

THE STATE
versus
ALPHA ELLARD
and
ROSARIA MUSONA
and
CHARLES MUSONA
and
INNOCENT SAUTI

HIGH COURT OF ZIMBABWE
ZHOU J
HARARE, 8, 9, 11, 12 & 16 June & 6, 7 & 8 July 2015 & 16, 29
& 30 August 2018; & 29 February 2019 & 25 April & 7 & 27 May 2019

Criminal Trial

Assessors: 1. Mr Chogugudza (Deceased before completion of trial)
2. Mr Gweme

B. Murevanhema for the State
B. Julajula for the first accused
W. Chagwiza for the second accused
M. Mandikumba for the fourth accused

ZHOU J: The three accused persons, together with one other accused person who absconded during the course of the trial and is still at large, are being charged with one count of murder as defined in s 47(1) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. The allegations against them are that on 21 and 24 December 2011 at Serui Source Farm Compound, Norton, all the accused persons or one or more of them unlawfully and with intent to kill, caused the death of Denis Khomo Tembo by striking him with logs, switches, fists and booted feet all over the body thereby causing injuries from which the deceased Denis Khomo Tembo died

on 18 February 2012. All the accused persons pleaded not guilty to the charge and tendered outlines of their defence.

During the course of the trial one of the assessors Mr Chogugudza passed away. With the consent of all the accused persons the trial proceeded with the remaining assessor. Also, when the matter was in the defence case accused three, Charles Musona, absconded. A warrant of arrest was issued against him. The trial proceeded in respect of the remaining three accused following an application for separation of trial made by the State which this court granted. For the avoidance of confusion, the remaining accused persons will be referred to in accordance with the original descriptions as accuseds one, two and four. This judgment is therefore in respect of the three accused persons.

The facts upon which the charge against the accused persons is founded as alleged in the outline of the State's case are as follows. The deceased and second accused were lovers, being boyfriend and girlfriend, respectively. On 21 December 2011 at about 2300 hours the deceased visited the second accused's residence. He found the first accused seated on her bed half-dressed. A misunderstanding ensued between the deceased and first accused. First accused momentarily left the room in which they were and returned in the company of accused three who is now at large, armed with a wooden log which he used to assault the deceased with. The first accused only stopped assaulting the deceased following intervention by some neighbours. On 24 December 2011 the deceased made a complaint of assault at Norton Rural Police Station and was referred to Norton Hospital for treatment on the same day. On the same day 24 December 2011 at about 1900 hours the first, second and fourth accused went to the deceased's house and took him to the second accused's house where they locked the door to stop the deceased from escaping. They asked why he had made a police report of assault. They indiscriminately assaulted the deceased using a switch, fists and booted feet. On 17 February 2012 the deceased collapsed and was taken to Norton Hospital where he died the following day. A postmortem examination established the cause of death to be "intracranial haemorrhage due to severe head injury as a result of assault".

The state led evidence from Willard Chaunoita, Andrea Banda, Darlington Chindiya, Barbra Sachiteka, and Blessing Kuchacharika. Willard Chaunoita is the medical practitioner who attended to and examined the deceased at Norton Hospital when the deceased came for treatment on 17 January 2012. He observed a fractured and dislocated elbow and wounds which was

discharging puss. In his view the injuries were severe and appeared to have been caused by a blunt object. The fracture and dislocation on the elbow of the deceased were of recent origin and were unconnected to the operation which he had undergone in 1998. Pursuant to the examination the witness prepared a medical affidavit which is dated 17 January 2012 which was also the date on which he attended to the deceased. He also commented on the postmortem report which was prepared by Dr Gabriel Auguero. He compiled a second affidavit in respect of the deceased on 12 April 2012, exh. 2. During cross-examination this witness stated that when he examined the deceased on 17 January 2012 the deceased was complaining of chest pain and made no mention of head injuries; neither did he complain of any pain or discomfort which is normally associated with intracranial haemorrhage.

The second witness for the prosecution, Andrea Banda, is a nurse stationed at Norton Hospital. He prepared the outpatient record, exh. 4, in respect of the deceased. He also attended to the deceased on 17 February 2012. He described the deceased's condition at the time that he came to hospital. According to the witness the deceased was sweating and vomiting. He was complaining of chest pain which made the witness to believe that he was suffering from pneumonia given that he had a history of that disease. According to the witness he had a previous history of an assault in December 2011 for which he had been treated. The deceased was ill-looking and shivering although his temperature was within the normal range. Deceased was not able to talk or stand on his own. His elbow was bandaged. He also had an arm-sling. In addition to prescribing some medication for the deceased he arranged for the deceased to be admitted.

