PRINCE CHOKUWA

And

CHARLES CHOKUWA

Versus

THE STATE

HIGH COURT OF ZIMBABWE
MAWADZE J
MASVINGO 9 JULY, 22 SEPTEMBER, & 9 OCTOBER, 2020

Assessors

1. Mr Chikukwa
2. Mrs Chademana

Criminal :- Discharge at the close of the Prosecution case

Mr B.E. Mathose, for the state
Mr M. Mureri, for the accused

MAWADZE J: The law as regards the interpretation of s 198(3) of the Criminal Procedure and Evidence Act, [*Chapter 9:07*] which relates to the discharge of an accused at the close of the prosecution case is a well beaten path. It is however at times disheartening that these simple and often repeated principles are either misinterpreted, misunderstood or simply ignored. If both parties in a criminal trial fully appreciate this law and apply their minds a lot of valuable time and energy may be saved in criminal trials.

The applicable principle or legal basis for granting a discharge of the accused at the close of the prosecution case was well laid out by GUBBAY CJ in the case of *S* v *Kachipare* 1998 (2) ZLR (S). The legal basis is where;

(a) there is no evidence to prove the essential element of the offence see *AG* v *Bvuma & Anor*. 1987 (2) ZLR 96 at 102 F – G or

(b) there is no evidence on which a reasonable court acting carefully, might properly convict, see *AG* v *Mzizi* 1991 (2) ZLR 321 at 323 B or

(c) the evidence adduced on behalf of the State is manifestly unreliable that no reasonable court could safely act on it. See *AG* v *Tarwirei* 1997 (1) ZLR 575 (S) at 576 G

It is also important to understand that a discharge of an accused at the close of the prosecution may only be granted if there is no evidence to support the offence charged or any other permissible verdict.

Lastly one should bear in mind that in considering the provisions of s 198(3) of the Criminal Procedure and Evidence Act, [*Cap 9:07*] the court is not dealing with the accused person's defence as at this stage no such evidence would have been placed before the trial court by the accused. All what is subjected to scrutiny at this stage is the prosecution case. The proffered defence outline by an accused person whilst it may be on record is not subject to consideration at this stage.

Both accused are facing the charge of murder as defined in s 47(1) of the Criminal Procedure and Evidence Act [*Cap 9:07*].

The charge is that on 23rd August 2018 at No. 6466 Muredzi Crescent, Mucheke 'D', Masvingo each or both of the accused caused the death of Simbarashe Mutasa by assaulting him all over the body with switches.

The accused persons are siblings. Accused 1 Prince was 20 years old and accused 2 Charles was 19 years at the material time. They were both residing at No. 6466 Muredzi Crescent, Mucheke 'D', Masvingo. At this house there were other tenants who also happen to be some of the State witnesses. During the relevant period the accused persons were also staying at this house with their married sister who was married to one Neville Mudimu also implicated in this matter.

The now deceased was aged 32 years old and was a serving member of the Zimbabwe National Army (ZNA) based at 4 Brigade, Masvingo and residing at No. 16009, Innocent Mudukuti Street, Runyararo West, Masvingo.

According to the State, Neville Mudimu who is a practising lawyer in Cape Town, South Africa is now a fugitive from justice. The investigating officer D/Sgt Pasca Musengezi said he failed to extradite Neville Mudimu through Interpol for trial as South African authorities could not co-operate in this matter since the offence Neville Mudimu is wanted for carries a possible death penalty which is abolished in South Africa.

It emerged from the evidence placed before us that the now deceased was involved in an extra marital love relationship with Neville Mudimu's wife, who is also a sister to the accused persons.

As fate would have it on the day in question 23 August 2018 the now deceased proceeded to the accused person's residence No. 6406, Muredzi Crescent, Mucheke 'D', Masvingo visiting his alleged lover Neville Mudimu's wife late at night and most probably unaware that Neville Mudimu was present at the house. The now deceased then entered his alleged lover's bedroom and all hell broke loose.

Neville Mudimu probably was unaware of this love triangle and probably mistook the now deceased as an intruder intending to steal from his room where he had retired to bed with his wife.

It is the State's case that Neville Mudimu raised alarm shouting that a thief was in his room. The now deceased realising the folly of his visit tried to flee but was apprehended inside the house by Neville Mudimu as the now deceased is believed to have been drunk. A fight then ensued between the now deceased and Neville Mudimu.

The State alleges that accused persons woke up from their room and went to assist Neville Mudimu. It is the nature of the accused person's assistance and their role which is the subject matter of this trial.

According to the State both accused persons helped Neville Mudimu their brother in law to pin down the now deceased, tied his hands and the legs using an electric cable. It is alleged they assaulted him indiscriminately with switches for a prolonged period and would also pour water on him probably to resuscitate him.

