

THE STATE

Versus

FARAI FERO

And

FORTUNE NGWENYA

And

KHUMBULANI SITHOLE

IN THE HIGH COURT OF ZIMBABWE

KABASA J with Assessors Mr P. Damba and Mr O. Dewa

BULAWAYO 17, 18 AND 19 OCTOBER 2023

Criminal Trial

S. Moyo with Ms Z. Sithole, for the state

Ms A. Kunda, for 1st and 2nd accused

Mrs S. Drau, for 3rd accused

KABASA J: The 3 accused appeared before us charged with murder, as defined in section 47 (1) of the Criminal Law (Codification and Reform) Act, Chapter 9:23. Accused 1 and 2 tendered limited pleas of guilty to culpable homicide which were not accepted by the state whilst accused 3 tendered a plea of not guilty.

The state alleges that on 30 March 2021 the 3 accused, acting in common purpose interrogated the now deceased accusing him of theft of clothes which were on the washing line. They took turns assaulting him. Later that same day they went to his house and took him to accused 3's house where accused 1 and 2 tied him to a trailer and took turns to assault him using a hose pipe demanding the stolen clothes. Accused 3 was monitoring the situation and barring members of the public from rescuing the deceased. The assault continued each time the clothes were not found at the places the deceased was indicating. At around 2300 hours the three accused took the deceased back to accused 3's house where they stripped him of his clothes before accused one poured water over him. On 31 March 2021 accused one and two took the deceased to the police at Pumula Police Station. The police immediately arrested the

2 accused before summoning an ambulance which ferried the deceased to Mpilo hospital where he died on admission.

In his defence accused one admitted assaulting the deceased using a hose pipe and open hands. He however denied an intention to kill him and explained that he was provoked by the theft and the assault was meant to punish the deceased.

Accused 2's defence was a replica of the first accused's. Accused 3 explained that he was told that the deceased had stolen his T-shirt and he tried to recover it by asking the deceased where it was. He also discovered that the deceased had stolen his gas tank. He went to the deceased's father to discuss the issue leaving the deceased with accused 1 and 2. He never assaulted the deceased.

To prove its case the state produced the following exhibits:-

- a) Post-mortem report
- b) All 3 accused's confirmed warned and cautioned statements
- c) A black hose pipe and a
- d) Rope

The hose-pipe measured 1, 2 m in length and 330 g in weight whilst the rope was 30 m long.

The statements of four witnesses were admitted into evidence as they appeared in the state summary in terms of section 314 of the Criminal Procedure and Evidence Act, [Chapter 9:07]. These witnesses are:-

Spencer Tshuma

Vusisiwe Ngwenya

Bhekisipho Maphosa and

Kudakwashe Kamwenga

Of the evidence so admitted Spencer Tshuma's evidence was to the effect that on 30 March 2021 around 2200 hours the three accused came to his home and one Justice Zikhali and Mpofo were with them. They barged into his house knocking over plates and an amplifier

destroying them in the process. Accused 1 and 2 were the ones who knocked over his property. The deceased stated that he had been assaulted and no longer knew what to do. The three accused started searching the witness's house destroying property in the process. Accused 1 went on to assault the witness but stopped when the deceased mentioned some other person as the one to whom he had given the stolen property. The witness accompanied them to this other person's house where a search was conducted which yielded no results. Accused 1 and 2 continued assaulting the deceased all over the body until he said the property was at his home. Upon leaving this person's house the witness went back to his home. After 2 hours the accused came to tell him that the deceased had been lying against the witness. At that time the witness noticed a cut above the deceased's eye.

Vusisiwe Ngwenya is the police officer who arrested accused 1 and 2 upon their arrival at the police station. He noticed that the deceased was in severe pain and had a cut above his eye. He then called an ambulance which ferried the deceased to hospital.

Bhekimpilo and Kudakwashe are also police officers whose evidence only established that warned and cautioned statements were recorded from the accused who also made indications at the scene.

Evidence was led from one Morgan Ncube who was a neighbour to accused 3 at the relevant time. He however did not know accused 1 and 2. On the day in question the 3 accused apprehended the deceased accusing him of theft. They brought him to accused 3's home where he was tied to a trailer using a rope. Accused 1 and 2 proceeded to assault him whilst accused 3 was holding the rope. The three later took the deceased to Spencer's home and returned after about 15 minutes without the clothes which had allegedly been stolen and the assault on the deceased continued. Accused 3 was standing close by as accused 1 and 2 were assaulting the deceased.

