

THE STATE
versus
FELIX MUTEVE

HIGH COURT OF ZIMBABWE
FOROMA J
HARARE, 12, 13, 14, 19 February 2019 & 25 & 29 March 2022

Judgement

H M Muringani, for the state
S Makonyere, for the accused

FOROMA J: Accused is called Felix Muteve. He was jointly charged of murder of one Jemias Bangu together with four others it being alleged that on 02 July 2016 at Sam Marange's car park the accused persons unlawfully and with intent to kill caused the death of Jemias Bangu by assaulting him with blunt objects and an umbrella stick thereby causing injuries from which he died. The five accused each pleaded not guilty to the charge. Second, third, fourth and fifth accused were discharged at the close of the state case and first accused was put on his defence.

The evidence against the accused 1 consisted of the following:

- a) The post mortem report by Dr Gonzales produced by consent as Exhibit 1.
- b) Evidence of one Peter Taruona as summarized in the state summary which was produced by consent in terms of s 314 of the Criminal Procedure and Evidence Act [Chapter 9:07]. The said evidence as admitted was as follows:
"he will state that he is a duly attested member of the Zimbabwe Republic Police stationed at Kuwadzana police station. In the company of Constable Makumbe they arrested the accused persons at Whitehouse".
- c) oral testimony of one Maxwell Rafemoyo and Simon Chivere the Investigating Officer.

Maxwell Rafemoyo gave evidence under oath to the following effect - that he resides at number 419 Kuwadzanan 5. He did not know the deceased during his lifetime. He knows accused 1-3 as he worked with them at a car park. Accused 4 owned one of the car parks where he worked and was a long time neighbour of his.

He only got to know accused 5 at some point they were jointly charged. He testified that towards sunset on 1 July 2016 accused 4 requested him to man his car park as he wanted to go to his other car park at Kuwadzana Extension to which he agreed and remained manning the said car park until 4th accused returned from Kuwadzana Extension. The witness indicated that he was a plumber and used to wash cars and sell firewood at accused 4's car park. Accused 4 left about 6:00p.m. and returned about 11:00 p.m. and took over the car park from the witness whom he excused and suggested he goes home to sleep. The witness did not go home but instead slept in a bus which he was meant to wash the following morning.

Between 1:00 a.m. and 2:00 a.m. he heard someone screaming that they had seen a thief. In response he woke up and went to a fire place at Sam Marange's car park. On enquiring as to accused 4's whereabouts he was told accused 4 had gone to the car park where a thief had reportedly been spotted i.e. at Tererai Muteve's car park. He too went to Tererai Muteve's car park where he found the now deceased leaning against a pre-cast wall. He observed that the now deceased was drunk. The witness enquired as to who the person leaning against the wall was and 2nd accused reported that it was the thief they had found in the car park and that the alleged thief had attempted to flee and they had apprehended him. The witness asked the alleged thief who he was and he replied that his name was Jemias Bangu and the witness ordered the alleged thief to sit down which he did. As the witness was trying to verify the alleged thief's identity, accused 1 assaulted the alleged thief with a switch which the witness described as an 80cm long by 5cm diameter guava tree switch. The witness described the assault as "struck the alleged thief on the side of the head" and he tried to restrain him. The witness asked why accused 1 was assaulting the now deceased and 1st accused replied that he was a thief. As the witness was perusing the identity document produced by the now deceased accused 1 struck the deceased again on the temple and the deceased started bleeding which was an indication that the assault had caused an injury to the now deceased's head. It was also the witness' evidence that on delivering the second blow to the now deceased accused 1 was then restrained by accused 2 and 3. The deceased protested at the assault by asking the 1st accused whom he addressed by name to stop assaulting him as he was not a thief. It was only then that it occurred to the witness that the now deceased actually knew accused 1 by name. Accused 1 however insisted that the now deceased was a thief. When the witness established that in all probability the now deceased had strayed after missing his cardinals due to

drunkenness he got him to stand up and tried to show him the way. As the witness was showing the alleged thief his direction to his residence, accused 1 objected to deceased being allowed to go away. Some exchange took place between the witness and accused 1 over whether the alleged thief was a thief with the witness pointing out that the man may have genuinely lost his way as he was drunk. After some heated argument the 1st accused insisted that the witness should not interfere as he was not on duty and should leave those on duty to handle the matter.

