

THE STATE
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JUSTIN NDLOVU

HIGH COURT OF ZIMBABWE
MUTEVEDZI J
HARARE, 5 & 23 September 2022

Criminal Trial

Assessors

Mr Chakvinga
Mrs Chitsiga

Havazvidi, for state
A Muza, for the accused

MUTEVEDZI J: In normal cases, when an altercation happens, it usually causes minor or no injuries at all. In extreme incidents like the one at hand, an altercation may lead to death. The case however illustrates the folly of imagining that every such death must result in someone being accused of murder.

The case against the accused should have made the prosecution curious. It is alleged that on 20 June 2021, in Braeside Harare the accused caused the death of Simbarashe Muzividzi by slapping him twice on the face and pushing him onto a hard, stony ground with intent to kill or realising that there was a real risk or possibility that death may result. On the fateful day, both the accused and the deceased were allegedly drinking beer with Kevin Levendale and two other colleagues. A misunderstanding then arose between the accused and the deceased with the latter demanding respect from the former whom he alleged was younger than him. The accused then slapped and pushed the deceased as alleged. The deceased fell and hit his head on the hard ground. Sometime later that evening, the deceased was arrested and detained by the police on allegations of having committed a robbery. Around 2200 hours on the same evening, the police details noticed that the deceased wasn't well. They took him to Harare Hospital. Some five or so days later he was transferred to Parirenyatwa Hospital where he was scheduled to undergo a head operation. He died on 3 July 2021. That death led to the arrest of the accused. The post mortem which was carried out concluded that death was due to

intracranial hypertension, right parieto-temporal subdural hematoma and severe head injury.

The post mortem report was duly produced and admitted as an exhibit.

The accused denied the allegations and tendered a plea of not guilty. He alleged that on the day in question, he was at the shops with one Kevin Levendale when the deceased approached him. He (deceased) was drunk and appeared to have been drinking heavily. He approached Kevin and Tawanda who were deep in conversation and demanded beer from them. The accused said he advised the deceased to let the two finish their conversation without disturbance. The deceased took offence and turned on the accused. He demanded to be respected as he said he was older than the accused. He pushed the accused. The accused added that he begged the deceased to stop and to leave him. The deceased would have none of that. He returned to push the accused once more. This time he even slapped the accused. He staggered towards the accused, beer bottle in hand. The accused said he feared that the deceased would use the beer bottle to assault him. It was then that the accused slapped the deceased and pushed him off. The drunk man staggered backwards. He fell about a metre away. The accused then approached to check if the deceased was alright. He appeared so and they left him there. He only learnt of the deceased's passing on more than a week later. He added that the deceased was a man of weird drinking habits. He was known to abuse alcohol. There was absolutely no bad blood between the two of them. On many occasions they took alcohol together.

The state applied to dispense with calling the *viva voce* evidence of Charles Musahwaro and Bertha Chiwanza. The prosecutor applied for the formal admission of those witnesses' evidence in terms of s 314 of the (Criminal Procedure and Evidence Act) [*Chapter 9:07*]. The defence did not raise any objection to it. The court duly admitted the evidence. Thereafter, oral evidence was called from two witnesses. The evidence of Charles Musahwaro was that he arrested the deceased for robbery. The deceased was thoroughly drunk and could barely walk unaided. He appeared unwell. Bertha Chiwanza is also a police officer who was at work when the deceased was detained. She escorted the deceased to Harare Hospital that night around 2300 hours after noticing that he was unwell. He was vomiting and was unable to speak.

1. Kevin Levendale

He was a friend to both the deceased and the accused. They all lived in Braeside. On the day in question, he was at the local shops with accused when the deceased also arrived. The deceased, in more than one way, accosted the accused. He stood in front of him in a manner that was belligerent. He was clearly spoiling for an argument with the accused. The deceased was drinking an illicit brew that he had purchased from Mbare. He was a known alcoholic in

the area. The accused did all he could to avoid a confrontation with the deceased. The deceased was however unrelenting. The accused clapped the deceased once on the face. The deceased appeared to close his eyes. It was like he blacked out because his eyes closed when he was still standing. He then fell hard on his head on the ground. The ground was smooth with a few stones. The witness repeated that the deceased was heavily inebriated. When he fell he did not get up. The witness said he asked the accused to check if the deceased was alright. Accused did. He lifted the deceased's hand which showed that he was alive. They left him and proceeded home. The witness admitted that the accused pushed the deceased but insisted that the push was slight and was meant to get the deceased away from him.

2. Comfort Chiocha

He is a police officer. He investigated the case. His evidence related to how he arrested the accused and took him to the scene for indications. The crucial aspect of his evidence was that the ground on which the deceased fell was hard but had no visible stones. He did not see the deceased when he was arrested. He only took over the case after the deceased had passed on.

With the above evidence, the state closed its case.

The defence case

The accused person testified on his behalf in his defence case. He maintained his defence as he had given it in the defence outline. Soon thereafter, he closed his case.

The prosecutor was very quick to admit that her evidence was far from establishing the elements of the crime of murder. Needless to say, the concession was well made. She however urged the court to find the accused guilty of negligently causing the death of the deceased. In other words she wanted the court to find the accused guilty of culpable homicide in contravention of s 49 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*].

