

THE STATE

vs

LAZARUS TOGAREPI

HIGH COURT OF ZIMBABWE

MAWADZE J

MASVINGO, 12, 13 March, 26 July 2018, 4, 5 February and 8 March 2019

ASSESSORS.

1. Mr. J. Mushuku
2. Mr H. B. Chikukwa

### **Criminal Trial**

*Mr B. E. Mathose for the State*  
*Mrs B. Mzawazi for the Accused*

MAWADZE J: At the commencement of this trial, the state successfully applied for separation of trial as the accused was jointly charged with one Charles Chinhosva. Charles Chinhosva is at large and a warrant of his arrest was issued. The trial proceeded in respect of the accused Lazarus Togarepi.

In their closing written submissions counsel though poles apart seemed to have shifted their respective positions. *Mr Mathose* for the State who had pursued the murder charge indicated that the accused should be convicted of a lesser charge of contravening section 49 of the Criminal Law (Codification and Reform) Act [*Cap 9:23*] (the Criminal Code) relating to Culpable Homicide. *Mrs Mzawazi* who sought the accused's acquittal throughout the trial proposed that the accused be convicted of the permissible verdict of contravening section 89 (1) of the Criminal Code [*Cap 9:23*] relating to assault.

Our view is that had both counsel properly applied their minds to this case and the evidence available a lengthy and protracted trial could have been avoided.

The charge the accused is facing relates to contravening section 47 (1) of the Criminal Code [*Cap 9:23*] which is the charge of murder.

The charge is that between 14 and 15<sup>th</sup> November 2015 at Matsvange Village, Chief Mazungunye, Bikita, Masvingo the accused on his own or with Charles Chinhosva. (Charles) caused the death of Paradzanai Badza by striking him several times all over the body with switches, logs, open hands, fists and booted feet.

The chain of events on the night question culminating in the now deceased's death are largely common cause.

The now deceased then aged 40 years and residing in Taguta village teamed up with his friend Simbarashe Mutodi of Matsvange village on 14 November 2015 at about 2200 hrs to go and steal at one Mupanduki's homestead in Matsvange village. They wanted to steal a car battery as there were no people at Mupanduki's homestead. Wellington Maziofa had been asked to look after this homestead. The now deceased and his partner in crime Simbarashe Mutodi resided in neighbouring villages and Simbarashe Mutodi is from the same village from the Mupanduki's homestead where they went to steal.

The now deceased entered the house at Mupanduki's homestead whilst Simbarashe Mutodi stood guard. The now deceased had a torch and when he lit the torch inside the house Wellington Maziofa who was at a neighbouring home realised that there were intruders at Mupanduki's house. He teamed up with Kudakwashe Zhakata and Kudzai Zhakata and rushed to Mupanduki's homestead. The now deceased and Simbarashe Mutodi sensing danger fled from the scene but Simbarashe Mutodi was caught. The now deceased made good his escape back to his residence in Taguta village. Simbarashe Mutodi was questioned and revealed he was with the now deceased. He was taken to the local village head Jervas Garanewako who instructed that Simbarashe Mutodi be taken to the now deceased's homestead. Kudakwashe Douglas Zhakata, Kudzai Zhakata, Wellington Maziofa, Mathias Garanewako and Farai Garanewako took the now deceased's accomplice Simbarashe to the now deceased's residence. The now deceased refused to wake up. This forced the people to wake up the accused at around 2300 hrs as he was the acting Village Head of the now deceased. The accused came to the now deceased's residence with his accomplice Charles now at large together with Lovemore Tarwira and Thomas Tarwira.

Upon arrival at the now deceased's residence the now deceased refused to come out. This prompted the accused to effect entry into the now deceased's house through the window. The accused was confronted by the now deceased who had a knife and a knobkerrie. The accused called out for help from people gathering outside. The accused's alleged accomplice Charles then broke the door forcing the now deceased to come out of his house together with the accused. The now deceased was then taken by this group of people together with Simbarashe Mutodi to Mupanduki's homestead in the neighbouring village. Thereafter he was taken to a local business centre en route to the police now in a wheel burrow as he had been severely assaulted. The now deceased passed on en route to the business centre in the early hours of 15 November 2015.

