

THE STATE

versus

JEREMIAH MATSVAIRE

HIGH COURT OF ZIMBABWE

MAWADZE J,

MASVINGO, 21 SEPTEMBER, 2017, 28 FEBRUARY, 8 AND 23 MARCH, 2018

Assessors

1. Mr Mushuku
2. Mr Dauramanzi

Criminal – Trial

Mr B.E. Mathose for the state

B. Muzenda for the accused (assisted by)

W. Mehlo

MAWADZE J: The delay in finalising this trial was occasioned by the absence of the doctor who performed the post mortem on the remains of the now deceased. The said doctor had relocated to Namibia and it took time to put logistical arrangements to enable him to travel to Zimbabwe to testify. As will fully more appear in this judgment the doctor's evidence is very critical in this case.

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

The charge is that on 10 November 2015 in Chinyerere Village, Chief Nyakunhuwa, Zaka, Masvingo the accused caused the death of Tinago Chitapa by knocking his head on to some bare rock and assaulting him on both cheeks with open hands.

The accused who was 26 years old at the material time regarded the 78-year-old now deceased as a nephew. They both resided in the same village.

The accused believed that the now deceased was practising witchcraft and causing bad luck on the accused. He alleged that he had seen the now deceased the previous night on 9 November 2015 sprinkling some water calling out the names of the accused's family while at the homestead of the accused's grandmother. This prompted the accused on 10 November 2015 to approach the now deceased at about 1900 hrs to discuss the accused's suspicions. The accused misled the now deceased that he was wanted by their grandmother and took him away. Their grandmother was not at her homestead. Instead the accused took the now deceased to a bare rock near one Philemon Tamurepi's homestead. The accused demanded that the now deceased confesses to practising witchcraft but the now deceased professed ignorance. This apparently incensed the accused.

The state alleges that the accused proceeded to bash the now deceased's head against a bare rock and slapping him twice on the cheeks. The state case is that the now deceased was, as a result of this assault, seriously injured.

Philemon Tamirepi heard the commotion near his homestead and rushed to the scene. It is alleged the now deceased informed him about the assault and that the accused warned Philemon Tamirepi not to involve himself in the dispute. The accused and the now deceased then left the scene going to their respective homes.

The state alleges that the now deceased advised his wife Sophia Shiri about the alleged assault that night as he complained of a headache. The now deceased advised the village head about the alleged assault the next day. It is the State case that three days later on 13 November 2015 the now deceased's condition deteriorated and he was ferried to Musiso Mission hospital in Zaka after which he was transferred to Masvingo Provincial hospital and then to Parirenyatwa hospital in Harare where he passed on on 17 November 2015. A post mortem was performed at Ndanga hospital in Zaka where the cause of death was said to be a result of head injury.

The accused in his defence outline while not disputing the sequence of events of the night of 10 November 2015 denied assaulting the now deceased in the manner alleged and causing his death. The accused said as he confronted the now deceased about the witchcraft allegations as they were near Philemon's Tamirepi's homestead the now deceased became aggressive and assaulted the accused with the now deceased's walking stick. The accused said he in turn acted in self-defence and hit back at the now deceased by slapping him on the cheeks with both hands. He denied bashing the now deceased's head against any rock. The accused said assault he perpetrated on the now deceased with open hands could not have possibly caused the now deceased's demise. In fact, the accused said the now deceased was not injured as a result of the assault hence was able to perform his daily chores the next day fetching firewood and attending funeral in the village. He said the now deceased was also able to walk to make a report to the village head. The accused contends that the post mortem report is misleading as the findings therein were made at the behest of the now deceased's relatives who were hell bent on fixing the accused for the altercation he had had with the now deceased.

The evidence of Sgt. Paul Chimbaka and Sgt Anyway Mutamba was admitted in terms of s 314 of the Criminal Procedure and Evidence Act [*Cap 9:07*]. Sgt Anyway Mutamba is the one who recorded accused's confirmed warned and cautioned statement. Sgt Paul Chimbaka investigated the matter. The gist of his evidence is that he took the accused for indications together with Philemon Tamirepi and drew a sketch plan.

