

THE STATE

versus

PRINCE CHOKUWA

and

CHARLES CHOKUWA

HIGH COURT OF ZIMBABWE

MAWADZE J

MASVINGO 9 JULY, 22 SEPTEMBER, 9 OCTOBER & 20 NOVEMBER, 2020

Assessors 1. Mr Chikukwa
2. Mrs Chademana

Criminal Trial

Mr B.E Mathose, for the state
Mr M. Mureri, for both accused

MAWADZE J: Both accused are siblings. Accused 1 Prince is the elder brother. They are both being charged of murder as defined in section 47(i) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*].

The charge is that on 23 August 2018 at No. 6466 Muredzi Crescent, Mucheke "D", Masvingo each or both of the accused caused the death of Simbarashe Mutasa by assaulting him all over the body with switches.

At the material time accused 1 Prince was 20 years old and accused 2 Charles 19 years old. They were both tenants at No. 6466 Muredzi Crescent, Mucheke "D", Masvingo with other tenants some of whom are state witnesses. They were also staying with their married sister at the same house who was married to Neville Mudimu, a practising lawyer in Cape Town South Africa who is also implicated in this matter.

The now deceased was aged 32 years old and a serving member of the Zimbabwe National Army (ZNA) based at 4 Brigade, Masvingo and residing at No. 16009, Innocent Mudukuti Street, Runyararo West, Masvingo.

This matter has been a subject of another judgement HMA 53/20 delivered on 9 October 2020 in which both accused unsuccessfully made an interlocutory application to be discharged at the close of the prosecution case. We nonetheless have to briefly repeat the facts of this matter.

According to the state the accused persons' brother in law Neville Mudimu is holed up in South Africa as a fugitive from justice and that South African authorities can not extradite him to Zimbabwe to face the murder charge which potentially carries a death penalty.

In the course of the trial the following evidence emerged;

The now deceased was involved in an extra marital relationship with accused persons' sister who is Neville Mudimu's wife. On the day in question 23 august 2018 Neville Mudimu had just arrived from South Africa unbeknown to the now deceased. Thus when the now deceased visited the accused persons' residence No. 6466 Muredzi Crescent, Mucheke "D", Masvingo in the wee hours of the night and proceeded to his girlfriend's bedroom (Neville Mudimu's wife) he was not aware of the presence of Neville Mudimu.

Upon entering the room Neville Mudimu who possibly was unaware of the love triangle mistook the now deceased as a thief and raised alarm. In a panic the now deceased is said to have tried to flee but as he was drunk he was apprehended by Neville Mudimu inside the house. It is not clear if both accused persons were aware of this love triangle.

The state case is that as Neville Mudimu was struggling with the now deceased accused persons woke up from their room and joined to assist Neville Mudimu. The state alleges that both accused persons helped Neville Mudimu to pin down the now deceased and tied both his hands and legs using an electric cable. It is further alleged that the three of them, Neville Mudimu and both accused persons severely assaulted the now deceased with switches for a prolonged period of

time and would pour water on him to resuscitate him. It is alleged that after inflicting the fatal injuries both accused persons proceeded to Chesvingo police post and made a report of unlawful entry into their home against the now deceased. The police attended the scene and arrested the now deceased whom they took to the police post. However the now deceased passed on at the police post due to the injuries inflicted before being taken to hospital.

The basic defence by the accused persons is that they did not assault the now deceased in any manner. Instead they implicated their brother in law Neville Mudimu and other fellow tenants at their house some of whom are state witnesses being Joseph Vindirai, Petros Vurayayi, one Fini's father and some other two unnamed men.

Accused 1 Prince said his only role was to take a rope or electric cable after being asked to do so by Joseph Vindirai. This is the rope or electric chord which was used to tie the now deceased's hands and legs. Accused 1 Prince said it is Joseph Vindirayi who tied the now deceased.

Accused 2 Charles said his only role was to pluck switches after being asked to do so by Neville Mudimu and that the switches were used to assault the now deceased by Neville Mudimu.

Both accused persons said thereafter they left the now deceased in the custody of Neville Mudimu and fellow tenants as they were sent to make a report at Chesvingo police post. They said the police attended the scene and took the now deceased away. After that they learnt of the now deceased's death and were taken as state witnesses. The accused persons' said they were shocked when some days later on 8 September 2018 they were arrested as accused persons responsible for the now deceased's death.

The cause of the now deceased's death is not an issue despite the belated muted protestations by both accused persons who sought to imply that the now deceased could have been possibly fatally injured whilst in the custody of the police. There is no basis at all for accused persons to make such wild allegations.