The witness then decided to withdraw from the matter and left the now deceased in the custody of first accused and second and third accused and he proceeded to fourth accused's car park where he found fourth accused and fifth accused by fire. While by the fire the witness established from accused 4 and 5 that they did not believe the alleged thief was a real thief. While by fourth accused's car park at the fire place the witness noticed first accused arrive with second and third accused and the alleged thief (the now deceased) and first accused insisted that the now deceased was a real thief. It was eventually agreed that the deceased would be detained overnight and be taken to the police at day break. The witness urged those who had brought deceased to the fire place that if they would not release the deceased to go they should desist from assaulting him further. The witness claims that he washed the deceased's face before he left to sleep and noticed that the now deceased had sustained an injury to the skin on his temple. The witness then left the now deceased by the fire at the 4th accused's car park and went to the bus where he slept.

The witness also testified that all this took place around 3.00 am. Before day break accused 2 approached him twice in the bus. Initially he informed him that the boys were still assaulting the now deceased and the witness suggested that he stops them. The witness however indicated that he could not come to help as accused 1 had warned him against interference as he was off duty. Before the second accused returned to him in the bus that morning the witness heard someone shouting (Uyo! Uyo!) (there he is, there he is) suggesting someone was escaping. Before long the second accused approached the witness again at the bus where the witness was sleeping and reported that the now deceased tried to escape but he was apprehended and some of the people at the fire were contemplating cutting his legs and hands and believed that deceased may have already had one of his legs broken. Accused 2 did not indicate by name who was involved in assaulting the now deceased. Not long after second accused had left the bus the witness woke up to fill his tank with some water for washing the vehicles. Before he went to fetch water he went to the

fireplace where he found accused 1-4 but did not see accused 5. He observed that the now deceased had been badly assaulted. He then suggested that they take their victim to the police and while at the fire place one Manjoro took an umbrella stick and assaulted the deceased with it despite the fact that the deceased was bleeding. While still by the fire the witness observed two men passing by on their way to Tererai Muteve's car park who on hearing that the deceased was a thief one of them took a switch and delivered about 10 strokes on the deceased's back side. The witness then went to Kuwadzana Police where he made a report. The witness also indicated that he had not disclosed most of the details he gave in his oral testimony when he gave his statement to the police because he had been threatened by accused 1 that no one should give details of what had taken place otherwise he would ensure they are also implicated.

During cross examination the witness was shown his witness statement in which significant aspects of his oral evidence had not been mentioned and asked to comment it being suggested that the said details were recent fabrications or after thought which he strongly disputed. The witness maintained that he had informed the police about threats made to him by accused 1. It was also put to him that he too had participated in assaulting the deceased which he denied. The witness disputed that deceased was assaulted by any mob as the only mob he witnessed was the one that had gathered at the scene between 7:00 a.m. and 8:00 a.m. when he returned from the police before the deceased had been taken to hospital.

The next witness called by the state was Simon Chivere a Sergeant in the ZRP and the investigation officer, who had served 24 years in the ZRP. He neither knew the accused nor the deceased during his lifetime. He handled the investigation of the matter and recorded the accused's warned and cautioned statement. He testified that it was not easy to identify as to who among the accused had assaulted the deceased as all of them denied doing so. During cross examination the witness was unable to confirm that the stain he observed on the seat of the vehicle where first accused was seating was deceased's blood as no forensic test of same had been carried out.

