

THE STATE
versus
TAKAWIRA NDARADZI

HIGH COURT OF ZIMBABWE
MUSAKWA J WITH ASSESSORS
HARARE, 18, 21, 29 February 2013 and 15 September 2014

Criminal Trial

B. Murevanhema, for the State
E. F. Maphosa, for accused

MUSAKWA J: It is axiomatic that one of the hallmarks of a security service is discipline. Unfortunately the present case is a sad reflection of the absence of such discipline by some bad apples in the Police Force.

The accused pleaded not guilty to a charge of contravening s 47 of the Criminal Law (Codification and Reform) Act [*Cap 9:23*] in which it is alleged that on 18 August 2011 and at G and C Farm, Mhangura he unlawfully and with intent to kill or realising a real risk or possibility of death arising murdered Tinashe Chamaringa by assaulting him with a stick all over the body causing injuries from which the deceased died. The indictment is not elegantly drafted as it suggests that the accused acted with someone who is not specified. Of course the evidence led was clear that the accused was in the company of a colleague who subsequently absconded whilst awaiting trial. In addition, the charge should specify which paragraph of s 47 the state seeks to prove.

It is not in dispute that the accused and his colleague, Petros Nyahungwe arrested the deceased on allegations of theft. Prior to taking him away they then assaulted him.

In his defence outline the accused claimed that the deceased was assaulted by his colleague. This is contradictory as the accused also admitted assaulting the deceased five times under the soles. The deceased did not sustain any visible injuries from the assaults. He also denied detaining the deceased overnight. On the following day the deceased fell down whilst they were on their way to Doma Police Station. There is a suggestion that the deceased sustained the fatal injury from the fall.

Lovemore Makiyi a resident of G and C farm testified that after the accused and his colleague had handcuffed the deceased they commenced to assault him using a half metre stick and a knobkerrie. He described one of the weapons as a plank. He stated that the deceased was assaulted indiscriminately as he lay down.

This witness was confused about the dates and times when events took place. He initially stated that the assault lasted for about four hours. However, he gave the time as between 6 a.m. and 8.30 a.m. In another breath he said the assault took place on the following day.

However, what came out from the witness which is not in dispute is that the accused and his colleague put up for the night at the deceased's home. The witness claimed to have been assaulted as well. He also stated that they had gone to Masango's farm where the accused and his colleague arrested a suspect. The witness and the suspect spent the night in handcuffs at the deceased's home. On the following day they returned to Masango's farm where the deceased was implicated by Lovemore Mlambo. That is when the deceased was assaulted. They then returned to the deceased's home before they embarked on the journey to Doma.

It was whilst on the way to Doma that the deceased complained of pain. He subsequently fell down. The witness was told to remain guarding the deceased. When he complained how he could do so whilst handcuffed he was then uncuffed and told to do the same with the deceased.

Although this witness stated that the deceased fell on his back he further stated that there were no stones where this happened. It is clear that this witness's testimony is a bit confused on the sequence of events.

Petros Dickson, a guard at Sterlingvale Farm testified that he was arrested whilst on duty on 17 August 2011. There had been theft at the deceased's place of work. The deceased requested him to assist in investigations. He was surprised when the accused and his colleague approached him at night and demanded the stolen irrigation pipes. He was then assaulted. The deceased who was also in their company was made to sit down. The accused and his colleague then assaulted the deceased under the soles and on the back of the head with a knobkerrie. The knobkerrie belonged to the witness as he used it during guard duties.

The accused's colleague used a stick encased in a green plastic material. The accused used the same stick to hit him under the feet. When they went to the deceased's residence

they were again questioned. The deceased looked unwell. On the following day they set out for the Police Station.

He was adamant that the assaults took place in the evening. He also said that he had been assaulted with the knobkerrie. Whilst the deceased lay down the accused had stepped on his neck with severe force. However, he also said that after the assault the deceased looked well and he did not think he would die.

Shupikai Mapuranga confirmed that she was arrested by the accused and his colleague. She was not informed of the reasons. The accused then hit the deceased on the legs with a knobkerrie as he lay on the ground. The accused's colleague also hit the deceased. This happened when the deceased was handcuffed. She stated that the accused's colleague is the one who had stepped on the deceased. She had noted an abrasion on the left side of the deceased's neck

Shupikai also confirmed putting up at the deceased' home overnight. On the following day they set out for the Police Station. As they walked the deceased fell on his back. The place where he fell down had grass. The deceased had looked like he was in pain judging by his manner of walking.