Later the deceased indicated that the clothes were somewhere in the bush whereupon accused 1 and 2 took him there whilst he, accused 3 and deceased's father remained behind. When the 2 accused took long to return accused 3 called them asking what they were still doing. During the assault accused 3 did not restrain accused 1 and 2.

Counsel for the 3rd accused sought to discredit this witness by suggesting that he had told the police that accused 3 was holding the deceased's legs during the assault but in court he had said accused 3 was holding the rope. The witness reiterated that accused 3 was holding

the rope not the deceased's legs. It was also suggested that he had told the police that he heard a scream at accused 3's home and went to investigate but in his testimony he mentioned that he saw the accused going to pick up the deceased from his home. He explained that he was already at his home when he saw the three going to deceased's home. He further explained that there must have been a mistake somewhere. As regards who went to Spencer's home and how they went there the witness explained that due to time lapse he could have forgotten that detail.

Can it be said this witness was not a credible witness solely because of the seemingly contradicting statements regarding the issue of whether accused 3 was holding the rope or deceased's legs and whether he went out to investigate after hearing a scream or he was home when he saw the 3 accused going to deceased's home.

This incident occurred in March of 2021 and the witness testified in October 2023 almost 2 years later. There is no dispute that all 3 accused were at accused 3's home. The rope which was said to have been used to tie the deceased to a trailer was produced in evidence by consent, so was the hose-pipe. This confirmed the witness's testimony and his ability to observe what was happening on the night in question. There appeared to be no issue as regards visibility and the witness explained that although he was at a distance, he was standing at accused 3's house at the gate and there were lights thereat.

If he was bent on embellishing his evidence he could easily have included accused 3 in the actual assault. His narration of the events could not have come from a fertile imagination. He would not have had reason to commit all that was happening to memory in anticipation of testifying in court. The apparent inconsistency highlighted by defence counsel is not of any great significance as to cast doubt on the witness's credibility and ability to recall what he observed which was of significance. Whether accused 3 drove to Spencer's house and who he was with is a detail that is not so significant to warrant criticising the witness for not recalling such minute detail.

The minor contradictions, if one can call them that, do not justify a rejection of this witness's evidence. His explanation that time lapse militated against his recalling all the details is understandable and not anything out of the ordinary.

We were satisfied that he was overall a credible witness whose evidence could be safely relied on.

Spencer's evidence on how violent the accused were was corroborative of Morgan's testimony when he said he could not intervene as he was scared due to the violence that was being exhibited. He feared the accused would assault him too. Spencer who had been named by the deceased got the brunt of this violence when the accused went to his home to search for the alleged stolen property.

On the whole the assault itself was not in dispute nor was it disputed that the accused met his death from the injuries he sustained as a result of that assault. The assault itself was prolonged. Vusisiwe Ngwenya gave the time when the deceased was brought to the police station as 0130 hours. The deceased had been in the hands of the accused from around 2000 - 2100 hours.

It took all of about 4 hours before he was handed over to the police, in severe pain and severely injured as demonstrated by the fact that he died on admission to hospital.

Did the 3 accused intend to kill the deceased or foresaw the real risk or possibility that their conduct may cause death but continued nonetheless?

Accused 1 and 2 accept that they assaulted the deceased. In his confirmed warned and cautioned statement accused 1 said:-

"I admit the charge of assaulting Blessing Zikhali with a hosepipe. We assaulted him for stealing property."

As for accused 2 he said:-

"I admit that I assaulted him, it was not my intention to assault him to the extent of causing his death. It was a mistake to put the law in my hands (sic)"

Both accused would have us believe that they directed the blows on the deceased's back. Accused 1 specifically recalled that he concentrated the blows from the waistline to somewhere behind the legs.

The undisputed fact is that no one else assaulted the deceased on this night. The deceased was with the accused from the time they took him from his home to the time they surrendered him to the police.

Doctor Jekenya who examined the deceased's body on 31 March 2021 noted the following marks of violence:-

“Multiple darkened (black) whip lashes all over the body especially the chest and abdominal walls. Marked lashes around the liver, kidney and spleen areas. Scratches and bruises of all limbs.”

