

THE STATE
versus
CRIPS MUPATIKI
and
MINDLAW MASUNDA

HIGH COURT OF ZIMBABWE
MWAYERA J
MUTARE, 18, 21, 25, 28 June and 4 July 2019

Criminal Trial

ASSESORS: 1. Mrs Mudzinge
2. Mr Magorokosho

M Musarurwa, for the State
B.N. Mungure, for the first Accused
K.G. Muraicho, for the second accused

MWAYERA J: Both accused appeared before the court facing murder allegations as defined in s 47 (1) (a) or (b) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. It is alleged that on 12 October 2015 at around 0300 hours and at Chemushowe Business Centre, Chief Chitsunge, Buhera, the two accused persons interchangeably assaulted the now deceased using switches all over the body several times. The deceased sustained serious injuries from which he died. The body was examined by Doctor Tendayi Mutsvayi who concluded that cause of death was haemathorax (in simple terms collection of blood between chest walls and lungs due to blunt trauma causing shock to the body). Both accused pleaded not guilty to the charge.

The first accused denied assaulting the deceased with an intention to kill the latter. He admitted assaulting the deceased while in the company of the second accused and admitted his conduct was negligent and thus proffered a plea of guilty to culpable homicide.

The second accused denied assaulting the deceased although he was at the scene. He blamed accused 1 for assaulting and occasioning the death of the deceased.

The State adduced the following evidence: The post mortem report by Doctor Tendayi Mutsvayi outlining the cause of death exh 1 by consent. The first accused's confirmed warned and cautioned statement exh 2 by consent, the sketch plan of the general layout of the

scene exh 3 by consent, certificate of weight of sticks exh 4 and 4 (a) and bundle of sticks exh 5 by consent.

Fanuel Muchengeti gave oral evidence while the rest of the witnesses namely Joyce Masunda, Mateya Tawanda Patson, Sophia Dhenya, Lloyd Jonhera, George Chematumba, Timothy Kapesu, Tendayi Mutsvayi and Marazi Liberty's evidence was formerly admitted in terms of s 314 Criminal Procedure and Evidence Act [*Chapter 9:07*].

Fanuel Muchengeti was apparently the only eye witness. His evidence was to the effect that he witnessed both the accused assault the deceased with switches especially at the front of the second accused's shop. The witness who was an employee of the second accused told the court that he proceeded to raise alarm with the second accused's wife Joyce Masunda the second State witness. According to the witness, Fanuel Muchengeti, the deceased was now lying down when the second accused's wife came and restrained her husband. The witness also took away the stick which accused 2 was holding as he restrained further assaults by switches. The witness told the court that the switches used were plucked from nearby trees. He later heard that the deceased had passed on behind a grinding mill at the same shopping centre. The assaults were perpetrated in the early morning hours around 0300 hours and he learnt of the death around 1000 am on the same day.

The witness appeared to have been shocked by the events of the day on question as he appeared to be in a state of fright when he testified on the actual assault and eventual death. The fear however did not cloud his evidence as clearly what prompted him to go and call the second accused's wife was the attack on the deceased. His evidence in so far as the two accused both assaulted the deceased tallied with the first accused's version to a great extent. The witness generally gave his evidence in a straight forward manner. He was economical with detail but was sincere with the court that both accused assaulted the deceased who was very drunk compared to the two accused persons.

The first accused maintained his plea of guilty to culpable homicide. He pointed out that accused 2 alerted him that he suspected the deceased was a thief who wanted to steal from him. He was invited to assist in handling the thief and he responded and assaulted the deceased with switches. According to the first accused, the second accused also assaulted the deceased with switches tendered as exhibits in court. The first accused as outlined in his confirmed warned and cautioned statement, defence outline and evidence in chief was consistent in his narration of what transpired on the fateful day. The first accused together with accused 2 suspected that the deceased wanted to enter into second accused's shop to

steal hence they unleashed the assaults on him causing injuries from which the deceased passed on. The first accused was generally viewed as being genuine with the court given the manner he testified. He was candid with the court.

