

THE STATE

Versus

HERBERT KANYINJI

And

BORNWELL MAHACHI

And

AMIGO SHUMBA

And

NORGE RAPAYI

And

MBEKEZELI BHEBHE

IN THE HIGH COURT OF ZIMBABWE

KABASA J with Assessors Mr E. Mashingaidze and Mr M. Ndlovu
BULAWAYO 18 OCTOBER 2022 AND 9 JULY 2024

Criminal trial

K. M. Goveya, for the state
R. Ndlovu, for the accused

KABASA J: - The 5 accused appeared before us on a charge of murder as defined in section 47(1) of the Criminal Law (Codification and Reform) Act, Chapter 9:23. They pleaded not guilty.

The state's case is that on 30 March 2021 the 5 were part of a seven member team of police officers tasked with tracking down and arresting the now deceased who was a suspect in a spate of robberies around Bulawayo and Esigodini area. Armed with AK 47 rifles they went to the now deceased's home where they barged into his bedroom, apprehended him and proceed to assault him indiscriminately. They then drove away with him and at around 2330 hours took him to United Bulawayo Hospitals where he was declared dead on arrival.

In denying the charge all 5 did not deny being part of the team that went out to arrest the now deceased on suspicion of involvement in several cases of robbery. They arrived at the

now deceased's home and on entering the room where he was sleeping they sought to confirm his identity. He gave the name Alfred. They then turned their attention to a woman who was in that room to verify the now deceased's identity. The now deceased then sprung and tried to disarm the 3rd accused of his firearm resulting in a scuffle. The now deceased resisted arrest and a struggle ensued until he was eventually subdued and had his hands tied. He still attempted to break free and managed to escape but was apprehended. He was driven to Claremont on a recovery mission as it was believed a firearm was hidden there. On the way the now deceased had a seizure and as his condition deteriorated he was driven to the hospital where he was eventually pronounced dead.

In an endeavor to prove its case the state produced the following documents:-

- a) Post mortem report
- b) Ballistic report and an
- c) Affidavit from a Doctor Mhlanga who pronounced the deceased dead on the night of 30/3/2021.

The following witnesses' statements as they appeared in the state summary were admitted into evidence in terms of section 314 of the Criminal Procedure and Evidence Act, Chapter 9:07:-

Doctor Gregori

Silweleni Ndlovu

The state subsequently led evidence from six state witnesses. The first witness was Rejoice Nyathi. She is the woman who was with the now deceased in the bedroom when the accused barged in. She is the now deceased's wife. In short her evidence was that there was a knock at the door before the door was pushed open. The people asked the now deceased to identify himself. He did and they started stomping on his head. It was a dark night and although a torch was used to illuminate the room she was not able to identify these intruders. They did not identify themselves. She dashed out of the room as she could not watch her husband being assaulted. She returned later and saw evidence of drag marks within the yard. She later learnt of the deceased's death.

Before she left however she had observed that 2 men came into the bedroom whilst 3 were standing at the entrance.

We were alive to the fact that this witness lost her husband and may therefore be resentful towards the people she believes are behind her husband's death. However she did not exhibit such resentment nor did she appear to be bent on embellishing her evidence.

She candidly admitted that she was not able to identify the people who barged into their bedroom. We fail to appreciate why she would say they did not identify themselves if indeed they did.

We got the impression that she limited herself to what she witnessed and nothing else. The gun which was discharged and was not disputed was after she had left and so she could not say under what circumstances that occurred.

Attempts to discredit her were a futile exercise. Her evidence as regards the assault on the deceased was corroborated by the second witness, the deceased's mother.

Her evidence was to the effect that 5 men arrived at her homestead around 10 p.m. and barged into her son, the now deceased's bedroom. She went out together with her husband. One of these men had a torch. They were ordered to go back into their room which they did. However upon hearing sounds of assault she sneaked out and went behind a fowl run. She could hear the now deceased asking for forgiveness and pleading ignorance of whatever he was being asked which she could not hear. These men did not identify themselves and she thought they were robbers. At some stage a gun went off and she later saw a hole it created on the floor of that bedroom. The now deceased was then dragged out and ordered to stand up but he could not. One of the men kept asking the others to stop assaulting the now deceased. A motor vehicle later arrived and they carried him into the vehicle. She gave them a T-shirt and jacket and a copy of his birth certificate and only learnt that they were police officers when they told her to follow to Central Police.

That however never happened as she later learnt of the deceased's death the following morning. She had an opportunity to see his body and noticed that his head was swollen, he had bled from the mouth and nose and the T-shirt she had handed over was now torn. He was now wearing a khaki trousers whose source she did not know.

Apart from seemingly suggesting that the deceased's wife was still present at the time the deceased was dragged outside his bedroom, her evidence as regards the assault on the deceased was corroborative of the first witness.