When put to him that the first witness was an accomplice he disputed it and indicated that although he had been arrested with the other accused on interviewing him during his investigations he established that he was an informant and he did not treat him as an accomplice. He testified that he recorded Rafemoyo's statement as a witness on 20 July 2016 and it was after this statement was recorded that Rafemoyo informed him that he had been threatened by one of the accused but

he did not mention the accused's name. The witness admitted that the witness Rafemoyo did not inform him that the first accused had assaulted the deceased with a guava tree switch neither did he tell him that the deceased has also been assaulted by one of the two men who had passed by the fourth accused's car park (by the fire place) who had assaulted the deceased by striking deceased's back with a switch delivering about 10 strokes before proceeding to collect their vehicle at Tererai Muteve's car park. He was insistent that he regarded witness Rafemoyo as an informant and not as an accomplice. The witness was adamant that the docket that was opened in this matter was a result of a report to the police by Rafemoyo.

The state closed its case after the witness was excused. The first Accused took the witness stand after the other co-accused persons were discharged at the close of the state case. Accused gave evidence under oath. He adhered to his warned and cautioned statement and his defence outline as his evidence in chief. Essentially the accused denied assaulting the deceased and averred that when the deceased was force-marched to Sam Marange's car park the witness was asleep in one of the cars he was guarding.

After being woken up by his brother Goodman Muteve around 3:00 a.m. he observed the deceased being assaulted by a group of people. He was informed by his brother Goodman Muteve that deceased had been spotted by him upon which he shouted for help resulting in the deceased being apprehended and being taken to Sam Marange's car park. He never left the car park which he had to guard. When he came out of the Mazda truck he had been sleeping in he observed a group of about 10 people surrounding the deceased whom he referred to as the thief with some of the people beating the deceased.

He only left the car park he was guarding and went to Sam Marange's car park fire place where he observed some of his co-accused one of whom Priviledge Manjoro was assaulting the deceased with an umbrella stick/handle. He and Goodman Muteve and Sam Marange after a while went to Holland Police Post to report that there was an injured person by the car park leaving the deceased with Maxwell Rafemoyo, Priviledge Manjoro and Authony Honge by the fire place at Sam Marange's car park.

When they returned deceased had already been taken to the hospital. He therefore claimed that he had nothing to do with the murder of the deceased. Accused denied that he had assaulted the deceased with a switch from a guava tree. He denied having seen the deceased bleeding from

the head. The witness denied that he refused that deceased be released to go as he considered him as a thief. He also denied that accused two and three restrained him from assaulting the deceased before deceased was taken to Sam Marange's car park. Accused also denied that he insisted that the deceased be detained overnight. He also denied having threatened Maxwell Rafemoyo not to disclose what he and others had done to deceased claiming that he never discussed the issue of deceased's murder with Maxwell Rafemoyo. During cross examination by state counsel Accused denied having assaulted the deceased and claimed that Maxwell Rafemoyo hated him. When asked as to why he did not instruct his counsel to challenge Maxwell Rafemoyo's claim his answer was that he did not challenge the evidence out of ignorance. He was also asked why he did not challenge Maxwell Rafemoyo's evidence that he had been restrained by Goodman Muteve and another from assaulting deceased and in response he insisted that Maxwell Rafemoyo had fabricated this evidence and disputed that he had detained the deceased so that he and others would assault him. When asked why he did not take deceased to police or assist him he answered that he could not take him to police because he was not the one who had assaulted him. He also testified that he could see deceased being assaulted by a group of people about 10 metres away.

When asked if he could identify any of the persons in the group that he claimed assaulted deceased at Sam Marange's car park by the fire place he said he could not identify any as he was some distance away. Accused was asked to reconcile the answer that he could not identify the deceased's assailants and what he had said in his warned and cautioned statement namely that he did not identify some of the assailants which he could not do particularly since it was dark in the night but he could not do so. Accused accepted that delivering blows to deceased's head was reckless as the human head is a vulnerable part of the human anatomy and could cause death. Accused did not call any witness and closed his case when he concluded his testimony.

Analysis of Evidence

The State led evidence of Maxwell Rafemoyo whose testimony was essentially that Accused assaulted the deceased by striking him twice on the head. Deceased was injured on the head as a result of the said assault. The defence submitted that the witness Maxwell Rafemoyo is an accomplice and that his evidence should be treated with caution. The defence also submitted that Maxwell Rafemoyo contradicted his evidence to the police in his witness statement in that his oral testimony directly and in detail incriminated the Accused Felix Muteve the first accused

whereas he did not implicate the first Accused in his statement to the police as a witness. For this reason the defence argued that Maxwell Rafemoyo's evidence should not be considered.

