THE STATE
versus
KASIKAI GOODZI
and
PASCA GOODZI
and
WINMORE MHLANGA

HIGH COURT OF ZIMBABWE
MANYANGADZE J
HARARE, 21 September, 4 October, 24 November 2022, 26 January, 9 March, 10 May, 7 June, 25 July, 19 September , 18 October.,29 November 2023 &12 January 2024.

Assessors: Mr *Chakuvinga*
Mr *Jemwa*

Criminal Trial

V Ngoma, for the State
E Nyamukondiwa, for the 1st accused
F Nyakunika, for the 2nd accused
ET Mufambi, for the 3rd accused person

MANYANGADZE J: The three accused were jointly charged with the crime of murder, as defined in section 47(1) of the Criminal Law (Codification and Reform) Act[*Chapter 9:23*] ("the Criminal Law Code"). It is alleged that on 9 July 2017, at Bosholf Drive, Sunningdale, Harare, acting in concert, they unlawfully and with intent to kill, assaulted Tendai Vera ("the deceased") with open hands, booted feet, and an iron bar several times all over the body, causing injuries from which the deceased died.

The allegations against the accused are that they saw the deceased carrying a sack whilst at accused 3's residence. They ganged up against the deceased, and assaulted him using open hands, fists, booted feet, and a mattock handle. They accused the deceased of being a thief. After the assault, they dragged the deceased's motionless body across the road and dumped it on the side of the road. It was discovered by some passing motorists, who made a report to the police.

All the accused pleaded not guilty to the charge. Their defence outlines are filed of record.

Accused 1 completely denies assaulting the deceased. He states that he was coming from a beer drink on the day in question, in the company of accused 2. They saw the deceased entering their yard carrying a sack. The deceased tried to pick up some tools they use in their business of mending tyres.

The deceased tried to strike accused 2 with an iron bar. Accused 1 grabbed deceased from behind, trying to stop him from assaulting accused 2. Accused 3 came from his room and started assaulting deceased with a mattock handle. Accused 1 and accused 2 tried to prevent accused 3 from assaulting the deceased, without success.

Basically, accused 1's defence is that he only apprehended the deceased, a suspected thief, together with accused 2. It is accused 3 who assaulted the deceased.

Accused 2 also completely denies assaulting the deceased. He is a brother to accused 1. They came home together from a beer drink around 0100 hours when they saw the deceased at accused 3's premises. They suspected him to be a thief. The defence outline of accused 2 is the same as that of accused 1.

Accused 3 completely denies assaulting the deceased. He avers that he was woken up from sleep by accused 1 and 2 who told him that they had caught a thief and they had already dealt with him. He said he was shown the deceased's motionless body by the 1st and 2nd accused. He urged the two, that is to say, accused 1 and 2, to report the matter to the police. They instead dumped the deceased's body across the road and returned home.

The State opened its case by tendering evidence of the post-mortem report which was marked exhibit 1. Also tendered was the sketch plan, which was marked exhibit 2.

The evidence of witnesses Runyararo Tongoona and Innocent Gwandu was admitted as it appears in the summary of the State's evidence, in terms of s 314 of the Criminal Procedure and Evidence Act [*Chapter 9:07*]. Tongoona is the police officer who received the report of the discovery of the deceased's body from some motorists and was the first officer to attend to the scene. His role was to arrange for the removal of the deceased from the scene to the hospital. Innocent Gwandu was a resident of Sunningdale who carried out the business of tyre mending close to where the deceased's body was found. He was among the crowd that gathered at the scene on the morning the deceased's body was carried from the scene to the hospital.

The State then led oral evidence from witnesses listed as 2, 3, 4 and 7 on the State's summary of evidence. Details of their evidence are on record. Only salient aspects thereof will be highlighted.

Wilmore Chitambo was a resident of Sunningdale at the material time, and stayed close to where the crime was allegedly committed. He knew all accused as local residents, and worked with accused 2 in mending tyres.

The witness told the court that he was called to the scene by accused 3. At the scene he saw the deceased tied to a tree. The witness stated that he saw accused 1 assaulting deceased with booted feet, on his back. There were several blows. He did not manage to count them. Acting on the advice of accused 3's wife, the witness tried in vain to stop accused 1 and 3 from assaulting deceased. He said accused 3 was holding something like a rope. It appears to him he had been assaulting the deceased with that rope. The witness however, stated that at the moment he arrived he just saw accused 3 holding the rope-like object.

The witness observed that the deceased's clothes were torn and blood-stained. The assault was taking place at accused 3's residence, in the yard. The witness further stated that he was able to see what was going on as it was a moonlit night, and he was close to the scene. The witness said when he went back to his house, he heard continuous cries from the deceased, suggesting that the assault was still being carried on.

