

THE STATE
versus
EMMANUEL JOSIAH CHITURUMANI

HIGH COURT OF ZIMBABWE
MWAYERA J
MUTARE, 20 and 30 November 2019, 20 December 2019,
3, 22 and 23 January 2020

Criminal Trial

ASSESORS: 1. Mrs Mawoneke
2. Mr Mudzingo

Ms T. L Katsiru, for the State
J. T Fusire, for the accused

MWAYERA J: The accused was arraigned before this court on a charge of murder as defined in s 47 (1) of the criminal Law (Codification and Reform) Act [*Chapter 9:23*]. The state alleges that on 28 October 2018, and at Munhuhaashati Village, Chief Mutema, Chipinge, the accused person unlawfully caused the death of Phillip Ndlovu by striking him twice on the back intending to kill him or realising that there was a real risk or possibility that his continued conduct might cause the death and continued to engage in that conduct despite the risk or possibility thereby causing injuries from which the said Phillip Ndlovu died. The accused pleaded not guilty and denied having intentionally caused the death of the now deceased and he argued that the assault with a stick or switch was not the cause of death of the now deceased.

The accused in his defence outline which he latter adopted as evidence in chief protested his innocence as he outlined events of the day in question. According to the accused on 28 October 2018, the now deceased person together with Felistas Vhingeya, Tadiwanashe Chiturumani, Tanatswa Chiturumani and Learnmore Vhingeya took longer than expected to come back from the fields where they had gone to check for baboons. Upon making follow ups the accused was shocked when he observed the now deceased seated with no short on while the 4 children were paired with the girls mounting on top of the boys. Tanatswa mounted Learnmore Vhingeya while Felistas Vhingeya mounted Tadiwanashe Chiturumani. The accused then looked for a small stick with which to chastise the four minor children and the now deceased. As he was using the stick the now deceased ran away and upon being

pursued by the accused the now deceased made a U-turn leading to a collision with the accused and they both fell to the ground. The now deceased got up first and when he tried to run away he collided into a Musasa tree with his head following which he fell down unconscious. The accused sought for help from the elders but the deceased succumbed to injuries and passed on after an hour. The accused maintained his version throughout the defence case. It is also worth noting that the same version was given in his confirmed warned and cautioned statement tendered as exh 1 by consent wherein accused stated:

“I admit to the charge being levelled against me in that I struck Phillip Ndlovu twice with a stick on the back. He ran towards me and we collided and we both fell down. He got up and tried to run away and collided on a Musasa tree by his head and fell down and fainted. He then died after we carried him home.”

The accused was consistent in his version. He was a reliable witness. The state relied on evidence of 9 witnesses most of which was on contentious aspects and such admitted formerly in terms of s 314 of the Criminal Procedure and Evidence Act [*Chapter 9:07*]. The first two witnesses gave oral evidence. Tanatswa Chiturumani’s evidence was essential that the juvenile children went to chase away baboons from the maize field. While at the field the now deceased instructed the children to remove panties and ordered the girls to mount on the boys. It was then that accused arrived and he assaulted all the children who ran away including the deceased. She confirmed that accused used a switch to assault them. It was also clear from the witness’s evidence that the deceased hit onto a tree and fell down. The witness did not give much detail on how the deceased died but that did not take away the clear and credible narration of the events given her age. The witness was credible.

The second witness to give *viva-vorce* evidence is Dr Ozimmo Mativenga. The doctor examined the remains of the deceased. He explained his finding as reflected on the post mortem report tendered as exh 3. By consent. The doctor observed lacerations on the lower back of the deceased, oral and nose bleeding, abnormal circumrotating of the neck which made him conclude that the cause of death was due to head injury and spinal cord injury. He attributed the fatal injuries to hitting a hard surface with force. The doctor gave his evidence well and he made it clear that the lacerations on the back could not have caused death but the injuries on the head and neck. His evidence was beyond reproach.

The issues that fall for determination are

- (1) Whether or not the accused unlawfully and intentionally caused the death of the deceased.

(2) Whether or not there is any nexus and or causal link between the admitted assault perpetrated on the deceased by the accused and the death of the deceased.

From the totality of the evidence, it is apparent the deceased died as a result of head neck and spinal cord injuries occasioned by hitting on a hard surface the tree. It is common cause the deceased appeared to be promoting and encouraging the children to engage in sexual activities and obscenities. The deceased himself had no short on while the children with no panties were mounting on each other. It is also not in dispute that this prompted accused to take a switch to chastise the juvenile children and deceased. From evidence adduced the chastisement, the manner and nature of switch used could not have occasioned the nature of injuries observed by the doctor on the head and neck. The charge of murder the accused is facing requires proof of both the unlawful action and intention to kill. See *State v Kurangana* HH 267/17 and *S v Mungwanda* 2002 (1) ZLR 57.

