

THE STATE  
versus  
SIMBARASHE MUPINGA  
and  
TAWANDA MAGURA  
and  
LOVEMORE MUPINGA

HIGH COURT OF ZIMBABWE  
MAWADZE J  
MASVINGO, 1 & 16 February 2024

**Criminal Trial**

*B E Mathose*, for the State

*G. Gadaga*, for the accused 1

*K. Mabvuure*, for the accused 2

*Ms T. Kapito*, for the accused 3

MAWADZE J: The 3 accused were arraigned on the charge of murder the now deceased Elliot Chingava.

Accused 1 Simbarashe Mupinga (Simbarashe) is 30 years old and resides in the same village with 20-year-old Lovemore Mupinga (Lovemore). The 20-year-old accused 2 Tawanda Magura resides in Gwarinda village. The 47-year-old now deceased Elliot Chingava was residing in Silas Village. All the accused persons and the now deceased were staying under Chief Shumba, Masvingo.

On 27 May 2021 the three accused, and the now deceased were all at their local Muchakate business centre drinking beer.

The state alleges that around 2000hrs an altercation arose between accused Lovemore and one Nomore Feveke (Nomore). It is alleged that all the 3 accused teamed up to indiserimately assault Nomore with booted feet and hands.

The state alleges that the now deceased and one Courage Chaponda (Courage) who were colleagues of Nomore got wind of the altercation and rushed to the scene to rescue their friend Nomore. Courage was armed with a log.

It is the state case that all the 3 accused turned on to the now deceased and assaulted him with fists, open hands and booted feet. It is said accused Simbarashe disarmed Courage of the log and used it to repeatedly strike the now deceased all over the body causing him to fall down after which all the 3 accused fled from the scene. The state alleges that one patron Victor Chinono attended to the now deceased and proceeded to his home. However, it is said his condition deteriorated and was referred to Monrgenster hospital where he unfortunately passed on away the following day 28 May 2021 around 1445hrs to the injuries he had sustained.

The accused persons gave different accounts of what happened and all denied having played any role in the demise of the now deceased.

Accused 1 Simbarashe said he only got into this fracons when accused 2 Tawanda was engaged in a fist fight with one Nomore in a bid to stop this fight. Accused 1 Simbarashe said as he tried to stop this fist fight the now deceased and one Courage came running. He said Courage was armed with a log accused 1 said the now deceased should have been already injured somewhere as his shirt was already blood stained. Accused 1 Simbarashe said Nomore was losing the fist fight against the younger accused 2 Tawanda hence the now deceased tried to intervene by attacking accused Tawanda with the log accused 1 Simbarashe said he disarmed the now deceased of the log and proceeded to hit the now deceased twice on the buttocks with the log causing the now deceased to fall down. Accused 1 Simbarashe said when he tried to deliver a third blow he missed and instead hit accused Lovemore with the log. He said thereafter all the 3 accused left the scene.

Accused 1 Simbarashe maintained in his evidence that the two blows he delivered on the now deceased's buttocks with a log could not have possibly caused his death. He said the head

injury the now deceased sustained should have been inflicted somewhere well before the now deceased came to the scene where accused 1 Simbarashe only assaulted him on the buttocks.

Accused 2 Tawanda said it is him who had a misunderstanding with the now deceased and that the now deceased slapped him. In retaliation accused Tawanda said he tripped the now deceased and left the scene. Accused 2 Tawanda denied assaulting the now deceased in any other manner and said he does not know what befell the now deceased resulting in his death. Accused 2 Tawanda said he was heavily drunk and never acted in common purpose with any of his co accused.

Accused 3 Lovemore denied acting cahoris with either accused 1 Simbarashe or accused 2 Tawanda. He said his only role was on attempt to stop the fight between accused 2 Tawanda and Nomore. In the process he said he was hit was a log a person he could him to leave the scene hence is unaware as to how the now deceased was injured or assaulted.

