

THE STATE

Versus

EFFORT NATALI

And

NYASHA PASINA

And

ELVIS MARIROMBA MAZISE

IN THE HIGH COURT OF ZIMBABWE

KABASA J with Assessors Mrs C Baye and Mr E. Shumba

GWERU 25, 26 AND 29 JANUARY 2024

Criminal Trial

L C Mamombe, for the state

P Takayendesa, for the 1st accused

P Mthembu, for the 2nd accused

T Komboni, for the 3rd accused

KABASA J: The three accused appeared before us on a charge of murder to which they pleaded not guilty.

The state alleges that on 27 February 2022 at around 0100 hours the three accused, Courage and the now deceased were at Nemangwe Business Centre. A misunderstanding ensued between accused 3 and the now deceased after accused 3 accused the now deceased of stealing an empty beer bottle. The now deceased struck the accused once on the head with an empty bottle. Accused 3 sought assistance from accused 1, 2 and one Courage and acting in concert they attacked the now deceased. They used booted feet, open hands, a log and an unknown object to assault the now deceased indiscriminately until he fell unconscious. The now deceased subsequently died on 1 March 2022 whilst admitted at Gokwe district hospital.

In his defence accused 1 denied ever assaulting the deceased and explained that he tried to find out what the problem was when the now deceased struck accused 3 on the head with a

bottle. The now deceased turned on him and assaulted him. One Arthurniel, Adonia and Courage intervened and were joined by accused 2 in assaulting the now deceased. He decided to take the injured accused 3 to the Police and on their way back en route to the hospital accused 3 also joined in the assault until the now deceased was eventually taken home by one Takudzwa.

Accused 2 explained that he was at the business centre when he learnt that accused 3 who is his uncle had been assaulted by the now deceased. He, in the company of Adonia tried to locate accused 3 but met the now deceased who accused him of being one with accused 3 and proceeded to slap him on the head several times. He retaliated by slapping the now deceased once on the cheek. People who were close by joined in and started assaulting the now deceased. He decided to flee from the scene. He had no intention to kill the deceased but accepted negligently causing his death and therefore prayed that he be found guilty of culpable homicide.

As for accused 3 he too tendered a plea of guilty to culpable homicide explaining that the now deceased assaulted him with a bottle after they had had a misunderstanding over beer. He sustained an injury and when other patrons saw that injury they pursued the now deceased. They caught up with him and he also followed and kicked the deceased twice and also hit him with clenched fists on the face. He then left with one Ado and Talent heading to the Police Station and later to the clinic where he was referred to Gokwe hospital for treatment. He later learnt of the deceased's death after three days.

To prove its case the state produced the post-mortem report, accused 2 and 3's confirmed warned and cautioned statements, sought and had the evidence of nine witnesses admitted as it appeared on the state summary and led evidence from two state witnesses.

The witnesses whose evidence was admitted in terms of section 314 of the Criminal Procedure and Evidence Act, Chapter 9:07 are:

Mpiliso Mamupengesi

Takudzwa Seramwe

Nyasha Marvellous

Doctor Austin Mashoko

Tinashe Imbayarwo

Mudonhi Kakomo

Emmanuel Sithole

Sharon Nyoni and

Doctor Juan Rodriguez Gregori

The evidence of these 9 witnesses was common cause. Takudzwa is the one who helped the now deceased after he had already sustained the injuries which he later succumbed to. Benias, Tinashe, Mudonhi, Emmanuel and Sharon are Police Officers whose role was the recording of warned and cautioned statements as well as indications, the ferrying of the deceased's body to and from the hospital for post-mortem examination, the results of the post-mortem examination and the events associated with the reporting of the matter to the Police, the admission of the now deceased in hospital and the certification of his death.

These witnesses' evidence therefore did not shed light on the crucial issue of the identity of the people who caused the injuries which took the deceased's life.

The evidence of Shephard Baradza and Arthurniel Mpofu is largely what the state relied on in an effort to answer the crucial question regarding the identity of the perpetrators.

Shephard was at the business centre on the fateful night or early hours of the morning. His evidence was that accused 3 falsely accused the now deceased of theft of an empty bottle. The ensuing misunderstanding saw accused 3 feigning a blow at the now deceased who then struck him with a bottle causing a cut on the head. The two fought for about thirty minutes and accused 3 was overpowered. Accused 3 then called for reinforcement and accused 1 and 2 came to his aide. Accused 1 grabbed the now deceased by the legs causing him to fall whereupon accused 3 sat on the now deceased's stomach whilst accused 2 trampled on him. He then left to call the now deceased's relative.

This witness's evidence appeared to flow and made sense until the second witness testified. This second witness said he was not there when accused 3 was initially assaulted using a bottle but when he exited the bar he saw accused 1 and one Courage holding the now deceased, one on either side but not in a friendly manner. The now deceased was bleeding from the mouth. He asked accused 1 and Courage to let him go and they did. As he was going

away the now deceased uttered words to the effect that they would do nothing to him. Accused 1 then pursued him, they both ran back to the business centre each one carrying a log. They fought and the now deceased was struck with a log and fell. Courage, accused 2 and 3 then joined in trampling on the now deceased. They then disappeared and he helped the now deceased who was still talking. The fight took about 2 hours, from 1 am to 3 or after 3 am. As he watched this assault on the now deceased the first witness was also there. He was there throughout the incident.