Under cross-examination, the witness was adamant he saw accused 1 assaulting the deceased with booted feet. As for accused 2, the witness stated that he did not see him assault the deceased. He said accused 2 was just standing by. The witness was asked whether he saw accused 3 assaulting deceased. He indicated that at the time he arrived accused 3 was holding a rope. At that moment, he was not assaulting the deceased. It was accused 1 who was assaulting the deceased, with booted feet.

Passmore Ruhukwa is another local resident, who stayed within the neighbourhood of the scene of crime at the time.

He told the court that he was woken from sleep by someone shouting "thief!". He came out of his house and realised the noise was coming from accused 3's yard. He went there and saw the deceased tied to a tree.

The witness went on to state that at the scene, he saw accused 1 holding the deceased at the shoulders, whilst accused 3 was assaulting him. He said accused 3 was assaulting deceased with a rope. Asked to describe that rope, he referred to it as "mboma". He said it was

rubber like. The witness stated that he tried to stop accused 3 from assaulting deceased Accused 3 told him to go away.

After failing to stop the assault, the witness went back to sleep. Under cross-examination he maintained his narration that he saw accused 1 holding deceased by the shoulders, whilst accused 3 assaulted him with a "mboma".

Again, the witness said he did not see accused 2 assaulting the deceased.

Luckson Saurowe is a duly attested member of the Zimbabwe Republic Police, stationed at CID (Homicide), Harare. He is the one who led the team of detectives on indications that were made by the accused. It was accused 1 and 2 who went for indications. Accused 3 was not there, as he had not yet been arrested.

The witness's testimony was mainly on the indications he conducted. He was not the Investigating Officer. The indications were recorded on video, and the video was played in court. There was no objection from any of the accused to having the video shown in court.

The indications were largely along the lines of the participating accused i.e. accused 1 and 2's defence story. Their story being basically that they apprehended a suspected thief who attempted to assault accused 2. It is accused 3 who assaulted deceased with a log on the forehead. Thus, the indications consisted mainly of what accused 1 and 2 told the witness during the indications.

Mike Tsambatare was the last State witness. He is based at CID (homicide) and was the Investigating Officer. Like most, if not all investigating officers, his evidence comes after the event. It is mainly about the investigations he carried out, which involve interviewing the accused persons and witnesses. It is mostly behind-the-scenes work which results in the compilation of the crime docket. His role, clearly an essential one, is to gather the evidence that is required in court. Calling him as a witness usually results in him repeating the evidence that he would have submitted to the prosecutor in the crime docket. This was so in the present case. The witness tended to dwell on what the accused persons and the State witnesses told him. This evidence is already on record, elicited from the witnesses themselves.

However, an important aspect of the investigating officer's evidence in this matter is that accused 3 was at large for about 3 years after the commission of the offence. He was only arrested in 2020 at his rural home in Muzokomba.

Turning to the accused persons' defence evidence, each one adhered to his defence outline, and incorporated it into his evidence. We have already adverted to the defence outlines, which are detailed on record.

Where two or more accused persons are jointly charged, the criminal liability of each accused must be clearly and satisfactorily established. The prosecution bears the burden of proving that liability beyond a reasonable doubt, in respect of each accused.

Accused 1 could not put us in a clear picture as to how he protected the deceased from being assaulted by accused 3. He held the deceased, the victim of the assault, and not accused 3, the assailant. This is consistent with what the second State witness stated, that he saw accused 1 holding the deceased by the shoulders whilst accused 3 assaulted the deceased. Accused 1 was facilitating an assault by accused 3. He himself had had a go at the deceased, with his booted feet.

Accused 2 was consistent that he is the one who called out, "thief!" drawing people's attention to the scene. He was also consistent that accused 3 came out holding a wooden handle, with which he struck deceased on the forehead. However, when it came to participation of accused 1, accused 2 insisted he did not see accused 1 assault deceased. The accused could however, not explain why State witness Wilmore Chitambo stated that he saw accused 1 assaulting the deceased with booted feet.

Accused 1 and 2 are biological brothers. Accused 2 only saw what accused 3 did to the deceased. He did not, or chose not to see, what his brother, accused 1, did to the deceased. Wilmore Chitambo was just a neighbour at that time. His relationship with any of the 3 accused did not go beyond that. Thus, he was not more favourably disposed to any one accused over the other. He was a neutral witness. Therefore, his evidence on what he himself witnessed accused 1 doing, is to be preferred to that of accused 2.