The doctor further observed that:-

“Severe forces (sic) were used to cause the severe internal loss of blood as evidenced by the extremely pale body.”

Accused 1 and 2 were therefore not being honest when they sought to minimise the period they took assaulting the deceased and the part of the body they assaulted. It was an indiscriminate assault all over the body. Had they only assaulted him at the back the doctor would not have observed the whip lashes all over the body “especially the chest and abdominal walls.”

The hose-pipe itself, whilst the thickness was not stated, was as thick as the thickness of two adult normal-size thumbs. It is rubber and when used to repeatedly whip a human being, is undoubtedly capable of inflicting grave injuries as happened in this case.

The cause of death was:-

- a) Haemorrhagic shock
- b) Multiple injuries as a result of an assault

The post-mortem report is corroborative of the nature of the assault, the viciousness of it and the prolonged nature thereof. The violence which Spencer and Morgan testified to translated to a violent assault which led to the deceased’s death.

Was the assault justified? No one, even the police have a right to assault a suspect. The deceased was a suspect who probably, in a desperate bid to spare himself of the vicious assault, tried to lead the assailants on a wild goose chase which yielded no result as the T-shirt and pair of jeans was never recovered. The deceased was not a child who any one could talk of chastising.

Were the two accused provoked? Section 239 of the Criminal Law Code provides that:-

- “(1) If, after being provoked, a person does or omits to do anything resulting in the death of a person which would be an essential element of the crime of murder if done or omitted, as the case may be, with the intention or realisation referred to in section forty-seven, the person shall be guilty of culpable homicide if, as a result of the provocation –

- (a) he or she does not have the intention or realisation referred to in section forty-seven; or
- (b) he or she has the intention or realisation referred to in section forty-seven but has completely lost his or her self-control, the provocation being sufficient to make a reasonable person in his or position and circumstances lose his or her self-control.”

The 2 accused used to assist accused 3 in delivering whatever goods it is accused 3 was in the business of procuring. The deceased equally assisted in such deliveries. The T-shirt which was allegedly stolen was accused 3's and it was stolen at his house. What then would have provoked the 2 accused to the extent of losing self-control?

Was their behaviour not typical of people who have no respect for the law and have no qualms in taking the law into their own hands? We think it is.

There was no provocation to talk about. They were out to mete out punishment they misguidedly thought the deceased deserved. Their attempt to minimise the nature of the assault speaks volumes about their lack of credibility.

Granted all they need do is tell a story and they are not expected to convince the court as to its truthfulness (*R v Difford* 1937 AD 370, *S v Kuraone* HH 961-15). Their story was however shown to be not only improbable but beyond doubt false.

Did they desire death and set out to kill and succeeded in doing so? (*S v Mugwanda* 2002 (1) ZLR 547 (S), *S v Jealous Tomasi* HH 217-16, *S v Herold Moyo* HB 19-17). They may not have desired death and set out to kill but in using that hose-pipe of that thickness to indiscriminately assault a human being with such severe force to cause the internal haemorrhage, they foresaw the real risk or possibility that death may result but continued nonetheless. They could not care less.

Turning to accused 3, can he escape liability. He held the rope that was used to tie the deceased to his trailer within his yard. He went with the 2 accused to deceased's home and took him from the safety of his home. He went to Spencer's house with the 2 accused and the deceased and exhibited the violence that had earlier on scared Morgan from intervening. Morgan did not see him restraining the 2 accused, he aided them as they assaulted the deceased whilst he was tied to the trailer by holding the restraining rope.

In his confirmed warned and cautioned statement he said:-

“I admit to the charge but I personally did not assault the now deceased. He was assaulted by my boys after having stolen clothes from the washing line. I called the boy’s father and informed him of what had happened. Whilst talking the boys attacked and assaulted him. They then went with him where he said he hid the clothes and I remained with his father. After having looked for the clothes and failing to find them they then took him to the police but they had already injured him, that caused them to be arrested and he passed on in hospital.”

Is he seeking to be a “Pontius Pilate” washing his hands off the deceased’s fate and surrendering him to his boys to deal with him?