Whilst these witnesses' evidence was clear as to what role accused 2 and 3 played in this assault, there was a divergence in their evidence when it came to the role played by accused 1.

Accused 1's explanation was that Arthurniel was lying in order to save himself as he is the one who participated in the assault. The now deceased was assaulted by this witness, Courage, Adonia, accused 2 and accused 3.

We found it difficult if not impossible to reconcile the two witnesses' evidence. Granted two people observing the same event may not necessarily relate it in exactly the same manner but the divergence must be within reason. In *S v Mupanedengu S 197-94* the Supreme Court pointed out that in traffic accidents witnesses' testimony can be unreliable, not because they will be lying but "their memory of a sudden unexpected, fast-moving and fast-changing series of events is faulty."

This is not the case here. This was not a traffic accident and both witnesses suggest that this incident took some time, with one talking of a 30 minute fight between accused 3 and the now deceased and the other a 2 hour fight where the now deceased fought with accused 1 before Courage, accused 2 and 3 joined in. Barring drunkenness which both witnesses ruled out what could have militated against them observing this incident and at least giving an account which could be reconciled.

We were left wondering as to when exactly the second witness came on the scene and when the first witness left and if indeed he left and for how long. Surely if he left for an hour Arthurniel would not say he was there throughout. An hour is too long a time for one to be mistaken as to the presence or absence of a person who was near to them.

Shephard mentioned that when he left the now deceased had fled and he saw him lying down at the tarred road. Is it being suggested that when the second witness saw the now deceased and accused 1 and Courage they had picked him up from that tarred road? The lack of clarity and coherence left us wondering what role, if any, accused 1 played in this assault.

Accused 1 could be untruthful as to what his involvement was but the onus is not on him to prove anything. He need not convince the court as to the truthfulness of his story. As was stated in *R v Difford* 1937 AD 370, the accused need not convince the court as to the truthfulness of his story whatever explanation he gives no matter how improbable, it may be, the court cannot dismiss it unless it has been shown to be not only improbable but beyond doubt false (See also *S v Kurauone* HH 96-15)

Accused 2 in his warned and cautioned statement stated that he saw accused 1 among the people who were assaulting the now deceased. Section 259 of the Criminal Procedure and Evidence Act Chapter 9:07 states that no confession made by any person shall be admissible as evidence against any other person. The court can therefore not rely on accused 2's confession as proof of accused 1's participation.

Turning to accused 2 and 3, in his confirmed warned and cautioned statement accused 2 completely denied assaulting the now deceased and implicated Authurniel, Adonia, Courage and accused 3. In his defence outline he admitted assaulting the now deceased and tendered a plea of guilty to culpable homicide.

At the earliest opportunity he had to give his side of the story he completely denied assaulting the now deceased. Is he a trustworthy person whose word can carry any weight when he does a *volte face* and accepts slapping the now deceased only once? If that was all he did why did he not say so from the outset? It could be said he was not represented then but does one need to be legally represented to just tell the truth? And now that he is legally represented why would he admit to culpable homicide if he had nothing to do with the assault that led to deceased's death? If all he did was slap him when they were just the two of them and then fled soon after that, it means he was not involved in the assault perpetrated by Courage and others and so cannot be said to have acted in concert with them.

His admission of culpable homicide speaks volumes regarding his participation in the assault that led to the deceased's death. Shephard and Arthurniel observed him participating in that assault.

Accused 3 also gave a detailed account of the events of the fateful night in his confirmed warned and cautioned statement but left himself out of the assault. In concluding his account he said “I did not assault the deceased in any way.”

In his defence outline he too tendered a plea of guilty to culpable homicide and admitted kicking the now deceased and hitting him with clenched fists. Granted the now deceased had hit him with a bottle but he did not hit back at that time. He assaulted the now deceased well after and he said he was revenging.

He had no right to take the law into his own hands, especially given that he had already decided to go and report the assault to the Police.

Both accused 2 and 3 were observed trampling on the now deceased as he lay on the ground.

The deceased sustained fractures of the 1st - 3rd costal arch and there was abundant free blood in the thoracic cavity. He had haemorrhagic infiltrate in the left parietal region, right temporal region and occipital region and subarachnoid haemorrhagic in occipital region. These injuries speak to the indiscriminate assault perpetrated on him as observed by Shephard and Arthurniel. The fact that these two’s evidence as regards accused 1 was found to be irreconcilable does not mean their observations of the role accused 2 and 3 played is to be discarded.

The two accused only sought to minimise the extent of the assault but admitted that they participated in the assault.

