THE STATE

Versus

GIFT TAILO

And

FARAI FUKIZA

IN THE HIGH COURT OF ZIMBABWE
KABASA J with Assessors Mr. P. Damba and Mr. J. Sobantu
BULAWAYO 10 AND 12 MAY 2022

Criminal Trial

B Gundani, for the state
A. Ndlovu with U.M. Nare, for the 1st and 2nd accused

KABASA J: The accused are facing a charge of murder, as defined in section 47 (1) of the Criminal Law (Codification and Reform) Act, Chapter 9:23. Accused 1 tendered a plea of guilty and it being a murder charge, a plea of not guilty was entered. Accused 2 tendered a plea of not guilty.

The state alleges that on 23rd December 2020 the deceased and one Alexander Sibanda left their homesteads at around 0800 hours and passed by Matshetshe Business Centre en route to a party. At the business centre they consumed some alcohol and the 2 accused were also present and also drinking beer. The accused later ferried the deceased, Alexander and others to the party using their motor vehicle. The deceased later left the party around 1400 hours going to look for tobacco at the business centre. On the way he met the two accused and a misunderstanding ensued. The accused proceeded to assault the deceased using a log, stones, a shovel, a metal pipe and a thorn tree branch. They

thereafter took him to their homestead alleging that he knew about a robbery that had occurred at their home. They later took him to the police station at Esigodini where they reported that he had been involved in an accident after he jumped in front of their vehicle. They were advised to take him to hospital, where he succumbed to his injuries that same night.

In their defence the accused did not deny causing the injuries which led to the deceased's death but explained that when they met the deceased he jumped in front of their vehicle and forcibly opened the door to the vehicle and this instilled fear of a possible robbery as their father had been a victim a week earlier. They panicked and proceeded to assault the deceased using a switch and booted feet. They had no intention to cause his death.

To prove its case, the state produced the following exhibits.

a) Postmortem report.

b) Accused's confirmed warned and cautioned statements.

c) 2 shovels, one weighing 1,510 kg and the other 1,595 kg with lengths of 82 and 72 cm respectively.

d) Three stones weighing 2, 92 kg, 6,71kg and 1,13 kg

e) A metal tube 31 cm long and 0,045 kg in weight.

f) 2 logs, 54 cm and 41 cm long and 4 sticks, 33 cm, 34 cm, 32 cm and 18 cm long.

The statements of 7 witnesses was admitted into evidence in terms of section 314 of the Criminal Procedure and Evidence Act, Chapter 9:07. Evidence was also led from 4 state witnesses.

Of the evidence admitted in terms of section 314, Alexander's evidence confirmed that deceased left the party for the business centre but did not return. The evidence was largely colourless.

Njabulo Tshuma's evidence established that when he got to the scene after being alerted by one Sibusisiwe Mabhena, he found the accused assaulting the deceased using a metal rod. They then put him in their vehicle and left. Sandrah Hamadziripi happened to be in the area because she wanted to collect her debt. As she passed by the accused's home she saw some elderly people restraining the accused from assaulting the deceased who was lying on the ground bruised. She remarked that they should take him to the police but this remark angered accused 2 who chased her away.

Justice Mbewe is the police officer to whom the report of a traffic accident was made who, on observing that the deceased's condition was bad, instructed the accused to take him to hospital and come back later so they could visit the accident scene. The accused did not return and the assault allegations subsequently surfaced which changed the complexion of the case resulting in it being referred to CID for investigation.

The foregoing was not disputed as each one of these witnesses' evidence was admitted in terms of section 314 of the CPEA.

Of the 4 witnesses who gave *viva voce* evidence, the evidence of the Investigating Officer, was largely colourless. Its relevance related to the recovery of the exhibits which were produced in evidence and the fact that the shovels had blood stains.

The defence sought to cast aspersions on the witness's impartiality, suggesting that he was motivated by revenge due to a misunderstanding he had

with the accused's brother but the nature of the evidence did not suggest any malice on the part of the witness.

The state's case would not have changed even if this witness had not testified. The criticism was therefore baseless. The recovered exhibits are attributable to the witnesses who witnessed the assault and not the Investigating Officer.

We got the impression that he merely confined himself to what he did and what he recovered as a result of indications made to him by witnesses. We found no fault with his evidence.

Samson Sibindi was one of the witnesses who observed the assault. The accused and deceased are people known to him as neighbours. He called the accused "my boys", an expression which spoke to the nature of his relationship with them.

