

THE STATE
versus
SHEPHERD SHAMBARE
and
EVEREST MATUNGE
and
GEORGE KASEKE
and
STANELY CHITENDA

HIGH COURT OF ZIMBABWE
MWAYERA J
HARARE, 31 May 2017

Criminal Trial

ASSESSORS: 1. Mr Chivanda
2. Mr Mutambira

T. Mapfuwa, for the State
M. Mutsvairo, for the accused

MWAYERA J: The matter is coming up for judgement. It is with a sign of relief that we come to this concluding stage of the murder trial given the matter has been long outstanding since 2012. The 28th of April 2017, marked closure of trial of the 4 accused persons in a trial which started off with the accused being 5. We are indebted to both State and Defence counsel for filing closing submissions timeously, submissions which we found valuable and of assistance to the court in coming up with our disposition. During the course of the trial one Norman Mafigo who was the 4th accused passed on, leaving the trial to be concluded in respect of the other 4 accused persons. We will maintain the numbers as per the initial charge that is accused one Shepherd Shambare, accused 2 Everest Matunge, accused 3 George Kaseke and accused 5 Stanley Chitenda for easy of reference.

All the four accused persons were out of custody as they were admitted to bail in the interest of their enjoyment of their right to individual liberty during the progression of the trial. The problem came when the trial was postponed for continuation. It was not easy to have all the four accused attend trial at one go as one or two of them were no longer employed by the same employer. We comment the defence counsel for facilitating the attendance of court by the accused persons. It was also not easy for the doctor's attendance to be secured for purposes of continuation of trial.

Another problem was the difficulty faced in reconvening a full complement of the court given the reassignment of the judge to another division of the High Court and the commitment of the assessors with other judges. At some stage the prosecutor was on leave and finally we decided for purposes of ensuring that the trial comes to an end, as the court and the officers of the court we agreed to proceed with the matter during vacation periods which were periods when most courts would not be in session. Thus we managed to reach this conclusion stage.

The four accused together with one Norman Mafigo were charged with murder as defined in s 47 of the Criminal Law Codification and Reform Act [*Chapter 9:23*]. The accused denied having subjected Aleck Bongo Loore to assault with booted feet, open hands, rubber button sticks, wire rods, wooden sticks so as to effect an arrest on the said Aleck Loore. They denied subjecting the deceased to assault from which the deceased died. All the accused thus pleaded not guilty to the charge of murder. The accused denied the charge of murder which was leveled against them.

According to the postmortem report which was tendered in evidence as exh I, post mortem report by Doctor Tariro Mushuku, the deceased died as a result of broken neck, fractured cervical spine at C3 and C4 level. The doctor observed the body of Aleck and observed froth from both nostrils, broken neck, several bruises and haematomas all around the body. The doctor was the last State witness to testify. Her evidence was to confirm and outline her findings as per the post mortem report which emanated from the external examination of the deceased Aleck Bango Loore. The doctor's evidence was clear blunt trauma or blunt force trauma could occasion the type of injuries she observed.

Evidence of Sergeant Major Guni was admitted in terms of s 314 of the Criminal Procedure and Evidence Act. His evidence was basically to the effect that he recorded warned

and cautioned statements from the accused persons and that such recording was freely and voluntarily done.

The State called witnesses who gave oral evidence, Tafadzwa Mumba recounted how the accused persons approached him enquiring the whereabouts of one Peter Kaulunga. Thereafter he escorted the accused to the 5th accused Stanley Chitenda's place. Upon questioning by accused 1 to 3 about the whereabouts of Peter Kaulunga, the group ended up at Freedom Phiri's place from where they proceeded to Dulen Bango's residence where Silas and Peter Kaulunga were and finally they went to a shed where the deceased was located. The search continued up to the time they reached Cosmas Dumba's shed where they located the deceased. On the way the deceased, according to the witness Tafadzwa Mumba, was subjected to assault by the accused persons. The witness was also subjected to assault. At the time of assault the deceased was handcuffed and even when he fell he was subjected to further assaults whilst lying on the ground.