The State alleges that it is the accused and his alleged accomplice at large Charles who fatally assaulted the now deceased. It is alleged the assault started when the now deceased came out of his house, continued as they took him to Mupanduki's residence and continued at Mupanduki's residence until the now deceased could no longer walk and immediately died. This according to the State gave rise to the charge of murder against the accused and his accomplice Charles currently at large.

The accused denies the charge and alleges that it is a mob of people which had gathered at the now deceased's house which pounced on him as soon as he came out after Charles broke the door. The accused said due to mob psychology this mob lynched the now deceased and that everyone present partook in the assault of the now deceased. The accused said this is why the so-called State witnesses were initially also charged with murder but that as investigations progressed, they teamed up and ganged up against the accused and Charles whom they solely blamed for the assault. As per accused's defence outline therefore the now deceased was assaulted by the mob and that accused is being falsely incriminated.

A different version however emerges from Exhibit 2 being the accused's confirmed warned and cautioned statement. In that statement although the accused implicates his alleged accomplice Charles and some of the State witnesses he admitted taking part in the assault of the now deceased. In that statement the accused said he used switches to assault the now deceased on the legs several times. In fact, the accused said he perpetrated the assault on the now deceased firstly at the now deceased's residence, then on the way to Mupanduki's homestead. He said he assaulted the now deceased several times with switches.

In his evidence the accused gave another different version. The accused was now saying he tried to restrain the mob from assaulting the now deceased. This is not part of his statement Exhibit 2. The accused said he only assaulted the now deceased with a small switch on the legs and that this could not have caused his death. In fact, the accused tried to disown his confirmed warned and cautioned statement on the number of blows he inflicted and that he assaulted the now deceased on the way to Mupanduki's homestead. It was clear the accused was simply cherry picking on parts of his confirmed warned and cautioned statement avoiding those utterances which are at variance with his defence outline and evidence in court.

Similarly, the accused was at pains to explain why he decided to go to the now deceased's residence at night and even getting into the now deceased's house through the window. His explanation was that he was angry because other State witness were alleging that he, the accused, was benefitting from the proceeds of the now deceased's criminal conduct and that the now deceased himself had tried to attack the accused inside the now deceased's house.

All in all, the accused gave three different versions. In his confirmed warned and cautioned statement, he admits assaulting the now deceased for a prolonged period both at the now deceased's homestead and on the way to Mupanduki's residence. In his defence outline he denied assaulting the now deceased and alleged his role was of a peace maker restraining the mob. Under cross examination he said he assaulted the now deceased only twice on the legs with a small switch. These three different versions cannot possibly be true and they adversely affect the accused's credibility.

A total of 5 exhibits were produced by consent and these are;

- Exhibit 1 - the post mortem report
- Exhibit 2 - accused's confirmed warned and cautioned statement
- Exhibit 3 (a) and (b) - two torches
- Exhibit 4 (a) to (d) - switches
  - (a) - 160 cm long and 0,551 kg
  - (b) - 140 cm long and 0,363 kg
  - (c) - 70 cm long and 0, 057 kg
  - (d) - 50 cm long and 0, 085 kg

Exhibit 5 - affidavit detailing the switches.

The cause of the now deceased's death is not in issue. Prior to the assault he was of good health and died from the injuries from the assault. To further amplify on the injuries he sustained and the cause of death we shall consider the uncontroverted evidence of Dr. Zimbwa who examined his remains and authored Exhibit 1 the post mortem report.