We note however that, in its cross examination of accused 2, the State did not establish anything significant incriminating accused 2. It only averred that he participated in the assault, without specifying or particularising what it is accused 2 did in the assault.

As for accused 3, both the evidence of accused 1 and accused 2 incriminates him. They saw him assault deceased with what looked like a pick handle, on the forehead. Granted, this is accomplice evidence coming from 2 brothers. They are likely to protect each other and gang up against accused 3. Such evidence must be treated with caution. If this was the only evidence against accused 3, it would not be safe to rely on it. See *S v Mubaiwa* 1980 ZLR 477, *Sambo* v *The State* SC 22/90.

However, as the record shows, evidence from the State witnesses incriminates accused 3. One of them saw accused 3 holding a rubber-like rope, described as "mboma" The other witness saw him using it to assault the deceased. The deceased was tied to a tree in accused 3's

yard. It seems accused 3 was the most belligerent of the assailants. He refused to be restrained by either the State witnesses or his fellow accused.

Again, the State witnesses, who were neighbours, bore no ill will towards accused 3, or any of the accused persons for that matter. There was sufficient and satisfactory corroboration for the accomplice evidence. The facts of the matter clearly establish the participation of accused 1 and accused 3 in the assault on the deceased. It was a sustained assault. The weapons used include booted feet, a pick handle, and the rubber-like rope referred to as "mboma".

The deceased was tied to a tree after the assault on the forehead with a pick handle. Most of the assault was done whilst he was tied to the tree. The post-mortem report by Doctor Betancout shows injuries consistent with a severe and sustained assault. They are described as severe and marked cerebral oedema, subarachnoid haemorrhage, head trauma due to blunt trauma and multiple trauma the whole body due to assault.

The accused involved in the assault i.e. accused 1 and accused 3, whilst they may not have formulated an actual intention to cause death, certainly realised the real risk or possibility that their conduct may cause the death of the deceased, and continued with that conduct regardless. In its closing submissions, the State has not pushed for a verdict of murder with actual intent, but constructive intent. It is murder all the same. However, it recognises that the accused did not intentionally set out to kill the deceased. They must have foreseen or realised the possibility that death will result from their conduct but continued nonetheless, reckless as to whether death occurred. See *S v Mugwanda* SC 19/02, *S v Mtisi* MTHC/28.

But we however differ with the State's submissions in its push for the conviction of all the 3 accused. As seen in our analysis of the evidence led in this matter, the participation of accused 2 was not satisfactorily established. All that was established by the evidence is that he was just standing at the scene. His mere presence is not sufficient to impute complicity to him. All the witnesses said they did not see him assault deceased. There is therefore no valid basis for inferring that he was acting in common purpose with his co-accused.

In the circumstances, accused 1 and 3 are found guilty of murder with constructive intent, as defined in s 47 (1) (b) of the Criminal Law Code.
Accused 2 is found not guilty and is acquitted.

SENTENCING JUDGMENT

After a full trial, the two accused were convicted of murder with constructive intent, as defined in s 47 (1)(b) of the Criminal Law Code. The detailed facts appear in the main judgment above.

In assessing sentence, the court will be guided by section 12 of the Criminal Procedure (Sentencing Guidelines) Regulations, Statutory Instrument 146/23, which enjoins the court to look at the following factors, among others:

- Characteristics of the offender
- Characteristics of the victim, including the impact of the offender on the victim
- Probability of the offender committing a similar or other offences.
- Desirability of protecting the victim or society from the offender.

Although there are only two accused in the dock, the 2nd accused having been acquitted, the remaining 2 accused will continue to be referred to as 1st and 3rd accused. This will maintain consistency in the record and avoid confusion, so the accused will be referred to as designated at the commencement of trial.

In this regard, in respect of accused 1, the court takes into account that he is a first offender. He is aged 43 and has heavy family responsibilities. These include 9 children, all of whom are minors. He has lost employment with the Zimbabwe National Army due to absenteeism, mainly caused by frequent court attendance. The accused had been drinking beer on the night in question. There was therefore an element of intoxication in his conduct. It cannot be said from this single and unfortunate incident that the accused has a pre-disposition to violence. The circumstances in which the offence was committed do not reflect that. There was an element of provocation. The accused got home only to find the deceased, a suspected thief, in accused's yard at 1 am. Indications are that he intended, or had in fact attempted, to steal accused 1's tyre mending equipment.

There is no evidence of planning or pre-meditation. It was a spontaneous act in response to the sudden discovery that someone was in accused 1's yard carrying a sack. What also heavily weighed upon the court's mind is the fact that this offence was committed in July 2017, six and a half years ago. The accused, together with accused 2 who has been acquitted, initially underwent trial. The trial was aborted and subsequently commenced *de novo.* The accused went through the harrowing experience of a criminal trial twice. We find that misery mitigatory, unless it is shown that the delay was caused by him. It has not been shown that he was responsible for the inordinate delay in the finalisation of this matter.