Darlington Chindiya gave evidence that the deceased was his uncle. His evidence was that on 21 December 2011 he and the deceased went to the second accused's residence around midnight. Upon arrival the deceased knocked and the second accused opened the door. They found first accused sitting on a bed without his shirt on. A misunderstanding ensued with the deceased accusing the first accused of improperly associating with his wife, the second accused. Accused left the room and returned with the third accused. The deceased person was assaulted by the first accused and third accused using logs. The first accused pushed the deceased to the ground and the two of them continued to assault him. During examination in chief he could not describe the length or diameter of the logs. The accused persons were restrained from assaulting the deceased by some neighbours. Second accused did not participate in the assault. The witness

stated that the deceased had a previous injury in the arm and had a “nail” which had been inserted. He got injured on the same arm when he fell down during the scuffle, and the iron bar which he referred to as a “nail” was protruding. Deceased reported the matter at Norton Rural Police Station on a subsequent day. At the police station the deceased was given a note with an RRB Number to take to the Zimbabwe Republic Police Special Constabulary member for the accused persons to report at Norton Rural Police Station. The accused persons became aware of the note before it was delivered to the member concerned and started looking for the deceased. The witness stated that on 24 December 2011 the first, third and fourth accused came and took him and the deceased to the second accused’s residence where the fourth accused locked the door to a room in which they were. First accused assaulted the deceased using his hands and some logs which he estimated to be about 60 centimetres long and 2 centimetres thick. Second accused also assaulted the deceased. The assaults were directed at the deceased’s buttocks. Third accused would be sent to collect the logs and buy beer. He stated that first accused and third accused were friends of the deceased. Before they retired to bed the first accused took the deceased’s bloodstained pair of trousers and washed them. The fourth accused demanded money from the first and second accused persons alleging that he had completed his job. The accused, the deceased and the witness slept in the same house. The following morning between 0400 hours and 0500 hours the first and third accused released the deceased through the window. According to the witness accused two and three escaped through the window because they had no money to give to the fourth accused since they had spent it on beer. Accused one and four remained asleep in the house. The witness also escaped through the same window. Accused two and three took the deceased to second accused’s plot. Accused two carried the deceased on her back because he was unable to walk. The deceased did not go to hospital for treatment until 17 January 2012. Later on during examination in chief the witness was asked to explain why the deceased’s trousers were blood stained. That is when he explained that the deceased had been assaulted on the head using a pump by the fourth accused. He described a cut on the deceased’s head which he observed when he cut the deceased’s hair the following day. This witness also said the first, second and fourth accused persons were drunk and were drinking beer during the time that they were assaulting the deceased.

During cross-examination the witness sometimes referred to a fight between the deceased and the two accused persons in relation to the incident of 21 December 2011. Also, his evidence

regarding the involvement of the third accused was inconsistent. In one instance he suggested that the third accused assaulted the deceased but during cross-examination stated that he had tried to stop the fight. Upon being pressed on the issue his response was: "I cannot recall." He stated that he could not dispute that the deceased assaulted the second accused person but insisted that he did not see that happen. Later under cross-examination he changed from his original evidence about a metal object which protruded from the deceased's hand. He sought to suggest that it looked like a bone. Also, during cross-examination he stated that the second accused also assaulted the deceased at the time that he had fallen onto the ground. This was a complete departure from his evidence in chief. Later he changed by stating that she had in fact never assaulted him on that day. He admitted that his evidence was poor because he had no proper recollection of the events. He admitted that "we were drunk", yet earlier on he had stated that they had had only two beers each. Later under cross-examination he denied being drunk and stated that he had not taken alcohol. Regarding the events of 24 December 2011, the summary of this witness's evidence never mentioned the use of a pump to assault the deceased. His statement to the police did not mention the pump as having been used to strike the deceased. There is only reference to two switches having been used upon the deceased. The reference to switches in the summary of his evidence also contradicts his evidence in court that logs were used to assault the deceased. His evidence regarding the events of 24 December 2011 was that the second accused was given a switch by the fourth accused person and told to assault the deceased using it.

Barbra Sachiteka, the fourth witness for the State stated that the deceased was his nephew. Her evidence pertained to the injury to the hand which the deceased suffered in 1998. Her evidence was that the injury had healed at the time that she last saw him alive on 21 December 2011.