It is alleged that after severely injuring the now deceased who could now not sit or walk, the accused person proceeded to a local Chesvingo Police post and made a report of unlawful entry into their house against the now deceased whom they took as a thief. The police attended the scene and arrested the now deceased and took him to the police post awaiting to take him to hospital due to the severity of the injuries he had sustained. However the now deceased passed on whilst at the police post before an ambulance had arrived.

The cause of the now deceased's death is said to be respiratory failure and multiple rib fractures.

In their defence outline both accused deny ever assaulting the now deceased in any manner. According to both accused when the now deceased was apprehended inside their house that night he was assaulted by other people who include Neville Mudimu, the State witnesses Joseph Vandirai, Petros Urayayi and also other people described as Fini's father and some other two unnamed young men.

Accused 1 Prince said he was ordered by Joseph Vandirai to take a rope and he complied. Accused 1 Prince said Joseph Vandirai used the rope to tie the now deceased's legs.

Accused 2 Charles said he was asked him to pluck switches by Neville Mudimu and he too complied and that Neville Mudimu used the switches to assault the now deceased.

Both accused persons said their role was that they proceeded to the police post to report the intrusion into their house by the now deceased who was then arrested and taken away by the police. Both accused persons said they later learnt of the now deceased's death and that they were taken as State witnesses. Both accused persons said they were shocked on 8 September, 2018 when the tables were turned and they were arrested as accused persons responsible for the now deceased's death.

The cause of the now deceased's death is not in dispute.

Despite the State's omission to either call Dr Zimbwa to testify or to seek to have his summary of evidence admitted in terms of s 314 of the Criminal Procedure and Evidence, Act [*Cap 9:07*] as he is the one who examined the now deceased's remains and compiled the post mortem report, it cannot be disputed that the now deceased died from the injuries arising from the severe assault. The pieces of broken switches measuring 50 – 70 cm were produced by consent as Exhibit 3 and a USB cable used to tie the now deceased was tendered as Exhibit 2.

The post mortem report Exhibit 1 produced by consent shows that the now deceased suffered extensive bruises of the head, face, upper trunk, abdomen, both upper and lower limbs. He also sustained multiple rib fractures with collapsed thoracic case. The cause of his death was respiratory failure and multiple rib fractures. The proximate cause of the now deceased's death was therefore the fatal assault perpetrated on him on the night in question.

The narrow issue to be resolved therefore is whether the accused persons had a role in the fatal assault.

The fact that this matter was poorly investigated cannot be doubted. In fact the investigating officer D/Sgt Pascal Musengezi did not only concede to this but admitted that Neville Mudimu paid the police money in order for him and the accused persons to be initially released by the Officer in Charge of Chikato Police Station one Shumba. Sgt James Murambidza who arrested both accused persons on 24 August 2018 said he too was shocked to later realise that his boss had decided not to detain Neville Mudimu and both accused. As a result Neville Mudimu proceeded to South Africa.

It was also due to this apparent corruption by the uniformed branch of the police that the CID Homicide Section was later roped in to investigate this seemingly straight forward matter resulting in the arrest of both accused as per the Investigation Officer. By then Neville Mudimu had made good his escape to South Africa.

This also explains why statements were only recorded from civilian State witnesses in September 2018 despite that all these witnesses were available.

Despite these apparent imperfections all the three police details Cst Peter Sithole, Sgt James Murambidza and D/Sgt Pasca Musengezi who all attended the scene on the day in question 24 August 2018 confirmed the injuries inflicted on the now deceased.

Cst. Peter Sithole found the now deceased lying at the residence of the accused. His hands were tied at the back with an electric chord. He observed blood and bruises on the now deceased's face. The now deceased was also bleeding on his right hand and his body was wet and muddy. He said the now deceased could not walk or sit hence they had to lift him into the motor vehicle.

Sgt James Murambidza who also arrived later found the now deceased lying on some wet and muddy ground. He could tell the now deceased had been severely assaulted. The now

deceased explained that he was not a thief but had visited his girlfriend but had been severely assaulted. They had to lift him into the motor vehicle. He also recovered switches Exhibit 3 at the scene. Most importantly he arrested Neville and both accused who were implicated in the assault.

D/Sgt Pasca Musengezi who later became the investigating officer first saw the now deceased on 24 August 2018 at Chesvingo Police post. He observed that the now deceased was wet, muddy with multiple bruises all over the body mostly caused by switches. He too went to the scene that day and was part of the team who recovered Exhibit 2 the USB cable and the pieces of switches Exhibit 3.