His evidence was to the effect that as he was searching for his cattle at around 1600 hours he observed at a distance the 2 accused who were pelting stones at something that was on the ground. On drawing closer he noticed that, that "something" was the deceased. The 2 accused did not stop pelting him with stones. He feared for his life and so decided not to intervene. He however heard the 2 accused asking the deceased why he had robbed and injured their father, and that they were assaulting him for that. Accused 1 proceeded to pick up a metal rod with which he assaulted the deceased all over the body whilst accused 2 was kicking him. The deceased looked helpless, he was covered in blood and was not moving.

The brief cross-examination the witness was subjected to did not discredit his testimony. He was able to demonstrate through estimation of distances that

he was able to observe the assault and was not mistaken as to what he observed. The incident occurred in broad daylight and there was no suggestion that there was anything obstructing his vision. He indicated where he was standing when he moved closer, which was a distance of 6 -7 metres, close enough for him to clearly see what was happening. 15 minutes lapsed whilst he was observing before he moved away to a distance of 8 -10 metres but the assault did not stop. It was only the weapons which changed, from stones to a metal pipe and a thorny tree branch. The witness identified exhibit 7 and 9 as the weapons he observed being used to assault the deceased. Exhibit 7 was the 6, 71 kg stone and exhibit 9 the metal tube 31 cm long and 0,045 kg in weight.

We were satisfied this witness related what he saw and did not seek to embellish his evidence. He had no reason to.

The witness could easily pass for one in his late 40s or early 50s and therefore much older than the 2 accused. We found it very telling that at his age he felt scared to intervene and could only watch. This spoke to the brutality of the assault.

Miriam Sibindi was the second witness. She is a 15 year old girl who was known to the deceased as a neighbor. The 2 accused were also neighbours.

She was with one Charity Masuku whose evidence was admitted in terms of section 314 when they observed accused 2 holding deceased's leg and assaulting him with a metal rod. He also picked a stone which he used to assault the deceased on the chest. She too identified exhibit 7 and 9 as the weapons she observed being used. The metal rod was used to assault the deceased on the buttocks many times. The deceased was crying whilst the accused were asking him who had entered their homestead.

Whilst this witness could not explain how she was able to see which weapon was used and on what part of the body as she said the accused's motor vehicle was blocking her, there was however no doubt in our minds that she did observe the assault. She too, like the first witness, mentioned the fact that accused were asking the deceased about an incident that had occurred at their home, the robbery the accused said resulted in their father sustaining injuries.

Her estimation of distances was also not reliable but on being asked to indicate her indications showed that what she perceived as 60 m was actually 40 paces and that is where she was initially when she observed the assault.

We got the impression that she is one of those people who when relating an incident assume that those listening can understand her description of an area familiar to her but unfamiliar to the audience. Asked to clarify how she could see if the accused's motor vehicle was blocking her, she said they were downhill so it was clear where deceased was moving to as he tried to move, a clear demonstration of her inability to appreciate that that which she could easily relate to was not as easy for an audience not familiar with what she was talking about. This was borne out of innocence rather than from a desire to mislead the court as to what she observed.

Whether the particular stone and metal rod she identified were the exact weapons used is ultimately not the issue. The issue being that stones and sticks were used, so too a metal rod.

The last witness was Sibusisiwe Mabhena. She is from the same area as the accused and deceased, they are neighbours.

Her evidence was to the effect that as she was on her way to Esikhoveni she heard sounds of someone being assaulted or people fighting. When she got

closer she observed the deceased who was lying on the ground while accused I was holding a spade and accused 2 a stone. The spade was being used to assault the deceased on the chest area. Accused 2 proceeded to retrieve something that looked like a tube and continued with the assault. She left the scene going back home to pick up something she had forgotten and it took her 30 minutes to come back to the scene. When she got back the 2 accused were still assaulting the deceased and accused 1 took a tree branch with which he assaulted the deceased on the belly, many times. Accused 2 was kicking the deceased asking him why he would ask for money from them yet their father was now disabled because of him.

She identified exhibit 4, 6 and 9 as the weapons she observed being used. Exhibit 4 was the shovel measuring 82 cm in length and 1,510 kg in weight, exhibit 6 was the 2,9 kg stone and exhibit 9 the metal tube.

After the assault the deceased was thrown into the back of the accused's motor vehicle where he was joined by accused 2 whilst accused 1 was the one driving. She then observed people gathering at the accused's homestead and she joined them and observed that deceased's hands had been tied with a chain.

