

HH 52-03  
Crb 31-33/03  
THE STATE  
versus  
WILLIAM NHONGO  
and  
SHADRECK MUSORO  
and  
MAYENGA MAYENGA

HIGH COURT OF ZIMBABWE  
CHINHENGO J,  
MASVINGO, 20 February, 2003

### **CRIMINAL TRIAL**

**(*Ex tempore* judgment : Corrected)**

**Mr D Malunga for the State  
Miss J Mupamhanga for the Defence**

**CHINHENGO J:** The accused persons were charged with two counts of murder it being alleged, in respect of the first count, that on or about the 19<sup>th</sup> January, 2000 and at or near Chigumisirwa Business Centre in Bikita, the three accused persons or one or more of them unlawfully and with intent to kill, assaulted Richard Maphosa all over the head and body with thick sticks, booted feet and open hands causing him injuries from which he died on the 20<sup>th</sup> January, 2002 at Chikuku Hospital in Bikita.

The allegation in the second count is that on or about 19<sup>th</sup> January, 2002, and at or near Chigumisirwa Business Centre, in Bikita, all three accused persons or one or more of them unlawfully and with intent to kill, assaulted Richard Chatunga all over the body with thick sticks, booted feet, open hands, causing him injuries from which the said Richard

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**Chatunga died on the 20<sup>th</sup> January, 2002.**

On arraignment before the Court, the accused persons pleaded not guilty to the two charges of murder, but they each pleaded guilty to culpable homicide.

The State accepted the plea of guilty to culpable homicide in respect of each count. A statement of agreed facts was prepared and handed into Court as Exhibit 1. For the purposes of the record and the judgment, I will read through the statement of agreed facts. It reads as follows:-

" Accused 1 is William Nhongo aged 36 and resides at Tiwabarire Village, Bikita. Accused number 2 is Shadreck Musoro, aged 26, who resides at Mufari Village, in Bikita. Accused 3 is Mayenga Mayenga aged 29 who resides at Muzokura Village, in Bikita.

The three accused persons are members of the Zanu PF Youth League in Bikita. The first deceased Person Richard Maphosa was aged 47 resided at Chigumisirwa Village, Chief Masungunye, in Bikita. The second deceased, Richard Chatunga, resided at Mufara Village, Chief Mazungunye, in Bikita.

**On the 19<sup>th</sup> of January, 2002, a celebration party for the winning member of Parliament for Bikita East was held at Chigumisirwa and Munyii Business Centres in Bikita. The three accused persons were amongst the congregated youth members. The three accused persons being among the youth leadership received information that the two deceased persons were members of the opposition MDC. At the gathering the two deceased persons were mentioned as active members of the MDC in the ward and thus a resolution was made to have them summoned to the Business Centre where the youth members were gathered. Consequently, the two deceased members were brought to the gathering where they were questioned with regards to their connection to the opposition party. The two deceased persons denied knowledge of their alleged membership of the opposition party.**

The deceased persons were instructed to lie down on the ground. They did as they were instructed and thereafter the accused persons took turns to assault the deceased persons on their heads and bodies using thick sticks. After sometime, the deceased persons were force-marched to Munyii Business

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Centre, some seven kilometres away.

Along the way, they were subjected to further and continuous assaults. The second deceased, Richard Chatunga, failed to get to Munyii Business Centre. He collapsed on the way due to injuries sustained during the assault. The accused persons and their group of youths left the deceased by the roadside.

On arrival at Munyii Business Centre, the accused persons ordered the deceased Richard Maphosa to denounce his membership of the opposition party, but the deceased failed to do so. This angered the accused persons who further assaulted the deceased, Richard Maphosa, several times on the back and shoulders. He fell down and lost consciousness and then the assaults stopped.

**On the 20<sup>th</sup> January, 2002, attempts were made to ferry the deceased persons to hospital but both died on their way to hospital. On the 23<sup>rd</sup> January, 2002, post-mortem examinations were carried out by Doctor Javangwe and his findings are recorded in the Post Mortem Reports, Numbers 125096 C and 125094 C which shall be produced in Court as Exhibits. The accused persons admit having assaulted the deceased persons on the day in question, but deny having had the intention to kill them and therefore tender a plea of guilty to culpable homicide and the State accepts the limited plea".**

The State produced as Exhibits the form of Post Mortem Reports prepared in respect of the deceased persons. Exhibit 2 relates to Richard Chatunga. In that report, the Doctor who examined the deceased's body noted the following injuries sustained by the deceased - "blood in both chest cavities, multiple lacerations on the back". The Doctor concluded that the cause of death in respect of Richard Chatunga was haemothorax.