The last witness for the State was Blessing Kuchacharika. His evidence was that on 17 February 2012 the deceased arrived at his plot in Norton and asked to take a rest. He was complaining of chest pains. The condition of the deceased was critical as he was shivering and had an arm-sling. The witness sought to take the deceased to his relatives but he walked some six metres before he fell to the ground. The witness called the deceased's relatives. He was eventually taken to hospital by his brother-in-law. During cross-examination the witness stated that the deceased did not complain of a headache.

First accused gave evidence that on 21 December 2011 he and second accused were drinking beer while seated in the latter's dining room when the deceased arrived in the company of Darlington Chindiya. The second accused is the one who opened the door for them when they knocked. Upon entering the room the deceased pulled the second accused to her bedroom. He heard some commotion from the bedroom suggesting that the second accused was under attack by the deceased. He went into the bedroom and found the deceased assaulting second accused. When he tried to stop the violence the deceased turned on him and started to assault him as well, using open hands. A fight ensued between the two with first accused defending himself against attack by the deceased. They went outside the room. During the scuffle the deceased fell down. When he got up the deceased said that he had had a dislocation. They attempted to get assistance to resolve the misunderstanding from the first accused's brother but found him having retired to bed. On 23 December 2011 he met the fourth accused at a bottle store. Fourth accused confronted him alleging that the first accused had fought with the third accused who is his uncle. Around 1800 hours on the same day the fourth accused and third accused approached the second accused at his residence and advised that they wanted to discuss the issue which was now in the hands of the police. This accused, together with fourth accused, the deceased, third accused and Darlington Chindiya walked together to the second accused's residence. All of them except for third accused were drinking beer. While at the second accused's residence accused four queried why his uncle, the third accused, was being involved in a matter involving the first accused, deceased and second accused. He struck the deceased using his hands. He also used switches to assault the deceased whom he accused of involving his uncle in matters related to prostitution. Accused three tried without success to restrain the fourth accused from assaulting the deceased. Accused four instructed the second accused to also assault the deceased using a switch, which she did. Fourth accused then locked the door and directed that no one would leave the room unless he had been given some money. He later went to sleep in one of the rooms leaving third accused, fourth accused, deceased and Darlington Chindiya in the dining room. When the first accused woke up the following morning only he and fourth accused were in the house the others having gone out through a window. The rest of his other evidence related to events after the 24th December 2011. He denied the suggestion by fourth accused's legal practitioner that the latter had sold him a phone. His evidence was that he met the fourth accused for the first time on 23 December 2011. His

evidence during cross-examination was that he never saw the fourth accused using a pump to hit the deceased but only heard about it.

Second accused's evidence is that on 21 December 2011 when the deceased and Darlington Chindiya came to her residence she was inside her house with first accused. Deceased accused her of ditching him for first accused and started to assault her. When the first accused sought to restrain him he turned on the first accused and attacked him as well. Third accused also tried to stop the scuffle. Deceased, first accused and third accused then went outside the house as the two accused persons were trying to disarm him of the jug which he was holding. That was when she heard the deceased saying that he had injured his arm. On the events of 24 December her evidence was that she was alerted about the presence of the deceased, Darlington Chindiya, accused three and accused four by the first accused when she was at a neighbour's house. When she went to her house she found them there, drinking. Fourth accused demanded to have the document concerning a complaint made to the police by the deceased. The fourth accused held a bicycle pump which he wanted to use to assault the deceased with but it was taken away by accused three. In her evidence-in-chief she said accused four only poked the deceased using the pump on the forehead. He did not inflict a blow. Later during cross-examination she stated that he hit him using the pump which she now referred to as a scotch-cart pump. Accused four then got a switch which he used to assault the deceased demanding the note from the police. When it broke he got another switch and ordered the second accused to also assault the deceased because she was the one who had caused the problem which gave rise to the police report. He had locked the door and kept the keys in his pocket. He threatened to assault the second accused if she failed to comply with his order for her to assault the deceased. She complied by striking the deceased on the buttocks using the switch. During cross-examination she stated that the deceased could not do heavy work because of an injury to his hand which he had sustained in an accident before she met him.

Accused four gave evidence in support of his defence. He stated that on 24 December 2011 his uncle, accused three, asked him to come and assist in resolving the issue in which the deceased had made a police report against third accused and the other accused persons for assault. His evidence was that the deceased was assaulted by the first accused and second accused using a switch. The first accused also used clenched fists. He observed blood stains on the deceased. He struck the deceased three times using sticks which were estimated to be 60 centimetres long and

1.5 centimetres thick. He also struck him using his open hands. During his evidence-in-chief he stated that he assaulted the deceased because he had accused him of having been hired and uttered some insulting vulgar words. He denied ever using a pump to strike the deceased. He stated that he locked the door because when he wanted to leave the others who were in the house said that he should take the deceased with him since they were neighbours.