In support of its case the state produced 4 exhibits by consent. These are;

Exhibit 1: the post mortem report, exhibits 2 to 4 being confirmed warned and cautioned statements of all the 3 accused respectively.

The evidence of the investigating officer sergeant Sizani Maphosa and Dr Zimbwa was admitted in terms of section 314 of the Criminal Procedure and Evidence Act [*Chapter 9:07*].

*Viva voce* evidence was lea from Nomore Mateveke ( Normore), Courage Chaponda [Courage and Victor Chinono (Victor)].

Just before close of the prosecution case the charge against accused 3 Lovemore was therefore not found guilty and acquitted. This judgment as a result is now only in respect of Accused 1 Simbarashe and accused 2 Tawanda.

We turn to the evidence of the state witnesses;

Sgt Sizani Maphosa (Sgt Maphosa)

Sgt Maphosa is the investigating officer. Her testimony is formal and of no probative value. When she arrived at Morgenster hospital the now deceased had died. Upon examining his body, she realised that the now realised that the now deceased's jacket was blood stained and he had a sutured cut on the left side of the head. She proceeded to arrest all the accused and caused a post mortem to be done, Exhibit1.

Dr Godfrey Zimbwa

Dr Zimbwa examine the remains of the now deceased and authored Exhibit1 the post mortem report. The cause of the now deceased is not in issue. The doctor observed a suture laceration on the left parietal which was  $\pm 5$ cm skull deep. The now deceased was frothing from the mouth. The cause of his death was a severe head injury.

The issues which therefore falls for determination is two fold. Firstly, what are the circumstances the now deceased sustained the fatal head injury. Secondly whether it is any of the accused, that is accused 1 Simbarashe or accused 2 Tawanda who caused that fatal injury as both acting in common purpose. Indeed, the court will consider whether the charge of murder has been proved or any other permissible verdict.

Nomore Mateveke (Nomore)

Nomore regards all the 3 accused as his nephews and resides in Mazingo village, chief Shumba Masvingo. He arrived at the business centre at 1600hrs and at around 2000hrs he was among patrons drinking beer in Victor's barber shop.

The previous given accused 2 Lovemore his gango (in shona) (frying work). At around 2000hrs he asked accused 3 Lovemore about the whereabouts of the gango. He said accused 2 Tawanda who was present just came and kicked him in the chest. Thereafter he said accused 1 Simbarashe came as if he was to restrain accused 2 Tawanda but instead joined in by assaulting Nomore with fists with accused 2 Tawanda as Nomore was lying down. Nomore said accused 2 Tawanda was sitting on him assaulting him with fists as accused 1 Simbarashe was kicking him with booted feet. Nomore said he was helpless, could not fight back as his hand had dislocated.

Nomore said as he was been attacked lying down by accused 1 Simbarashe and accused 2 Tawanda he heard the voice of his colleague the now deceased shouting coming to the scene saying Nomore could not be attacked in the deceased's presence. At that point Nomore said accused 1 Simbarashe ran towards the now deceased. Nomore said he heard a thudding sound followed by a person falling down but could not see what was happening as he was still lying down being assaulted by accused 2 Tawanda stood up, stooped the assault possibly to inquire what was going on. Nomore said he took this opportunity to flee from the scene and proceeded him.

Upon arrival home Nomore said he realised he had lost the keys to his house but would not dare return to the scene. He only returned to the scene the next morning to look for his keys. At

the scene he was surprised to see blood stains as he himself had not bled during the assault on him by accused 1 Simbarashe and accused 2 Tawanda. Thereafter he proceeded to the local police to make a report of the assault perpetrated on him by accused 1 Simbarashe and accused 2 Tawanda. Later that day he was advised about the death of the now deceased.

Nomore said he was drunk that night but accused 1 Simbarashe and accused 2 Tawanda were not very drunk compared to him. Nomore exonerated accused 3 Lovemore whom he said did not participate in assaulting Nomore.