Section 196 A of the Criminal Law (Codification and Reform) Act, Chapter 9:23 provides that:-

- “(1) If two or more persons are accused of committing a crime in association with each and the state adduces evidence to show that each of them had the requisite *mens rea* to commit the crime, whether by virtue of having the intention to commit it or the knowledge that it would be committed, or the realisation of a real risk or possibility that a crime of the kind in question would be committed, then they may be convicted as co-perpetrators, in which event the conduct of the actual perpetrator (even if none of them is identified as the actual perpetrator) shall be deemed also to be the conduct of every co-perpetrator, whether or not the conduct of the co-perpetrator contributed directly in any way to the commission of the crime by the actual perpetrator.”

In the “*Criminal Law in South Africa*” 2^{ed}, the authors Walker et al at p 262 thereof explain that for common purpose to arise, there are four further requirements which are:-

- “1. The participant must have been aware that the crime was or was about to be committed.
2. He must have intended to form a common purpose with those who were actively committing it.
3. He must have manifested this intention by performing some positive act of association with the conduct of the others.
4. He must have had the necessary *mens rea* in respect of the particular crime, whether *dolus directus*, *dolus eventualis* or *culpa*.”

In casu the two accused joined in as the now deceased was on the ground, defenceless and associated with the perpetrators by trampling on the deceased with booted feet.

Was the intention to kill or did they realise that there was a real risk or possibility that their conduct may cause death and continued to engage in such conduct despite such realisation?

The now deceased was aggressive that night and had hit accused 3 with a bottle on the head. He appeared to be in a fighting mood even shouting that those who had come to accused 3's aid would do nothing to him. No weapon was used and considering the circumstances of this case it cannot be said the accused intended to kill or appreciated the real risk or possibility that death may result. They were however careless and due to their negligence the deceased lost his life.

The state in closing submissions, conceded that the evidence did not prove murder but culpable homicide and we are of the view that such concession was properly made.

As regards accused 1 we will give him the benefit of the doubt for the reasons aforesaid. As for accused 2 and 3 the state has not proved murder but culpable homicide. The case on culpable homicide has been proved beyond a reasonable doubt.

Consequently accused 1 is found not guilty and acquitted. Accused 2 and 3 are found guilty of culpable homicide.

Sentence

In assessing sentence we considered the following:-

Accused 2 was 17 years old at the time the offence was committed. 17 is a very youthful age. Youthfulness is a strong mitigatory factor and it is odious to sentence such a youthful person to the same sentence that would be appropriate for a more mature offender. (*S v Zaranyika & Ors* 1995 (1) ZLR 270 (H)).

The accused was in pre-trial incarceration for 1 year 9 months before he was granted bail. It has taken almost 2 years to finalise the matter and one cannot underestimate the amount of anxiety the accused must have suffered awaiting for the finalisation of the matter.

From the onset the accused accepted responsibility for his actions as he admitted to the lesser offence of culpable homicide which the state finally conceded to at the end of the trial. He therefore showed some of measure of contrition.

The lack of a father figure in his upbringing may also have had an adverse effect on him. He stays with an elderly grandmother following the death of his mother and his father's re-marriage.

Accused 3 although older than accused 2, is also still youthful. He was 25 at the time the offence was committed. He too accepted responsibility by offering a limited plea to culpable homicide which the state eventually conceded to at the end of the trial.

Accused 3 is an orphan who lost his parents when he was an infant. He stays with an elderly grandmother. He lacked parental care and love and the influence of a father figure.

No lethal weapon was used and the 2 accused appeared to have gone with the "crowd mentality" and joined in the assault on the deceased.

Accused 3 had however been assaulted with a bottle on the head and sustained an injury. The deceased had been aggressive and dared the people who had tried to calm the situation. He did not help the emotive situation.

In aggravation is the fact that a life was lost. The deceased was only 24, he was youthful and still had dreams to fulfil. His life was cut short.

The use of violence has led to the loss of many a life. Society abhors violence and courts must be seen to send the message clearly, that violence will not be tolerated, especially when it leads to loss of life.

Accused 2 the Probation Officer's report showed that he is a young man who does not listen. He is wayward and that explains his presence at a night club in the wee hours of the morning. He must be quite a handful for his aged grandmother to instil discipline in him.

Accused 3 had decided to go and report the assault on him by the deceased but decided to take the law into his own hands.

The sentence must therefore fit you the offenders, the offence and be fair to society.

For his youthful age accused 2's sentence will be different from accused 3's who was 8 years older at the time.

The circumstances of this case do not justify a departure from the presumptive penalty of 3 years. The reduction of accused 2's sentence is in recognition of his age at the time of the commission of the offence.

That said accused 2 is sentenced to 2 years imprisonment of which 1 year is suspended for 5 years on condition accused does not within that period commit an offence of which an assault or violence on the person of another is an element and for which upon conviction he is sentenced to a term of imprisonment without the option of a fine.

Accused 3 is sentenced to 3 years imprisonment of which 1 year is suspended for 5 years on the same conditions

T. E. S accused 2 – 1 year imprisonment

T. E. S accused 3 – 2 years imprisonment

National Prosecuting Authority, state's legal practitioners
Danziger and Partners, 1st accused's legal practitioners
Garikayi and Company, 2nd accused's legal practitioners
Dzimba, Jaravaza & Associates, 3rd accused's legal practitioners