Exhibit 3 is a post mortem report in respect of Richard Maphosa. The Doctor reported on the injuries sustained by the deceased as follows -

"Deep cut on the occipital skull right side with associated skull fractures; faeces in the mouth unlikely to have been vomited by the

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deceased, probably put into mouth - faecal matter in trachea; puncture wound lateral aspect of the left upper arm; blood in both sides of the chest cavity and multiple lacerations post aspect of beating".

The Doctor concluded that death was due to "respiratory failure and haemorrhagic shock due to haemothorax and "possible asphyxia due to aspiration of the faecal matter into the respiratory tract".

The two Exhibits, Exhibit 2 and 3 were produced with the consent of counsel for the accused persons.

Having perused the papers filed of record that is the State Outline and the defence outline, and in particular, having regard to the statement of agreed facts, the Court is satisfied on the facts of this case that this is a proper case for returning a verdict of guilty to culpable homicide. Accordingly the Court finds the accused persons, each one of them, guilty of culpable homicide.

The following facts are relevant to a consideration of sentence. First, the whole background to the offences is political. The accused were members of the Zanu PF Youth League in Bikita. The deceased were suspected to be members of the Movement for Democratic Change (MDC). Second, the three accused persons were in leadership positions in the Zanu PF Youth League. They were not therefore ordinary members of the Youth League. Third, the fatal assaults on the deceased were not spontaneous. The violence perpetrated against the deceased was well-planned. The accused resolved to have the deceased brought to Munyii Business Centre. They were apprehended and questioned with regard to their connections to the MDC. They were severely assaulted. The assault was methodical and deliberate. The accused were forced to lie on the ground and assaulted with thick sticks. They were continuously assaulted even as they were force-marched for about seven kilometres to Munyii Business Centre. One of the deceased collapsed on the way before they reached the intended destination. Fourth, the assault was most severe and brutal such that the deceased died the following day. The injuries from which they died are detailed in the post-mortem report. At the pain of repetition, I will refer to those injuries. In the case of Richard Chatunga, he had blood in both sides of chest cavity, and multiple lacerations on the back. In the case of Richard Maphosa he had a deep cut on the occipital skull right side with associated skull fractures. He had faeces in his mouth and in his trachea. He had blood in both sides of the chest cavity and other injuries as well. Fifth, the accused assaulted the deceased in order for the deceased to confess or admit that they were members of the MDC. It was not even

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established that the deceased were in fact members of the MDC. Right onto their death, the deceased denied that they belonged to the MDC. They were thus fatally assaulted on a mere suspicion that they were members of the MDC.

Sixth, the occasion was a celebration party for the winning member of Parliament for Bikita East. It was an occasion where the new MP must have been celebrating his victory to represent both those who voted for and those who voted against him, for indeed, in every democracy the winner represents in Parliament not only those of his party, but those of the opposition as well. It was not an occasion to be visited by such an unfortunate incident, which no doubt should have disappointed and shamed the new MP.

**I will refer to the case of *S v Simbi and Others*, 1996(1)**

**ZLR 167 (4) for the principles which are relevant to this case.**

**That case involved public violence and the facts appear at 168**

**C-D:**

**"The statement of facts accepted by the accused were that they were residents of Sakubva in Mutare and they were the youth supporters of the independent elected Executive Mayor of Mutare, Lawrence Mudehwe. Zanu (P.F.) women and other supporters were campaigning for Zanu (P.F.) candidates Muvhundura and Matare by distributing posters to people in that suburb. The accused acting in concert, snatched campaign posters from those persons campaigning for Muvhundura and Matare and tore them into pieces shouting slogans 'Down with Muvhundura and Matare, forward with Mudehwe', 'Pasi na Muvhundura na Matare, pamberi no Mudehwe'. They then forced the supporters of Muvhundura and Matare to stop campaigning and to depart from that area. The value of damage caused to property was \$500. The accused admitted that they violently and with intent and in common purpose disturbed the peace and invaded the rights of other persons and that they had no right to do so".**

The learned Judge said that in passing sentence deterrence must be given greater prominence proportionately than factors personal and subjective to the offender because it must be conveyed to would be

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transgressors during election campaigns that violence and public disorder would be dealt with in a stern manner. He said that the Court must have regard to the circumstances under which the public violence or public disorder takes place. He also said that considerations of public interest and public safety out-weigh those of the individual in such cases. The public must be protected from unlawful violence and they must feel that they are being given protection. I agree entirely with these sentiments.