The witness's evidence on material aspects especially the assault tallied with that of Freedom Phiri, another State witness who gave oral evidence. Freedom Phiri also stated the 4 accused persons stepped on the deceased with booted feet whilst the deceased was lying down. The first witness Tafadzwa Mumba stated that accused 2, stepped on the deceased. What emanates from the two state witnesses' evidence is that while the deceased was bound he was assaulted. The assault was perpetrated even while he was lying on the ground when he had fallen as a result of the attack on him. Both State witnesses mentioned that during the fracas, the accused smoked dagga. The slight variations on when the assault and variations in detail as regards the manner of assault was immaterial given both witnesses became involved with the accused at different times. First to enter the scene was the first witness Tafadzwa Mumba and at a later stage Freedom Phiri was also part to the witnessing of what was transpiring.

Both witnesses testified that the assault on the deceased was vicious and prolonged. The deceased was kicked by booted feet according to both witnesses, Freedom Phiri and Tafadzwa Mumba. The 1st, 2nd and 3rd accused were wearing safety shoes and they kicked deceased with those safety shoes while accused 5 was wearing ordinary shoes. They kicked indiscriminately on the body of the deceased. Both witnesses were consistent that the deceased was stepped on all over the body.

Freedom Phiri was part of the group that took the deceased to the police station. He confirmed that the deceased fell at the police station. I must comment that to a large extent the witnesses' evidence on what transpired on the night in question tallied with the accused person's versions, except with regards the nature and extent of assault.

It was not in dispute that the assault and arrest of the deceased was prompted by allegations of robbery that occurred at the first 4 accused persons' employer's place. Accused 1, 3 and 5 admitted to having struck the deceased. They only differed with the witnesses in so far as the nature and extent of the assault was concerned. Freedom Phiri recounted events of the night in question and the fateful morning when the deceased passed on. He observed all the accused take turns to assault the deceased with a button stick and booted feet. All the other accused kicked the deceased as earlier mentioned with safety shoes except for accused 5. The witness was firm that the deceased maintained he was innocent of the alleged robbery, but the assault persisted. The deceased was injured and he could not stand or walk on his own. He cried out that he had been injured but still the assault persisted.

The deceased was assisted into a motor vehicle firstly, on being taken to Impala Dawns Farm. Secondly he was assisted into a vehicle on being taken to the police station and finally carried into a vehicle for purposes of being ferried to hospital. Going to the police station was in the morning around 7.00 a.m. According to the witness, it was after sun rise when they were at Impala Dawns. The witness told the court he observed that the deceased was hopelessly lying down. The latter was swollen all over the body and even his face and eyes were swollen such that he could hardly open his eyes. He was no longer talking as he was doing during the night. The witness pointed out that a button stick was still being used in the morning to assault another suspect Chidowi. The button stick which he had observed during the night being used to assault the deceased was still in possession of the accused persons in the morning before they took the deceased to the police station.

The deceased who could no longer talk or stand on his own had to be carried to the vehicle and upon arrival at the charge office had to be carried into the charge office. He staggered as he could no longer stand as an indication that he had been injured. The witness concluded that he had been seriously injured. The witness told the court that whilst in the charge office the deceased could no longer stand for long, but dropped to the floor and passed out. The

witness stated that the deceased did not hit against a pillar in the Charge Office but he just fell as he could not stand. He was then carried after falling on the floor in the Charge Office. After the fall he was carried and conveyed to hospital where he was pronounced dead on arrival.

The version of Freedom Phiri which as earlier mentioned tallied to a great extent with the first witness's evidence was straight forward. It was clear that at the time of taking the deceased to the police station the latter had already been badly injured and the fall was finally succumbing to injuries already sustained. According to the witnesses, no further assaults or injuries were perpetrated at the police station or at the Charge Office. Generally, the witness was open and candid with the court. He displayed he was a rural man with nothing to hide, very open with evidence and not economical in any manner.

The third State witness Dulen Bango witnessed events at the shed. He stated that the accused persons indiscriminately assaulted the deceased with button sticks, switches, kicking him with safety shoes and booted feet. He just like the other state witnesses recounted that the assault was protracted and vicious as the accused wanted to bring to book the culprits of the robbery and they also wanted to recover property allegedly stolen from their employer.