This witness's evidence was easy to follow, precise and to the point. We were satisfied the clarity stemmed from the fact that she was merely relating what she saw and nothing more.

From the totality of this evidence it was clear the deceased succumbed to injuries inflicted by the 2 accused. Equally clear was the fact that weapons were used.

We did not lose sight of what the accused had to say. Whilst accepting that they inflicted these injuries on the deceased they sought to suggest that no weapon was used. Only a switch and booted feet.

Granted the accused are not expected to convince the court as to the truthfulness of their story, whatever explanation they give, 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. (*R* v *Difford* 1937 AD 370, *S* v *Kurauone* HH 961-15). However such explanation is not looked at in isolation but in light of the evidence led against them.

The two accused gave 5-10 minutes as the duration of the assault, which assault was perpetrated through the use of a metre long and 2-3 cm thick stick and a couple of kicks directed at the chest, yet the postmortem showed the following marks of violence:_

a) abrasion on the shoulder (5 x 3cm), chest right (4 x 4cm) chest left (3 x 2cm), hip (3 x 2cm), right lower back (8 x 2cm).

b) swollen both hips and buttocks with intra muscular bleeding.

c) laceration on the left upper lip (1 cm), left corner of mouth (1 cm), chin (4 x 1cm)

d) hematoma on the left occipital region (2 cm)

e) Ruptured small vessels on the thigh muscles

f) hemoperitoneum (which is internal bleeding in which blood gathers in the peritoneal cavity)

g) Ruptured liver right lobe (8 x 3 cm)

h) ribs fracture right 10-12, left 11-12.

These marks of violence are indicative of a protracted assault as testified to by the witnesses and equally supports the witnesses' testimony that booted feet, stones, metal rod, shovel and sticks were used in the assault. The deceased died due to hemorrhagic shock and a ruptured liver as a result of the assault.

Mr. Ndlovu for the defence submitted that a shovel could not have been used to strike the deceased as the post mortem did not indicate injuries commensurate with the use of such a weapon.

On the contrary ,the ruptured small vessels of the thigh muscles, ruptured liver and hemoperitoneum are injuries indicative of the use of a weapon, which weapon Sibusisiwe said was the shovel which she saw being used on the deceased's belly.

The stone was said to have been used on the chest and 4 ribs were fractured. It could be that the witnesses were not accurate as to the exact stone used but that does not change the fact that a stone was used and the injuries support such evidence.

It was clear accused I was battling with his conscience. We say so because he at times appeared unable to respond to questions which were directed at showing how ridiculous his defence sounded. At times he would mumble words under his breath rather than speak up, especially as he conceded that the deceased never retaliated or tried to use the beer bottle he was holding in his hand, which beer bottle they had wanted the court to believe was a weapon the now deceased was armed with.

If indeed the 2 accused believed they were about to be robbed, the 2 kicks accused 1 said felled deceased were all that was required to avert the perceived attack. The 2 accused could have easily driven away and spared the deceased his life.

It became clear that the 2 were not attacking the deceased because they thought he presented a threat to them but it was their way of revenging for they thought the deceased was involved in a robbery that had earlier on occurred at their home.

It was not for them to try and get the deceased to confess, which the evidence of the three witnesses clearly revealed. This was a matter for the police and it was to the police that the 2 accused should have gone with whatever evidence they had linking the deceased to this robbery.

We were left wondering as to whether the accused were seeking to rely on self-defence as their story was not very coherent. Section 253 of the Criminal Law Code sets out the requirements to be satisfied for a self-defence claim to succeed. Even if we were to accept that the 2 accused believed they were under attack, what they did was not necessary to avert whatever attack they thought they were under. The means used was unreasonable and unwarranted in the circumstances and whatever harm they thought the now deceased would inflict cannot be compared to the harm they inflicted in order to avert it.

We are however in no doubt that there was no issue of self defence but rather vengeance on a person they thought was involved in a robbery at their home.

Given the evidence before us, can it be said the accused's actions make them liable to a lesser offence of culpable homicide?

We are unable to say the 2 accused desired 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).

However when people use stones to pelt at a human being, no matter the size and a shovel and sticks to perpetrate a protracted assault on a human being with such force as to cause the injuries observed by Doctor Pesanai, can it be said when the victim dies the perpetrators can only be said to have negligently failed to realize that death may result from their conduct? Further after bundling the already injured now deceased into their vehicle they took him to their home, not to get money so as to ferry him to hospital as they sought to make us believe, but once there, they continued with the assault as shown by Sandrah Hamadziripi's evidence.