Dr. Zimbwa noted the following injuries which he explained as follows;

- i) Multiple head and facial injuries – these were caused by blunt force or being pulled on the ground.
- ii) Bilateral peri orbital haematomas - the huge skin around both eyes was swollen and again this was caused by a non-sharp object.
- iii) Depressed skull fracture on left frontal area – this skull fracture was on left side of the head and it means the skull was pushed back into the brain tissue and the skull around that area was no longer firm or hard.
- iv) Hyper mobile neck – the doctor said generally after death the body becomes stiff but in this case the now deceased's neck had free play on to the left, right, front and back. This is normally caused by either fracture of the neck bones or dislocation of the neck bones. The fracture of neck bones can be detected by a cracking sound if the neck is moved and if it is a dislocation no such sound is produced.
- v) Multiple rib fractures – the doctor observed this after pressing the rib cage which produced a cracking sound and also noted that the symmetry of the chest had been disturbed. Severe force caused such injuries.

According to the doctor there were two proximate causes of death, which are;

- a) Severe head injury – this caused immediate injury to the brain. The brain controls all processes in the body hence if injured those processes either stop or are impaired which leads to either immediate or delayed death. The doctor likened the brain as the computer of the body.
- b) Cervical spine fracture – the doctor explained that the spinal cord can be likened to the connection between the computer being the brain and the rest of the body. It passes through the neck bones, chest and then back hence if broken that disrupts all the communication between the brain and the body or the command to and from the

brain. Again this leads to immediate death because processes like breathing or functioning of the diaphragm stops.

From this medical evidence it is clear that the now deceased sustained serious and several injuries. The assault itself was clearly brutal, indiscriminate and prolonged. Clearly severe force was used to fracture the skull and the ribs. Further from the evidence led the now deceased could no longer walk and had to be pushed in a wheel burrow. He immediately succumbed to those injuries.

The next question we have now to resolve is whether it is the accused on his own, or with his alleged accomplice Charles who inflicted those injuries or with the mob or it was the mob on its own. Further we have to probe the intention of the person or persons who inflicted these injuries to establish whether it proves the offence of murder either with actual or constructive intent or any other permissible verdict like culpable homicide or assault as provided for in the 4<sup>th</sup> Schedule of the Criminal Code [*Cap 9:23*].

We have already analysed the accused's evidence and established that he is not a credible witness as he gave three different versions on his role in relation to the now deceased's injuries. We now turn to the State case.

Simbarashe Mutodi, Jervas Garanewako, Mathias Garanewako, Farai Garanewako, Douglas Zhakata, Kudzai Zhakata, Wellington Maziofa, Lovemeore Tarwira, Thomas Tarwira, Assistant Inspector Painosi Muoni and Inspector Lorraine Zishiri all gave evidence.

We did not find any meaningful value from the evidence of the two police details Assistant Inspector Painos Muoni and Inspector Lorraine Zishiri.

Inspector Lorraine Zishiri the Officer in Charge of ZRP Bikita explained that the investigating officer in this case one Sergeant Pepukai has been discharged from the police force and is now in Botswana. He was un co-operative and unwilling to testify. She also confirmed that the switches Exhibit 4 (a) to (d) were recovered in connection with this case together with the torches Exhibit 3 (a) and (b). In our view the Investigating Officer would have explained why the state witnesses were first arrested as suspects in this matter and later turned into State witnesses by the police.

Assistant Inspector Painos Muoni's evidence is simply that he attended to the now deceased moments before he died. All he noted were multiple injuries all over the body and that he delegated Sergeant Pepukai to investigate the case and to also interrogate everyone who was present when the now deceased was assaulted.

As already said the crux of the matter is who assaulted the now deceased causing his death. It is clearly unnecessary to regurgitate the evidence each and every witness on peripheral issues which we have already found to be common cause. We shall rather focus on what each State witness said on how the now deceased was assaulted.

Simbarashe Mutodi (Simbarashe)

According to Simbarashe when he was apprehended at Mupanduki's residence and when he led his captors to the now deceased's residence he was not assaulted. The assault started at Accused's residence after accused had been briefed. He said the accused assaulted him 10 times on the back with a switch for the alleged theft. When accused's accomplice Charles arrived, he Charles also assaulted Simbarashe with open hands for the same reason before taking him to the now deceased's homestead.