We simply highlighted all this evidence to drive the point home that the now deceased did not die of natural causes. Further, the attending police arrested Neville Mudimu, and the two accused in connection with this matter. However the police details are not eye witnesses to the assault perpetrated on the now deceased. The eye witnesses called by the State are all tenants at the house being Ndaizivei Muparuri a 43 year old woman, Joseph Vandirayi an adult man and another adult man Petros Raurayi. Both accused alleged that it is these three State witnesses who are part of the group who assaulted the now deceased. What is important to note is that these witnesses all vehemently denied assaulting the now deceased at all. In fact it is not clear why if both accused implicated them in the assault these State witnesses were not arrested on 24 August 2018 by the attending details or whether both accused implicated them when they went to report a case of unlawful entry to Sgt James Murambidza at Chesvingo Police post. Sgt James Murambidza said he was never advised of this. In fact this was never put to him by the accused. The accused persons are yet to explain this omission.

Ndaizivei Muparuri (Ndaizivei) said when she came out of her room she found both Neville Mudimu and accused 1 Prince pinning the now deceased inside the house. Thereafter she said Neville Mudimu and accused 1 Prince took turns to assault the now deceased with switches as he lay down. She said accused 2 Charles would pluck switches and give to Neville Mudimu and accused 1 Prince. She said at some point accused 2 Charles also joined in the assault of the now deceased who was screaming pleading to no avail that he was not a thief but had visited his girlfriend. She said water was also poured on to the now deceased.

Ndaizivei who confessed to be unable to distinguish accused 1 Prince from accused 2 Charles still implicated both accused in the assault. Indeed both accused persons look alike facially and in respect of their stature. According to Ndaizivei the assault lasted for two hours.

Joseph Vandirayi (Joseph) said when he came out of his room he found Neville Mudimu holding the now deceased. He said accused 2 Charles then tied the now deceased's hands and legs. Joseph said Neville proceeded to assault the now deceased with switches ordering accused person's young brother Emmanuel to pour water on the now deceased. Joseph said the now deceased protested in the midst of the assault that he was not a thief but a member of Zimbabwe National Army who had come to see his girlfriend one Shelter at this house.

According to Joseph accused 1 Prince used a USB cable to assault the now deceased. Neville Mudimu severely assaulted the now deceased with switches and accused 2 Charles plucked switches to give Neville Mudimu. Joseph prevanciated on whether accused 2 Charles assaulted the now deceased.

Lastly, Petros Raurayi (Petros) said when he came out of his room Neville was assaulting the now deceased and that he admonished him telling Neville Mudimu to take the now deceased to the police.

Petros said accused 2 Charles was pinning the now deceased inside the house and later plucked switches outside the house. He said while now outside the house Neville Mudimu and both accused assaulted the now deceased with switches and he failed to restrain them. Petros maintained this under cross examination stating that the assault was prolonged and severe despite the now deceased's protestations that he was a member of the Zimbabwe National Army and not a thief as he had come to the house to see his girlfriend.

Given this evidence the application by both accused to be discharged at the close of the State case is clearly ill advised. One cannot say there is no evidence to prove the offence charged of murder or any permissible verdict of culpable homicide or assault.

It cannot be said that the evidence of the State witnesses has been so discredited that no reasonable court can act upon it. Both accused persons were at the scene. What exactly did they see or hear the now deceased saying? What specific role did each of the accused play? What is their comment on the evidence of the eye witnesses? What report did they make to Sgt James Murambidza? Did they disclose the assault on the now deceased and the assailants? If not why?

Did both accused believe the now deceased was a thief despite his protestations and why? All these questions and possibly more others should be answered by both accused if at all they are to be exonerated of any unlawful conduct. Such issues are to be explained and not to bolster the State's case but to rebut evidence on record. There is indeed clear evidence led by State which puts both accused at the scene of crime and also allegations of the roles they both played which evidence any reasonable court cannot ignore.

It is improper and procedurally wrong for *Mr Mureri* in his written submissions to smuggle Neville Mudimu's warned and cautioned statement and accused 2 Charles Chokuwa's warned and cautioned statement as Annexures 'A' and 'B'. These statements are not part of the record at this stage and were not produced by the State. They do not form part of the State case or the record. The accused are yet to give their evidence and to produce their Exhibits if any. As I explained at the beginning at this stage the court does not consider the evidence of the accused as such evidence is not yet before the court.

We are therefore not satisfied that the accused persons have made a case of their discharge at this stage. A *prima facie* case has been clearly proved by the State. The evidence before us cannot be said to the non-supportive of the charge or any permissible verdict of culpable homicide or assault. The accused persons should in the interests of justice be put to their respective defences.

Accordingly, the application for the discharge of each or both the accused persons at the close of prosecution case cannot succeed. It is accordingly dismissed.

National Prosecuting Authority, counsel for the State
Matutu & Mureri, counsel for both accused