The second accused was adamant that he did not assault the deceased but that it was first accused who assaulted the deceased. He stated that he was throughout the assault not involved at all. Despite this denial, it was clear the second accused as the shop owner had more to protect and could not fold his arms on a suspected thief. In fact during cross examination by both counsel for the first accused and State, the second accused was exposed as being economical with the truth. He was exposed as a man bent on exploiting the economically weaker for his own benefit. He portrayed the first accused as an overzealous violent person. He sought unconvincingly to portray himself as an innocent bystander while at the same time admitting that he suspected that the deceased was a thief. The second accused was holding a switch when his wife arrived. He accepted that the sticks produced in court were used to assault the deceased by accused 1 and that the other 3 sticks he did not see them being used. He was exposed as an untruthful witness for clearly he also used switches to assault the deceased. The sticks he said he did not observe accused 1 use are sticks he used to assault the deceased. His answer that he did not observe them being used was a flimsy excuse for not telling the court his role in the assault. Generally the second accused fared badly under cross examination. He presented an unbelievable account of events which exposed him as a stranger to the world of truth.

The denial by accused 2 was exposed as merely designed to mislead the court. Moreso when one considers that the assault of the deceased only stopped after the intervention of accused 2's wife when she retorted words to the effect that accused should stop so as to avoid inviting an avenging spirit on their family. The first State witness's evidence was very clear on both accused's participation in assaulting the deceased and we found no reason why he would falsely incriminate the second accused.

At the close of both the state and defence cases it was clear that on the fateful morning at Chemushore Business Centre Chitsunge, Buhera the deceased succumbed to assault induced injuries and died. Both accused persons participated in assaulting the deceased using switches thereby causing serious injuries. There is apparent evidence that both accused persons are liable for causing injuries from which the deceased died. The question that has to be determined given the charge of murder the accused are facing is as

regards the degree of liability. It is settled murder consists of both the unlawful and intentional killing of another.

In their closing submissions the state and defence counsels correctly assessed that from the circumstances of this matter and evidence adduced the accused persons cannot be said to have set out with an aim to kill the deceased and proceeded to achieve the goal. Given the nature of sticks used in assaulting the deceased one cannot deduce that death was substantially certain. To that extent therefore the accused persons cannot be held liable for murder with actual intention. See *S v Lloyd Mukukuzi and Another* HH 577/17 and also *Mungwanda v S* SC 19/2002 on definition of actual and legal intention. Having discounted murder with actual intention the second question is whether or not the state has proved beyond reasonable doubt that the accused unlawfully and with legal intention caused the death of the deceased.

The question is whether the accused subjectively foresaw the possibility of his act causing death and was reckless of such result. If from the circumstances the accused has the *dolus eventualis* then they should be found liable for murder with legal or constructive intention. The legal intention emanating from subjective foresight just like any other factual issue, may be proved by inference. In this case both accused interchangeably struck the deceased severally with switches plucked from nearby trees. The accused unreasonably suspected the deceased, a person they were drinking with to be a thief. They sought to chastise the suspected thief by assaulting him with switches. Going by the manner of assault and the smallness of the switches used even though the assault was prolonged one cannot infer that the accused foresaw that death would ensue and foresaw that there was a real risk or possibility that death would occur. In this case the accused cannot be convicted of murder with legal intention. See *S v Mema* HB 143/13.

It remains a fact that the accused assaulted the deceased occasioning injuries from which he died. The next question is would a reasonable person in the circumstances which the accused found themselves in have realised that death may result from their conduct and persisted with that conduct? If the answer is in the affirmative then the accused should be held liable of culpable homicide. In this case the accused severally and interchangeably assaulted the deceased using sticks indiscriminately. The deceased fell to the ground and was not retaliating in any manner. The assault caused injuries around the pleural cavity occasioning accumulation of blood leading to the fatal results.

