

THE STATE

versus

TORESAI GAMBIZA

HIGH COURT OF ZIMBABWE
MAWADZE J
MASVINGO, 10, 13, 16, 23 March & 3 & 6 April, 2017

Assessors

1. Mr J. Mushuku
2. Mr E.J. Gweru

Criminal Trial

Mr T. Chikwati, for the State

Mr Mafa, for the accused

MAWADZE J: The accused is facing the charge of murder as defined in s 47(1) of the Criminal Law (Codification and Reform) Act, [*Cap 9:23*].

The accused was jointly charged with Personally Ngundu who is currently at large. The State successfully applied for separation of trial.

The charge is that the accused or one or both unlawfully caused the death of Lessie Temai, a female adult by striking her with a switch and kicking her on 21 March 2015 in Madziya Village, Chief Murove, Mwenezi in Masvingo.

The accused is 45 years old and his alleged accomplice Personally Ngundu is 27 years old. The accused resides in Munongwani Village, Chief Mawarire, Mwenezi, Masvingo. His alleged accomplice resides in Madziya Village, Chief Murove, Mwenezi, Masvingo the same village the now deceased resided.

The now deceased was a 52 year old widow and is described as a person who was of ill health and well known for patronising beer drinks.

On 21 March 2015 there was a beer drink at Ngundu's homestead, the parents of the alleged accomplice Personally Ngundu in Madziya Village, Chief Murove, Mwenezi, Masvingo. There were a number of patrons partaking in the traditional brew which included the now deceased, Mukowa Moyo, Personally Ngundu and the accused. Esnath Ngundu the mother of the alleged accomplice was selling the beer at her homestead.

It would appear from the evidence that the traditional brew was very intoxicating as many people who were present seemed to have been very drunk from the evidence placed before us. A number of brawls also arose which culminated in the now deceased's demise.

At about 1600 hours the now deceased and one Mukowa Moyo (Moyo) were involved in an altercation which degenerated in a fight. The source of dispute is said to have been a mini skirt the now deceased was wearing which provoked the ire of Moyo. The now deceased did not take kindly to being rebuked for her attire.

The State alleges that Personally Ngundu who is at large stopped the fight by in turn assaulting both Moyo and the now deceased with a switch. The now deceased is said to have turned her wrath towards Personally Ngundu by shouting at him. It is alleged that Personally Ngundu responded by kicking the now deceased causing her to fall only to be helped to her feet by Esnath Ngundu who assisted her to sit down.

The State alleges that the accused for no apparent reason took a switch a struck the now deceased on the head again causing her to fall down. It is alleged that Esnath Ngundu assisted the now deceased to get up and took her into one of Esnath Ngundu's huts. The now deceased unfortunately passed on at around 1800 hours.

The accused flatly denied assaulting the now deceased in any manner. Instead the accused lays the blame squarely on his alleged accomplice Personally Ngundu who is at large

whom he said heavily assaulted the now deceased on the head with a switch. According to the accused the old adage that the guilty are afraid explains why Personally Ngundu is at large. The accused said Personally Ngundu's mother one Esnath Ngundu a State witness is simply living by the saying that blood is thicker than water by protecting her son Personally Ngundu and falsely incriminating the accused. The accused who denied that he was heavily intoxicated said in his evidence that the now deceased and one Moyo who was also initially arrested in connection with this matter, are the persons who first quarrelled and then engaged in a fight. According to the accused Moyo was heavily drunk and he was unable to meaningfully fight back as the now deceased overpowered him. The accused's version is that this fight was not stopped by anybody but the protagonists stopped on their own.

The accused said Personally Ngundu then took a switch and assaulted Moyo whom he took out of the yard. Upon his return the accused said Personally Ngundu proceeded to assault the now deceased on the head with a switch and several times all over the body. The accused said Personally Ngundu then proceeded to kick the deceased with safety shoes on the chest causing her to fall headlong. Accused said the now deceased exclaimed that Personally Ngundu has killed her.

The accused's evidence is that at that point Personally Ngundu threw away the switch and ran away. The accused said he picked the switch and secured it on top of a garage well knowing it was an exhibit.