Three state witnesses Philemon Tamirepi, Sophia Shiri and Dr Chaibva gave *viva voce* evidence. The accused testified and did not call witnesses. A total of 3 Exhibits being Exhibit 1 the post mortem report; Exhibit 2 accused's confirmed warned and cautioned statement and Exhibit 3 Form 221 (Request for the post mortem report) were produced by consent.

In our view nothing turns on Form 231 tendered as Exhibit 3.

The accused's confirmed warned and cautioned statement Exhibit 2 is almost the same as accused's defence outline save for the concession that a day after this incident now on 11 November 2015 accused said the now deceased was not feeling well contrary to the averments in his defence outline.

The post mortem report Exhibit 'I' compiled by Dr Chaibva on 22 November 2015 indicates that no external injuries were observed. The cause of death is indicated as head injury.

The issue which this court is seized with relates to the manner the accused allegedly assaulted the now deceased and whether that assault was the proximate cause of the now deceased. What compounds the problem in this matter is that there is no eye witness to the alleged assault.

We turn to the *viva voce* evidence led;

Philemon Tamirepi (Philemon)

Philemon went to where the accused and the now deceased were on the night in question on 10 November 2015 after the assault. He said what attracted him to the scene was the noise being made by both the accused and the now deceased near his homestead. He recognised the voices as those of the accused and the now deceased who were speaking at the top of their voices. The accused was demanding a confession from the now deceased who in turn was saying he knew nothing about the allegations levelled against him. He then approached the scene inquiring what the problem was. The accused told him it was none of his business.

Philemon said the now deceased was lying down on his back on some rock surface with his walking stick by his side and his cell phone handset on the ground. The accused was standing close by. He said he implored the two to go home and discuss their differences the next day during daylight. Philemon said the now deceased got up picking his mobile cell phone and walking stick remarking that he, Philemon had arrived late as the accused had already assaulted the now deceased. Philemon, did not inquire into the manner of the alleged assault perpetrated on the now deceased and the accused did not respond save to say it was none of Philemon's business. The accused and the now deceased then went their separate ways.

Philemon said thereafter he only saw the now deceased three days later and by then the now deceased was seriously sick and unable to talk or eat. The now deceased's son who was away advised them to take him to hospital. He said the accused's father paid for the transport cost to Musiso Mission hospital in Zaka. Philemon said he accompanied the now deceased to Musiso Mission hospital where the now deceased was treated of high blood pressure and diabetes after which he was referred to Masvingo Provincial hospital for a scan to be done in relation to the alleged assault. Philemon played no further part. He said accused's father again paid for the transport of the now deceased to Masvingo.

Philemon said he later learnt the now deceased had passed on and the accused's father again paid for the burial costs including transporting the body for burial at their rural home. Philemon said the body could not be immediately buried as a post mortem had not been done and the now deceased's body was ferried to Masvingo Provincial hospital for that purpose. He however said the post mortem was not done at Masvingo Provincial hospital but at Ndanga District hospital in Zaka. By then the accused had been arrested in connection with the now deceased's death.

Philemon said the now deceased did not disclose to him the manner the accused had allegedly assaulted the now deceased. He did not see any visible injuries on the now deceased who by then was able to talk and walk on his own without any problem.

The accused did not materially challenge Philemon's evidence save to say Philemon was drunk and did not see properly in darkness as accused insisted that the now deceased was not lying on his back but seated at the scene.

In our view Philemon's testimony does not answer the material question of how the accused allegedly assaulted the now deceased. In our assessment it matters not in what position Philemon found the now deceased at the scene. He could have been seated or lying on his back but that would not change the price of rice in China as it were. It was also not clear from Philemon's evidence why the accused's father took it upon himself to pay for the expenses related to the now deceased. Was it because accused's father accepted accused's responsibility in relation to the now deceased's illness? Did he do so at accused's behest? Did he do so as a good Samaritan and or relative? The accused's father did not testify as he was not called hence these questions remained unanswered. It is also not clear from Philemon's evidence as at what point the accused was arrested. At the end of the day Philemon's testimony does not answer the material question.