At the now deceased's homestead Simbarashe said when the now deceased came out Charles was the first to assault the now deceased with open hands, fists and pieces of fire wood saying thieves should be punished. The accused also joined in the assault and all persons present failed to restrain the accused and Charles. By then the now deceased had been injured on the head. He said after being taken to Mupanduki's residence the assault continued as the accused and Charles used a leather belt and switches. He said Thomas and Brighton failed to restrain the accused and Charles. Simbarashe said the assault only stopped around 0500 hrs from around 2300 hrs. By then the now deceased was severely injured, could not walk and died immediately.

Simbarashe denied that he was assaulted by the mob. He insisted that it is the accused and Charles who assaulted him and the now deceased and that they are the ones who inflicted the fatal injuries on the now deceased.

Simbarashe is the now deceased's accomplice and a self-confessed thief. We found no reason why he would choose to falsely incriminate the accused and Charles and exonerate other persons especially those who apprehended him.

Kudakwashe Douglas Zhakata (Douglas)

Douglas said it is the accused and Charles who started to assault the now deceased as soon as the now deceased came out of his house. They used switches and pieces of fire wood. He said Farai Garanewako and Mathias Garanewako failed to restrain the accused and Charles who were very violent to the extent of threatening anyone who tried to restrain them. The now deceased started to bleed from the mouth.

Douglas said Simbarashe and the now deceased were force marched to Mupanduki's residence where the accused and Charles resumed the assault until dawn. He said by then the now deceased was severely injured and could no longer walk. After the now deceased's death Douglas was arrested after being implicated by the accused and Charles but he was later exonerated. He implicated accused and Charles in the assault of the now deceased with booted feet, switches and open hands. Douglas said he only tied Simbarashe with a rope at the time they apprehended him at Mupanduki's residence.

Wellington Maziofa (Wellington)

Wellington testified that as soon as the now deceased came out of his house the accused and Charles started to assault him with fists, open hands and switches all over the body. He said they continued to assault the now deceased on the way to Mupanduki's residence. At Mupanduki's residence he said the assault continued as the accused and Charles could not be restrained as they were violent. Wellington said the now deceased was severely injured and died thereafter. He implicates only the accused and Charles.

Mathias Garanewako (Mathias)

Mathias's testimony is that accused and Charles started to assault the now deceased at the now deceased's residence with switches, booted feet and that Farai failed to restrain them as he was pushed away by the violent accused and Charles. He said the assault continued en route to Mupanduki's residence by the accused and Charles. Mathias said the accused and Charles continued to assault the now deceased at Mupanduki's homestead with switches Exhibit 4 (c) and (d). He said the assault was severe and indiscriminate. He too was arrested after the now deceased's death after the accused and Charles implicated him but he was later released.

Farai Garanewako (Farai)

Farai said when the now deceased came out of his house armed with a knife and a stick he was disarmed by Charles. He said Charles and the accused started to assault the now deceased with booted feet, switches and pieces of firewood. Farai said he together with Mathias failed to restrain the accused and Charles. He said on the way to Mupanduki's homestead the accused and Charles continued with the assault. The only other person one Vincent at that point also assaulted the now deceased with a stick which had a chain. At Mupanduki's residence he said the accused and Charles continued with the assault. By then the now deceased was shivering, severely injured, bleeding from the mouth and could no longer walk. The assault only stopped around 0500 hrs after which the now deceased died. Farai was later arrested after the accused and Charles implicated him but was later released. He said when Vincent assaulted the now deceased on the way to Mupanduki's residence other state witnesses missed it as they were following behind. He said the accused used Exhibit 4(a) and even stone. The assault was all over the body.

In our view Douglas, Kudzai, Wellington, Farai and Mathias gave their evidence well. They all corroborated each other on the fact that it is the accused and Charles who assaulted the now deceased, save for Farai who also implicated Vincent. Farai however explained how the other witnesses possible missed the single blow delivered by Vincent enroute to Mupanduki's homestead. They were all clear on where the assault started, that is at the now deceased's residence, enroute to Mupanduki's homestead and at Mupanduki's homestead. They corroborated each other on the manner and duration of the assault. They explained clearly the effect of the assault on the now deceased and how the persons present failed to restrain the accused and Charles.