The following issues are not contested in this case. They are that:

- a. The accused and the deceased were acquaintances
- b. On the day in question the deceased was thoroughly intoxicated
- c. The deceased was aggressive towards the accused
- d. The accused slapped the deceased twice on the face and slightly pushed him in a bid to fend him off from continuing to harass him
- e. The deceased staggered backwards, lost balance and fell heavily on his head
- f. He sustained injuries which were not apparent at the time
- g. The accused checked the deceased and thought he would be alright

The issue for determination

The only issue which the court must determine is whether the accused negligently caused the death of the deceased. Prosecution on one hand agreed that the accused did not intend to kill the deceased but argued that he negligently caused the death. Counsel for accused on the other alleged that no reasonable person could have foreseen that the mere act of assaulting and pushing the deceased could result in his death.

The crime of culpable homicide is defined in the Criminal Law Code as follows:

49 Culpable homicide

Any person who causes the death of another person—

(a) negligently failing to realise that death may result from his or her conduct; or

(b) realising that death may result from his or her conduct and negligently failing to guard against that possibility;

shall be guilty of culpable homicide and liable to imprisonment for life or any definite period of imprisonment or a fine up to or exceeding level fourteen or both.

The crimes of murder and culpable homicide both relate to the killing by an accused, of another human being. Where there is no death, the accused cannot be guilty- in fact, cannot be charged with either crime. Whilst there can be a conviction of attempted murder where there is no death, there cannot be a conviction of attempted culpable homicide. That difference emanates from the mental elements of the two offences which are markedly distinct. Murder requires actual intention or foreseeing the risk or possibility of death occurring as a result of one's conduct but regardless of the existence of that risk or possibility, one proceeds with it.

The offence of culpable homicide necessarily entails the absence of intention and the presence of negligence. It follows therefore that even where the crime of culpable homicide results from an intentional act of assault that fact must not be allowed to mask the reality of the requirement of negligently causing death. In practice therefore where culpable homicide is premised on an assault, there is a two rung test which must be satisfied. First it must be shown that the assault was intentional. Put differently, there must be proof of an assault. In cases where the conduct leading to the assault was for instance not voluntary, the assault cannot be proven. The matter simply ends there. Difficulties appear to arise where the state has successfully proved the assault or where the assault is admitted such as in this case. In such circumstances, a court cannot convict an accused person solely because he intentionally assaulted the victim who happened to have died as a result of the assault. It is a requirement in addition to proving that the accused intentionally assaulted the victim, that the accused must have reasonably foreseen that death might result from that assault. Or where the accused realises that death might occur from his conduct, he negligently fails to guard against the possibility of the

occurrence of death. It is therefore the accused's negligent failure to foresee the possibility of death resulting from the assault that matters and not the intention to assault. See Professor Roger Whiting's article, *Negligence, Fault and Criminal Liability (1991) 108, SALJ 431*

In this case, the state's judgment must have been clouded by the failure to distinguish the intention to assault from the failure to reasonably foresee death occurring as a result of that assault. The facts as they appear and the evidence that is before the court, clearly illustrate that this was what was called a common assault at common law. Before the advent of the Criminal Law Code, there was a distinction between the offence of assault common and assault with intent to cause grievous bodily harm. Assault common was preferred in instances such as in the instant case- where little to no force at all was used against the victim. What is on record is that the accused slapped the deceased with bare and open hands. He pushed him slightly with the objective of getting the deceased out his way. To expect any reasonable person to have foreseen that death could result from such conduct is unimaginable. The witnesses' testimony was that the ground on which the accused and the deceased were standing was smooth. One witness said there were few loose stones but the other said he did not see any stones at all. The accused therefore did not have any intention to cause any harm to the deceased. He could not have and did not reasonably foresee that the accused could be seriously injured from the assault and subsequently die. If anything this was a freak and unfortunate accident which resulted in the death of the deceased. With respect and without causing offence to the relatives of the deceased, he struck us a man who appeared to be followed by controversy. We do not at all suggest that he deserved to be harmed. We simply point it out that there are times when victims of crime appear to place themselves in harm's way. The evidence is that he was hopelessly drunk on this day. In truth he was dependent on alcohol. He threw himself at accused until the accused got angry and slapped and pushed him. He fell and uncontrollably hit his head on the hard ground. He was injured. Instead of getting medical assistance, he was arrested by the police and detained in a police station for suspected robbery.

From the above findings, it is impossible to impute any negligence on the accused for failure to realise that the assault he perpetrated on the deceased in the form of a clap or two and a slight push would result in these tragic consequences.

S 275 of the Criminal Law Code provides for competent verdicts of certain offences. The permissible verdicts for murder are infanticide, culpable homicide and any crime which a person may be convicted of if he or she is charged with infanticide or culpable homicide. Those permissible verdicts on a charge of culpable homicide include the offence of assault.

On the background of the above the court finds that the evidence of the prosecution failed to establish the essential elements of murder. They equally failed to satisfy the requirements of the crime of culpable homicide. What we are convinced of is that the evidence of the state proves beyond reasonable doubt that the accused assaulted the deceased. In the circumstances, the accused is found not guilty and is acquitted of the crime of murder but is found guilty of the permissible verdict of assault as defined in s 89(1) of the Criminal Law Code.

*The National Prosecuting Authority, the state legal practitioners
Chivore Dzingirai Group of Lawyers, accused's legal practitioners*