In this case the accused simply made a follow up because the children had taken too long before returning from chasing the baboons from the maize field. He only took a stick to discipline or correct the children upon seeing them engage in indecent obscene acts. The accused cannot be said to have set out with an aim to kill and proceed to kill the deceased. Going by the nature of switch or stick used and on all the children including the deceased one cannot even infer legal intention. There is just no evidence of realisation of risk given the manner in which the children and deceased were assaulted. The death occurred when he deceased bumped or collided with a tree with force. There is no link or nexus between the assault with a stick and the ultimate collision culminating in fatal head and spinal injuries which caused the death. In fact accused only struck the deceased twice on the back and the latter fled and suddenly made a U-turn as if to retaliate. That led to both accused and deceased falling. The deceased was the first to rise and then he ran into the Musasa tree trunk. The sequence shows there was a clear break from the assault. See *State v Heremiah Masvaure* HMA 24/18 on causation. In this case the falling and subsequent rise by the deceased which followed his severe collision with a tree cannot be related to the assault. There is no causal link between the admitted minor assault and the death as ably explained by the doctor who in an unambiguous manner excluded the lacerations on the back from being the cause of death.

That the state has an onus to prove beyond reasonable doubt that the accused unlawfully and intentionally caused the death of the deceased is settled. See s 18 (4) of the Criminal Law Code and also see *R v M* 1946 AD 1023, *S v makanyanga* 1996 (2) ZLR and *S v*

Kulper 2009 (1) ZLR where GREENBERG J quoted with approval in *R v Difford* 1937 AD 370, the learned judge had this to say:

“...no onus rests on the accused to convince court of the truth of any explanation he gives. If he gives an explanation even if that explanation be improbable, the court is not entitled to convict unless satisfied, not only that the explanation is improbable, but that beyond any reasonable doubt it is false. If there is no reasonable possibility of his explanation being true, then he is entitled to an acquittal.”

In this case the accused's version of events is supported by the state witnesses including the two witnesses who gave oral evidence. The children were being mischievous and the accused sought to stop them by assaulting them using a stick and they ran away. The doctor excluded the use of the stick as the cause of death. A close look of the circumstances leading to the death of the deceased does not even give room by stretch of imagination to imputation of accused having been negligent. There is no evidence that he foresaw that death would ensue and that he was negligent or that he failed to guard against the death ensuing. The accused was removed from causation chain due to the fall by collision from which deceased got up and ran away leaving accused on the ground. No one was pursuing the deceased when he rammed into a tree and fell unconscious. The accused upon realising this sought help and carried deceased home for help where unfortunately deceased passed on. There was no neglect or negligence on the part of the accused warranting liability for culpable homicide as suggested by the state counsel in closing submissions. From the foregoing it is apparent that the accused cannot be held liable for causing the death of the deceased intentionally or negligently. However, given the common cause fact as per accused's own say so and state witness' version that the accused assaulted the children and deceased twice the accused cannot escape liability for the assault. It is accepted the assault of striking twice on the back only caused lacerations but not the death of the deceased. Accordingly the accused is found not guilty and acquitted of murder and he is found guilty of assault.

Sentence

In considering an appropriate sentence we have taken note of all mitigatory factors and aggravatory factors submitted by both the defence and state counsels. You are a young first offender who technically pleaded guilty to the assault as you never sought to deny having struck the deceased twice with a stick. You cooperated with the law enforcement agents and assisted the court by being sincere in court. That plea to assault cannot be ignored on considering an appropriate sentence. You are related to the deceased who unfortunately

passed on albeit not at your hands but the incident will be imbedded in your head for all your life. You assaulted the deceased who was being a nuisance and encouraging child sexual molestation. The motive was to inculcate discipline and chastise. That motive reduces your moral blameworthiness for the assault.

However, in aggravation is the fact that you used a stick to chastise the deceased you assaulted him on his back occasioning lacerations albeit not serious injuries. Society has moved away from corporal punishment as a way of correcting or instilling discipline. The offence you stand convicted of although not serious is prevalent and unacceptable. Regard being had to the penalty provisions the offence is punishable by the option of a fine. We have however considered the circumstances of the commission of the offence and the fact that you have been in custody pre-trial incarceration for 3 months and feel that a fine coupled with a suspended prison term would be unduly harsh. Community service based sentence would equally be unduly harsh given the pre-trial incarceration period of 3 months. We have also taken notice of the trauma you have suffered from 28 October 2018 to today over a year anxiously waiting for the outcome of a serious murder charge hanging over your head.

We are of the view that a suspended prison term will not only deter you but likeminded people while at the same time meeting the justice of the case.

You are sentenced as follows:

3 months imprisonment wholly suspended for 3 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
Legal Aid Directorate, accused's legal practitioners