Had these men identified themselves we fail to appreciate why this witness would say they did not.

She, like the first witness, was unable to identify the 5 men.

We failed to find anything to criticize about this witness which touched on the issue of her credibility. Her account may not have been in the exact terms as the first witness's but sight must not be lost of the fact that she was there throughout after the first witness had left.

What was clear however was that the now deceased was alive at the time he was taken away.

The third witness was the deceased's step-father. His evidence as regards the assault was the same as the other witnesses save for the fact that once he was ordered to go back to his room he complied and only came out after the men had driven off.

He too confined himself to what he heard and saw, limited as it was, as he retreated to his room on being ordered to do so.

He too heard the gun shot but was unable to say why it was discharged as he was not inside the deceased's bedroom.

Like the 2 witnesses before him we found him to be a witness who merely related what he remembered of the events of that night and did not seek to embellish the evidence.

The next 2 witnesses were the nurses who were asked to attend to the deceased at UBH. Their collective evidence was briefly that accused 1 insisted that they come to the vehicle when they asked him to bring the deceased into casualty. On getting to the vehicle they observed that the deceased was no longer breathing and a doctor subsequently confirmed that he had died. His name was given by accused 1 as Nkululeko Banda and the doctor who certified him dead stated as much in his affidavit. The report was that he had suffered from a seizure along the way was given by accused 1. They also noticed that he was bleeding from the mouth and nose. He had bruises on his body which they described as superficial.

Whilst it was suggested that they delayed in attending to the deceased their evidence was clear that they attended to him as quickly as could be expected in the circumstances as it was a busy night.

The sixth witness was called in an effort to explain the post mortem contents but he could not due to his junior status to the pathologist who conducted the post mortem.

The post mortem conducted by Dr. Juana Rodriguez Gregori gave the cause of death as asphyxia, occlusion of airway due to neck constriction. Interrogatories were sent to the pathologist in terms of section 278(12) of the Criminal Procedure and Evidence Act seeking clarification on the contents of the post mortem. After a very long delay which saw the matter taking all of 2 years to finally be concluded Doctor Gregori's Spanish response to the interrogatories was translated into English. The long and short of what was given as the cause of death was:-

“We propose as the cause of death asphyxia due to occlusion of the airways, as we did not find external injuries characteristic of manual or noose strangulation, hanging, submersion or the presence of food remains as in bronchoaspiration. We propose the occlusion of the airways due to the contrition of the neck in its front part, due to the negropsycho findings in the larynx, tongue and stomach, remembering what the literature suggests about mechanical asphyxia that occurs when surrounding the neck with the arm and forearm, called cervical dams or trauma at that level, called shock and this pressure acts to occlude the airways, with external injuries to the neck being minimal or absent.”

This translation was criticised by the defence on the basis that the response to the interrogatories was not signed, dated nor was a name endorsed thereon to show who had responded to the interrogatories.

Should the contents be rejected *in toto*? We think not and this is so because the postmortem report itself was produced in terms of section 278(11) of the Criminal Procedure and Evidence Act, Chapter 9:07. The cause of death did not change. It was given as asphyxia and that is still what came out in responses to the interrogatories. To then suggest that such should be expunged from the record does not make sense. With or without the explanations, which we do not think changed the complexion of the postmortem contents, the undisputed fact is that death was due to asphyxia, occlusion of airway due to neck constriction.

What is important is to unravel who caused that occlusion of the airways. Does the witnesses' testimony speak to an assault linked to the cause of death? Has the *mens rea* and

actus reus been proved showing that the accused's actions are the cause of death? This is the question we had to grapple with.

In their defence all 5 accused more or less repeated what they said in their defence outline. They denied assaulting the now deceased and stated that they applied what force was deemed necessary in the circumstances in order to arrest the deceased who was resisting arrest.

We must state that this case was not easy. This is so because there was no witness to the infliction of the manual strangulation which is the cause of the deceased's death. When the deceased left his home he was still alive. The strangulation must have occurred between the point he left his home to wherever he got the trousers he was now wearing which was not from his mother.

In that motor vehicle were police officers who apparently had not been to the deceased's home as none of the witnesses there had seen police officers dressed in the attire described by the nurses who attended to the deceased at UBH.

What was the involvement of these police officers and who are they? Why were they not charged together with the 5 whose involvement appears to explain the bruises on the deceased's body but not the asphyxia?

The investigating officer's evidence was expunged from the record at the state's instance. He may have shed light on who these other police officers were and why they were not charged together with the 5 accused, more so as the 5 accused appeared to question why it was only them selected for prosecution.

In every criminal case, the state bears the onus to prove its case beyond a reasonable doubt.

Granted the 5 accused were undoubtedly being economical with the truth but it is not for them to prove their innocence.

