

MOSES MUBVUMBI
and
PRISCA KANYAMA
and
EVERIN CHIPERE
and
VIVIAN CHIPERE
and
MIRIAM NYAMUKONDIWA
and
REBECCA KANYAMA
and
ISAAC GWANYAGWANYA
and
ISAAC MUTUTURU
and
PIKITAYI NYAMANDE
versus
THE STATE

HIGH COURT OF ZIMBABWE
CHIWESHE JP AND UCHENA J
HARARE, 29 September, 6 and 11 October 2011

Criminal Appeal

B Pesanai, for the appellant
F.I. Nyahunzi, for the respondent

UCHENA J: The appellants were convicted and sentenced on a charge of culpable homicide. They were convicted and sentenced by a regional magistrate sitting at Marondera Regional Magistrate's Court. They appealed against the severity of the sentence of 8 years imprisonment of which 5 years was suspended on conditions of good behaviour.

The facts on which they were charged are as follows. On 30 June 2004, Moses Mubvumbi and John Rego took the deceased from his home to the field where he was first assaulted by the appellants. They suspected him of having broken into and stolen from Sinikiwe's house. They assaulted him with clenched fists, open hands, booted feet and switches, all over his body. He was later ferried by tractor to Sinikiwe's house where

Michael Kazingizi, Moses Mubvumbi and Isaac Gwanyangwanya further assaulted him, with open hands, booted feet, clenched fists, and some switches. They later transported him to his house by tractor as he could no longer walk on his own. The deceased died at his house the following day on 1 July 2004.

The deceased's body was examined by a doctor who found that death was due to a head injury which caused a fracture on the left occipital.

The appellant's appeal against sentence only, was based on the severity of the sentence. They alleged that they had told the magistrate that they had paid compensation of 15 heads of cattle and 2 goats to the deceased's family, which the magistrate refused to record and take into consideration in passing sentence. This allegation was made in the appellant's grounds of appeal to which the magistrate's comments were, "I stand by my reasons for sentence and judgment."

In his heads of arguments Mr *Nyahunzi*, for the respondent submitted that the participation of each appellant was not properly canvassed leaving the propriety of their convictions in doubt. Though Mr *Pesanai* for the appellants had not on noting the appeal picked this irregularity, he responded to it and submitted that it affects the appellant's conviction. In his submissions during the hearing of the appeal Mr *Nyahunzvi* for the respondent in conformity with the professionalism, expected from the respondent's officers, submitted that he could not support the conviction as the participation of each appellant was not covered in the canvassing of essential elements.

The appellants are men and women of various age groups who at two different places, in two different groups and at two different times, assaulted the deceased, leading to his death. Their pleas were taken in a collective manner, with questions being asked, to all of them, and their responses to each question being recorded in series as each gave his or her response one after the other.

The purpose of canvassing the essential elements of the offence when a plea of guilty is tendered is to satisfy the court that the accused committed the offence charged. In doing so the court seeks to satisfy itself that the accused is not tendering an ill informed plea of guilty. It does so by explaining the essential elements of the crime charged and verifying the accused's admission of those essential elements by putting

them to him in a series of questions covering each essential element of the crime, and ensuring that he has no defence to offer to the crime charged.

As already said in this case the magistrate asked general questions to all nine accused persons at the same time, which each appellant answered one after the other. This is not the correct way of canvassing essential elements in a trial involving several accused persons who participated in the commission of the crime at two different places and in different ways, using different means to assault the deceased. This can be demonstrated by the following questions and answers.

Q Do you admit that on the 30/6/2004 at Shambahweta Village Murewa you wrongfully and unlawfully assaulted the now deceased with clenched fists, open hands, booted feet , logs, switches, all over his body?

A 1 Yes
2 Yes
3 Yes
4 Yes
5 Yes
6 Yes
7 Yes
8 Yes
9 Yes

Q Do you admit that because of these assaults by each of you severally he sustained injuries that led to his death on 1/07/04.

A 1 Yes
2 Yes
3 Yes
4 Yes
5 Yes
6 Yes
7 Yes
8 Yes
9 Yes

An examination of these two questions raises the following questions. How did the court satisfy itself from the first question, which appellants used open hands, clenched fists, booted feet, logs, switches etc.? Did every blow by what ever weapon used cause the deceased's death? Did the appellants understand what they were saying yes to when they answered these two questions? More importantly did the magistrate understand and

become satisfied of what the appellants were telling him when they answered his questions quoted above. These questions would not have arisen if each appellant had been separately asked these questions and the magistrate had gone further to ask each appellant what he or she used and on what part of the deceased's body. On the second question the Dr's finding does not show that the deceased died because of all the blows delivered by the appellants. He said it is the head injury which caused the deceased's death. A diligent inquiry during the canvassing of the essential elements with each appellant one at a time would have established, which appellant used which weapon, where he/she struck the deceased's body and his or her culpability. In the case of *S v Dube & Anor* 1988 (2) ZLR 385 (SC) at pp 385H to 386A DUMBUTHSENA CJ commenting on the need for a judicial officer to exercise care when taking a plea of guilty said;

“Where there is a plea of guilty, judicial officers must be careful not to regard every fact as proved just because it is admitted. Where the accused admits "possession" of a prohibited article, the court must establish just what the accused is admitting, possession being a difficult legal concept. A similar caution applies to the explanation of the charge and the elements of the offence.”