All the State witnesses testified that the deceased was subjected to severe assault. The deceased was apprehended by the accused persons around 10.00 pm on the 23rd of March 2009 and only handed over to the police on the 24th at around 10.00 am while in bad shape. At the police station the deceased whose condition had deteriorated fell and was pronounced dead on arrival at hospital. We must mention that all the three State witnesses who gave viva voce evidence were subjected to lengthy, bruising cross examination by the defence counsel, but they stood their ground on the sequence of events pertaining to the alleged assault on the night in question. They were taken to task on the variances on their observations and clearly explained that their entry into the stage or scene was at different times. When they were all in attendance, the assault continued on the deceased who was now helpless and could not stand or walk freely on his own.

It was evident from the witnesses' testimony that the accused took turns to assault the deceased at random. It was not all five at one go subjecting the deceased to assault. Even though it was at night the accused and witnesses were well known to each other as they lived in the same locality. Further at some stage a torch which was in the late Norman Mapfigo's

possession was lit. The witnesses were all unsophisticated rural folk who despite being subjected to assault remained desirous of seeing and witnessing. Tafadzwa Mumba for example was advised to go back after handcuffs had been removed from him, but in a typical rural folk style he kept on following to the gardens where the accused hoped to recover the property. He Tafadzwa, only remained at the turn off after the vehicle had picked the accused and the deceased and was heading to Impala Dawns.

All the witnesses were candid. We found no reason why they would falsely implicate accused 2 as having participated in the assault just like the other accused persons. In assessing the totality of the evidence before the court, that is the accused persons' version in their explanation for denial of the charge and the state witnesses' version, the following common cause observations are made.

It is common cause that the 5 accused persons were investigating a robbery which had occurred at Impala Dawns farm that is, the first four accused persons' employer's place. That accused 1 to 4 started off in the absence of the 5th accused whom they approached after apprehending two of the state witnesses Tafadzwa Mumba and Freedom Phiri. It is also not in dispute that all the 5 accused were after the recovery of part of the stolen property. All the accused had the deceased in their custody from the night of the 23rd of March up to 10.00 am on the 24th of March when they handed the deceased to the police station. It is also not in dispute that the alleged robbery offence had been reported to the police when the accused persons proceeded to effect arrest and detain the deceased for about 12 hours.

It is further common cause that the 5th accused was at the relevant time a member of the Special Constabulary. The 5th accused on one breath accepted having assaulted the deceased under the feet and on another sought to convince the court to accept that he dissuaded his co-accused from further assaulting the deceased. Accused 5 however, did not give any version or explanation as regards why the deceased was not standing straight on being handed over to the police station.

Further, it is not in dispute when the deceased was taken to the police station he never recovered there from. We must comment that his fall is consistent with all the three state witnesses' version that the deceased was no longer able to stand on his own as he had been badly injured. They all alluded to prolonged random assault all over the deceased's body making the

latter lose control of bodily movements. According to the witnesses, the deceased could neither stand nor walk on his own as he staggered and was shoved into motor vehicle and literally carried into a motor vehicle by the accused persons. This only buttresses that, while in the hands of the 5 accused persons, the deceased was severely injured and in bad shape.

The evidence on record is clear that despite the deceased's protestation of innocence to the alleged robbery and nothing having been recovered from him, he was subjected to prolonged vicious and indiscriminate assault at the hands of the accused persons. It can be deduced from the sequence of events and circumstances of this case that all the accused had a common goal to investigate and bring to book the alleged perpetrators of the robbery at Impala Dawns.

The first 4 accused were employed as security personal or game wardens and went out with the 5th accused a member of the special constabulary with the common purpose of apprehending, arresting and detaining the culprit and also recovering the property for eventual hand over to the police. They each assaulted the deceased in their own manner as described by the state witnesses. The question is whether or not the accused were acting with common purpose and in concert. There is no evidence on record to suggest otherwise. All set out with one common purpose. In this case the deceased succumbed to death occasioned by injuries. There is a nexus between the assault by the accused persons and the resultant injuries which occasioned the death of the deceased. The nature and extend of blows inflicted by each accused might have been different, but not anything that would vitiate liability of the accused persons. This is particularly so when one considers the doctrine of common cause.