The accused said Personally Ngundu's mother Esnath Ngundu took the now deceased into one of her huts but came out to advise those people present that the now deceased's condition was deteriorating. The accused said some water was poured on the now deceased to no avail as she passed on and most of the patrons vanished from the scene.

The accused said he proceeded to the nearby Sengejira business centre where he unfortunately met Personally Ngundu who attacked the accused. The accused said his crime was telling people at Sengejira business centre what Personally Ngundu had done, that is killing the now deceased. The accused said he was severely assaulted by Personally Ngundu with one of the bigger switches in court produced as Exhibit 2(b) and was also hit on the head with a stone resulting in him bleeding profusely. The accused said no one came to his rescue as all the local people know Personally Ngundu as a person of a violent disposition who does not even hesitate to use weapon like knives.

The accused said Personally Ngundu then fled from the scene and accused went to Esnath Ngundu's homestead to wait for the police whom he heard had been called to attend the deceased's death. The accused said he also hoped to report to the police the assault perpetrated on him by Personally Ngundu. However, when the police arrived the accused said the tables were turned as he was implicated in the murder of the now deceased. He said his report of assault was virtually ignored by the police despite the visible injuries he had. The police did not even bother to have him medically examined timeously even after the Magistrate had made such an order. Instead the accused said the investigating officer frantically tried to prevail upon the accused to coerce him to admit to having a hand in the now deceased's death.

The accused said he did not flee from the scene as his hands were clean and that he even tried to render first aid to the now deceased not because he had assaulted her but out of his good heart. He denied that any compensation was demanded from him by the now deceased's relatives.

It is accused's contention that Esnath Ngundu and Pesani Singateri both State witnesses are simply conniving to falsely implicate him. Accused alleges Esnath Ngundu is trying to lessen her burden for compensation to the now deceased's family by also involving the accused, and that Pesanai Singateri was the now deceased's boyfriend. The accused thus insisted that he never laid his finger on the now deceased and has completely no hand in her demise.

The post mortem report Exhibit 1 compiled by Dr Godfrey Zimbwa who examined the now deceased's body on 22nd May 2015 reveals the following observations and findings;

- (i) the now deceased had facial and scalp bruises
- (ii) bilateral periorbital haematomas
- (iii) multiple bruises on the upper chest
- (iv) bleeding from the mouth and nostrils

The doctor concluded that the cause of death was head injury arising from blunt trauma.

The observations and findings by the doctor are not being challenged. It is therefore a fact that the now deceased was assaulted fatally.

The State produced two switches Exhibit 2(a) a very thin switch 61 cm long and Exhibit 2(b) a thicker switch 144 cm long. The State alleges that both these switches were used to

assault the now deceased. Our brief comment is that it is unlikely that Exhibit 2(a) the thinner switch could have fatally injured the now deceased.

The State case is premised on the evidence of two eye witnesses Esnath Ngundu and Pesanai Singateri. The evidence of the investigating officer Sgt Timothy Manasa is largely formal and peripheral. We therefore turn to their evidence.

Esnath Ngundu (Esnath)

Esnath is the mother of the alleged accomplice Personally Ngundu. She is well known to the accused who stays in the neighbouring village. The now deceased was her fellow villager. This tragic event occurred at her homestead where there was a beer drink. She is not aware of the current whereabouts of her son Personally Ngundu who has since defaulted court.

Esnath said on the day in question she attended a meeting and only came back home at about 1600 hours. Her daughter was selling the beer in her absence.

In her evidence she said the now deceased and one Moyo quarrelled and ended up in a fight. She said Moyo was the first to hit the now deceased on the chest. The now deceased then stood up and the two were embroiled in a fist fight. She said Moyo was overpowered and felled to the ground. The now deceased then sat on Moyo's stomach.

It is at that point that Esnath said her son Personally Ngundu intervened. She said he, Personally Ngundu, plucked a switch from a Mutobwe tree and proceeded to assault both Moyo and the now deceased ordering them to stop the fight at his homestead. She was not able to count the blows delivered by Personally Ngundu on either Moyo or the now deceased. They were several. The switch got broken. Personally Ngundu got another switch. She did not see where the blows landed. Esnath said armed with a second switch Personally Ngundu ordered both the now deceased and Moyo to leave the beer drink. Apparently Moyo complied but the now deceased protested shouting at Personally Ngundu.