The onus to prove the guilt of the accused persons beyond reasonable doubt is on the state. This principle of the common law has been codified in s 18(1) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] which provides the following:

“Subject to subsection (2), no person shall be held to be guilty of a crime in terms of this Code or any other enactment unless each essential element of the crime is proved beyond a reasonable doubt.”

The accused persons bear no onus to prove their innocence. This settled position of the law has been articulated in many cases. A leading statement on the standard of proof which is required in a criminal case is by GREENBERG J in *R v Difford* 1937 AD 370 at 373:

“No onus rests on the accused to convince the court of the truth of any explanation which he gives. If he gives an explanation, even if that explanation is improbable, the court is not entitled to convict unless it is satisfied, not only that the explanation is improbable, but that beyond any reasonable doubt it is false. If there is any reasonable possibility of his explanation being true, then he is entitled to his acquittal.”

In *R v M* 1946 AD 1023 at 1027 DAVIS AJA said:

“... the court does not have to believe the defence story, still less does it have to believe it in all its details; it is sufficient if it thinks that there is a reasonable possibility that it may be substantially true.”

From the totality of the evidence led the following facts are common cause. On 21 December 2011 the deceased was involved in an altercation with the first accused and second accused at the second accused’s residence. The exchange became physical, resulting in the deceased being injured on the hand. On 24 December 2011 there was yet another altercation at the same place. The deceased was assaulted by the fourth accused during that misunderstanding using some sticks. Fourth accused then locked the exit door to the house to prevent the occupants from leaving. Second and third accused together with the deceased and Darlington Chindiya managed to escape through the window of the house in the early hours of the following day. The precise description of the sticks used to assault the deceased on 21 December is contested as they

are described differently as logs and switches. The deceased died on 18 February 2012. The cause of his death is given in the postmortem report as “intracranial haemorrhage due to severe head injury as a result of assault.” This death occurred almost two months after the altercations involving the accused persons. The question which must be answered, having regard to the cause of death, is: Who assaulted the deceased in the head thereby causing the injury and internal bleeding as a consequence of which he died?

In relation to the events of 21 December 2011 there was no evidence that the deceased was ever assaulted on the head. The only witness who gave evidence on this aspect did not give evidence on the deceased being injured or assaulted on the head. His evidence was that the deceased sustained an injury on his hand on which he had previously been injured and still had an iron bar inserted in the hand. The witness’s evidence was that when the deceased fell down the metal bar protruded from his hand. The evidence of this witness on what exactly happened on this day is difficult to believe. He either had no proper recollection of the events or was being deliberately untruthful. He could not commit himself to matters of detail such as time and the size of the objects used during the altercation. In his evidence in chief he was not prepared to describe the “logs” which he said were used to assault the deceased. As already highlighted above, the evidence of this witness is thoroughly unsatisfactory, incoherent and difficult to believe save where it is common cause. What is clear from the evidence is that on this day the deceased was in fact the aggressor in that he assaulted the second accused person upon the belief that he had become involved in a relationship with the first accused person. He does not explain why the first accused person would from nowhere start assaulting the deceased. What is consistent with the probabilities is what the first and second accused persons said that when the first accused tried to restrain the deceased from assaulting the first accused the deceased then turned and directed his attacks on the first accused person, resulting in the scuffle in which he got injured. There is no evidence to suggest that the events of 21 December 2011 had any contribution to the injuries on his head which caused his death.

On the events of 24 December 2011 there was the involvement of the fourth accused person. It seems, from the evidence led, that his involvement was caused by the implication of the third accused in the alleged assault of the deceased on 21 December 2011. The state witness and accused show that he was not amused about the fact that his uncle, third accused, had been reported