The remarks by MCNALLY JA in *Mukoyo v S SC182/92* are instructive. He stated, "they patently had a common purpose to carry out an assault with intent to commit grievous bodily harm. So it is immaterial who struck the fatal blow." In this case all accused actively participated in the assault of the deceased such that one can easily read group action. In other words, they had common purpose to bring to book the culprit of the alleged robbery. The accused took turns to deliver different blows, but none can escape liability on the basis that it is not known who among the 5 accused delivered the fatal blows. There must be active association with the conduct of the others to attain the common purpose. See *State v Chauke & Another 2008 ZLR (3) 494*, also *S v Woods & Another 1993 (2) ZLR 258*. All the accused struck or assaulted the deceased and they can therefore not escape liability of the unlawful attack.

Accused 2's temporal withdrawal to dry his clothes and warm himself after he had been drenched by rain during the process of investigating, arresting and detaining the deceased cannot vitiate his liability. Moreso given thereafter he carried on with the others and tendered assistance in the common purpose to bring the culprit to book. They went together to the employer's farm and along the way, the deceased was further subjected to assault as testified by the witnesses. I have already pointed out, all the accused set out with a common goal to arrest, detain suspects of robbery and also recover the stolen property. For whatever unlawful conduct they engaged in, they are liable.

However, from the evidence adduced there is nothing to show that the accused set out with a common goal or aim to kill the deceased. Murder with actual intention would require the intention to kill and setting out to achieve the same. The evidence on record does not portray murder as defined in s 47 (1a) of the Criminal Law Codification Reform Act [*Chapter 9:23*]. In other words, evidence which has been adduced is not sufficient to prove a charge of murder with actual intention.

Moving to the second wrung of murder as defined in s 47 (1b) of the Criminal Law Codification and Reform Act. The question is whether or not evidence adduced has established murder as defined in s 47 (1b) beyond a reasonable doubt. Section 47 (1b) states,

“any person who causes the death of another realizing that there is real risk or possibility that his or her conduct may cause death and continues to engage in that conduct despite the risk or possibility shall be guilty of murder.”

Section 47 (1b) connotes a situation where there is realization that there is a real risk or possibility that an individual's conduct may cause death and nonetheless the individual continues to engage in such conduct despite the risk. The requirements of murder as defined in s 47 (1b) murder with constructive intent are conjunctive as correctly observed by Mr Mutsvairo in his closing submissions. They must therefore be realization of the risk and continuance of engagement in the conduct bringing about the risk. The test in murder with constructive intention put in other words is subjective. The test being whether or not the accused realized the real risk or possibility that death may ensue from his conduct and continued to engage in such conduct. *S v Gumbi 1994 (2) ZLR 323* were IBRAHIM JA in reference to murder with constructive intention made pertinent remarks that there must be in the mind of the accused person a volitional

component. In other words, he must in fact say to himself, '*I know I may kill this person if I shoot, but I am going to shoot anyway.*'

Given the circumstances of this case the accused cannot therefore escape having volitional component. They subjected the deceased to prolonged vicious assault indiscriminately despite his losing control of composure, deteriorating rapidly from failing to walk on his own and talk, they still continued to assault. See also the case of *S v Mugwanda 2002 (1) ZLR 74*, which is quite instructive in defining murder with constructive intention.

In casu the accused persons, acting with common purpose and in consent engaged in a volitional conduct of assaulting suspects and in doing so subjected the deceased to prolonged indiscriminate assaults using booted feet, rubber button and sticks. The deceased could not walk or stand on his own. But the accused did not desist from their conduct of detaining, and assaulting him. Given the evidence of failure to walk, failure to stand, confusion of the deceased, the accused realized that there was a real risk or possibility that such conduct may cause the death and they nonetheless continued with such conduct despite the real risk or possibility of death ensuing.

The emphasis by the defence that a robbery had occurred is not a defence to the offence as no one has a right to torture or beat up suspects. In *Ketai Muchawa v State SC 101/96*, the Supreme Court clearly spelt out mob violence against suspects or even proved criminals is not tolerated. The defence further suggested that the cause of death was the fall at the police station. This was not substantiated by any evidence. Clearly from the state witnesses Phiri and Dulen Bango the deceased did not hit on anything in the police station. When he fell it was a sign of giving in to injuries occasioned at the hands of the accused persons. Whereas it is appreciated the accused have no duty to prove their innocence given the detailed evidence of Dulen Bango as regards how the deceased fell at the police station and the detailed evidence of the state witnesses as regards how the deceased was subjected to assault at the hands of the accused persons and the injuries sustained, one wonders how the defence sought to rely on the fall as having caused the death. The fall was a resultant act of the injuries occasioned at the hands of the accused persons.