Is the witness Maxwell Rafemoyo an accomplice?

Jonathan Burchell in his book *Principles of Criminal Law* 5th Edition p 565 defines an accomplice as follows:

“An accomplice is one who takes part in the Commission of the crime, other than the perpetrator(s) and other than the accessory after the fact. Accomplice liability is distinct from that of the perpetrator, being based on the accomplice's own unlawful conduct and fault (*mens rea*) but it is also liability which is accessory in nature in that there can be no question of accomplice liability without a perpetrator who commits the crime”.

It is important to mention at this stage that the accused did not give any evidence as to the role of the witness Rafemoyo in the commission of the offence charged. In his confirmed warned and cautionance statement (Exh 4) the first accused indicated that he could pin point some people in the mob that assaulted the deceased and these were Honye a security guard Priviledge Manjoro and he did not know the other assailants by name but by sight. In his defence outline accused mentions by name only Priviledge Manjoro as the person he observed assaulting the deceased with an umbrella stick (handle) by the fire place at Sam Maranges's car park. Although he claims to have seen Maxwell Rafemoyo at the same fire place at Sam Marange's fire place he did not testify to the witness doing anything suggestive of being an accomplice. The first accused's defence counsel overplayed the fact that the witness Maxwell Rafemoyo was arrested together with the other accused persons before being released and being turned into a state witness. It was on the basis of this view which he held that during cross-examination of both the investigating officer and Maxwell Rafemoyo defence counsel put it to the witnesses that the witness Maxwell had also assaulted the deceased. Both witnesses however disputed the position adopted by accused one's defence counsel with the investigating offer being emphatic that Maxwell Rafemoyo was an informant. Bearing in mind that the first accused did not implicate Maxwell Rafemoyo either in his warned and cautioned statement or in the defence outline or in the oral testimony in court it is quite surprising how defence counsel formulated the impression that the witness Rafemoyo was either an accomplice or a co-perpetrator of the murder of the deceased. The court is therefore satisfied that the witness Maxwell Rafemoyo was neither a co-perpetrator nor an accomplice.

Whether Maxwell Rafemoyo's oral evidence in court contradicted the evidence in his statement to the police and if so whether it should be discarded?

It will be recalled that Maxwell Rafemoyo was put to task to explain why his evidence to the police did not reconcile with his oral testimony in court. His response was that he had been threatened by accused 1 who did not want anyone to disclose to the police the details of what transpired on the night deceased was brutally assaulted at the car park(s). Obviously if any of the people present at the scene of crime revealed to the police the details of who had done what to the deceased accused would be implicated in the murder of the deceased. Maxwell Rafemoyo was threatened with implication in the murder if he leaked information that would expose the role and participation of accused 1 and fear of false implication cannot be dismissed as inconsequential. Although the investigating officer confirmed that Maxwell Rafemoyo had reported to him that he had been threatened by one of the accused the details of the threat were not made explicit. Simon Chivere the investigation officer denied during cross-examination that the witness Rafemoyo had revealed to him that accused 1 struck the deceased on the head with a switch from a guava tree causing the deceased an injury which caused him to bleed. He also maintained that Maxwell Rafemoyo did not disclose who it was that had threatened him. Incidentally he too (that is Simon Chivere) had not made any reference to the threats in his own witness' statement. The defence considered that the non-disclosure of the assault of deceased by accused 1 and the alleged threat by the accused was confirmation that the witness had departed from his statement to the police. Relying on the case of *State v Donga and Anor* 1993(2) ZLR 291 at 294 defence argued that in the circumstances the evidence of the witness should be discarded completely per MCNALLY JA. The case of *State v Donga* is clearly distinguishable from the one *in casu* in that the case of Donga involved impeachment of a State witness. In that case the Supreme Court did not determine as a rule that in every case where a witness has deviated materially from a statement to the police that witness' testimony should be discarded entirely. For instance where some of the evidence in the testimony in which the witness is departing from in an earlier statement to the police is against the accused the court is entitled to give due regard to such evidence *State v Mazhambe* 1997 (2) ZLR – 587. MCNALLY J's point which is clear from a reading of the judgment of *State v Donga (supra)* was that the court cannot during impeachment proceedings decide that her extra-curial statement contains true facts and her testimony in court is false.

