

LYSON MUYAMBO  
and  
HARDLIFE MHUTE  
and  
JOSEPH MUZIYE  
and  
SENDI TAGUTA  
versus  
THE STATE

HIGH COURT OF ZIMBABWE  
HUNGWE & WAMAMBO JJ  
HARARE, 10, 12 July 2018 & 20 February 2019

### **Criminal Appeal**

*L Madhuku*, for the appellants  
*E Nyazamba*, for the respondent

WAMAMBO J: The appellants were convicted of contravening s 49 of the Criminal Law (Codification) and Reform Act [*Chapter 9:23*] (culpable homicide). They were each sentenced to seven (7) years imprisonment of which 2 years imprisonment were suspended on condition of good behaviour.

They are appealing against both conviction and sentence.

The grounds of appeal against conviction can be summarised as follows:

The Trial Court misdirected itself by convicting the appellants on contradictory and uncorroborated evidence by the two State witnesses. The trial court erred at law in not finding whether or not the appellants' conduct was both the factual and legal cause of the deceased. Death was not reasonably foreseeable in the circumstances.

On sentence the appellants raised two grounds. They allege that the sentence is so manifestly excessive in the circumstances of the case so as to induce a sense of shock "but also an

exercise in irrationality.” The trial court failed to apply sentencing, guidelines “particularly in not considering community service.”

What appears to be common cause is the following: The appellants and deceased were present at Manzvire business centre Chipinge on 13 September 2013. This was the scene of the crime. There was an altercation wherein the appellants were active participants. From here the state and defence versions differ considerably. The state evidence implicates all the appellants in the commission of the offence charged. On the other hand the defence case exonerates the appellants from the commission of the offence they were charged of.

The State evidence reflects that all the appellants assaulted deceased. A baton stick, a whip, booted feet and open hands were used to perpetrate the assault.

The deceased was assaulted along with his wife, a sister in law and one Amon. The State evidence was to the effect that the misunderstanding leading to deceased’s death started over an empty beer bottle. Second appellant took an empty bottle for which deceased had paid a deposit fee. When deceased protested second appellant insulted him. Deceased send someone (Amon) to collect the empty bottle from second appellant. The appellants assaulted Amon. When deceased enquired as to why they were assaulting Amon first appellant retorted that they were looking for him (deceased). First appellant then tripped deceased who fell on his back. A sustained brutal assault on deceased by the appellants then followed. The assault on deceased was so vicious it resulted in his eye being disorged. A State witness who attempted to rescue deceased was assaulted by the appellants to the extent that she soiled herself.

The State evidence reflects that deceased was seriously assaulted to the extent that he lay helpless and motionless. Deceased was ferried to hospital where he died of head injury. The post-mortem report documents deceased’s injuries.

The defence attacks the State witnesses’ evidence as being unreliable and uncorroborated. Sight should not be lost, of the fact that the two witnesses observed the deceased being assaulted from two different angles. The bar lady was observing the assault from a window while behind a counter in the bottle store seven to eight metres away. An electric light illuminated the scene. The assault on deceased went on for about twenty minutes. The other state witness (Rose) was also a victim of the assault by the appellants. She was close to the deceased when he was assaulted. She also suffered injuries from the assault.

The State witnesses were found to be credible by the trial court. Their evidence of a serious, brutal assault on deceased was not dislodged in cross examination. After carefully considering the purported contradictions we were unable to discredit their evidence. In fact the two State witnesses evidence resonated with the probabilities.

By the time, deceased was ferried to hospital he already had injuries on the head and was bleeding from the nose. When he took a breath blood would rush out. These were serious injuries.

The appellants gave a defence outline that they never assaulted deceased. It is not a coincidence that the very same people who claim that they did not assault deceased were at the scene and were observed by two witnesses assaulting deceased. Paragraph 7 of the appellants' defence outline reads as follows:-

“7. The circumstances surrounding the incident that the accused describe as a brawl were such that no reasonable person could ever have realised the possibility of death occurring as a result of their conduct, left alone taking any steps to avoid the possibility of death.”

The question to be asked is why would appellants' conduct, be connected to deceased's death? The appellants never assaulted deceased in the first place, according to the defence outline.