**The accused persons were in positions of leadership in the party. They were therefore obliged to set a good example, not themselves to lead in an unlawful and unwarranted attack on the deceased. State Counsel referred me to a most apposite case that of *S v Masiwa S-130-92*, where a man who had criticized the Prime Minister was assaulted resulting in his death. The facts are summarised at p 32 of the *Bulletin of Zimbabwe Law (1992 No.3)*. I will refer to them -**

"Appellant, recently put in charge of a remote Mine by the parastatal ZMDC, had fallen out with the deceased, an employee who had been the acting overseer. When the latter made derogatory comments about the Prime Minister and Government and suggested that there might be a better Government (this being at election time) the appellant had him handcuffed, with a stout rope around his neck, and taken next day to the police. When the police released him without charge one week later, the deceased returned to the Mine, but was promptly caught again and again taken in handcuffs to the Appellant's quarters to be punished. He was brutally beaten by appellant and 4 others over several hours (including a dinner break for the assailants), with fists, sticks and a fan belt, often whilst tied to a rope until he lost consciousness and

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appeared to have died".

**The Supreme Court in that case upheld a sentence of 7 years imprisonment. But I am aware that in that case, the appellant had been clever by half by pretending to the police that he thought that the deceased was still in police custody when in fact the appellant himself had participated in the assault. I must also note that the appellant had two previous convictions for causing risk to others under Mining Regulations and for assault with intent to cause grievous bodily harm.**

**Miss *Mupamhanga* submitted, in a most eloquent and fervent manner, that the setting of this offence was the Land Reform Programme, which was referred to as the Third Chimurenga. She said that bases were created in the Villages and MDC members were identified as the enemies of the Third Chimurenga. She submitted that in their naivete, the accused genuinely believed that they were engaged in a war similar to the Second Chimurenga. She described how the accused were subjected to what she referred to as "wrongful indoctrination". She said that with their low level of education the accused believed that in assaulting the deceased they were carrying out a national duty.**

**She submitted that because of the wrongful indoctrination the accused were used by others, disregarded and dumped, I do not minimize the power of media and political propaganda. They can have an abiding effect on the less sophisticated members of society. But in my view, whatever propaganda or wrongful indoctrination there was, it could not have been an exhortation to assault, maim or kill others. I do also recognize that elections or election time can be an emotive time. Individuals are often made to engage in activities in support of their candidates which are not authorized under the law. In this case, however, it must be noted that the election of the Member of Parliament was over and it was celebration time. The Courts must therefore not be seen to condone any such unlawful activities.**

**Miss *Mupamhanga* also submitted on the personal factors**

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of mitigation. William Nhongo is 36 years old, married with five children. He is the sole breadwinner of his family and siblings. Shadreck Musoro is also married and a father of one. His parents are old and his family and the parents are entirely dependant on him. Mayenga Mayenga is 29 years old. Although he is not married, he lives with his old and widowed mother. He has three orphans to look after. All the three accused persons are first offenders. These factors are indeed personal. Their belief that they were engaged in a war where the MDC was the enemy would be entirely subjective. Whilst all these factors, personal or subjective as they are, must be taken into account, they take lesser prominence to considerations of deterrence and the interests of public interest, public order and public safety.

Mrs *Malunga* urged the Court to impose a sentence of about 7 years on each count, whilst Miss *Mupamhanga* urged this Court to impose a punishment of community service. I must observe that community service is reserved for minor offences. If community service as a punishment is to continue to be respected in our society, it must be imposed only in those cases where it is appropriate. I cannot agree that in a case such as this, where the accused assaulted the deceased, who were suspected political opponents and caused their deaths, community service would be appropriate. If community service were imposed, that would only serve to bring it into disrepute as an alternative punishment to imprisonment. I would therefore like to preserve its integrity as a sensible and viable option to imprisonment in certain cases. I agree with the submissions by State counsel that a fairly long term of imprisonment is justified in this case. The accused caused the death of two men. The families and friends of the deceased have suffered unnecessarily from their passing away. These friends and families are the true victims of these offences. But because the accused are first offenders and they admitted to the negligent killing of the deceased in the circumstances outlined in the judgment and having regard to the personal and subjective factors of mitigation, I will suspend a portion of the overall sentence which I will impose.

