THE STATE
versus
SHEPHERD SHAMBARE
and
EVERSET MATUNGE
and
GEORGE KASEKE
and
STANLEY CHITENDA

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 1 November 2017 & 7 February 2018

Bail Pending Appeal

T Zhuwarara, for the applicant
T Mapfuwa, for the state

CHITAPI J: The applicants apply for bail pending appeal against both conviction and sentence. The applicants were convicted of "murder with constructive intention" as defined in s 47 (1b) of the Criminal Law Codification and Reform Act [*Chapter 9:23*] by MWAYERA J sitting with assessors on 31 May 2017 in the High Court, Harare. The conviction of the appellants followed a trial which commenced in 2012. The learned judge in her judgment decried the delay in the finalisation of the trial which was caused by a variety of reason which included difficulties of finding accused persons each time a date was set as they were on bail and the trial would be postponed *sine die* now and then. The judge for her part was not readily available as she had been reassigned from the criminal division to another division of the court. I have deliberately alluded to the question of the delayed finalisation of the trial in order to keep in mind that during the 5

years that the trial would slowly grind to its finalisation, the applicants were out of custody and none of them absconded the court's jurisdiction.

The brief facts of the matter were that the applicants including another who passed on during the course of the trial unlawfully assaulted the deceased, Aleck Bongo Loore and arrested him on allegations of having committed a robbery at Impala Downs Farm. The applicants were one or more or all of them employees at the said farm. The accused were investigating the robbery and seeking to arrest the perpetrators as well as recovering proceeds of the robbery. The accused persons held the deceased captive from the night of 23 March 2009 and surrendered the deceased to the police on the following day around 10.00 am.

The learned judge in a 12 paged typed judgment believed stated witnesses whose evidence corroborated each other that the deceased was subjected to a protracted and vicious assault by all the applicants using their booted feet, baton sticks and switches. The applicants wore safety shoes and assaulted the deceased indiscriminately all over the body. Applicant number 4 Stanley Chitenda was a member of the police special constabulary and he admitted to having assaulted the deceased under the feet. The learned judge accepted the further evidence of state witnesses that the applicants, all other of them trampled on the deceased as he lay on the ground injured. The learned judge acknowledged slight variations in the description of the nature of the assaults perpetrated by the applicants. The variations pertained to matters of detail which were immaterial. The assault perpetrated on the deceased was serious. He was taken to the police station by the applicants in a vehicle and from there to the hospital. The deceased could hardly stand or walk on his own. The deceased's body was swollen including his face and he could hardly open his eyes. He could not talk. The deceased fell down on the floor in the charge office as he could not support himself. There was a suggestion that the deceased hit against the pillar at the charge office. Whether or not he in fact did so before falling to the floor would be immaterial because the deceased's inability to walk or stand on his own was on account of his condition which was not self-induced but a result of the assault perpetrated upon him by the applicants.

The deceased was pronounced dead on arrival at the hospital. The evidence of the doctor corroborated the state witness evidence that force had been applied to the body of the deceased. The learned judge detailed the injuries found by the doctor upon the examination of the remains of the deceased. The injuries were observed *inter alia* on the neck. The neck was fractured. The

doctor's evidence as the learned judge observed was not controverted. The learned judge dismissed the applicants' contentions that in the absence of an internal examination having been conducted, the doctor's evidence could not be given evidential value. Indeed where an assault results in a broken neck and the victim dies, what other conclusion can be reached other than that the assault resulted in the death of the victim. There was no misdirection on the part of the learned judge in accepting the doctor's evidence as to what injuries the doctor observed and the doctor's conclusion as to the cause of the deceased's death.

The learned magistrate convicted the applicants on the basis of their having acted in common purpose. The learned judge was not misdirected in articulating and applying the doctrine of common purpose and in convicting the applicants on the said basis. The applicants admitted engaging in the assault upon the deceased but minimized their degrees of participation and involvement. The doctrine of common purpose seeks to deal with this very legal problem. It admits that in gang actions, each member cannot act in the same manner as the other one. The degrees of participation in the absence of dissociation are not material. The learned judge correctly applied the doctrine of common purpose to the facts of the matter.