Both accused said they had taken alcohol, 2 quarts each of Castle and Black Label but they were not intoxicated. They knew and appreciated what they were doing. Even if they were intoxicated, voluntary intoxication can at most be mitigatory. They committed the offence in association with each other, making them both equally liable for the deceased's death. The deceased was lying on the ground, helpless, bloodied and not moving and yet the 2 were unrelenting. They must have realized their conduct could cause death, which risk or possibility must have been evident to them but they continued nonetheless despite the risk or possibility. Is it however necessary to distinguish whether the murder was in terms of section 47(1) (a) or (1) (b)?

In *Tafadzwa Watson Mapfoche* v *The State* SC 84-21 MAKARAU JA (as she then was) made reference to section 47 (1) of the Criminal Law Code where murder is defined in paragraphs 1 (a) and 1 (b) and made the following observation:-

> "Thus under the section, it is not necessary, as was the position under the common law, to find the accused guilty of murder with either actual intent or with constructive intent. Put differently, it is not necessary under the Code to specify that the accused has been convicted under section 47 (1) (a) or (b). Killing or causing the death of another person with either of the two intentions is murder as defined by the section.

It further appears to me that the distinction between a conviction of murder with actual intent and murder with constructive intent, which under the common law greatly influences the court in assessing sentence is no longer as significant or material as it was."

In persuading us to return a verdict of guilty to the lesser offence of culpable homicide, Mr. Ndlovu referred to MAWADZE J's judgment in *S* v *Kuipa and 3 Others* HMA 29-21.

The facts therein are very different from the ones *in casu*, the deceased in that case was assaulted by a mob of villagers after he was caught in a house into which he had unlawfully gained entry. The owner of the home raised alarm and villagers responded. He was assaulted by a mob and the accused, Kuipa, was one of the people who joined in the assault.

After considering the circumstances of the assault, the learned Judge said:-

> "The only benefit we can afford the accused is that he could not have formulated the intention to kill the now deceased. He simply got overly excited and joined fellow villagers in taking the law into his own hands believing they were disciplining a thief. The accused was negligent in the manner he assaulted the now deceased and simply abandoned him at night severely injured."

The same cannot be said *in casu*. The 2 accused used all manner of weapons to assault a defenceless person who was only unfortunate to be suspected of having committed a robbery at the accused's homestead. The

accused only took him to hospital because the police had instructed them to after misleading the police into believing that the now deceased had been a victim of a road traffic accident.

We are therefore satisfied they realized the risk or possibility that their conduct may cause death but continued to engage in that conduct. The state has therefore proved its case beyond a reasonable doubt and the 2 accused are accordingly found guilty as charged.

Sentence

In assessing an appropriate sentence I have considered that you are both first offenders.

At the time of commission of the offence you were aged 22 and 23 years respectively. You are now24 and 25. You were youthful then and you still can be considered as youthful now.

The immaturity of youth makes it odious to impose on them the same penalty that would *otherwise be appropriate for a mature offender*.

(S v Zaranyika and Others 1995 (1) ZLR 270 (H)).

You assisted with burial expenses, paying a total sum of USD 3 500. You therefore showed some measure of remorse in doing so. You also paid USD5 000 as compensation. Yes, this does not bring back the deceased but the gesture shows contrition.

Accused 2 you are in 3rd year and your studies will be interrupted. Both of you had consumed some alcohol and being youthful that consumption of alcohol added another irrationality to the immaturity of youth.

In aggravation is the fact that a life was needlessly lost. Courts have time without number emphasized the need to respect the sanctity of life. Once lost a life cannot be replaced.

You caused immeasurable pain to the deceased's loved ones who, like you, was in the prime of his life.

It cannot be disputed that the deceased died a painful death, at the hands of people he knew well as you were from the same village.

That said, however the sentence to be imposed must fit you as the offenders, the offence and be fair to society. The sentence itself must be fair and rational (*S* v *Harington* 1988 (2) ZLR 344)

The court must never assume a vengeful attitude when considering an appropriate sentence (*S* v *Tsibo Ndlovu* HB 46-96).

With that said, a sentence of 12 years imprisonment will meet the justice of the case. You are so sentenced.

National Prosecuting Authority, state's legal practitioners
Dube & Associates, 1st and 2nd accused's legal practitioners