In casu the state did not impeach Maxwell Rafemoyo as it did not regard his oral testimony to be a material departure from the statement given to the police. The court thus finds that the evidence of Maxwell Rafemoyo cannot be discarded on the basis of the defence's contentions.

Can the court convict the accused on the strength of the evidence of a single witness *in casu* the evidence of Maxwell Rafemoyo?

The law permits the court to convict an accused person on the evidence of a competent and credible single witness. This is clear from s 269 of the Criminal Procedure and Evidence Act [Chapter 9:07]. The issue is therefore whether the evidence of Maxwell Rafemoyo is evidence of a single witness on which the court can base a conviction of the accused.

It is the view of the court that the evidence in this case is not of a single witness. In truth the evidence of a single witness *in casu* only relates to the implication of the accused. There is the following evidence *aliunde* - the post mortem report which is a pathologist's evidence on the cause of death which evidence was not contested by the accused. Such evidence establishes that the cause of death as established by the pathologist per post mortem was:

- (i) hypovolemic shock
- (ii) heamoperitoneum
- (iii) liver laceration
- (iv) assault

It is significant to note that the pathologist also noted the following in respect of an Internal Examination to the head-(i) scalp bruises subgalean haematoma on the frontal left parietal and occipital area and marked brain oedema. The pathologist also noted the following injuries- Multiple bruises on the head face thorax abdomen lower and upper limb, fracture right tibia – fibula – fracture left knee fracture and swollen both fore arm.

All these observations are consistent with assault. Accused one denied having assaulted deceased at all. He claimed that Maxwell Marange's claim that he assaulted deceased is a lie. The accused did not dispute Rafemoyo's evidence that he resisted Rafemoyo's attempts to have the deceased released and that accused 2 and 3 restrained him from assaulting the deceased whom he persistently referred to as a thief.

The court did not find accused to be a credible witness. In his warned and cautioned statement (confirmed by the magistrates court) the accused implicated. Autony Honye and

Privilege Manjoro in the assault of the deceased but did not implicate Maxwell Rafemoyo. Accused maliciously attempted to incriminate Maxwell Rafemoyo in his oral testimony in court. The court does not believe that if accused saw Honye and Manjoro assault the deceased that would have been an observation he made from a distance of about 110 metres in the night. In fact in his oral evidence in court the accused said he saw a mob lynching the deceased but he could not identify any of these because of the distance he was from them. An important question arises as to why would Maxwell Rafemoyo incriminate the accused and exculpate the rest of the accused including his brother Goodman Muteve who actually was responsible for the initial apprehension of the deceased who ended up being assaulted by his co-guards.

Accused proffered some explanation why Maxwell Rafemoyo would falsely implicate him namely bad blood that originated from an occasion when the witness Rafemoyo recovered a fee from his clients for guarding their vehicles. This was never put to the witness Rafemoyo for comment. The court dismisses it as a recent fabrication.

Maxwell Rafemoyo could easily have exonerated accused if he was inclined to do so. The court does not believe that Rafemoyo falsely and maliciously implicated the accused. In fact where their testimony differs the court prefers that of Maxwell Rafemoyo to that of the accused. The blows to accused head have been confirmed out by the pathologist's observations in the post mortem report. The court finds the witness Maxwell Rafemoyo to have been a competent and credible witness who was not shaken during cross examination.

Disposition

It is clear from the evidence of the pathologist in the post mortem report and that of Maxwell Rafemoyo that before day break the deceased made his last attempt to escape but was captured and brought back to the fire place at Marange's Car Park. Before deceased's last attempt to escape accused 2 had approached Rafemoyo to report that the deceased was being assaulted. After the deceased was recaptured accused 2 went back to Rafemoyo to report that the deceased's assailants were planning to maim the deceased by cutting his hands and breaking his legs. The court believes that the injuries to the deceased's limbs must have been caused after deceased's recapture and that these injuries must have been caused by more than one assailant. The brain oedema and haematoma on the frontal left parietal area must have been caused by the accused's reckless assault of the deceased on the head as testified by Maxwell Rafemoyo. In the

circumstances the court finds accused guilty of murder in contravention of s 47 (1)(b) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*].