Sophia Shiri (Sophia)

Sophia is the now deceased's wife. She said when she protested that the now deceased could not go with the accused to their grandmother's homestead on the day in question as it was late at night the accused who did not appear angry at all promised to accompany the now deceased back home later that night. She however said the now deceased returned home alone at about 2100 hours.

According to Sophia the now deceased suffered from painful legs hence he used a walking stick.

Upon his return home Sophia said the now deceased reported to her that the accused had assaulted him by hitting the now deceased's head against some rock. This ordinarily would be hearsay evidence and the state did not allege that it fits within the category of a dying declaration. This puts the court in quandary in that it cannot accept this as a fact proved on how the accused allegedly assaulted the now deceased.

Sophia said they retired to bed and she realised the now deceased was in pain crying saying accused had bashed his head against some rock for allegedly sprinkling some holy water to cast some evil spell on the accused's family at their grandmother's homestead.

Sophia testified that the next day the now deceased's head was swollen at the back, and forehead. His eyes were blood shot hence he went to report the alleged assault to the village head.

Sophia was unclear as to when the now deceased's condition deteriorated to the point where he collapsed and could no longer eat or talk. She confirmed that accused's father paid for the now deceased's transport to Musiso Mission hospital. She further confirmed that at Musiso Mission hospital the now deceased was treated for diabetes and that he was referred to Masvingo Provincial hospital for a scan to be done on his head. From Masvingo, Sophia said the now deceased was transferred to Parirenyatwa hospital in Harare where he later passed on. Again Sophia said accused's relatives paid for all the required transport and burial costs inclusive of three buckets of maize consumed at the now deceased's funeral. She too did not explain what informed this gesture from accused's relatives and at what point the accused was arrested.

When Sophia was probed in cross examination she said the now deceased's diabetic condition was only diagnosed at Musiso Mission hospital in Zaka. This would seem to suggest that the now deceased may well not have been aware of the fact that he was diabetic. Sophia further said the now deceased was allegedly assaulted on Tuesday night and that he was only ferried to Musiso Mission hospital on Friday.

In our view Sophia's evidence does not answer the question on how the now deceased was assaulted by the accused.

Dr Tafara Chaibva (Dr Chaibva)

In our assessment Dr Chaibva is the most critical witness in this matter.

At the material time Dr Chaibva was based at Ndanga District hospital in Zaka. Currently he is based in Namibia.

Dr Chaibva testified that he examined the remains of the now deceased's body at Ndanga District hospital in Zaka as per Exhibit 3 at the behest of the police on 22 November 2015. He said upon examining the now deceased's body he did not find any external injuries. He concluded that the cause of the now deceased's death was head injury.

The evidence of Dr Chaibva is not only puzzling but further complicates this matter. His professional conduct leaves much to be desired on how he compiled the post mortem report. We say so because he admitted that what he endorsed as the cause of the now deceased's death is solely based on what the police told him about the history of the now deceased's illness. It was not his own professional independent finding. Further he had not observed any injury on the now deceased's head or any fracture on the head. The mind boggles as to why he did not simply say the cause of death was indeterminate from his examination and probably recommended a full post mortem by a pathologist as he had only done an external post mortem. In fact, he conceded that his so called finding was based on the police report to him that the now deceased's head had been bashed against a rock!!