In our view the state's failure to either call Dr Zimbwa who examined the remains of the now deceased or to have his evidence admitted in terms of section 314 Criminal Procedure and Evidence Act [*Cap 9:07*] is not fatal vis-a-vis the cause of the now deceased's death. In any case the post mortem report was admitted as Exhibit 2 and it shows that the now deceased suffered extensive bruises on the head face, upper trunk, abdomen, both upper and lower limbs. He also

sustained multiple rib fractures with collapsed thoracic case. The cause of his death is said to be "*respiratory failure and multiple rib fractures*". It is therefore not an issue that these serious injuries arised from the assault perpetrated on the deceased on the night in question. All the 3 police details who attended to the now deceased on the night in question constable Peter Sithole, Sergeant James Murambidza and D/Sgt Pasca Musengezi confirmed that the now deceased was seriously injured at the time they took him at the accused persons' residence that night. Hitherto the deceased was in good health when he intruded in Neville Mudimu's bedroom. Further the switches Exhibit 3 used to assault the now deceased were recovered.

The only issue this court has to resolve is whether each of the accused or both of them had a hand in the now deceased's death. Did they assault him or not?

The evidence of Constable Peter Sithole, Sergeant James Murambidza and the investigating officer D/Sgt Pascal Musengezi is not useful in resolving this dispute. All of them attended the scene after the now deceased had already been severely injured and they all confirmed observing the injuries on the now deceased, recovered the switches Exhibit 2 and the cable Exhibit 3. The now deceased also told them he was not thief but had visited his girlfriend one Shelter at the residence of the accused persons although there was no woman with that name [his girlfriend was in fact Neville Mudimu's wife!]

The state relied on the evidence of fellow tenants Ndaizevei Muparuri a 43 year old woman, Joseph Vandırayi and Petros Raurayi both adult men.

Ndaizevei Muparuri (Ndaizevei)

Ndaizevei said when she came out of her room she found Neville Mudimu and Accused 1 Prince pinning the now deceased inside the house and proceeded to assault him as he lay down. She said accused 2 Charles plucked switches used by Neville Mudimu and accused 1 Prince. At some point she said accused 2 also joined in the assault.

Ndaizevei's gave quite confusing evidence in a number of respects. She confessed that she is unable to distinguish between accused 1 Prince and accused 2 Charles which means she cannot confidently say what role each one of them played. She continually prevaricated whether both accused or one of them actually assaulted the now deceased. She also said the now deceased said he had visited his girlfriend at this residence and was not a thief but she later changed and said the now deceased did not explain the purpose of his visit at this house. Despite her confession that she

is illiterate and that a statement was recorded from her after a very long time Ndaizivei's evidence was very difficult to follow. The basis for her confusion is difficult to appreciate and understand on such a simple matter on who assaulted the now deceased and how.

Joseph Vindirayi (Joseph)

According to Joseph when he woke up he found Neville Mudimu holding the now deceased. He said it is Accused 2 Charles who tied the now deceased's hands and legs. He said Neville Mudimu is the one who severely assaulted the now deceased and would order accused persons' young brother Emmanuel to pour water on the now deceased. He said accused 1 Prince used a cable to assault the now deceased and that accused 2 Charles plucked the switches. Later on Joseph seemed to say accused 2 Charles also assaulted the now deceased.

Under cross examination Joseph also seemed to change his evidence explaining that he could not see clearly what happened outside the house as it was dark. He too conceded that some aspects of his evidence in court differ with what he said in his statement to the police. He too could not distinguish between accused 1 Prince and accused 2 Charles.

Petros Raurayi (Petros)

Petros said when he came out of his room Neville was assaulting the now deceased hence he admonished him to take the now deceased to the police to no avail. He said accused 2 Charles pinned the now deceased inside the house and later on plucked switches. Petros said both accused persons' proceeded to assault the now deceased.

Analysis of the Evidence

The fact that this matter was poorly investigated cannot be doubted. The investigating officer D/Sgt Musengezi conceded as much. To start with the witnesses' statements were recorded only after a year for no apparent reason when all these state witnesses were always available even on the day the incident happened. Secondly after being "arrested" on the very day of the incident Neville Mudimu and both accused persons were released. Neville Mudimu then made his way back to South Africa and accused persons were only rearrested in September 2018. Thirdly the investigating officer D/Sgt Musengezi explained that all this was due to corruption as the then officer in charge of ZRP Chikato one Shumba was handsomely paid by Neville Mudimu in order not to detain Neville Mudimu and both accused persons and to release them. He said this was why this matter was later assigned to the CID homicide section when initially it was a simple matter to

be investigated by the uniform branch of the police. To make matters worse the state witnesses themselves gave either contradictory evidence on the roles played of each of the accused persons or they could not materially corroborate each other on the crucial aspect of what either accused 1 Prince or accused 2 Charles specifically did.

