THE STATE

Versus

GOLDEN BAKO

And

ERISHA SIMANGO

And

AMIRI PHIRI

IN THE HIGH COURT OF ZIMBABWE
TAKUVAJ
GWERU HIGH COURT CIRCUIT 6 & 7 FEBRUARY 2014

Shumba for the state
D. Mujaya for the 1st accused
Ms C.T. Mugabe for the 2nd accused
Ms Chimango for the 3rd accused

Criminal Trial

TAKUVAJ: The three accused persons are facing a charge of murder in that on the 3oth of July 2012 and at Maramba Business Centre, Zvishavane, in the Midlands Province, Golden Bako, Erisha Simango and Amiri Phiri or one or more of them unlawfully caused the death of Manford Moyo, by striking him all over the body with booted feet and clenched fists, and striking him on the head with a stone, intending to kill him or realizing that there was a real risk or possibility that their conduct may cause death and continued to engage in that conduct despite the risk or possibility.

The three pleaded not guilty. Accused 1 relied on self-defence while accused 2 denied causing deceased's death in that he did not foresee that accused 1 would assault deceased with a stone causing his death. Accused 3 denied killing the deceased. He admitted that he assaulted the deceased inside the bottle store. He further denied harbouring an intention to kill the deceased.

The state led evidence from three witnesses. The first witness was Charity Danira who was employed as a bar lady at Maramba Bottle Store, the scene of the crime. Her evidence was as follows; She was on duty on the fateful day. Accused persons arrived around 4pm and they were listening to music from a memory card. Later deceased arrived and shortly thereafter there was a misunderstanding between deceased and accused 2 over how the music was to be

played. Deceased and accused 2 started fighting and the others joined by assaulting deceased using their hands. The accused persons hit the deceased all over the body. Accused persons pushed deceased outside and continued to assault him. She did not follow the group outside but later accused 2 and 3 returned and asked for some water. The witness said she did not witness the assault outside the shop. The assault inside the shop did not involve kicking according to her.

We find this witness to be a credible witness although her evidence lacks detail for the following reasons:

- the witness did not exaggerate her evidence
- she admitted that she did not see who started the fight
- she did not see accused persons assaulting the deceased with booted feet
- she did not see what went on outside the shop

Most of her evidence is common cause. We accept it in its totality. Second witness was Jester Sithole who said she was in an adjacent shop when she saw all 3 accused persons assaulting deceased with booted feet, fists and open hands. They assaulted deceased indiscriminately. She said the accused and deceased later went outside where they (accused persons) continued to assault deceased. According to this witness the taller accused person then picked up something, threw it and deceased then fell down. She said deceased had his back towards the person who was throwing the missile. She said he was attempting to walk away when he was struck from a distance of approximately 1 ½ metres. The witness could see clearly because of the moonlight. She said she did not see deceased picking up a stone. At the time deceased was assaulted the fight had stopped according to her. She also said at that stage, accused 2 was no longer assaulting the deceased. After that accused 2 asked for some water.

This witness' testimony is materially similar to that of the 1st witness except that she said (i) she saw accused persons kicking deceased with booted feet; (ii) that she saw accused 1 pick up something which he threw towards deceased; (iii) that deceased fell down shortly thereafter. The witness gave her evidence in a very very low tone. Despite being asked to raise her voice she kept on murmuring. We had to stretch our ears to hear what she was saying. However, her evidence was not seriously challenged by the defence – none of them put it to her that accused persons never used booted feet on the deceased. Accused 1 admitted that he picked up a stone and threw is at deceased. He admits deceased fell down. Deceased sustained an injury at the back of the head. The post mortem report confirms this. This corroborates the witness' testimony. We do not believe that the witness would mention the use of booted feet if this had not occurred. She has no motive to fabricate evidence against accused persons. For these reasons, her evidence is accepted.

The third witness was David Madhadha. His testimony is basically as follows: He is a headman. Accused persons are his neighbours. Deceased was his maternal uncle. On the day in question he found accused persons drinking beer at Maramba Bottle Store. They had ordered the bar lady to play one song repeatedly – deceased did not like this and a misunderstanding ensured. The witness went to relieve himself. Upon return, he found the three accused persons and the deceased on the verandah with accused 2 holding deceased on his right side, accused 3