Paragraph 8 of the defence outline is a continuation of the same allegation in paragraph 7. The appellants in their testimonies did not fare well. First appellant contradicted the defence outline in material respects. In the defence outline it is alleged that he moderately assaulted one of the women leading the attack. In testimony he was careful to state that although he saw deceased at the scene he never assaulted him. His testimony speaks to a short altercation involving Hosea and Rose Maphosa. In one breath he talked of a big brawl which was really bad involving a mob while in another he talks of a not so serious assault.

Second appellant testified about a lady who struck him with a bottle resulting in him falling down. This is not indicated in the defence outline. He also testified about being rescued by his friends. Notably second appellant claims that he never saw deceased at the scene. He was quick to say that he does not know what transpired at the scene as he had fled. His evidence was terse and evasive.

The third appellant testified that he observed the first appellant in an altercation. From there he fled. He does not say who first appellant was fighting. His evidence was that he never saw

deceased at the scene. He contradicted himself. At one point, he testified that second appellant was at the scene and in re-examination said he (second appellant) was not present at the scene.

The fourth appellant testified that he was not involved in the altercation. He further testified that he was at the bottle store and bought his beers and left. He suggested that he was at home when the altercation occurred.

The trial court carefully analysed the evidence in its totality. The court was satisfied that the appellants' versions were not true as there was direct credible evidence implicating them.

The evidence of the sustained assault on deceased, the injuries observed at the scene are consistent with the post mortem report. The circumstances are such that from the start the appellants were the aggressors. The deceased did not assault any of the appellants but did not have a chance even to defend himself.

Various weapons were used by the appellants to assault deceased. Deceased sustained very serious injuries including a gorged eye and a deep laceration on the right cheek, injuries on the fore head and bleeding from the nose.

The above is consistent with negligence as defined under s 49 of the Criminal Law (Codification and Reform Act) [Chapter 9:23]. From the serious assaults and injuries resulting therefrom, it is not surprising that deceased died soon after the assault. There is in the circumstances, no basis or valid reason why it can be suggested that the assault is not the cause of death. In fact, to the contrary, the irresistible conclusion is that the assaults led to deceased's death.

We find in the circumstances that a reasonable man would have foreseen that such conduct would result in the death of deceased and would have taken reasonable steps to avoid death. Sentence is the discretion of the trial court. It was suggested by Mr *Madhuku* counsel for the appellants that an effective sentence of two years for culpable homicide appears to be the norm.

On his part Mr *Nyazamba* for the respondent averred that the sentence passed is "neither severe nor incompetent."

The trial court applied the sentencing principles judiciously. The appellant's mitigation was considered, including the fact that they are first offenders and family men who may have been affected by intoxication. The sanctity of life was also highlighted as was the fact that the assault was vicious. There was also no attempt to assist deceased as a sign of contrition. General and personal deterrence were also considered in passing sentence.

In *State v Giannoulis* 1975 (4) SA 867 (AD) the headnote reads as follows:-

“In every appeal against sentence whether imposed by a Magistrate or a Judge the court hearing the appeal should be guided by the principle that sentence is “preeminently a matter for the discretion of the court” and should be careful not to erode such discretion hence the further principle that the sentence should only be altered if the discretion has not been judicially and properly exercised”. The test under (b) is whether the sentence is vitiated by irregularity, misdirection or is disturbingly in appropriate.”

In applying the above principles we find that the trial court exercised its discretion judicially and properly.

In *S v Chakwizira* HH 814/16 MAWADZE J had occasion to state at p 3 as follows:

“The offence of culpable homicide arising from violent conduct remains a very serious offence which invariably attracts a custodial sentence. This court has the duty to protect the sanctity of human life as enshrined in our Constitution. Human blood is both sacred and precious. Once a life is lost it cannot be replaced. The accused should learn to control himself and resort to lawful means to resolve problems”

In that case a sentence for 8 years imprisonment of which 3 years imprisonment were suspended on conditions was found to be appropriate.

Other related decided cases wherein sentences were passed in the vicinity of the sentence in this case include: The *S v Nemaramba Beaven Sovenes* HH 502/16 and the *S v Aspias Shumba and Others* HH 460/16.

In the circumstances of the serious nature of the assault on deceased by a gang in front of his wife and companions for no reason we find that the sentence resonates with the circumstances of the offence the offender and societal expectations.

In the result we dismiss the appeal against both conviction and sentence.

HUNGWE J agrees .....

*Lovemore Madhuku Lawyers*, appellant’s legal practitioners  
*National Prosecuting Authority*, respondent’s legal practitioners