to the police for a matter that involved an alleged love triangle to which the deceased, first accused and second accused were the parties. It is common cause that a note had been written by the police for the first, second and third accused persons to report at Norton Rural Police Station in connection with allegations of assaulting the deceased on 21 December 2011. The three accused persons became aware of the existence of that note before it was formally communicated to them. The four accused persons together with the deceased and Darlington Chindiya convened at the second accused's house. Darlington Chindiya stated that when they got to the second accused's house the first accused assaulted the deceased initially using hands but later using logs. The assaults were directed at the back of the deceased. First accused denied the alleged assault and stated that only the fourth accused assaulted the deceased on this day. The fourth accused also stated that first accused assaulted the deceased. It is therefore the evidence of Darlington Chindiya and the fourth accused on the one hand against that of the first accused himself, which is supported by the second accused who did not implicate second accused in assaulting the deceased on 24 December 2011, which must be examined. As noted above, the evidence of the state witness cannot be relied upon because he lacked credibility. Either he was heavily intoxicated to the extent of not properly appreciating what was happening or he was simply being untruthful. The evidence of the fourth accused person cannot assist the state for the simple reason that he was also an accused who was determined to shift blame. He departed from his defence outline and contradicted himself about the involvement of the third accused in assaulting the deceased. In his evidence in chief he more or less completely exonerated the third accused. On the mutually destructive versions, the court is unable to conclude that the guilt of the first accused person was proved beyond reasonable doubt.

As for the second accused, this court finds that on 21 December 2011 she was actually the victim of attack by the deceased. On 24 December 2011 she did not voluntarily beat up the deceased. She was ordered to do so by the fourth accused under threat of assault. The part of the deceased's body upon which she struck – the buttocks- is unconnected to the cause of the deceased's death. She cannot be found guilty of assault because she was under compulsion hence the elements of intention and unlawfulness were not proved. She had become a captive of the fourth accused.

As regards the fourth accused, the State sought to rely on the testimony of Darlington Chindiya and the defence outlines of two of the accused persons that he used a pump to strike the deceased on the head. A number of issues arise from relying on the use of the pump as the instrument which inflicted the blow which led to the death of the deceased. The first issue is that in both the charge sheet and the outline of the State's case there was no mention of the pump as one of the weapons used to inflict injury upon the deceased. There is explicit mention of "logs, switches, fists and booted feet" in the charge sheet, while in the state outline, including the summarized evidence of Darlington Chindiya, there is only mention of the switch, fists and booted feet. In fact, it is difficult to understand where the fists and booted feet came from since the summary of Darlington's evidence does not mention them. The issue of the pump only came very late in the evidence-in-chief of Darlington Chindiya, which points to it being an afterthought, possibly incited by the mention of the pump in some of the defence outlines of some accused persons. The pump itself was not produced; neither were its whereabouts established by the State. Accused one who mentioned the pump in his defence outline categorically stated in his evidence before this court that he only heard about it but had not personally seen the fourth accused using it to strike the deceased. Accused two stated in her defence outline that the fourth accused "bashed the deceased once on the head with a scotch cart manual pump". But in her evidence-in-chief she initially referred to a bicycle pump only to change later on. Further, her first version was that the fourth accused merely poked the deceased on his forehead before the pump was taken away by accused three, a version which she later changed when she then suggested that he actually struck the deceased using the pump. Her evidence on the use of the pump is unconvincing.

There are other aspects of the state's evidence which weaken the state case. When the deceased went to hospital on 17 January 2012 he never complained of a headache or injury in the head. The doctor who examined and treated him, Willard Chinouta, did not observe any injuries on the deceased's head. He only noticed a fractured elbow as well as wounds that were discharging puss.

On the evidence led, there is nothing to attribute to accused four the injury to the deceased's head. The charge of murder has therefore not been proved against him. No other offence has been proved against him. The evidence of Darlington Chindiya that he assaulted the deceased cannot be relied upon for the reasons already outlined above in the face of a denial by the first accused.

On his own evidence, which was consistent with the evidence of Darlington Chindiya, accused one and accused two he indeed struck the deceased using a switch or switches. His conduct would constitute an assault as defined in the Code. S 88 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] provides, *inter alia*, that ‘assault’ means “any act by a person involving the application of force, directly or indirectly, to the body of another person, whereby bodily harm is caused to that other person.” The same section defines ‘bodily harm’ to mean “any harm causing pain or discomfort to the body, or any impairment of the body or its functions, whether temporary or permanent.” Section 89(1) criminalises an assault in the following terms:

“(a) Any person who commits an assault upon another person intending to cause that other person bodily harm or realizing that there is a real risk or possibility that bodily harm may result . . . shall be guilty of assault . . .”

On the evidence led, and on his own evidence, the fourth accused must be found guilty of assault.

In the result, the verdict of the court is as follows:

1. Accused one is found not guilty and acquitted.
2. Accused two is found not guilty and acquitted.
3. Accused four is found guilty of assault in contravention of s 89(1)(a) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*].

National Prosecuting Authority, legal practitioners for the State
Kwiriwiri Law Chambers, first accused’s legal practitioners
Chagwiza & Partners, second accused’s legal practitioners
Chigwanda Legal Practitioners, fourth accused’s legal practitioners