by the left side while accused 1 was pushing deceased out of the verandah. Deceased's shirt had been violently removed from his body. It was hanging by the sleeves. It was torn. The witness then got hold of accused 2 in an effort to restrain him. Accused 2 told the witness that they should be left alone to do as they pleased i.e. assaulting the deceased. Accused 2 said deceased had to be taught a lesson because he was belittling them. Meanwhile, deceased was telling accused 1 and 3 that he did not want to fight with them. Accused 1 and 3 did not take heed. The witness saw deceased fall down, deceased got up but fell down again and this time he did not get up. He believed the deceased had been injured at this stage. Deceased was not armed and the accused persons were assaulting deceased with booted feet and clenched fists all over his body. The witness said he failed to protect the deceased from being assaulted by the three accused persons because he could only hold one accused at a time and the other would continue assaulting the deceased. After the deceased fell down, the witness heard one of the accused persons saying "Golden why did you kill this person?" Accused 1 then ran away. The witness checked deceased's pulse and realized that he had died. Since it was dark he did not observe any injury but later saw that deceased had been injured at the back of his head. When police attended the scene he saw accused 1 showing the police the stone he had used i.e. Exhibit 9. The witness said stones similar to Exhibit 9 were found a few metres from the verandah. He said there are many stones around that area. He denied that deceased picked up a stone when he was running away. According to this witness accused 1 paid 3 cattle to the deceased's family. Accused 2 paid 5 cattle and accused 3 paid 1 beast and $250,00 cash. He conceded that accused persons could have paid in the form of groceries etc. He said from his assessment accused persons were drunk but could appreciate what they were doing. He said he was not drunk because he had taken only ½ of the scud he had bought. According to this witness deceased was close to the 1st accused when he saw him falling down.

This witness gave his evidence confidently. He did not contradict himself or prevaricate during cross examination. His evidence is brief and can be easily understood. Most parts of his evidence are common cause and I need not analyse those portions suffice to say as regards contentious areas these are narrow and are as follows:

(a) The witness said after striking deceased with the stone accused 1 ran away. While accused 1 said he remained at the scene. In our view this fact is colourless in the circumstances of this case
(b) The witness said all accused persons used booted feet and fists – accused 1 said they did not do so – it is common cause that at some point during the commotion the deceased fell down. We do not believe that given the zeal and gusto accused persons had to assault this old man (as they put it). They would stop assaulting deceased when he was on the ground. There were no rules in this fight and naturally one would resort to all the methods available and convenient including kicking. We find that this witness like Jester Sithole told the court the truth namely that accused persons kicked deceased while he was on the ground.
(c) The witness said he did not see deceased picking up a stone before he was hit by accused 1. On the other hand accused 1 said the opposite is what happened. In our view accused 1 is not being truthful on this point. We say so for the following reasons:

(i) the medical evidence shows that deceased was hit on the occipit i.e the back of the head. If what accused 1 told the court is what happened, this quite obviously means deceased could not have been injured on that part of his body. That deceased had a wound at the back of the head makes accused's version thoroughly discreditable and false. This is the *coup de grace* to accused 1's defence.

(ii) further, if more proof is required, it is to be found in accused 2 and 3's evidence to the effect that they did not see deceased bending down before he was hit. Accused 2 and 3's evidence is admissible against accused 1. This is trite. Accused 2 and 3 were very close to where accused 1 was standing when he threw the stone. Also it is their testimony that they saw deceased running away. They also saw him fall to the ground shortly thereafter.

(iii) of the five people who witnessed the incident, 4 say they did not see deceased bending down before he was hit and it is only the forlorn 1st accused who said he did so.

We find Mr Madhadha to be a credible witness on this point as his evidence has been sufficiently corroborated by other witnesses and the post mortem report. We accept his evidence and reject accused 1's evidence.

As against accused 2, the following areas are in dispute:

(a) The witness said while deceased was on the ground all the accused persons were kicking him with booted feet. Accused 2 said at that stage he was no longer assaulting deceased. I have already analysed this evidence when I dealt with accused 1's testimony. Our findings thereof equally apply to the second accused. However, I must add that what was more telling and instructive of accused 2's state of mind at that time is the following evidence by the 3rd state witness Mr Madhadha, "I attempted to hold accused 2 whilst at the verandah in order to stop him from further assaulting the deceased but accused 2 said "uncle, let me assault this old man who is belittling us."" This portion of the witness' testimony was not challenged during cross examination. In our view, this is the final nail in accused 2's defence that he was acting in self-defence, for at that stage he was undoubtedly the aggressor.

The 1st accused gave evidence in his defence and his version as pointed out above differs from that of the other witnesses. We make an adverse finding in respect of accused 1's credibility for the simple reason that he told us a false story. He lied that when he threw the stone he did not see where it landed. We find that he aimed the stone on the upper part of deceased's head. Indeed the 1st accused admitted that he aimed the stone at the deceased. We find that the throwing of the stone by accused 1 was a continuation of the assault that had commenced inside the shop.

