THE STATE
versus
AMON VAMBE
and
TENDAI MUPAKWA

HIGH COURT OF ZIMBABWE
MWAYERA J
HARARE, 9 October 2013, 18 November 2013, 8 September 2015,
15 October 2015, 30 March 2016 and 7 April 2016

ASSESSORS : 1. Mr Chidyausiku
2. Mr Barwa

Criminal trial

M Manhamo, for the State
O Shava, for accused 1 & 2

MWAYERA J: The case concerns the allegations of murder of one Desmond Vambe. On 23 October 2010 at Bako village Headman Mtengwa, Sadza, the two accused are alleged to have unlawfully and with intent to kill or realising that there was a real risk or possibility that their conduct might cause the death, caused the death of Desmond Vambe by assaulting him all over his body with clenched fists, booted feet and a log thereby inflicting injuries from which Desmond Vambe died. Both accused pleaded not guilty to the charge.

It is apparent from the evidence that the accused persons are related as uncle and nephew respectively. The deceased was the 1st accused's son. On the fateful day the accused persons together with one Loverage Matanga went to the 1st accused's rural home in response to a call by one Chanzini Vambe.

The latter had called in the accused to take charge of the deceased who appeared mentally disturbed as he was destroying property and causing problems. Upon arrival at the rural home, on approaching the deceased who was behind the 1st accused's bedroom the deceased took to his heels. The 2nd accused persued and caught up with the deceased

whereupon, they wrestled with each other. In the struggle between the 2nd accused and the deceased the 2nd accused slapped the deceased as he fought to release himself. At that time the 1st accused who had remained behind parking the motor vehicle had caught up with the two. The 1st accused freed the 2nd accused from the deceased with whom the latter was wrestling. The 1st accused then assaulted the deceased with a belt, stick and log. There after the deceased was taken back to the homestead and was caused to lie in the veranda. It is clear from the evidence of the state witness Chanzini and the two accused persons that the deceased's condition deteriorated. He was given some porridge but he threw up and started frothing. Thereafter the deceased was rushed to Sadza Hospital where he was pronounced dead upon arrival.

The State adduced evidence from the medical doctor Chatanga, Chanzini Vambe and the Investigating Officer Sergeant Richard Mariga.

Chanzini Vambe the 1st accused's mother and grandmother to the deceased recounted how the two accused and one Loverage Matanga arrived home and went about to apprehend the deceased. The witness initially was over protective of the 1st accused her son and the State successfully sought to have her declared hostile. After impeachment the witness who was economical with detail went over events of the fateful day. What was clear in her evidence was that the accused persons assaulted the deceased even while at the veranda and that Loverage Matanga was restraining. She like the accused persons confirmed that the deceased was later taken away in the vehicle and that she later discovered he had passed on. I must mention at this stage that Loverage Matanga, an uncle to the accused who was present at the material time was not called to testify as he was not located. Even though he was related to the accussed and deceased he was present at the material time and his evidence would have been of assistance to not only the State but the court.

The investigating officer Sergeant Richard Mariga also testified. He caused the post mortem examination of the remains of the deceased and recorded a warned and cautioned statements of the 1st accused person. The witness recovered a log and stick allegedly used during the attack but none of these exhibits were produced in court as the witness said he is not the one who recovered the exhibits from the scene, but that they were recovered and handed to him by one officer Mamhonzi who was not called to testify.

The State also adduced evidence from one Dr Nhamo Rwadzai Linge Changata. The Medical Practitioner who at the relevant time was based at Sadza District Hospital confirmed examining the remains of the deceased at the request of the Zimbabwe Republic Police on 25

September 2010. The Medical Practitioner explained his findings as contained in the post-mortem report which was tendered as Exh 1. The doctor observed a cut on the right frontal region of the head, scars on the right side of the neck, contrusion marks in posterior deltoid region on back, bleeding from the nose and mouth. Unkempt, signs of mental retardation. He then concluded that death was due to cerebral haemorrhage. In explaining his findings the doctor detailed that the injuries could have been occasioned by blunt trauma with a lot of force. Whereas the doctor's explanation was helpful and honest the defence correctly and rightly took him to task on the external examination he carried out leading to a conclusion of internal injury being the cause of death. The issue is credible and honest as he was the examination conclusive? I propose to discuss this aspect later in the judgment suffices at this stage to take note of the question loaming large.

The defence case was punctuated by evidence from the accused persons who testified in person. No other witnesses were called. The first accused maintained his defence outline that he assaulted the deceased his son using a belt and stick on the legs as a way of chastising him since his son was misbehaving and showing signs of mental instability. In his confirmed warned and cautioned statement which was tendered by the State as exh 3 by consent the first accused gave the same version but added that the 2nd accused assaulted the deceased using booted feet and clenched fists.