Further in the absence of evidence controverting the doctor's findings of injuries on the deceased's body, injuries which are in conformity with the state witnesses' evidence, injuries described by the doctor, the doctor's finding is conclusive. They were in our view no compelling

reasons why the doctor should have engaged internal bodily examination given the obvious cause of injury, the neck injuries, fractured neck on C3 and C4 level and all the other bodily injuries observed, the history of the assault as given by the witnesses or as supplied. The doctor really did not have to engage into internal examination. Her explanation was resources were limited, but there was no allegation as regards the necessity of internal injuries. To that extent therefore, we relied on the doctor's findings as to the cause of death as it was substantiated and explained by the doctor and also supported by the state witnesses' evidence.

The accused persons also to a great extent supported the finding because they did not dispute assaulting the deceased although they minimized their involvement and the nature of assault to which he was subjected to. In the absence of explanation of what was transpiring within the 12 hours given the obvious injuries observed and the subsequent death one finds no fault in the findings of the doctor and the conclusion as regards the cause of death.

In the final analysis the accused have no defence to the conduct of assaulting the deceased in a vicious and protracted manner as they did. The accused realized the real risk of their conduct, that the assault may cause death but, they continued thereby causing death of the deceased. Accordingly, all the four accused that is accused 1, 2, 3 and 5 are found guilty of murder with constructive intention as defined in s 47 (1b) of the Criminal Law Codification and Reform Act [*Chapter 9:23*].

SENTENCE

In arriving at an appropriate sentence, we have considered mitigatory circumstances and aggravatory circumstances submitted by Mr Mutsvairo and Mr Mapfuwa respectively. We have also taken note of the circumstances surrounding the commission of the offence. Note has been taken of the fact that you stand convicted of the offence of murder with constructive intention. We have taken as mitigatory the fact that we held that there are extenuating circumstances in this matter, thus reducing your moral blameworthiness.

Mr Mutsvairo has submitted at lengthy your personal circumstances. You are all family men with fairly heavy responsibilities. Other than your immediate families you have further dependents in the form of the extended family which is a normal occurrence in the African community. Both counsels have drawn the attention of the court to the common cause aspects that this matter has been long outstanding. The offence having been committed in the year 2009

and the matter only coming up for trial in 2012 for whatever reasons and the matter now coming to conclusion in 2017, reasons which have been highlighted in the judgement.

We will take note of the fact that during the period that you were awaiting trial and then during the period that you were awaiting the finalization of the matter, you must have suffered the anxiety which goes with the suspense given the charge that you were facing is a serious charge of murder. We have also taken note of personal circumstances. Accused 2 is also living with a condition of being HIV positive and accused 5's wife has a heart problem. All the mitigatory factors have to be considered together with aggravatory factors on the other hand.

No amount of remorse or compensation can bring about the lost life of the individual who passed on in this case. You ventured on the deep end as first offenders and committed a heinous offence which calls for severe sentence to deter not only accused but the generality of the populace from engaging in violence. The manner in which you subjected the deceased to assault as observed by the State counsel amounts to torture and inhuman treatment and that is not acceptable in a democratic country like Zimbabwe which has a Constitution which upholds the rights of individuals. In any event everyone is presumed innocent till proven guilty, even if they are facing serious allegations.

The fact that you ganged up as a team for purposes of subjecting individuals to assault that culminated in the death of the deceased is aggravatory because that aspect of mob psychology is not acceptable at all. The courts have to discourage use of physical prowess in beating up others as some people, end up losing their God given right to life. Such conduct has to be visited by punishment which will deter, not only the accused persons, but like-minded people in the community. You went on a rampage and you were merciless in the manner in which you carried on the assault. The offence is deserving of a lengthy custodial term. We are however, not blind to the fact that for the 8 years that you were waiting for the finalization of the matter, you must have gone through trauma and we take that to be a form of punishment. It is with that in mind that we feel we should move from the lengthy imprisonment term to a reasonably long imprisonment term which we feel would be appropriate and meet the justice of the case.

Your sentence as follow:

Each 10 years imprisonment.

National Prosecuting Authority, State's counsel
Mushonga Mutsvairo, Accused persons' legal practitioners