Accused 1 admitted that he realized that he was throwing a stone at a human being. When asked what he thought would happen to the deceased, his answer was, "deceased was going to stop throwing a stone at me." When asked further how this was going to stop deceased, he became evasive saying this would scare the deceased. This evidence from

accused 1 coupled with the earlier concession that he used excessive force to propel the stone that he aimed at the deceased is indicative of a mind that foresaw the real possibility of death resulting from his reckless conduct.

Accused 2 also gave evidence in his defence. Apart from what we said earlier on, he also confirmed that deceased was running away from where they were with his back toward them when he was assaulted by accused 1 with a stone. He said the throwing of the stone was accused 1's own decision. Further he said deceased was about ten (10) metres from the 1st accused when he was struck. He was standing about 5 metres from the 1st accused. Accused 2 denied that deceased picked up a stone before he was hit. He also said although he had taken a sizeable amount of alcohol he appreciated everything that was happening. He said he drank opaque beer mixed with ZED and a scud. The thrust or gist of accused 2's defence is that when he assaulted deceased, he did so in self defence sine deceased was the aggressor. He denied using booted feet but admitted using clenched fists.

As pointed out before the rest of accused 2's evidence is in tandem with that of other witnesses except on the issue of self defence where he drew a distinction between "assaulting someone" and fighting someone.

Accused 3 admitted assaulting deceased with fists. As regards the manner in which deceased was assaulted, his evidence tallies with that of accused 2, Jester Sithole and Mr Madhadha.

The is issue is whether accused persons are guilty of murder or any other competent verdict. State counsel conceded that accused 2 and 3 could not be found guilty of murder as there was insufficient evidence to establish the requisite intention. He submitted that they be found guilty of assault as defined in section 89 of the Criminal law (Codification and Reform) Act. Accused 3 pleaded guilty to that offence in his defence outline. Accused 2 however denied the offence arguing that since the deceased started the fight he only assaulted the deceased in self-defence. Therefore his assault was lawful. As regards accused 1 the state submitted that he be found guilty of murder with constructive intent. Counsel for accused 1 said accused 1 should be found guilty of culpable homicide. We find that the state's concession is sound and proper at law. This brings us to two issues namely (i) whether accused 1 is guilty of murder with constructive intent; (ii) whether accused 2 is guilty of assault.

Let me deal with accused 2 first. If I understand the argument proffered on his behalf correctly, it goes like this: If A is an aggressor who assaults B with fists and B retaliates and over-powers A, B is nevertheless permitted to continue to assault A simply because A was the initial aggressor. This argument is fallacious for two reasons, namely, (a) it makes a mockery of the requirements of the defence of self-defence and (b) it leads to an absurdity in that in a fight, the protagonists may change from aggressor to victim or vice versa within a short space of time. In such a scenario the categorization of protagonists as aggressor and victim leads to disastrous consequences.

In casu there is overwhelming evidence that from the moment accused 1 and 3 joined in the fight, the deceased was immediately subdued. There is overwhelming evidence that the three accused continued assaulting him, tore his shirt, pushed him out of the shop on to the

verandah where deceased fell down and all 3 kicked him with booted feet. In view of this evidence, it is unconvincing to argue that accused 2 was still acting in self-defence. Put differently the accused persons were now the aggressors in that they had exceeded the bounds of reasonable self defence. The threat had been eliminated. On this basis the 2nd accused must be found guilty of assault.

Assuming however that I am wrong in this exposition of criminal law principles, there is another reason why accused 2 should be found guilty of assault. This reason is to be found in the doctrine of common purpose. According to this doctrine, if X is an accomplice to Y in a criminal enterprise, X will be liable for crimes committed by Y which fall with their common design. X is guilty because he participated in Y's crime with the necessary mental state; that is he participated knowing or foreseeing that Y would commit the crime in question. Now from the evidence of state witnesses, it would be naïve to deny that accused 2 was an accomplice to his two co-perpetrators. It can also not be denied that their common design was to assault the deceased. It should be noted that according to the doctrine of common purpose the *actus reus* is the participation in the criminal enterprise and not what each individual member of the gang did. To illustrate this point, – *in casu* it would be neither here nor there that one of them did not kick deceased while the other two did as long as it was foreseeable that the others would assault deceased in that manner.

For these reasons, accused 2 is found guilty of assault as defined in section 89 (1) (a) of the Criminal Law (Codification and Reform) Act [Chapter 9:23].

