RAYMOND MUSONZA
and
PREVIOUS KASEKE
and
TRYMORE KASEKE
and
TAPIWA KASEKE
and
RICHARD KASEKE
and
MANEX KASEKE
and
OBEY VAMBE
versus
THE STATE

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 9 August 2017 & 29 August 2017

Bail Pending Appeal

R Muchiweresi, for the applicants
F Kachidza, for the respondent

CHITAPI J: This application for bail pending appeal was argued before me on 9 August, 2017 and l reserved judgment. On 29 August, 2017, l dismissed the application and gave brief reasons for my judgment wherein l indicated that having gone through the record of trial in the proceedings appealed against and considered counsel's submissions, l had concluded that the applicants' had no reasonable prospects of appeal against conviction, there being no appeal against sentence. Having so concluded, I did not therefore consider that it was in the interests of justice to admit the applicants to bail pending the determination of their appeal. I also indicated that if the applicants required more detailed reasons for my order, their counsel could through the Registrar make a written request for the reasons within 7 days of my order. Counsel for the applicants has requested for the reasons. There are they.

The nine applicants were on 14 June, 2017 convicted and sentenced by the Regional Magistrate sitting at Murewa for the offence of culpable homicide as defined in s 49 (a) of the Criminal Law Codification and Reform Act, [*Chapter 9:23*]. The applicants were each sentenced to imprisonment for 6 years. 2 years were suspended for 5 years on the usual conditions of good behaviour leaving an effective sentence of 4 years imprisonment.

The allegations against applicants were that on 21 August, 2011 they each, one or more of them unlawfully assaulted Gumisai Murwira at Musoni Village, Chief Mangwende, Murewa, by striking the said Gumisai Murwira several times with wooden sticks, open hands and booted feed all over his body. The applicants allegedly acted negligently in their assault in failing to realise that death would result from their conduct. The victim allegedly suffered fractures to his ribs and bled internally. He passed on the same day of the assault. The deceased was a male adult aged 35 years.

The facts outlined by the State were that the deceased and all the applicants were cousins. The accused persons went to the deceased's homestead around 1600 hours on the date of the assault. They were in the company of a tenth accused who was said to be still at large. They found the deceased at home. The applicants then accused the deceased of being a thief in the village. A misunderstanding arose and the applicants assaulted the deceased in the manner alleged in the charge sheet. They left him in pain and went away. The deceased passed on about an hour later around 1700 hours.

At their trial at which they were legally respresented, applicants all pleaded not guilty to the charge. The basis of their denial to the charge was that they did not admit to having caused the death of the deceased by their assaulting him. The trial court had to determine whether or not the assault perpetrated by the applicants on the deceased led to his death. Counsel agreed on the facts and dispensed with the calling of evidence of state witnesses other than the doctor who carried out a post-mortem examination on the remains of the deceased person.

The port-mortem examination was carried out by doctor Munyaradzi Gwisai at Murewa District Hospital on 24 August. 2011. Doctor Gwisai's qualifications are MBCHB (Bachelor of Medicine, Bachelor of Surgery). He was stationed at Murehwa District Hospital in the capacity of Distirct Medical Officer. He prepared a port mortem report ref no 115171. He observed and recorded the following injuries

- fractured 7th and 8th ribs on left side of thoracic wall

- multiple bruises on the anterior and posterior chest and on the abdomen and upper and lower limbs

The doctor concluded that the injuries which he observed resulted in or led to the death of the deceased.

In their notice and grounds of appeal pending before this court under case no. CA 371/17, the applicants seek to impugn the trial court's judgment convicting them on the grounds of appeal. However a careful consideration of the grounds of appeal clearly shows that there is in effect only one ground of appeal. There is no appeal against sentence. The grounds of appeal read as follows:

"GROUNDS OF APPEAL

AD CONVICTION

1. The trial court erred in finding that the state managed to prove its case beyond reasonable doubt when no scientific evidence was adduced and linking the assault to the death.

2. The trial court erred at law in accepting the inadmissible evidence of the doctor as to the cause of death when the doctor was not an expert witness. The doctor was not a pathologist.

3. The trial court erred at law when it reasoned that any doctor can perform post mortem examination when it is trite that only a pathologist can do so."

I have indicated that the alleged grounds of appeal can be synthesized into one ground of appeal because basically what the applicants seek to argue is that because post-mortem examinations can only be carried out by a pathologist and not by any general doctor, and the doctor who examined the deceased's remains, not being a pathologist, he was not qualified to authoritatively determine the cause of death and consequently, the trial court erred in law and fact in placing reliance on and accepting the doctor's evidence. The upshot of the ground of appeal was therefore that the state failed to adduce admissible or conclusive evidence that the deceased succumbed to the assault perpetrated upon him by the applicants. In the absence of such evidence therefore, the court *a quo* erred in finding a causal connection between the death of the deceased and the assault perpetrated upon him.

The learned magistrate in his judgment held that the doctor who testified in court was qualified to carry out a post mortem examination and dismissed the defence contention that only

a pathologist can competently carry out a post mortem examination. I carefully read through the doctor's evidence and his cross-examination by the applicants' counsel. The doctor's evidence was very clear that he was not a forensic pathologist. A forensic pathologist is a specialist in the study of deceased corpses and injured tissue. It is important to underline the word "specialist" . A specialist in any filed concentrates on a particular subject and studies it in greater depth. Such person becomes a pundit and an authority in the area. It does not mean as in this case that a general medical practitioner cannot perform an autopsy and reach a correct conclusion as to the cause of death of a person. To give a weird example, if a person's head is decapitated from his or her body, one does not need to hunt for a forensic pathologist to determine the cause of the death. Where however there is doubt in the mind of a general practitioner as to the cause of death, then the expertise of the pathologist becomes necessary to be enlisted.