This assault persisted even after they apprehended and took deceased home. The version of the 1st accused was that he had to restrain accused 2. The 2nd accused's version in defence outline was to the effect that he only slapped the deceased in self-defence and the 1st accused used a stick which broke and then he used a log to assault the deceased. During the defence case it was apparent the 1st accused sought to minimise the participation of accused 2 in the assault of the deceased as he stood his ground that the 2nd accused only slapped the deceased in self-defence since the two were wresting. The 2nd accused in turn resiled from saying the 1st accused used a log to assault the deceased. He even introduced new evidence that the deceased vomited cow peas and pills after the assault and suggested these could have been linked to the death of the deceased. I must hasten to mention that such after -thought given the relationship between the two accused is indicative of desire to protect each other at the expense of the truth. The accused did not impress the court as candid witnesses in so far as detail pertaining to how the deceased was assaulted. What was clear despite the machinations to cover up the nature and extent of assault was that both accused exercised some physical force on the deceased on the fateful day. From the totality of the evidence

bearing in mind the onus is on the State to prove its case beyond reasonable doubt and that the accused does not have to prove his innocence on the same standard the case of *R* v *Difford* 1937, AD 772 is relevant. The court is to seek to strike a balance between the evidence and the law and come up with a disposition.

The accused were both arraigned before the court on a charge of murder as defined in s 47 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. The essential elements of murder are defined as unlawful and intentionally causing of death of another person. See the case of *The State* v *Milos Moyo* HB 85/2010 an accused can therefore only be guilty of murder if his action causes the consequence which would be the factual and legal cause of death. For murder with actual intent the accused must be shown to have set out with an aim or desire to cause death of the deceased. It is clear from the wording of s 47 that the enquiry does not end upon failure to prove or show murder with actual intent but one of necessity looks at the requirements of murder with constructive intent. The test for murder with constructive intent will be whether it is objectively foreseeable within the range of ordinary human experience that the actions of the accused would lead to the death of the deceased. It is clear from the essential elements for murder with actual or constructive intent there has to be both the *mens rea* and *actus reas*. Both the actual or legal intention to kill must accompany the act for one to be convicted of murder with actual or constructive intention respectively. The cases of *S* v *Milos Moyo supra* and *Chaitezvi and Others* HH 63-10 are instructive. In the present case from the totality of evidence adduced it is clear the accused did not set out with common purpose and desire to kill the deceased. The nature or manner of assault was not indicative of desire to kill.

The state counsel Mr *Manhamo* in his closing submissions rightly and correctly conceded that from the evidence adduced both actual and legal intention on the part of the accused to kill the deceased is missing. It is apparent there is no evidence to show that the accused set out with a desire to kill hence the charge of murder as defined in s 47 of the Code cannot be sustained. A close look at the evidence by the Doctor Changata shows that his observations of the injuries on the body are consistent with blunt trauma. This when viewed with the first accused's evidence in his confirmed warned and cautioned statement, defence outline and evidence in chief wherein he consistently mentioned he assaulted the deceased with a stick and belt as a way of chastising him cannot be whisked away. The first accused also gave evidence that the second accused wrestled with the deceased before he got to the scene. The injuries observed by the doctor are consistent with physical force used in assault

of the deceased. The post mortem report indicates from the endorsements by the doctor that despite not carrying out an internal examination the external examination was all embracing. The report when viewed in conjunction with all the other evidence cannot be dismissed as inconclusive. All wounds were recorded and there was clear consistency between the assault, injuries observed and the proximate cause of death. The use of force by blunt trauma causing injuries from which the deceased passed on as a result of bleeding. The question earlier posed whether or not the credible and honest doctor's examination was conclusive is clearly answered in the affirmative. This is more so when one considers the injuries recorded and the history of the matter as given by both the state witnesses and accused. The deceased was assaulted and he sustained injuries from which he died. The fact that there was no internal examination in the circumstances of his case given the all-embracing report does not render hollow the doctor's findings. See *The State* v *Kudakwashe Masawi* HH 320/14.

It is common cause that the two accused set out to apprehend the deceased who was believed to be mentally challenged and destroying property. It is also not in dispute that the deceased was subjected to assault by the two accused. Further it is common cause that the manner in which the first accused assaulted the deceased is different from the manner in which the second accused a nephew assaulted his uncle. The only eye witness to the assault Lovemore Matanga was not called to testify on details of how each of the accused assaulted the deceased. The first accused who was being helped to subdue his son by the accused 2 persisted the second accused assaulted the deceased in self-defence.