Esnath said Personally Ngundu then turned on to the now deceased and hit her causing her to fall down on her side. She did not see what Personally Ngundu used, whether it was a clenched fist or booted foot. All she did was to pull up the now deceased causing her to stand.

According to Esnath the accused then got involved at that stage. She said the accused came running wielding a switch and hit the now deceased twice on the head. This prompted

Esnath to pull away the now deceased into her hut protecting her as she realised the now deceased had been assaulted by a number of people, that is Moyo, Personally Ngundu and the accused.

Esnath identified Exhibit 2(b) the thicker switch as the switch used by the accused to assault the now deceased and Exhibit 2(a) the thinner switch as the one used by her son Personally Ngundu.

According to Esnath the now deceased, Moyo and the accused well all extremely drunk. She said another State witness Pesanai Singateri was also heavily intoxicated as he was just seated dozing oblivious to all these developments. Her son Personally Ngundu was moderately drunk.

After she took the now deceased into her hut Personally Ngundu then left the scene. She said while she was in the hut with the now deceased she realised the now deceased was having difficulties in breathing. As a result, she tried to wash her face and pour some water on to her. The accused helped her to remove the now deceased's blouse. She realised the condition of the now deceased was worsening and she tried to find a scotch cart to ferry her to a nearby clinic. The now deceased passed on before she could secure one. She advised the village head, the chief and proceeded to ZRP Sarahuru where she only got the next day.

The police attended the scene the next day and arrested accused and Moyo. Her son Personally had fled and was only arrested after some months.

Esnath said the now deceased was generally of ill health as she suffered from TB and was given to drinking heavily. Despite the absence of her son Personally Ngundu she paid to deceased's family a chicken, maize meal and a goat before deceased's burial. The deceased's family demanded 10 herd of cattle from each of the 3, that is Personally Ngundu, Moyo and the accused. She has since paid 7 herd of cattle to the deceased's family on behalf of her son Personally Ngundu.

Under cross examination Esnath disputed her statement to the police that Personally Ngundu kicked the now deceased. She conceded that her son Personally Ngundu is at large as a result of this case. However, she said she cannot tell who delivered the fatal blow among her son, accused and Moyo. Esnath conceded that as Moyo and the now deceased fought they wrestled each other on the ground strangling each other. She told the Court in cross examination

that she paid compensation to the now deceased's family on behalf of her son in line with the African tradition. She insisted that the accused had used the bigger switch Exhibit 2(b) which accused had put on top of the garage and that police later failed to find it. She does not know how and where Exhibit 2(b) was later recovered.

Esnath indicated that she was unaware of the alleged assault perpetrated on the accused by Personally Ngundu at Sengejira business centre.

In our assessment Esnath gave her evidence fairly well and seemed to have a clear recollection of the events of the day in question. She implicates Moyo, her son Personally Ngundu and accused in the assault of the now deceased. She was unable to say who amongst the three assaulted the now deceased more severely. As a result, one may be inclined to say she is a fair and balanced witness.

Pesanai Singateri (Pesanai)

Pesanai was known to the now deceased but refuted the allegation by the State that he was the now deceased's boyfriend. He is 25 years old. He agreed with Esnath that the now deceased was of ill health and given to heavily drinking. In fact, he said the now deceased had wounds all over her legs and hands.

Pesanai was not known to the accused, Moyo and Personally Ngundu prior to this case.

The evidence of Pesanai is that he arrived at this beer drink at about 1400 hrs. His version of events is at cross purpose with that of Esnath on virtually most of the issues or events. We shall highlight the following;

- (i) whereas Esnath said she only arrived at her homestead at about 1600 hours and that her daughter is the one who was selling the beer, Pesanai said upon his arrival at 1400 hours Esnath was present selling the beer and that he never saw the daughter selling the beer
- (ii) Esnath said Pesanai was extremely drunk at the material time to the extent that he was just seated dozing. Pesanai said he was not drunk at all and had taken little beer when all this happened
- (iii) Esnath and Pesanai differ materially in how Moyo and the now deceased fought. Esnath said the two wrestled each other on the ground and that Personally