It is clear therefore that Nomore did not witness how the now deceased was fatally assaulted. He did not even see the assailant as it were. All he heard was the now deceased's protesting voice, followed by accused 1 Simbarashe rushing towards the now deceased, a thudding sound and some noise of a person falling down. There is no direct evidence from Nomore on how the now deceased was fatally injured. At most Nomore's evidence is circumstantial evidence.

#### Courage Chaponda (Courage)

Courage hails from Silas village, Chief Shumba, Masvingo and he too was at the business centre that night in the company of the now deceased and Nomore.

Courage said he went out of a beer outlet to relieve himself around 2000hrs. he heard some noise of people fighting. One Victor told him that the Mupinga siblings were attacking Nomore. He in turn advised the now deceased. Courage said the now deceased rushed to the scene to possibly rescue their colleague Nomore. Courage picked a metre log which was as thick as his forearm as he rushed to the scene. Upon arrival at the scene, he found Nomore lying down being pressed by accused 1 Simbarashe.

Courage said before he could intervene in any manner accused 1 Simbarashe turned on him and disposed him of the log. He said accused 1 Simbarashe used that log to assault Courage on the thigh. He said he managed to block a second blow with the same log directed at his head. Sensing danger and the futility of trying to intervene Courage said he took to heels dropping his pair of shoes and a cap. He only returned to the scene after accused persons had vanished to retrieve his items.

Courage said it is at that point that he found the now deceased seated at the scene with his shirt soaked in blood. Courage and the now deceased proceeded home and separated. The next day he learnt of the death of the now deceased.

Just like Nomore, Courage did not see how the now deceased was assaulted or injured. He had fled from the scene, despite his initial Courage to try and rescue a colleague Nomore. The heat in the kitchen was too much for him and he fled leaving even the now deceased. All he witnessed was accused 1 Simbarashe attacking Nomore who was lying helpless on the ground. he too exonerated accused 3 Lovemore as he said only accused 1 Simbarashe and accused 2 Tawanda were at the scene.

Victor Chinono (Victor)

It turned out that the only eye witness to the attack on the now deceased id Victor.

Victor resides in Chimuti village, under Chief Shumba, Masvingo. He owns a barber shop at the said business centre from where he operated. At times he sleeps in his barber shop. He allows patrons to also partake beer from his barber shop especially after work.

Victor said he and his colleagues had missed a gango (frying work) which they used to fry or roast meet whilst drinking. He said Nomore asked the accused persons about the gango around 2000hrs as they were at his barber shop.

Victor said accused 2 Tawanda reacted by attacking Nomore. Accused 1 Simbarashe then joined to attack Nomore. He said Courage and the now deceased came to the scene running. Courage had a metre log which was thick as a forearm. However, accused 1 Simbarashe quickly dispossessed Courage of that log and hit Courage with the log causing Courage to flee from the scene.

Victor said the now deceased who had arrived with Courage tried to intervene to rescue Nomore who was being attacked by accused 1 Simbarashe and accused 2 Tawanda. He explained how the now deceased was the attacked.

Victor said accused 1 Simbarashe who was now armed with a log hit the now deceased with the log on the side of the head. A lot of force was exerted. The now deceased fell down. As the now deceased was lying helpless on the ground both accused 1 Simbarashe and accused 2 Tawanda used fists to further assault the now deceased. Victor said accused 3 Lovemore was not at the scene. Victor said he witnessed all this as he stood hiding by the corner of a building few metres away. The place was well lit by solar lights. He said accused 1 Simbarashe and accused 2 Tawanda then scene. Victor did not examine to see any injuries on the now deceased.

Victor disputed accused 1 Simbarashe attacked the now deceased. He said accused persons were moderately drunk. He denied that the now deceased was the aggressor but was attacked as soon as he got to the scene where Nomore was being assaulted by accused 1 Simbarashe and accused 2 Tawanda. He too exonerated accused 3 Lovemore.