Coming to accused 1 let me state the legal principles first. In *Mugwamba* vs *The State* SC-19-02, CHIDYAUSIKU CJ stated that;

> "(1) the expression "intention to kill" does not, in law, necessarily require that the accused should have applied his will to compassing the death of the deceased. It is sufficient if the accused subjectively foresaw the possibility of his act causing death and was reckless of such result. This form of intention is known as *dolus eventualis*, as distinct for *dolus directus*.
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> (2) The fact that objectively the accused ought reasonably have foreseen such possibility is not sufficient. The distinction must be observed between what actually went on in the mind of the accused and what would have gone on in the mind of a *bous paterfamilias* in the position of the accused. In other words, the distinction between subjective foresight and objective foreseeability must not become blurred. The *factum probandum* is *dolus,* not *mepa.* These two different concepts never coincide.
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> (3) Subjective foresight, like any other factual issue, may be proved by inference. To constitute proof beyond reasonable doubt the inference must be the only one which can reasonably be drawn. It cannot be so drawn if there is a reasonable possibility that subjectively the accused did not foresee, even if he ought reasonably to have done so, and even if he probably did so." See also *S* v *Sigwahla* 1967 (4) SA 556 (A).

In casu, the following facts are salient

(a) That it is common cause that the sworn intention of the 1st accused and his companions was to assault the deceased. It follows therefore that the death of the deceased was not the desired objective. It however, occurred while accused 1 was engaged in the desired activity of assaulting the deceased. The 1st accused did not desire to kill, he intended to punish the deceased for fighting with accused 2.
(b) In pursuance of accused 1's activity i.e. assaulting the deceased, one wound was inflicted on deceased's head. The degree of force and depth of the wound is unknown although accused admitted that he used excessive force to propel the stone. Accused admitted that he aimed his blow at the deceased. He hit him at the back of the head which is a vital part of the body.
(c) Deceased fell down and died instantly from the injury.
(d) Although accused had taken alcohol he admitted that this did not inhibit his faculties of comprehension and appreciation.

These facts in my view are sufficient to establish beyond reasonable doubt that the accused did foresee the possibility of the death of the deceased as a consequence of the assault and persisted with the assault regardless. In this regard, accused acted recklessly.

Accordingly, accused 1 is found guilty of murder with constructive intent.

Extenuation

A finding of constructive intent is an extenuating factor. We find intoxication as another factor in extenuation. The circumstances surrounding the commission of the crime suggest irrationality caused by the intake of alcohol. The reason for the fight is senseless.

Mitigation

Accused 1 is a 22 year old single man. He spent 1 year 5 months in custody awaiting trial. Further, he paid three cattle as compensation to the deceased's family. Accused acted under the influence of alcohol.

Accused 2 is a single unemployed man aged 23 years. He has no children. He was drunk on the day in question. He spent 18 months in custody pending trial. It was further submitted on his behalf that he bought some groceries to feed mourners at deceased's funeral and that the assault was minor as no injuries were noted on the deceased's body. Accused is a first offender who suffers from tuberculosis.

Accused 3 is a 29 year old youth who leads an unsophisticated life style. Accused spent approximately two years in custody awaiting trial. He pleaded guilty and was contrite. Accused paid a beast as compensation to the deceased's family and contributed towards funeral expenses.

Aggravation

Accused 1 – we find the following factors in aggravation;

(a) life was needlessly lost
(b) accused acted in a wicked manner that even surprised his accomplices
(c) accused struck deceased when the latter was running away for dear life

(d) the accused was not remorseful at all

Accused 2 – engaged in gang assault upon the deceased. The assault could have been averted if accused had acted rationally.

Accused 3 – joined in the fight that did not concern him. He continued assaulting deceased even when deceased was unable to defend himself.

Sentence

Accused 1

In assessing an appropriate sentence, the court has taken into account the mitigatory aggravatory factors. The court is particularly concerned that life was unnecessarily and foolishly lost. The deceased did not deserve to die for simply raising his objection to the sequence in which music was to be played. The court must send a clear message to the accused and those of like mind that they should not expect mercy when they commit heinous crimes like murder arising from the use of violence.

For these reasons the accused is sentenced as follows:

17 years imprisonment.

Accused 2

$500,00 or in default of payment 6 months imprisonment. In addition 6 months imprisonment which will be suspended for a period of five years on condition the accused is not convicted of any offence involving violence on the person of another and for which he is sentenced to imprisonment without the option of a fine.

Accused 3

$500,00 or in default of payment 6 months imprisonment. In addition 6 months imprisonment which will be suspended for a period of five years on condition the accused is not convicted of any offence involving violence on the person of another and for which he is sentenced to imprisonment without the option of a fine.

Prosecutor General's Office, state's legal practitioners
Makonese & Partners (incorporating Chambati & Mataka Attorneys), 1st accused's legal practitioners
Gonese Attorneys, 2nd accused's legal practitioners
Chigariro Phiri & Partners, 3rd accused's legal practitioners