Chanzini the 1st accused's mother only witnessed assault of the deceased by accused 1 at the veranda and not by accused 2. The injuries observed by the doctor were multiple. To link the single slap by accused 2 to the cause of death, given the doctor's account that a lot of force had to be used on the head to cause cerebral haemorrhage and the assertion by accused 1 that accused 2 was acting in self-defence, would be stretching the imagination too far. It becomes speculative to link the 2nd accused to the competent verdicts of culpable homicide and assault This is moreso given once the accused's story is reasonably possibly true then he ought to be acquitted. The submissions by the state counsel that he cannot argue with the 2nd accused's averment that he only assaulted the deceased in self-defence at the time that they wrestled is not only professional but noble in the circumstances of the totality of evidence. From the evidence adduced the state has not proved beyond reasonable doubt any criminal liability in respect of accused 2. The 2nd accused is entitled to his acquittal and ought to be acquitted.

The question that remains is from the totality of the evidence adduced has the state disclosed beyond reasonable doubt any criminal liability on the part of the 1st accused. Put differently is there evidence adduced before the court that even though the 1st accused lacked the intention to cause the death of the deceased when he assaulted him, he was none the less liable for causing the death or that when he assaulted the deceased he was criminally liable. Culpable homicide and or assault are competent verdicts to be explored in the circumstances of this case.

Section 49 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] reads:

> "Any person who causes the death of another person
> (a) negligently failing to realise that death may result from his or her conduct or
> (b) realising that death may result from his or her conduct and negligently failing to guard against that possibility; shall be guilty of culpable homicide and liable to imprisonment for life or any other shorter period or a fine up to or not exceeding level fourteen or both."

A reading of this section as correctly observed by Mr *Shava* for the defence shows essential elements of culpable homicide as,

1. Proof of negligent conduct leading to death.
2. Foreseeability of death arising from that conduct.

The question is what should have accused done in order to safeguard against that death occurring. The case of *S* v *Majarira* HH 02/08 is instructive. Chinengo J ably commented on the requirements of conviction on culpable homicide when he stated as follows:

> "The concept of negligence in culpable homicide has two components – the issue of foresight that death would be a consequence of the conduct in question because his blame worthiness arise from failure to foresee the death in the circumstances where the reasonable man would have foreseen it. The second component requires an assessment of what should have been done in order to safeguard against that death occurring. To arrive at the conclusion that the accused negligently caused the death it must be determined what steps should reasonably have been taken to prevent death and whether the accused infact took steps because it is the accused's failure to take those reasonable steps which determines that the accused was negligent in bringing about death."

It is apparent from the evidence as already discussed that the deceased was subjected to physical torture of assault by the 1st accused. Although there are loop holes in the manner, the post mortem was carried out in that no internal examination was carried out, the injuries observed are consistent to physical trauma. The Doctor as a general practitioner is entitled to carry out a post-mortem. Although he cannot escape criticism for not carrying out a comprehensive examination his observation cannot be ignored. This is more so when one

considers the narration of events of the day from both the state and defence witnesses. The deceased was assaulted by the accused and was in the hands of the accused up until the time he passed on. The deceased had to be physically carried back to the homestead as he could not carry himself back. A man in that condition was laid down on the veranda, fed with porridge and only later taken to hospital where he was pronounced dead on arrival. From the sequence of events there was no break in the chain of events between the period of assault and deceased's death. There is a nexus between the first accused's assault of the deceased and the resultant death. The 1st accused negligently failed to realise that by assaulting the deceased in the manner he did and not taking deceased for treatment death might ensue. The 1st accused was negligent in assaulting and leaving the deceased unattended medically, in circumstances were injury or even death would be occasioned. The accused ought to have foreseen that his conduct in respect of deceased death would ensue. A reasonable man in the circumstances of the accused would have taken steps to prevent the death by going for medical attention, as opposed to keeping the deceased in the veranda when the condition after the assault was deteriorating. The question that comes to mind in fulfilling the requirements of negligence as indicated in the case of *Majarira* (*supra*) is firstly what did the accused do negligently leading to the death of Desmond Vambe and secondly was it foreseeable that death would ensure as a result of his actions and what steps did he fail to take in guarding against that death. The answers to these questions are clearly brought to surface from the evidence as one follows the sequence of events. The 1st accused, with the help of others pursued the deceased his son whom he suspected to be having a mental health problem. They subjected him to physical force to subdue him. They first assaulted the deceased till he was helpless and had to be assisted back home and caused to lie down in the veranda. This was despite the obvious deterioration of his condition. The first accused acted carelessly when he assaulted the deceased, a suspected mental patient and left him for sometime without medical attention till he died. The doctor's report and evidence confirm the assault being linked to the death. In the premises the State has discharged the required onus in so far as culpable homicide as defined in s 49 of the Criminal Law Codification Reform Act is concerned.

