In the evidence before us we do not have any fact from Monday Sibanda's testimony, that has been proven, upon which an inference of guilt can be drawn against the accused person.

In the evidence of Sikhumbuzo Moyo, the state counsel submits that, the mere fact that the accused persons said to the deceased he should have told them about the issue of Sikhumbuzo Moyo being apprehended by the police before they left the Republic of South Africa, shows that there was a motive to murder as the accused and his brother were unhappy that deceased had made them come for nothing.

This court has difficulty in drawing such an inference that the accused had a motive to murder the deceased for this reason for the following:

a) We are not told that the accused and his brother were annoyed or angered by this fact. Neither did the prosecutor himself probe the witness further on this point if he considered it a material fact and a basis upon which an inference of guilt would be sought to be drawn.

All the witnesses told us was that the accused said the deceased should have told them about this fact before they left Republic of South Africa. We are not told of the manner this was said, whether it was in anger or harshly. In fact the witness himself stated as a casual comment that came from the accused. If the state counsel wanted to seek an inference to be drawn on this point he should have proved anger, or annoyance, or agitation or an altercation between deceased and the accused and his brother. The anger, unhappiness or agitation would then be a proven fact whereupon the state would then seek that an inference be drawn from the proven anger or unhappiness that the accused and his brother could then have had a motive to harm the deceased. But the state counsel wants this court to first speculate on whether the accused and his brother were angered or not, then after speculating on that point, the court goes further to draw an inference. This is what is specifically prohibited in the *Shaw* case *(supra).*

In *R* v *Mlambo (supra)* it was stated that indications of an intention to kill had to be very strong if they are to make up for serious deficiency and leave no reasonable doubt and that inferences cannot be drawn from conjecture or speculation. It cannot be said that a strong intention to kill exists in the state merit by the accused persons that deceased should have told them about the witness's encounter with the police prior to their leaving the Republic of South Africa. We are not even told whether deceased responded to this and how, and whether the matter ended there or did not. All this was the duty of the state counsel to establish if he so believed that he wanted to pursue this avenue to establish motive on the basis of this fact.

The state has a duty to prove those facts that it seeks to have inferences drawn from. It would not be sufficient for the state to leave a matter hanging without establishing the fact upon which it seeks to have an inference drawn only for the state to what the court to scrounge around and speculate on the facts. The court is not allowed to speculate on facts in order to draw inferences therefrom. The court should list the proven facts first and then see what reasonable inferences can be drawn therefrom. The state counsel also submitted that the accused should be put on his defence so as to explain why in his defence outline he says the deceased parted with them when he went to Lobengula and yet Monday Sibanda says they were accompanying deceased who was going to his home in Plumtree. Again, Monday Sibanda was not probed by the state counsel to tell us if the accused persons were taking the deceased to Plumtree or to Bulawayo as in his testimony that's not clear. If the state sought to lean on this point, the evidence must have been extracted to the effect that the accused persons and deceased left Filabusi for Plumtree and not Bulawayo. With the gaps in Monday Sibanda's evidence on that issue, whether deceased parted with the accused persons on his way to Lobengula or not, is neither here nor there, since going to Lobengula that night did not mean that he was no longer going to his home in Plumtree. In any event it would be wrong to put the accused on his defence to bolster the state case. Even if the accused person is put on his defence on this point and he is adamant that deceased left going to Lobengula how will the state prove that that is not so and yet Monday Sibanda's evidence has not been shown to be at variance with that. The witness was not even asked during his evidence in chief to comment on that aspect of the defence outline so that we would have in the court record an assertion by the witness that the accused and deceased left going to Plumtree and not Lobengula.

It is this court's finding that the state has not established a *prima facie* case at all against the accused person and it would not be proper for this court to put the accused person on his defence and yet the state has not presented a single fact in the court record that would point towards the accused's guilt.

The case of *S* v *Tsvangirayi* HH 119/03 is to the effect that where no evidence has been led to establish the essential elements of the offence then the accused person is entitled to be discharged at the close of the state case, for what could he be called upon to answer?

It remains a mystery what could have happened to the deceased. Did he have an altercation with the accused persons after leaving Sikhumbuzo Moyo's place? Did he later have an altercation with some other people after parting with the accused and his brother? Was the deceased attacked in Bulawayo or Figtree? If he was attacked in Figtree did the accused and his brother go to Figtree? Did the accused and his brother have a gun with which they would shoot the deceased? All these questions have not been answered in the court record and although a nagging suspicion remains in one's mind that the accused and his brother should know something about the deceased's demise there is absolutely no evidence to point at such a conclusion. This court works on proved facts and where the state has not adduced sufficient evidence to lay a foundation for the accused's guilt then the accused person is entitled to his acquittal.

It is for these reasons that I find the accused person not guilty of murder at the close of the state case and he is accordingly acquitted.

National Prosecuting Authority, applicant's legal practitioners
Masiye-Moyo and Associates, accused's legal practitioners