We are alive to the fact that all these witnesses are the ones who took Simbarashe to accused's village and later proceeded to the now deceased's residence. They were all present until the now deceased was fatally injured. They were also initially implicated in the assault of the now deceased. They were arrested and only released on bail after which they were turned into witnesses. The lingering belief is that they may have a motive to false incriminate the accused and Charles, more so as they all said it is the accused and Charles who caused their arrest. Any reasonable court would therefore assess their evidence with caution and suspicion.

It may be unsafe to accept their evidence as the gospel truth unlike that of Simbarashe who does not have such a motive.

We have proceeded to look at the evidence of other witnesses who are not in the same boat with these witnesses. These are Jevas Garanewako the Village head, Lovemore Tarwira and Thomas Tarwira who were both related to the now deceased.

Jevas Garanewako (Jevas)

Jevas is the one who advised Douglas, Kudzai, Wellington, Farai and Mathias to take Simbarashe to now deceased's village and involve the now deceased's Village head. He said after 2 – 3 hours these persons he had so advised returned now with the now deceased, accused, Charles and other people going to Mupanduki's residence. He followed them as this was now in his village and as the Village head. Jevas said upon arrival at Mupanduki's residence he found the accused and Charles assaulting the now deceased and Simbarashe. He intervened and told them to take the suspects to the police. Jevas noticed that the now deceased was severely injured and was bleeding from the mouth. He said the accused and Charles were very violent and could not heed his advice as they used switches and pieces of firewood indiscriminately on the now deceased's body. The now deceased was helpless lying on the ground. In his presence the assault by the accused on the now deceased lasted about an hour. He left proceeding to call the police. Jevas was never implicated in the assault of either the now deceased or Simbarashe. He was not arrested.

In our assessment Jevas is a mature man who gave his evidence well. He has no motive to falsely incriminate the accused. There is no objective basis not to accept his evidence as it reads well.

Lovemore Tarwira (Lovemore)

Lovemore is a relative of the now deceased and stayed in the same village with the now deceased and the accused just like Thomas Tarwira. He is the one who led people from the neighbouring village to accused's homestead as accused is his village head so that they could proceed to the now deceased's homestead.

Lovemore said at the now deceased's residence the accused and one Charles his fellow villagers are the ones who assaulted the now deceased who was on the ground with switches,

booted feet and open hands all over the body. He followed when the now deceased was taken to Mupanduki's homestead where the accused and Charles continued with the assault using switches, fists and booted feet. He realised that the now deceased's life was in danger as he had been severely injured by the accused and Charles hence he telephoned the police. The now deceased passed on later.

Thomas Tarwira (Thomas)

Thomas is also one of the persons who called the accused as the acting village head to advise him of the allegations levelled against the now deceased. He also proceeded to the now deceased's residence that night.

Thomas said at the now deceased's homestead the accused and Charles assaulted the now deceased with switches (Exhibit 4c) and booted feet. He also followed to Mupanduki's homestead where the assault continued in the same manner. He said the assault only stopped when the now deceased was helpless and severely injured. He said the accused and Charles could not be restrained as they were very violent. After the now deceased's death Thomas was arrested after the accused and Charles implicated him but he was later exonerated.

Lovemore and Thomas clearly implicates the accused in the fatal assault of the now deceased. We find it illogical that they would exonerate other persons if indeed these persons had also assaulted the now deceased. They are the ones who had called in the accused as their village head. If at all they are malicious they would implicate other witnesses from the neighbouring village who were making allegations against their son in law the now deceased. We are inclined to accept their evidence.

Having applied our minds carefully to the evidence before us we are satisfied that it is the accused and his alleged accomplice who assaulted the now deceased. The assault by one Vincent was minimal and inconsequential.