Ngundu stopped the fight by assaulting both of them as the now deceased sat on Moyo's stomach. Pesanai said Moyo and the now deceased fought by exchanging fists fights and that they stopped on their own. He denied that Personally Ngundu stopped the fight or that the now deceased sat on Moyo's stomach

- (iv) Pesanai said when Personally Ngundu kicked the now deceased on the chest the now deceased fell on her back. On the other hand, Esnath did not see if the now deceased was kicked or hit with a fist by Personally Ngundu but she said the now deceased fell on her side. They both however agree that Esnath is the one who, pulled up the now deceased
- (v) Both Esnath and Pesanai agree that the accused assaulted the now deceased with a switch on the head but this is the only aspect of their evidence on which they agree. They differ on the position the now deceased was when he was assaulted by the accused. Esnath said the now deceased was seated but Pesanai said the now deceased was walking being held by Esnath. They differ on the exact switch used by the accused. Esnath said it is the bigger and thicker switch Exhibit 2(b) but Pesanai said it is the seemingly harmless very thin Exhibit 2(a). Esnath said accused delivered two blows to the head but Pesanai said they were three blows
- (vi) Pesanai's evidence is that the thicker and bigger switch Exhibit 2(b) was recovered by the police from the top of the garage on Esnath's indications. Esnath disputes this and said she led to the recovery of the thinner switch Exhibit 2(a) and is not aware how Exhibit 2(b) was recovered.
- (vii) Whereas Esnath said she was not sure as to who inflicted the fatal blow on the now deceased Pesanai was emphatic and clear that the accused's assault was not fatal in view of the type of the switch the accused used
- (viii) Esnath said Personally Ngundu used a switch to first assault the now deceased before possibly kicking her or using a fist. Pesanai said Personally Ngundu never used a switch but simply kicked the now deceased on the chest with safety shoes.

The evidence of the investigating officer Sgt. Timothy Manasa which is material is that he recovered Exhibit 2(a) the thinner switch at the instance of Esnath and Exhibit 2(b) the

thicker switch some 300 m away from the scene at the instance of the accused. This would seem to corroborate Esnath's evidence

It is clear to us that the State's case is plagued with material contradictions which remained uncured by the evidence led by the State. The two key State witnesses Esnath and Pesanai remained poles apart on the material issues. The question which arises is which version should the Court believe in those circumstances? Was Pesanai heavily intoxicated to the extent that he was dozing or not? Most importantly which switch did accused use to assault the now deceased? Was it Exhibit 2(a) the thinner and harmless one or the thicker Exhibit 2(b)? When Personally assaulted the now deceased did she fall on her side or on her back? These material contradictions in the State's case remain unresolved. Further, given these contradictions it is even difficult to invoke the doctrine of common purpose.

What even compounds the State's case is that the doctor was not called to testify. This is a case she cried out for the *viva voce* evidence of the doctor. The doctor would have shed more light on the now deceased's alleged ill health vis-à-vis her demise. Besides that, and most importantly the doctor would have assisted the Court on the nature of the head injury the now deceased suffered which is given as the proximate cause of the now deceased's death. It is the doctor who would possibly explain and clarify if such an injury could have been caused by a switch or from a fall on the head. The doctor would assist in shedding light as to whether Exhibit 2(a) or Exhibit 2(b) the switches could have caused fatal injuries or just one of the switches.

In our view the State has dismally failed to prove the case of murder against the accused, either with actual or constructive intent. The contradictory evidence led by the State cannot even possibly sustain the conviction of the accused on a permissible verdict of culpable homicide.

Despite the accused's spirited defence we are satisfied that the accused indeed assaulted the now deceased. It is the nature of that assault and its consequences which is unclear. The accused benefits from that doubt or lack of clarity. We are therefore inclined to return a verdict on a permissible verdict of assault.

VERDICT

Not guilty of murder as defined in s 47(1) of the Criminal Law (Codification and Reform) Act, [*Cap 9:23*], but guilty of assault as defined in s 89(1)(a) of the same Act [*Cap 9:23*].

SENTENCE

(Reasons given *ex tempore*)

Accused to pay a fine of \$150.00 fine or in default of payment 30 days imprisonment.

National Prosecuting Authority, counsel for the State

Mutendi, Mudisi & Shumba, pro deo counsel for the accused.