If as he said, the boys attacked and assaulted him what did he do to stop them or to disassociate himself from the assault? He curiously used the words “my boys” which shows the kind of relationship he had with them. They were “his boys” and he is ‘older’ than both of them. He could easily have stopped the assault had he been so inclined but chose to hold the rope restraining the deceased.

In his defence outline he said the deceased stole his T-shirt and tried to recover it by asking the deceased where it was. He was therefore present as the deceased was being interrogated. One wonders when he discovered the theft of the gas tank or is it his way of trying to justify the assault by throwing in something of greater value than a measly T-shirt.

Section 196 A of the Criminal Law Code provides that:-

“(1) If two or more persons are accused of committing a crime in association with each other 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.”

The 3rd accused was at the scene of the assault, it was at his house and within his yard. He held the rope that was used to tie the deceased to the trailer, he together with the other 2 went to get the deceased from his home before he was subjected to the brutal assault. He did not attempt to stop “his boys” from assaulting the deceased and did not bother to ensure he was taken to the police right from the moment they took him from his house. He went along to Spencer’s house where he and the other 2 accused went on a rampage ostensibly in a quest to recover the stolen T-shirt.

In *S v Siwela & Anor* HB 203-23 DUBE-BANDA J had this to say:-

“Common purpose is present when two or more persons having a common goal to commit a crime, act together in order to achieve that purpose, the conduct of each of them in the execution of that purpose is imputed to the others.”

Counsel for the 3rd accused also referred to the doctrine of common purpose as enunciated in *S v Safatsa* 1988 (1) SA 868, *S v Magedezi* 1989 (1) SA 687.

We have highlighted how accused 3 associated himself with the conduct of accused 1 and 2, from the time they took deceased from his home, to the point where he was tied to a trailer, to taking him to Spencer’s home and back, with the assault unrelenting with the failure to recover accused 3’s property up to the time he called accused 2 who had gone to the bush to try and recover the property only then suggesting that if they had not found the property they should come back so they could go to the police. That suggestion came after the deceased had been mortally wounded. Had it been done earlier the deceased might very well be still alive. The 2 accused listened when accused 3 asked them to return so they could go to the police, demonstrating that they were doing his bidding. It matters not that he did not expressly order the assault.

Accused 3 can therefore not escape liability. He is just as guilty as “his boys”, that is, accused 1 and 2.

Whether the murder is as defined in section 47 (1) (a) or (b) is neither here nor there (*S v Mapfoche* S 84-21). The distinction is insignificant, murder is murder, whether it is as per section 47 (1) (a) or (b).

That said we are satisfied the state proved its case against all 3 accused beyond a reasonable doubt and they are all found guilty of murder as defined in section 47 (1) of the Criminal Law (Codification and Reform) Act [Chapter 9:23].

Sentence

In assessing sentence we considered the following: - All 3 accused are first offenders, married with minor children. Their incarceration will impact negatively on their families as they are the sole breadwinners.

At 45, 32 and 40 years they had hitherto lived a blameless life. The deceased’s death is likely to haunt them for a long time to come.

Society will also refer to them as those who killed or those murderers and that in itself is a burden on their shoulders.

Accused 1 and 2 showed some measure of contrition by accepting their part in the assault.

Aggravating is the fact that a life was unnecessarily lost. People are prone to want to take the law into their hands in a vigilante kind of conduct which should be discouraged. The deceased's life was cut short over a measly T-shirt which he probably did not even steal.

Life is sacred and the sanctity of life to be respected. The death of the deceased must have caused immense pain to his loved ones. No one should have to lose their life under such circumstances. The assault was brutal as shown by the post-mortem report.

The presumptive penalty of 20 years in our view will be harsh given the 3 accused's personal circumstances and accused 1 and 2's show of contrition. Accused 3 also bought a coffin, a goat and groceries at the funeral.

As first offenders who have had their first brush with the law at the respective ages already alluded to, a sentence of 15 years would meet the justice of the case.

20 years is what one would ordinarily start at where the murder is committed in aggravating circumstances.

For these reasons each accused is sentenced to 15 years imprisonment.

National Prosecuting Authority, state's legal practitioners
Dube and Associates, 1st and 2nd accused's legal practitioners
Pundu and Company, 3rd accused's legal practitioners