It is also not disputed that both accused persons are the ones who went to Chesvingo police post to report. The condition of the now deceased at that point from the state's position is not clear. What is clear is that the now deceased remained at the house with Neville Mudimu. All the tenants were also at the same house. What then happened at that house in the absence of both accused persons? Was the now deceased already fatally injured? Was he further assaulted after both accused had left and by who? All these are clear gaps in the state case. Lastly, is it probable that all tenants who woke up in the wee hours of the night after the alarm had been raised that a "thief" had been caught inside their house would just watch as Neville and the accused persons assaulted the thief? Why would all tenants be disinterested in punishing "the thief"? Did they know of the love triangle and if not the general belief is that they would equally be aggrieved by the invasion of their privacy. This puts into serious doubt the credibility of the testimony of fellow tenants who testified. All this doubt which looms large on the mind of the court can only be resolved in favour of both accused persons.

At the end of the day the court has to simply accept the version given by each of the accused persons. What is that version?

- (i) that both accused persons did not physically assault the now deceased.
- (ii) that accused 1 Prince is the one who took the rope which was used to tie the now deceased (or the cable).
- (iii) that accused 2 Charles plucked switches which were used by Neville Mudimu and possibly other persons to assault the now deceased.

In our respectful view such a role can not by any stretch of imagination be said to amount to acting in common purpose with all what happened that night leading to the now deceased's death. This is fortified by the fact that at some point accused persons left leaving the now deceased at their house to report to the police. The state of the now deceased when they left is not clear. What also happened in their absence is not clear. It is possible the now deceased was further assaulted, or even more severely in their absence. Thus the doctrine of acting in common purpose

cannot be invoked. The liability of both accused person cannot be based on the provisions of section 196 A of the Criminal Law (Codification and Reform Act) [Cap 9:23] as co perpetrators.

Our respectful view is that both accused persons at most can be deemed to be accomplices not to the charge of murder or culpable homicide but to a permissible verdict to the charge of culpable homicide which is the offence [culpable homicide] those who assaulted the now deceased are most likely to be convicted of as per the 4th schedule of the Criminal Law (Codification and Reform Act) [Cap 9:23] ,which is Assault.

In terms of section 195 of the Criminal Law (Codification and Reform Act) [Cap 9:23] an accomplice is defined as;

"accomplice means a person, other than an actual perpetrator of a crime -

- (a) who incites, conspires with an actual perpetrator to commit a crime, with the result that a crime is subsequently committed; or*
- (b) authorises the actual to perpetrator to commit the crime; or*
- (c) who*
 - (i) knowing that an actual perpetrator intends to commit a crime, or*
 - (ii) realising that there is a real risk or possibility that an actual perpetrator intends to commit a crime;*

renders to the actual perpetrator any form of assistance which enables, assists or encourages the actual perpetrator to commit the crime"(underlying is my emphasis).

In the context of this matter when both accused persons woke up and found out that the now deceased was an intruder or a thief caught inside their house they indeed realised that those who caught the thief wanted to assault the thief. Accused 1 Prince decided to take a rope and or a cable which was to be used to either assault the "thief" or to tie the "thief's" hands and legs as a means to subdue him. Surely when Accused 2 Charles plucked switches he fully appreciated the switches would be used to assault the "thief". The means that both accused persons did render some form of assistance which enabled either Neville Mudimu and or other tenants to assault the now deceased as defined in section 195(c) of the Criminal Law (Codification and Reform Act) [Cap 9:23].

In the result therefore we are unable to find both accused guilty of murder as defined in section 47 (1) of the Criminal Law (Codification and Reform Act) [Cap 9:23] or guilty of culpable

homicide as defined in section 49 of the same Act [*Cap 9:23*]. Instead the evidence before us clearly shows that both accused persons are guilty of the permissible verdict of *Assault* as defined in section 89 (1) of the same Act [*Cap 9:23*].

VERDICT

Each Accused person÷

Guilty of contravening section 89 (1) of the Criminal Law (Codification and Reform Act) [*Cap 9:23*] ÷ Assault.

National Prosecuting Authority, counsel the state
Matutu & Mureri, counsel for both accused