When the doctor testified in court he said that it is possible to determine the cause of death of a deceased person from an external examination. One proceeds to make an internal examination where the external examination is not conclusive. When the internal examination does not lead to a conclusive determination on the cause of death, a pathologist's services and expertise become necessary.

The applicants' legal practitioner in the trial court did not suggest any other cause of the deceased's death. As observed by the learned magistrate, counsel sought to mislead the court and the doctor by suggesting that the deceased had been assaulted under his feat. The suggestion was misleading because the state outline as admitted did not indicate that the deceased was assaulted under his feet but all over his body. It is dishonest, unprofessional and unethical for counsel to mislead the court as was attempted before the trial court. Fortunately, the trial court was not hoodwinked and pointed out in its judgment that the court was surprised as to where counsel obtained that evidence from since it was not alleged in the defence outline or even in the applicants' warned and cautioned statement admitted by consent. I have already pointed out that other than concentrating on the erroneous submission that the doctor could not competently carry out the post mortem on account of his not being a forensic pathologist, the applicants and their counsel did not suggest any other probable causes of death as would have been pitted against the doctors finding and possibly created a doubt in the mind of the court as to whether the deceased's death could have resulted from any other cause but the assault.

The deceased was assaulted by a gang of 10 people. There was no evidence led that the assault was measured and aimed at specific parts of the body of the deceased. The defence outline referred to applicants assaulting the deceased on his feet (not under the feet), buttocks, legs and calf. The defence outline was not made part of the agreed facts. The State outline which was admitted referred to the deceased being assaulted all over the body with booted feet, open hands and sticks. It was not put to the doctor that the injuries which he observed on the body of the deceased were not there nor visible. The attack on the doctor's competence to determine the cause of the death of the deceased was in the magistrate's words "baseless". I agreed with the apt description.

The applicant's legal practitioner was not properly advised to impugn the trial court's acceptance of the doctors evidence on the basis that the doctor lacked the capacity and qualification to express a conclusive opinion on the deceased's cause of death.

The law on the acceptance of the evidence and opinions of medical practitioners is set out in the ss 278 (2) and 278 (3) of the Criminal Procedure & Evidence Act, [*Chapter 9:07*]. The two sections provide as follows

"278 Admissibility of affidavits in certain circumstances

1……..
(2) In any criminal proceedings in which it is relevant to prove-

(a) any fact ascertained by a medical practitioner in any examination carried out by him which is proper to the duties of a medical practitioner;

(b) that any treatment, including the performance of an operation, was administered by a medical practitioner;

(c) any opinion of a medical practitioner referred to in paragraph (a) or (b) relating to any fact or treatment referred to in that paragraph;

a document purporting to be an affidavit relating to any such examination or treatment and purporting to have been made by a person who in that affidavit states that he is or was a medical practitioner and in the performance of his duties in that capacity he carried out such examination and ascertained such fact in such examination or administered such treatment, and, in either case, arrived at such opinion, if any, stated therein shall, on its mere production in those proceedings by any person, but subject to subsection (11) and (12), be *prima facie* proof of the facts and of any opinion so stated.
(3) In any criminal proceedings in which it is relevant to prove-

(a) any fact ascertained or thing done by a person registered in terms of the Health Professions Act [*Chapter 27:19*] in the course of his duties;

> (b) any opinion of a person referred to in paragraph (a) relating to any fact or this referred to in that paragraph;
> a document purporting to be an affidavit relating to any such duties and purporting to have been made by a person who in that affidavit states that he is or was a person registered in terms of the Health Professions Act [*Chapter 27:19*] and in the performance of his duties in that capacity he ascertained such fact or did such thing and, in either case, arrived at such opinion, if any, stated therein shall, on its mere production in those proceedings by any person, but subject to subsection (11) and (12), be *prima facie* proof of the facts and of any opinion so stated."

The doctor *in casu* as was common cause is or was a medical practitioner. The importation of the notion that forensic pathologists are the only medical personnel who can competently carry out a post mortem examination is not provided for in the Zimbabwe Criminal Law or procedure. Counsel's ingenious argument to the contrary is not part of the Zimbabwe Law. This being the main if not the only argument which the applicants seek to argue on appeal, the same is doomed to predictable failure as the saying goes. In other words the argument is so devoid of merit and may turn out on to be an embarrassing one if counsel persists in it on appeal. The applicants' appeal having no prospects of success, I was obliged to dismiss their bail application pending appeal in order to safeguard the interests of justice and not bring the criminal justice system into disrepute by allowing properly convicted and sentenced convicts out on bail when they have filed a frivolous appeal. The applicants therefore failed to discharge the burden imposed upon them in terms of s 115 (c) (2) (b) to show on a balance of probabilities that it is in the interests of justice to permit their release on bail pending appeal. I therefore issued an order dismissing the applicants bail application.

Muchiweresi and Zvenyika, applicants' legal practitioners
National Prosecuting Authority, respondent's legal practitioners