Considering the deceased's posture upon being assaulted, would a reasonable person in the circumstances of the accused have realised that death may result from his conduct? In this case when the accused persons continuously for a prolonged period assaulted the helpless deceased they were negligent in failing to realise that serious injury or death may result from their conduct. That facts of this case are indeed similar to the circumstances of the case of *State v Gumbo* HB 19/18. In the *Gumbo* case accused who used sticks to assault the deceased all over the body was convicted of culpable homicide. Clearly as in this case the nature of the sticks used cannot be viewed as lethal or life threatening in the context of death being substantially certain but teaming up to assault several times a defenceless person is certainly carelessness on the part of the accused. A reasonable man in the circumstances of the accused would have realised that serious injuries or death may result from their conduct. The first accused admitted to culpable homicide.

Accordingly both accused are found not guilty of murder and are found guilty of culpable homicide as defined in s 49 of the Criminal Law (Codification and Reform) Act.

Sentence

In reaching at an appropriate sentence we have considered all mitigatory factors advanced by Mr *Mungure* for first accused and Mr *Muraicho* for the second accused. Both accused are first offenders who have family responsibilities wife and children respectively dependant on them. Both accused have been waiting anxiously from 2014 to today for the matter to be finalised. Even though the accused were admitted to bail the trauma and pressure that goes with having a serious criminal charge of murder hanging on one's head cannot be understated.

Also mitigatory for the first accused is the fact that he cooperated with the police from the onset and tendered a plea of guilty to culpable homicide. A plea of guilty ought to be credited for what it is worth and that should be reflected in the sentence. The first accused also showed regret of his conduct by compensating customarily by paying beasts and goats to the bereaved family. We are alive to the fact that no amount of compensation can bring back life but the gesture is a way of respecting humanity.

Both accused persons stand convicted of a serious offence. Precious human life was unnecessarily lost because of the accused's negligence. The degree of negligence given the protracted, several and indiscriminate assault was high. The accused's blameworthiness is high as this was team assault interchangeably directed on a man who was hopeless and not retaliating. The negligence borders on recklessness when one considers that the deceased was

said to be very drunk. As correctly stated by Mr *Musarurwa* the Constitutionally given right to life cannot just be whisked away.

The court has to express its displeasure at people who resort to violence to resolve disputes. In this case the accused persons unreasonably took the law into their own hands when they sought to chastise a suspected thief. Precious human life was lost in a painful manner going by the cause of death and the fact that deceased could not make it home after the assault. He died at the shopping centre. I am alive to the cases suggested for guidance in sentence and indeed they remain for guidance as it is imperative that the sentencing court has to properly and judiciously exercise its sentencing discretion taking into account the circumstances of the case before hand. To suggest the option of a fine and or community service is clearly not according the right to life the status as provided in the Constitution. Community service sentence is a noble form of sentence for minor offences and one cannot say generally assaulting another by two adult men occasioning death is a minor offence. Consideration of community service would not only put into disrepute the noble sentence for minor offences but will make society lose confidence in the justice delivery system.

In passing sentence the court has to seek to strike a balance between the offence and offender while at the same time tempering justice with mercy in such a manner as not to undermine the interest of administration of justice. The offence is deserving of a custodial term. We will however suspend a portion in due recognition of the mitigatory factors and that the matter has taken too long to be brought up for prosecution and finalisation. In this case different sentences for the accused will be justified because of first accused's plea of guilty and that he compensated the bereaved family. The credit for the plea of guilty and remorse should be reflected in the suspended period.

Accused are sentenced as follows:

Accused 1

4 years imprisonment of which 2 ½ years imprisonment is suspended for 5 years on condition accused does not within that period commit any offence involving the use of violence on the person of another for which he is sentenced to imprisonment without the option of a fine.

Accused 2

4 years imprisonment of which 2 years imprisonment is suspended for 5 years on condition accused does not within that period commit any offence involving the use of

violence on the person of another for which he is sentenced to imprisonment without the option of a fine.

National Prosecuting Authority, State's legal practitioners

Makombe & Associates, first Accused's legal practitioners

Mugadza Chinzamba & Partners, second accused's legal practitioners