I am aware that suspending a portion of a long prison term is not looked upon with favour by the Supreme Court. In this regard, I will refer to the remarks of GUBBAY JA (as he then was) in the case of *S v Gorogodo* 1998 (2) ZLR 378 (S) at 383 B-D and the remarks of KORSAH JA (as he then was) in *The Attorney General v Paweni Trading Corporation (Pvt) Ltd & Ors* 1990 (1) ZLR 24 (S), which remarks were also quoted in *S v*



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**Sawyer, 1999 (2) ZLR 390.**

I must quote the remarks of GUBBAY JA in *Gorogodo's* case and they are to this effect -

".....I do not believe that it is appropriate to suspend any portion thereof. There is no rule that every first offender who is to be imprisoned is entitled to have a portion of the period suspended. See *S v Moyana & Anor* 1980, ZLR 460 (AD) at 464 E-F. The main purpose of a suspended sentence is rehabilitative. Where, in consequence of the nature of his wrong-doing, the offender is required to undergo very lengthy incarceration (as in this instance), if that punishment does not induce him to settle down to useful life, it is unlikely that upon his release from gaol a further period of imprisonment hanging over his head would deter him from future crime".

**KORSAH JA in *Paweni Trading Corporation (supra)*, at 43G-44A said-**

"One final observation must be made : I do not think that where a convicted person is to undergo a very lengthy sentence, such as was impose by the trial court, anything is to be gained by suspending 7 years on condition of good behaviour. See *S v Gorogodo* S-192-88 (not yet reported) at p 6. There is no doubt that such suspension was made by the trial Court as a matter of personal deterrence. Such personal deterrence is not justifiable because those who have their wits about them usually find the closing of prison gates an experience which they do not want again, and if they do not learn their lessons after a lengthy period of incarceration, they can always be dealt with by the courts on the basis of the severity of the offence committed. To bring into effect a suspended period of 7 years for defrauding a man of \$200 would appear unjust to the man in the street".

I will however adopt the approach taken in *Sawyer's* case (*supra*). In this regard, I am guided by the remarks appearing at 397 B-D where GILLESPIE J in reference to GUBBAY JA and KORSAH JA's remarks said-

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"In that context, the remarks are, with respect, beyond criticism. They should not, however, be understood as an indication that it would never be appropriate to suspend a portion of a sentence solely because of a view that further offence is unlikely. They should never be taken as meaning that it would never be proper to suspend a portion, even a substantial portion, of a lengthy prison sentence.

**These two misapprehensions (for such they are) are refuted thus. Although the primary object of the suspension of a sentence, or portion of it, on conditions of good behaviour, is to encourage rehabilitation of the offender, that is not the only purpose.**

Another important reason so to act as to mitigate the severity of the sentence imposed, where general deterrence requires an exemplary sentence but individual circumstances call for meaningful mitigation thereof. The danger of a substantial sentence being brought into effect for a minor transgression is no reason to deprive a deserving person of the mitigatory effect of suspension of a portion of his prison term. Rather that danger, already minimal if the favourable view of the likelihood of his recidivism is correct, should be addressed by the judiciously strict formulation of the condition of suspension".

**I also do not propose to regard the two counts as one for sentence although these offences are related to one another. They were committed together as part of the same criminal activity. In both cases, the deceased were severely assaulted. I think that where a court is to sentence a convicted person for multiple counts of culpable homicide, it is quite in order to impose individual sentences for each offence. There is recent supportive authority to that effect.**

**In this case, individual persons died as a result of the assault. It would therefore be inappropriate to impose a globular sentence. The sentence which I will impose on each of the accused persons is as follows-**

**Count 1 : 7 years imprisonment**

**Count 2 : 7 years imprisonment. Of the total of 14 years imprisonment, 4 years imprisonment is suspended for five**

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**years on condition that during that period, the accused does not commit any offence involving an assault on the person of another for which he is sentenced to imprisonment in excess of 12 months without the option of a fine.**