I have considered the applicants' grounds of appeal. The applicants seek to argue that they were acting under the influence of marijuana which affected their mental composure to such extent as to vitiate their ability to form an intention to commit the crime. This issue was not advanced as a substantive defence by the accused. The proof of voluntary intoxication is a burden imposed upon an accused who advances such defence as clearly set out in s 222 of the Criminal Law (Codification & Reform) Act. The applicants failed to discharge the onus to prove voluntary intoxication leading to an inability to form the requisite intention for the commission of the offence. The learned judge made a finding that the applicants only sought to minimize their degrees of participation. This is inconsistent with the conduct of a person who cannot explain his conduct because of intoxication. This ground of appeal is ingenious but a red herring or spanner thrown in the works to confuse the clear factual scenario surrounding the commission of the offence by the applicants.

The applicants also argue that the trial court wrongly applied the doctrine of common purpose on the basis of "*dolus eventualis*" which is not part of our law. Apart from the submission being hair splitting, the ground of appeal lacks merit in as much as the applicant's aver that the

court *a quo* treated foresight as an inevitable yardstick of common purpose. The applicants further aver that the trial court failed to enquire at what point the applicants foresaw the possibility of the deceased dying and made a conscious decision to continue in the harmful activity. The applicants clearly did not acquaint themselves with the provisions of ss 196 A - 200 of the Criminal Law (Codification & Reform) Act when formulating this ground of appeal

The provisions of the said sections read together are clear that the doctrine of common purpose is very much part of our law and was correctly applied by the trial judge who was aided by decided cases in the superior court as quoted in her judgment.

The ground of appeal respecting an attack on the findings as to the cause of death has been dealt with. It lacks merit. The applicants viciously assaulted the deceased and the chain of causation was clearly established.

As against sentence, the applicants aver that given the trial courts verdict of murder predicated on constructive intent, the sentence of incarceration was not called for or if it was, then it was too long. A reading of the reasons for sentence does not reveal any misdirection by the judge in assessing sentence. In the absence of a misdirection of a material nature, the appeal court will not interfere with the sentence since it is a settled principle of law that sentencing is pre-eminently a matter for the discretion of the trial court see *S* v *Maglas* 2001 (1) SACR 469 (SCA); *S* v *Pillay* 1977 (4) SA 531 (A); *S* v *Gono* 2000 (2) ZLR 63 (SC).

In my judgment there are no prospects of prospects of success against conviction or sentence in this case. The applicants in terms of the provisions of s 115 (c) [2] (b) of the Criminal Procedure & Evidence Act [*Chapter 7:*06] bear the onus to prove on a balance of probabilities that the interests of justice will be served by their admission to bail following their conviction. The applicants perpetrated a vicious and prolonged assault upon the deceased whom they held hostage for more than 10 hours. Despite the deceased having suffered serious injury and helplessly lying on the ground, with the body and face swollen and unable to talk, the applicants did nothing to assist him. They were intent on causing harm to the deceased. They used weapons and their booted feet. The injuries suffered by the deceased were serious and led to the deceased's death. The trial judge justifiably found that the deceased had been subjected to torture and inhuman treatment. The applicants perpetrated a gang assault. The trial judge described the applicants as having engaged in "a rampage" in a merciless manner. The trial judge treated the court's finding of murder with

constructive intention as a mitigatory circumstance amongst other factors. She took into account the mitigating factors advanced on behalf of the applicants and balanced them against the aggravatory circumstances and exercised her discretion to pass what she considered an appropriate sentence taking into further account the delay of 8 years since the commission of the offence to the date of sentence.

In all the circumstances I am not persuaded that the applicants have discharged the onus to prove on a balance of probabilities that the interests of justice will be served by their release on bail. Their prospects of success on appeal are virtually nil and in the result, I determine the applicant as follows:

That the application for bail pending appeal be and is hereby dismissed.

Coghlan Welsh & Guest, applicants' legal practitioners
National Prosecuting Authority, state's legal practitioners