He at p 391 A to B commenting on how a judicial officer should take pleas of guilty from a number of accused persons in one trial said;

“Each accused person should have been dealt with separately. Each should have been questioned to reveal exactly what it was as between "keeping", "possessing", "selling" or "disposing" that he was admitting. The exact nature of the "possessing" that he was admitting should have been clarified.

The purpose of such questioning is not to test the accused person's credibility or to trap him into further admissions, but simply to determine precisely what it is that he is admitting.”

Section 271 (2) (b) Of the Criminal Procedure and Evidence Act [*Cap 9.07*], herein called the CP&E Act, requires that the magistrate be satisfied, before he can convict an accused person in proceedings under that section. The satisfaction must come from a careful verification of the accused's plea of guilty by confirming it through questioning him on his attitude to the essential elements of the crime charged. It is not possible for a magistrate to be satisfied if he asks general questions to many jointly

charged accused persons whose answers can only be yes or no because of the manner the questions will have been put to them. Section 271 (2) (b) provides as follows;

- “(b) the court shall, if it is of the opinion that the offence merits any punishment referred to in subpara (i) or (ii) of para (a) or if requested thereto by the prosecutor—
- (i) explain the charge and the essential elements of the offence to the accused and to that end require the prosecutor to state, in so far as the acts or omissions on which the charge is based are not apparent from the charge, on what acts or omissions the charge is based; and
 - (ii) inquire from the accused whether he understands the charge and the essential elements of the offence and whether his plea of guilty is an admission of the elements of the offence and of the acts or omissions stated in the charge or by the prosecutor; and may, if satisfied that the accused understands the charge and the essential elements of the offence and that he admits the elements of the offence and the acts or omissions on which the charge is based as stated in the charge or by the prosecutor, convict the accused of the offence to which he has pleaded guilty on his plea of guilty and impose any competent sentence or deal with the accused otherwise in accordance with the law:”

In this case the questions asked to the appellants as a group were not capable of establishing how each participated in assaulting the deceased. Thus each appellant’s acts or omissions were not established. They were also not capable of satisfying the magistrate of each appellant’s participation and therefore each appellant’s guilt of the offence charged. The magistrate’s need to exercise care in satisfying himself or herself of the accused’s plea is reinforced by the provisions of s 272, which requires him to alter the plea to one of not guilty if the accused’s response to his questions raise a doubt as to whether or not his plea of guilty is based on his accepting that he acted in the manner alleged and accepts the essential elements of the crime charged. Section 272 of the CP&E Act provides as follows;

- “If the court, at any stage of the proceedings in terms of section *two hundred and seventy-one* and before sentence is passed—
- (a) is in doubt whether the accused is in law guilty of the offence to which he has pleaded guilty; or

- (b) is not satisfied that the accused has admitted or correctly admitted all the essential elements of the offence or all the acts or omissions on which the charge is based; or
- (c) is not satisfied that the accused has no valid defence to the charge; the court shall record a plea of not guilty and require the prosecution to proceed with the trial.”

In this case the provisions of section 272 must have alerted the magistrate of the difficulty the putting of essential elements to the appellants as a group, would lead him to. The lack of details of each appellant’s participation leaves a doubt as to what offence each is guilty of.

It is not alleged in the states summary that the appellants were acting in common purpose therefore the actions of one appellant can not be imputed to others. The magistrate did not ask them if they were acting in common purpose. How then did he find that they were all guilty of culpable homicide, when some used switches and open hands, which could not have caused the head injury which caused the deceased’s death.

Culpable homicide is the causing of the death of another person by the accused when he or she

- (a) negligently fails to realise that death may result from his or her conduct; or
- (b) realising that death may result from his or her conduct but negligently fails to guard against that possibility.

The important fact to note in this case is that death must have been caused by the appellants, for the trial court to have convicted them of culpable homicide. In view of what has been said above it can not be said that the conduct of each appellant caused the deceased’s death as it was not alleged and accepted that they were acting in common purpose.

It is however common cause that each appellant acted unlawfully towards the deceased and can be convicted of some crime as a result of his or her conduct. That however can not be determined in the absence of a proper inquiry on the participation of each appellant and whether or not they were acting in common purpose. It is therefore not possible to avoid the remittal of the case to the magistrate’s court for a trial de novo, in

spite of the offence having been committed in 2004. Counsel for the appellant and for the respondent submitted that we should remit the case to the trial court for trial de novo.

I am satisfied that Mr *Nyahunzvi* for the respondent is correct in not supporting the appellants' convictions. He and Mr *Pesanai* for the appellants are correct in submitting that this court has the necessary jurisdiction to remit the case to the court aquo for a trial *de novo*.

In terms of s 41 (h) of the High Court Act [*Cap 7.06*], though this case was on appeal, this court can exercise its supplementary review powers to order its remittal to the magistrate's court for trial de novo

In my view the new trial must be before a different magistrate because there is reason to doubt the impartiality of the trial magistrate. It was alleged she had refused to record and consider the payment of compensation by the appellants to the deceased's family. I appreciate that allegations against a judicial officer should not be lightly accepted, but in this case the magistrate was given an opportunity to comment on this issue and chose not to do so. This leaves this court with no option but to accept that she acted as alleged and avoided commenting on it.

In the result it is ordered that the appellants' appeal be upheld. Their convictions and sentences are set aside. The case is remitted back to the regional magistrate's court for trial de novo before a different magistrate.

CHIWESHE JP, agrees -----

IEG Musimbe & Partners, appellants' legal practitioners
A/G's Criminal Division, respondent's legal practitioners