In *R v Difford* 1937 AD 370 WATERMEYER AJA succinctly stated that an accused need not convince the court as to the truthfulness of his story, whatever explanation he gives no matter how improbable, it may be, the court cannot dismiss it unless it has been shown to be not only improbable but beyond doubt false.

The issue was not whether there was evidence that the now deceased had committed the robberies. The issue is also not whether the police went out to arrest the wrong person. The issue is that a crack team had been put in place to account for a suspect believed to be one of those involved in the robberies. The very fact that the police were armed and enlisted the help of members of the special tactical team suggests that they believed they were out to track a dangerous criminal. They may have been mistaken but in going out they believed the information they had was correct.

This is not to suggest that members of the police should consider an arrest as synonymous with killing a suspect.

The circumstances of this case show that a gun was discharged. The only explanation we had was that it was so discharged at the time the now deceased tried to disarm accused 3 and as they wrestled for the firearm it discharged. Evidence showed that it hit the floor and a hole on the floor was testimony of this fact. This appears to support the assertion that the gun discharged during the tussle for it. It could have been due to some other reason but we do not have any evidence to controvert this explanation. This is not an issue where we can surmise and conclude that it must have been deliberately shot into the floor to disorient the now deceased.

The superficial bruises noted on the deceased's body could have occurred at the time there was this wrestle for the firearm. The explanation for the signs of violence on the deceased's body was that:-

“... As a sign of violence, multiple excoriations were observed, which may have been caused by the skin rubbing against some rough surface, pointed or sharp objects.”

Could this not have occurred inside the bedroom at the time the gun was discharged under the circumstances described by the accused? Unfortunately the only witness who could have assisted was deceased' wife but she had left the room. The deceased did not live to tell his side of the story.

We must say the chasing of the deceased's mother and step-father was probably deliberate so as to ensure no eye witness could recount what exactly happened but the court must go by evidence not suppositions.

What is clear though is that the assaults which the witnesses heard being perpetrated on the deceased were not the cause of death.

The deceased's wife said 2 of these men were the ones inside the room whilst 3 were at the entrance. Accused 4 was said to have been the one standing guard at the door where the deceased's step-father was and appears to not have gone into this bedroom. Of the ones at the entrance deceased's mother said one of them was telling the others to stop the assault, suggesting that he was disassociating himself from the assault. Who was this person?

Granted under cross-examination all the accused said they associated themselves with what was happening as they sought to arrest the deceased. Can we therefore conclude that as regards the assault all 5 are guilty based on the doctrine of common purpose?

Section 196 A of the Criminal Law Code provides that:-

“(1) If two or more persons accused of committing a crime in association with each other and the state adduces evidence to show that each of them had the requisite *mens rea* to commit the crime whether by virtue of having the intention to commit it or the knowledge that it would be committed, or the realization of a real risk or possibility that a crime of the kind in question would be committed, then they may be convicted as co-perpetrators, in which event the conduct of the actual perpetrator (even if none of them is identified as the actual perpetrator) shall be deemed also to be the conduct of every co-perpetrator, whether or not the conduct of the co-perpetrator contributed directly in any way to the commission of the crime by the actual perpetrator.”

We have already highlighted that of the 5 people who were said to have been at this home, one was said to have been trying to stop the assault whilst another was at some other door guarding and not at the entrance to the deceased's bedroom. On what basis then do we say all five are guilty of at least assault based on the doctrine of common purpose? We find ourselves unable to return a verdict of assault in the circumstances.

We have already stated that the nature of the assault is not linked to the cause of death. There is no nexus linking the accused's actions to the cause of death.

We were left with more questions than answers as to when and where and who strangled the now deceased.

Counsel for the accused referred to the case of *S v Bhunu* HMT 51-2021 where the court said:-

“The charge that the accused is facing of murder requires the state to prove that the accused unlawfully and intentionally caused the death of the deceased. This presupposes that there should be a causal link between the conduct of the accused and the death of the deceased. Both the *actus reus* and the *mens rea* have to be present for a charge of murder to be sustained.”

Given the foregoing pertaining to the assault which caused the excoriations on the deceased’s body and the lack of causal link to the cause of death which was asphyxia, we are unable to say the evidence before us showed that the 5 accused caused the deceased’s death.

As mentioned earlier, they could have witnessed the perpetrator of the strangulation, did not associate themselves with it but are bent on protecting that individual but we have to be satisfied that the case against them has been proved beyond a reasonable doubt before returning a verdict of guilty to murder as per the state’s submission.

We agonized over this matter and the more we agonized the more it became evident that the accused are entitled to be given the benefit of the doubt.

It is for the reasons that we came to the conclusion that the state failed to prove its case beyond a reasonable doubt entitling the accused to an acquittal.

Consequently the 5 accused are found not guilty and acquitted.

National Prosecuting Authority, state’s legal practitioners
R Ndlovu and Company, accused’s legal practitioners