Accordingly the 1st accused is found of guilty of culpable homicide as defined in s 49 of the Criminal Law Codification and Reform Act [*Chapter 9:23*] and accused 2 is found not guilty and acquitted.

SENTENCE ACCUSED ONE ONLY

In our endeavour to come up with an appropriate sentence we, have considered all mitigatory and aggravatory factors advanced by Mr Shava and Mr Manhamo respectively.

The first accused is a first offender, with fairly heavy responsibilities. The accused has 6 children all dependant on him. His wife, mother and his late sister's children all depend on him. Mr Shava submitted that the accused is HIV positive and that he has been on medication for 7 years. Further in mitigation is the fact that the accused will live with the stigma of having killed his own child. The society out there does not know the difference between culpable homicide and murder. They will hold that the deceased is a murderer who murdered his own child. Such stigma when viewed with the real pain of loosing a child under his hands has severe traumatic effect on the accused. In passing sentence we cannot loose sight of such mitigatory factors. As correctly observed by Bere J in *S* v *Shangwa* HH 85/12 murder itself is bound to create a stigma on the accused who will always be remembered for cutting short the life of a young person. In this case the accused negligently caused the death of his own child. That in itself is punishment. We are indebted to both state and defence counsels for referring us to a number of cases to assist us to come up with an appropriate sentence.

In passing sentence we are alive to the fact that the accused was subjected to one and half years pre-trial in caseration. That phase is by no means easy given the deteriorating prison conditions which are worsened by the current harsh economic conditions. The situation is further worsened by the anxiety which goes with having murder charges hovering over one's head. This matter has been hanging over the accused's head since 2010 when the offence was committed. A period of about 6 years in suspense and anxiety is certainly traumatic. The trial only commenced in 2013 and because of none timeous location of witnesses the wheels of justice moved very slowly. If the matter had been tried and finalised in 2010 the accused would have been approaching the finishing line of serving his sentence. In reaching at an appropriate sentence we will not loose sight of all these highly mitigatory factors.

However, as correctly submitted by the state counsel, Mr Manhamo the courts have a duty to protect the sanctity of human life. Everyone has a right to life as enshrined in our Constitution Act (20) : 2013. Section 48 (1) reads:

"Every person has the right to life"

No-one therefore should intentionally or negligently take away the God given right to life. The accused stands convicted of a serious offence of culpable homicide whereby he irresponsibly and negligently subjected his allegedly mentally ill child to assault thereby causing his death. The use of violence is condemned world over for the obvious reason that it is inhumane and leads to fatal situations like what occurred in the present case. The courts should show their displeasure for the use of violence by passing appropriate deterrent sentences. The suggestion by defence counsel for the option of fine is not appropriate. Given the circumstances of the case a fine would not only trivialise the offence but send a wrong signal to the society and also cause society to loose confidence in the justice delivery system. A fine is a preserve for trivial and not bad cases like the present. See *Nellie Mbano* v *State* HB 114./15 *S* v *Banda*, HB 30/13 and *S* v *Ntuli* 1975 (1) SA 429. In all the cases cited for culpable homicide, custodial sentences were imposed.

In passing sentence we are alive to the sentencing principles as pronounced in plethora of case law. The modern sentencing trends concentrate more on rehabilitative and reformative sentences as opposed to retributive sentence. The underpinning principle being that in passing sentence, the court should seek to strive a balance between the societal interest that is interest of justice, the offender's interesting and the offence. The sentence should match the offence and offender while at the same time meeting the interest of justice.

For such a balance to be struck there is need to temper justice with mercy so as to ensure that the sentence imposed does not break but help rehabilitate the offender. The sentence should at the end of it all deter not any the accused but like-minded people.

In the circumstances of this case were the accused, instead of protect his allegedly mentally challenged son negligently assaulted him causing his death a custodial sentence is called for. However, given the offence was committed some 6 years back the accused has suffered during the period of suspense.

An appropriate sentence if the matter had been finalised in 2010 would have been in the region of 8 years with a portion suspended on conditions of good behaviour. Taking into account all mitigatory and aggravatory factors it is our considered view, that we take into account the lengthy period before the finalisation of the matter and suspend a larger portion of the prison term to be imposed.

Accordingly the accused is sentenced as follows:

6 years imprisonment of which 5 years imprisonment is suspended for 5 years on condition the accused does not within that period commit any offence involving the use of

violence on the person of another for which he is sentenced to imprisonment without the option of a fine.

National Prosecuting Authority, for the State
Mbidzo, Muchadehama & Makoni, accused's legal practitioners