The offender has been convicted of the murder of Jemias Bangu by assaulting him with a guava tree switch on the head causing injuries from which the deceased died. The court found that the accused was guilty of murder as defined in s 47 (1)(b) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*].

In mitigation defence counsel submitted that the deceased died as a result of injuries inflicted by a number of assailants and not solely from the assault by the offer. The court found that the offender directed his blows from the switch to the deceased's head and the post mortem report speaks to head injuries. The court offender considers the entirely to blame for exposing the deceased to any indiscriminate assault by whoever else may have assaulted him because of his insistence that deceased was a thief. Besides the offender resisted suggestions by other guards that the accused be allowed to go as he may have strayed into the car park due to drunkenness and may not have been a thief.

Despite being restrained by his brother and another from assaulting deceased this did not deter the offender. The court without exonerating the other assailants finds that the death of deceased was to a large extent a result of the offender's conduct aforesaid. When the deceased was brought from Tererai Muteve's car park to the fireplace at Marange's car park the offender persisted in his objection to the deceased being released pending hand over to police the following day. As a result the deceased was subjected to further assaults which the witness Rafemoyo was informed about while he was sleeping in the bus. As a result of further assaults the deceased tried to escape and was re-captured. Injuries sustained by the deceased after recapture are also attributable directly or indirectly to the offender on account of his insistence that the deceased be detained at the Marange car park until sunrise or day break. It is the court's view that the offender made common purpose with other assailants of deceased.

Clearly therefore the submission that deceased died from assaults by other persons is misplaced as those other assailants formed common purpose with the offender who did not protect the deceased from further assaults after resisting deceased's release as aforesaid . The court is firmly of the view that the offender is to blame for the deceased's death on account of his conduct i.e. (1) assault with the switch and (2) resisting the deceased's release or not protecting him from

passers-by when it had been agreed that if the deceased was not to be released that night then at the very least he was not to be further assaulted. The deceased's limbs were fractured and such fractures must have been inflicted after his recapture when he was attempting to escape from further assaults at the fire place at Sam Marange's car park.

The deceased was subjected to brutal assaults when he was in the offender's captivity resulting in him sustaining wounds from which he died. It is aggravating that the deceased was disabled through torture by his assailants who fractured his limbs thus causing further life threatening injuries to the deceased.

The court will take into account the 3 years of pre-trial incarceration as it was urged upon by the defence counsel. The court will also take into account to the offender's credit the fact that what caused the offender to initially regard the deceased as a thief is that he was caught in Tererai Muteve's guarded car park at a time which the suspicion of him being a thief was very compelling. This however did not warrant the deceased being brutally assaulted. Once the deceased had been captured initially his captors ought to have taken him to police immediately or at the very least inform the police that they had caught a thief in the car park so that police would arrange to collect him. The decision by the offender to deal with the deceased without alerting the police amounts to the proverbial "taking the law into their own hands" which this court will not condone.

Human life is sacrosanct and the court knows too well that once lost it is not replaceable. It is for this reason that courts will always guard this God given gift jealously. The deceased died a very painful death all as a result of the offender's stubborn refusal to have the deceased released despite the other guards pointing to deceased's innocence. The court finds that capital punishment would not be warranted in the circumstances of this case. However a sentence which will send the correct message to the offender and any likeminded is called for. Such message is that taking the law into one's own hands and causing loss of human life is not tolerated by the law. Taking into account that a sentence must fit the offender and suit the offence and after taking into account what was submitted by both counsels in mitigation and aggravation the offender is sentenced as follows:-

You are sentenced to 20 years imprisonment.

S Makonyere, accused's legal practitioners
National Prosecuting Authority, state's legal practitioners