In our assessment Victor is a critical eye witness. He corroborated Nomore and Courage on how the now deceased came to the scene where Nomore was being attacked. There is nothing to suggest that Victor was too drunk to recall what he saw clearly he had no interest in this matter but simply happened to be at the scene at the right time. Nothing distracted him from seeing all what happened as he was close by. We therefore accept his evidence.

#### Findings made

##### Accused 1 Simbarashe

By his own admission accused 1 Simbarashe retrieved the said log from Courage. It is clear that it is this same log accused 1 Simbarashe used to assault Courage who fled from the scene. Accused 1 Simbarashe admits also assaulting Nomore although he was at pains to minimise his role. From the evidence accused 1 Simbarashe had no cause to attack either Normore or Courage. It is not true that accused 1 Simbarashe only hit the now deceased with a log on the buttocks. It is even farfetched that the now deceased came to the scene already injured on the head. It is foolhardy to believe the now deceased would involve himself in another fracas after being already seriously injured somewhere. Further, accused 1 Simbarashe was never consistent in explaining how he assaulted the now deceased. In his confirmed warned and cautioned statement he said he used the log twice to hit the now deceased on the buttocks, used a stone and also tripped him. In court he said he only delivered two blows on the deceased's buttocks.

It is our findings that accused 1 Simbarashe assaulted the now deceased with the said log on the side of the head inflicting the fatal injury. We dismiss accused 1 Simbarashe version as patently false.

##### Accused 2 Tawanda

In his warned and cautioned statement which is confirmed accused 2 Tawanda admitted tripping the now deceased twice. However, this version can not possibly be true in light of Victor's clear evidence Victor was explicit that after accused 1 Simbarashe delivered the blow to the head

with a log causing the now deceased to fall accused 2 Tawanda joined accused 1 Simbarashe to assault the now deceased with fists as he lay down.

The evidence before us is that it is accused 1 Simbarashe who delivered the fatal blow on the head with a log causing the now deceased to fall down. By then accused 2 Tawanda as per Victor was still on top of Nomore. One cannot say that accused 2 Tawanda acted in common purpose with accused 1 Simbarashe at that stage.

In our view accused 1 Simbarashe acted independently of accused 2 Tawanda when he rushed to the now deceased, disarmed Courage of the log and bashed the now deceased with it on the head. Further, as conceded by the state accused 1 Simbarashe's conduct can not amount to murder either with actual or constructive intent. The fatal blow to the head, followed by an assault all over the body with fists but besides the head injury no further injury was inflicted. Accused 1 Simbarashe was therefore simply negligent in the manner he assaulted the now deceased resulting in his demise. His conduct amounts to contravention of section 49 of the Criminal Law Code [Chapter 9:23] which is culpable homicide.

In respect of accused 2 Tawanda the evidence we accept is that she used fists only on the now deceased. In all probability the now deceased had already been injured on the head by accused 1 Simbarashe. No further injuries were observed on the now deceased. Thus accused 2 Tawanda's conduct amounts to assault in contravention of section 89 (1) of the Criminal Law code [Chapter 9:23].

For the avoidance of doubt, we have entered the following verdict.

VERDICT: -

Accused 1 Simbarashe: Guilty of contravention of section 49 of the Criminal Law [Codification and Reform] Act [Chapter 9:23]- Culpable Homicide.

Accused 2 Tawanda: Guilty of contravention of section 89 (1) of the Criminal Law [Codification and Reform] Act [Chapter 9:23]- Assault.

Accused 3 Lovmore: Charge is withdrawn after plea and is found not guilty and acquitted.

**MAWADZE J**

*National Prosecuting Authority*, counsel for the state

*Nyawo Ruzive*, legal practitioner pro deo counsel for accused 1

*Chihabakwa Law Chambers*, legal practitioner pro deo counsel for accused 2

*Legal Aid Directorate Masvingo*, legal practitioner pro deo counsel for accused 3