Lastly, we consider the intention of the accused. The State has conceded that the accused when he was invited to confront the now deceased had not formulated the intention to kill the now deceased. The manner in which he assaulted the now deceased is what is important. Did he intent to kill or did he foresee that death may result? Was the accused simply negligent in the manner he perpetrated the assault? In our view this is a borderline case between murder with constructive intent and culpable homicide. We are unable to say that it has been proved

beyond reasonable doubt that the accused did foresee that death would result. Despite the prolonged and sustained assault, the accused used open hands, fists, booted feet and switches Exhibit 4(a) to (d). *Prima facie* these are not lethal weapons. What is without doubt is that the accused negligently assaulted the now deceased. The accused may have realised that death may result from the assault but he negligently failed to guard against that possibility.

In the result, we are inclined to find the accused not guilty of murder but guilty of the permissible verdict of contravening section 49 of the Criminal Code [*Cap 9:23*] which relates to culpable homicide.

**VERDICT:** Guilty of contravening section 49 of the Criminal Law (Codification and Reform, Act [*Cap 9:23*] – Culpable homicide.

**REASONS FOR SENTENCE:**

The accused now stand convicted of the lesser charge of culpable homicide. As already said in the reasons for judgment this is a matter in which a prolonged trial could have been avoided.

In arriving at the appropriate sentence we have taken on board what counsel said for and against the accused.

Technically the accused is not a first offender as he was convicted on the same facts for unlawful entry effect into the now deceased's house and the subsequent assault perpetrated on the now deceased's wife. The accused was sentenced for 8 months. This should at the end of the day taken as a mitigatory factor as the accused has already been punished for his conduct arising from the same facts.

As regards his personal circumstances the accused is 40 years old with 4 children. He is unemployed with neither savings nor assets. As a peasant farmer a prison term would adversely affect his family which solely relies on his manual labour. We may as well treat the accused as a first offender who deserve some measure of leniency.

*Mrs Mzawazi* for the accused went to town about the fact that the accused is an unsophisticated rural person. We find this fact difficult to appreciate as a mitigatory factor. As an adult man and a village head surely the accused fully appreciated the unlawfulness of his conduct.

We fully appreciate the now deceased was not a saint either as he had attempted to commit the offence of theft. Further when confronted by the group of people he fled the scene of crime and proceeded to hide in his house. When the accused entered into the house the now deceased decided to be violent by arming himself. Be that as it may this does not mean that the now deceased deserved to die.

It is a mitigatory factor that there has been a delay of 4 years to finalise this matter. Credit should be given to the accused for having decided to stand trial and face the music unlike his alleged accomplice who is at large.

The accused will forever live with the stigma that he has the now deceased's blood on his hands. As already said he has been stripped of his title as the acting village head and may never qualify to be one as a result of this conviction. We are alive that we are punishing the accused for his negligence.

On the other hand, the sanctity of human life no matter how it is lost is paramount. Human blood is sacred as life cannot be replaced.

Culpable homicide arise from violent conduct is both a serious and prevalent offence. It is punishable with a custodial sentence in the absence of any special mitigatory factors. We find none in this case.

The accused being a village head should have been exemplary. Instead he decided to take the law into his own hands and decided to punish the now deceased with tragic and dangerous consequences. The offence the now deceased attempted to commit by all accounts was a petty one involving probably a used car battery. Surely can a life be lost on account of that. The accused's position in his own area meant that he should be guiding his subjects and encourage them to act within the confines of the law. Instead by assaulting the now deceased's fatally the accused was violating the very same law he is supposed to uphold.

The nature of the assault itself is an aggravating factor. It was prolonged, brutal and indiscriminate. Severe force was used as the now deceased's skull and ribs were fractured. The degree of negligence is very high. The accused's moral blameworthiness is equally high. Consequently, the accused deserves a severe censure from this court and cannot escape an effective custodial term.

In the result the accused is sentenced as follows;

“5 years imprisonment of which 2 years imprisonment is suspended for 5 years on condition the accused does not commit within that period any offence involving the use of violence upon the person of another for which the accused is sentenced to a term of imprisonment without the option of a fine.

**Effective Sentence:** 3 years imprisonment.”

*National Prosecuting Authority*, counsel for the State

*Bachi Mzawazi Legal Practitioners*, counsel for the accused