From the evidence of Dr Chaibva this matter is further complicated by the fact that the police were not even candid with him in disclosing the medical history of the now deceased and the sequence of events. It turns out that the police in a bid to have a post mortem done by him at Ndanga hospital lied to him that the now deceased had died at home when in fact he had died at Parirenyatwa hospital in Harare. It is unclear why the post mortem was not done at Parirenyatwa hospital where the now deceased died and how his body was released without such a post mortem having been done. In fact, Dr Chaibva was unaware that the now deceased had been first taken to Musiso Mission hospital, then to Masvingo Provincial hospital. It was not even disclosed to him that he was requested to perform a post mortem four days after the now deceased's death. He was never advised that the now deceased also suffered from high blood pressure and diabetes. He was not aware that doctors at Masvingo General hospital had

refused to carry out a post mortem report insisting that it should be done at the hospital where the now deceased died at Parirenyatwa. In fact, the now deceased had never been admitted at Ndanga District hospital in Zaka where the post mortem was subsequently done but had been attended to at Musiso Mission hospital in Zaka, Masvingo Provincial hospital and Parirenyatwa hospital in Harare.

While Dr Chaibva's conduct cannot be said to be beyond reproach, the police conduct in this matter deserve censure. Why did the police lie to Dr Chaibva that the now deceased had died at home and failed to disclose to him, the sequence of events? Clearly the investigations in this matter were not only poorly done but done in an unprofessional and dishonesty manner. The motive is difficult to understand. This is a case which called out for a proper full post mortem to ascertain the proximate cause of the now deceased's death or at least to have a post mortem done at Parirenyatwa hospital where the now deceased died. The conduct of Dr Chaibva further adds to this jigsaw puzzle.

The cause of the now deceased's death is not an issue this court can speculate on. It is an objective fact which should be proved from the facts before the court. The fact that the accused lied to the now deceased in a bid to lure the now deceased from his home at night would not prove the now deceased's death. The same goes for the accused's belief that the now deceased practised witchcraft and that this angered the accused.

The accused admitted that he assaulted the now deceased. It is the manner of the assault which is in issue and whether it led to the now deceased's death. There was no eye witness to the assault. The manner of the assault cannot be derived from circumstantial evidence available.

What exercised the mind of this court is whether there is a causal link between the admitted assault perpetrated on the now deceased by the accused. The question of causation is discussed by the learned author Jonathan Burchell in his book Principles of Criminal Law 5th Edition 2016 at page 52 and 95. The learned author deals with the need for a causal link between the act alleged or omission and the ultimate unlawful consequence. These are both factual and legal issues. Put differently the act or omission complained of against an accused person should create a causal link or connection to the now deceased's death. There must not be an intervening act or event which serves to break the chain of causation.

In this matter we are unable to say with certainty what caused the now deceased's death. In fact, it has not been proved that the now deceased had his head bashed against a rock on 10

November 2015 and that he sustained injuries leading to his death seven days later on 17 November 2015 at Parirenyatwa hospital. Was there any intervening act or event from 10 November 2015 to 17 November 2017, *a novus actus* (or *nova causa*) *interveniens*? Further it has been shown that the now deceased suffered from other ailments like diabetes and high blood pressure.

At the end of the day this court is left in doubt on how the accused assaulted the now deceased. He might as well have bashed his head against the rock but has this been proved beyond reasonable doubt? Clearly not. The injuries inflicted on the now deceased remain unknown if not unclear. It is therefore trite that in any criminal trial the doubt which exists should be resolved in favour of the accused person. It is unsafe in the circumstances to find the accused in this case guilty of the offence of murder as defined in s 47(1) of the Criminal Law (Codification and Reform) Act [*Cap 9:23*] or even the permissible of contravening section 49 of the same Act relating to culpable homicide if all what is proved is that the accused slapped the now deceased twice on his cheeks with open hands and the cause of the now deceased's death is unclear.

In the circumstances the accused can only be found guilty of contravening section 89(1) of the Criminal Law (Codification and Reform) Act [*Cap 9:23*] which relates to the permissible verdict of assault.

VERDICT – Guilty of assault as defined in s 89 of the Criminal Law (Codification and Reform Act [*Cap 9:23*]).

SENTENCE – The accused is sentenced to \$300.00 fine or in default 30 days imprisonment.

National Prosecuting Authority, counsel for the state

Hove & Partners, counsel for the accused