The court notes that very brief submissions in mitigation have been made on behalf of accused 3. These are that the accused is married to two wives and has five minor children. He is the sole breadwinner in his family. He earns a living through mending tyres. He is a first offender. The other factors such as delay in finalisation of the matter are the same as those submitted in respect of accused 1.

On the other hand, the accused persons have been convicted of a very serious crime. They acted in concert in a sustained and brutal assault on the deceased. The State has made its submissions in aggravation collectively against the two accused, calling for the same punishment. Indeed, there is no basis for distinguishing the penalty.

Between them, the accused viciously attacked the deceased using booted feet, a pick handle, and a button stick. What makes the assault particularly bad is the fact that the deceased had been subdued and tied to a tree. *Most of the assault took place after he had been tied to the tree.* There was no need at all for the assault. The deceased should have been handed over to the police so that the law takes its course. The 2 accused decided to take the law into their own hands.

Allowing citizens to take the law into their own hands is dangerous. Anarchy can easily develop in society with disastrous consequences. No one will be safe. Vigilantes will be calling the shots, pushing proper law enforcement agents into the background. Granted, the deceased behaved badly. He was seen in the accused's yard in the dead of night, around 1 am. He was carrying a sack which had suspected stolen items. The accused had their tyre mending equipment in that yard.

However, the deceased had been manhandled and apprehended. The next civilised step was to call the police. Instead, the accused tied him to a tree and assaulted him whilst tied to the tree. In these circumstances, the assault was not achieving any meaningful purpose. It was now a sadistic assault. The pleas from the accused's neighbours to stop the assault fell on deaf ears.

The court must however, be level headed, dispassionate and objective in its assessment of sentence. All the facts must be considered, both mitigating and aggravating. A fundamental feature in the sentencing guidelines is the establishment of presumptive sentences. For murder where there are aggravating circumstances, the presumptive sentence is 20 years imprisonment. Where there are mitigating circumstances, the presumptive sentence is 15 years.

The presumptive sentences are, as it were, a starting point. In the exercise of its discretion, the court may go above or below the presumptive sentence. It must however, exercise such

discretion justifiably, showing clear reasons why it has departed from the presumptive sentence.

In casu, despite the brutality of the assault, we are of the considered view that the case does not fit into the aggravating factors or circumstances listed in section 47 (2)(3) of the Criminal Law Code. These include premeditation, offence committed in furtherance of organised crime, use of a firearm or other dangerous weapon, or the offence was targeted at a law enforcement officer. Such aggravating features would attract the mandatory sentences prescribed in s 47 (4) of the Criminal Law Code which are death, imprisonment for life, or not less than 20 years imprisonment.

The court will therefore be guided by sections 8 and 9 of the Sentencing Guidelines. These provisions have an extensive list of what constitutes aggravating and mitigating circumstances. Mitigating circumstances, as outlined in section 9 of the Sentencing Guidelines include absence of previous convictions, showing remorse or contrition, remote likelihood of re-offending, evidence of provocation by the victim and intoxication.

It seems the circumstances of this case lean more towards s 9 than s 8. As already indicated, there was no pre-meditation. The deceased's conduct was provocative. Loitering in accused's premises at 0100hours, carrying a sack, the only reasonable suspicion is that he wanted to steal. This incensed the accused, who had their tyre mending equipment kept on those premises. Coupled with this, there is the inordinately long period from the commission of the offence to the date of sentence. that is, from July 2017 to January 2024, which is six and a half years.

Even if the accused were released from custody on bail at some point, the long wait on its own was mental torture. It reflects an unfortunate failure of the criminal justice system in finalising the case. The mitigating factors place this case in the category that attracts a presumptive sentence of 15 years imprisonment. Further consideration should be done whether the sentence should simply sit on the presumptive sentence or be adjusted downwards. Given what has been highlighted, the court is of the considered view that the penalty be below the presumptive penalty. However, it should not go too far below, lest the grave crime the accused committed be trivialised.

In this regard, the suggestion made on behalf of accused 1 that he be sentenced to community service is misplaced. It will trivialise the offence.

Imprisonment is inevitable for such a grave crime. Taking all factors into account, each accused will be sentenced as follows;

10 years imprisonment

National Prosecuting Authority, State`s legal practitioners
Chigwanda Legal Practitioners, first accused's legal practitioners
Dondo &Partners, second accused's legal practitioner
Gunje Legal Practice, third accused's legal practitioners