

PROSPER CHIROZVA
versus
THE STATE

HIGH COURT OF ZIMBABWE
MUSAKWA & MUZOFA JJ
HARARE, 18 May 2020 & 1 June 2020

Criminal Appeal

N. Chigoro, for the appellant
A. Muziwi, for the respondent

MUSAKWA J: The appellant was convicted of culpable homicide whereupon he was sentenced to 3 years' imprisonment of which 1 year was suspended for 5 years on condition of good behaviour. Although the appellant noted an appeal against conviction and sentence, at the hearing of the appeal Mr *Chigoro* abandoned the appeal against sentence.

The grounds of appeal are as follows:

1. The trial court erred in admitting contradictory evidence.
2. The trial court erred in holding that the appellant assaulted the deceased several times when the State indicated that he slapped the deceased once.
3. The trial court erred in finding that by chasing the deceased who was fleeing from justice and slapping him once, the appellant was grossly negligent.
4. The trial court erred in overlooking the road traffic accident as the possible cause of the deceased's death.

The facts of the matter are that the deceased was aged 66 years. On 26 September 2016 the deceased who was riding a motor bike was involved in some traffic incident whose particulars are not clear. The incident involved the appellant who was driving a Nissan Caravan motor vehicle. The incident took place along Samora Machel Avenue somewhere in Eastlea. It would appear that the deceased drove away under circumstances in which the appellant felt he was fleeing. This is despite the appellant's own testimony that after the accident people had begun to converge on the scene. The appellant thought that the deceased might have feared being lynched, hence the flight. The appellant pursued and caught up with the deceased along Northampton Crescent in Eastlea. He admitted to slapping the deceased once.

On the other hand, state witnesses stated that the appellant assaulted the deceased several times and the deceased fell down. The witnesses to this incident were two ladies who worked for a land development company that is situated near the scene of confrontation. The commotion that ensued when the appellant caught up with the deceased attracted them to the scene. Both ladies stated that they saw a motor bike and a silver minibus. According to Caroline Sharon Nyarumba, as she walked towards the scene the appellant removed the deceased's helmet and beat him on the head. The deceased fell on his back. She also talked of the deceased being pushed and the bike falling on him. When the appellant was asked why he was beating the deceased, he replied that this was because the deceased had caused an accident along Samora Machel Avenue. As people started to gather, the appellant drove away. As they assisted the deceased, he appeared to be disoriented and bled from the mouth. The deceased could not stand on one of the legs.

Pamela Cecilia Zamba also gave evidence largely similar to that of Caroline Sharon Nyarumba. At the time she got out of the office she saw the deceased seated on the motor bike whilst the appellant assaulted him. The appellant first slapped the deceased and then pushed him. When the appellant slapped the deceased his helmet fell off. She stated that the appellant gave his reason for assaulting the deceased as the accident that had occurred along Samora Machel Avenue. She sought to restrain the appellant but failed. When the deceased was struck with a fist he fell on his back and started to bleed from the mouth. When they drew the appellant's attention to the deceased's condition, the appellant walked away.

The thrust of Mr *Chigoro's* submission was that the deceased may have died from injuries sustained from an accident as opposed from assault by the appellant. He based this submission on evidence from one of the witnesses to the effect that the deceased complained of a painful leg. He also submitted that it was not clear how the deceased's helmet came off. This is because one witness stated that the appellant took off the helmet whilst another stated that the helmet came off due to the assault. On the other hand, the appellant stated that the deceased is the one who took off the helmet.

Mr *Muziwi* submitted that the inconsistencies relied upon are immaterial. There was no evidence of an accident having occurred at the scene.

The first ground of appeal is not concise. It is too vague for the ground to allege that the trial court erred in relying on contradictory evidence without specifying such evidence. I do not think that the matter was helped by Mr *Chigoro* highlighting such contradictions in his address. As was held in *S v McNab* 1986 (2) ZLR 280 (SC), in an appeal what the appellant

attacks in the judgment of the convicting court must be set out in accordance with the rules. A ground of appeal must point in what specific manner the court erred.

The second ground of appeal is equally bad. The case for the State was never that the appellant only slapped the deceased once. It is the appellant who claimed to have slapped the deceased once. The eye witnesses stated that the appellant struck the deceased several times and pushed him.

On the third ground the trial court did not make a finding that the appellant was negligent by chasing the deceased and assaulting him once as is contended. On the contrary the trial court made a finding that the appellant pursued the deceased and when he caught up with him, assaulted him several times, causing him to fall on his back. The trial court correctly ruled that where death arises from an intentional assault, the accused is liable on the basis of foreseeability. As authority the trial court cited *R v John* 1969 (2) RLR 23. Thus the reasoning by the trial court cannot be faulted.

The last ground of appeal is without basis and is actually speculative. The real evidence that there was some accident on account of the deceased's driving conduct came from the appellant. But the appellant never suggested that the deceased was injured. On the contrary the appellant stated that the deceased crossed his way and this resulted in the appellant being involved in an accident with another vehicle. As people started to gather the deceased panicked and fled, hence the chase by the appellant. State witnesses talked about the deceased complaining of a painful leg. They also testified about the motor bike falling on the deceased. This might have been the cause of the pain in the leg. Irrespective of whether the deceased had pain in the leg, that was not the cause of death. The post-mortem report noted the cause of death as subarachnoid haemorrhage and blunt head trauma. It must be borne in mind that State witnesses talked of assault on the head and the deceased falling on his back. Either of these mechanisms could have contributed to the head trauma and subarachnoid haemorrhage and certainly not a painful leg. As for foreseeability, the law does not require that an accused should foresee the exact manner of death. As was held by McNally JA in the unreported case of *S v Tanga* S-37-93 at p 8 of the cyclostyled judgment-

“As to foreseeability, it seems that if even by means of a minor assault, you knock a man down and he hits his head and you kick him in the midriff, you must foresee the possibility of serious injury or even death. It is not necessary that you foresee the actual way he might die...”

Accordingly, the appeal against conviction is hereby dismissed.

MUZOF A J agrees

Chigoro Law Chambers, appellant's legal practitioners

National Prosecuting Authority, legal practitioners for the state