Assistant Inspector Mutasa of Mhangura Police Station testified that he made observations from indications made by the accused and state witnesses. The place where the deceased was assaulted, that is tobacco barns at G and C farm had gravel and loose stones. He also noted footprints. There was grass where the deceased collapsed. Through the accused's indications he recovered a stick encased with a green pipe. The stick in question was produced as an exhibit. The deceased's head was swollen and the body was bleeding from the mouth. There were bruises on the shoulder.

As part of its case the state produced a post-mortem report compiled by doctor Mambanda. The following injuries were noted-

Swollen left side of head

“Broken neck

Bruising on left side of head and shoulder

Bleeding in mouth”.

The cause of death was given as cervical spine fracture and subdural haemorrhage.

In the absence of the doctor who conducted the autopsy the State called doctor Kufandoga. Apparently he is the one who certified the death of the deceased. His qualifications are Bachelor of Medicine and Bachelor of Surgery (MBCbB). He is a Government Medical Officer and has held that post for eight years. He explained what is involved in certifying a death. In addition he stated that he noted that the deceased had injuries to the head and bruises around the mouth. In respect of the head he noted bruising and swelling in the parietal area.

He further explained that cervical fracture relates to the breaking of vital bones of the neck. Subdural haemorrhage relates to the bleeding of veins covering the brain. This results in pressure inside the skull leading to compression of brain tissue and consequently, death. As to what can cause fracture of the spine, he stated trauma from being struck or the neck being twisted. He also stated that a person with a fracture of the neck may be able to walk on their own. A fall is unlikely to cause such injury unless it is from a height. Regarding the consequences of fracture of the spine he stated that this may damage the spinal cord through which all impulses to vital organs are transmitted. For example C3 to C8 are vital for supplying oxygen to the muscles. He further explained that subdural haemorrhage can only be detected through a scan or by opening up the skull.

The accused testified in his defence. He received his training at Mhangura Police Station. As part of his training he stated that he was taught to administer minimum force under the soles. He only went to school up to grade three. He also confirmed that his colleague arrested Lovemore Makiyi over a debt of US\$19 that was owed to his brother.

When they proceeded to G and C farm they established that the person they sought in respect of the theft of pipes was not a suspect. The deceased was assaulted by his colleague for wasting their time and making a false report. Although he said he cautioned his colleague on the manner in which he assaulted the deceased, he in turn also assaulted the deceased. He assaulted the deceased five times under the soles with a baton. He claimed this was minimum force in keeping with his training.

On the other hand he said his colleague used severe force as he directed blows to the chest and the head. His colleague also struck the deceased with a whip on the neck. Although he said the duration of the assault was short, in reply to a question by defence counsel he stated that it lasted for about an hour. During the assault the state witnesses who testified were present. This was at Petros Dickson's residence. They subsequently put up at the

deceased's residence. The deceased made no complaints and he conversed with Petros Dickson.

The accused testified on their journey to the Police Station on the following day. He further stated that they walked along a gravel road between two fields when the deceased fell on his back. The deceased did not sustain any head wounds. He and his colleague took about an hour to return to the scene when they went to secure transport. It dawned on him that Lovemore Makiyi could have done something during their absence.

Under cross-examination he admitted that Shupikai was his girlfriend. He also failed to explain how Petros' evidence that he struck the deceased with a knobkerrie was challenged. In trying to justify that he played a lesser role he stated that he told his colleague that a suspect should not be assaulted on the upper part of the body. The assault then ended when he told his colleague that it was time to go.

With this evidence the state sought a verdict in terms of s 47 (1) (b) of the Code. In seeking such verdict Mr *Murevanhema* erroneously referred to it as murder with constructive intent. This is an anachronistic term that was discarded by s 15 (4) of the Code. The provision in question states that-

“For the avoidance of doubt it is declared that the test for realisation of a real risk or possibility supersedes the common-law test for constructive or legal intention and its components of foresight of a possibility and recklessness wherever that test was formerly applicable.”

I had occasion to criticise the use of the term constructive intent in *S v Hakutangwi* HH- 269-14. In seeking such verdict Mr *Murevanhema* pointed out that in assaulting the deceased the accused had subjective foresight and must have realised that he might cause death but persisted with the assault despite the attendant risk.

In seeking accused's outright acquittal counsel for the defence submitted that there was no proof that the deceased died at the accused's hands. This is because the accused testified that he restrained his colleague from further assaulting the deceased. It was also submitted that there was a break in the causal chain. This is because the deceased must have sustained the fatal injuries from a fall. Related to this, counsel for the accused further submitted that no full post-mortem examination was conducted in order to establish the cause of death.

Even by his own admission the accused assaulted the deceased. The only issue is to what extent he did so. He naturally would be inclined to minimise his participation in the assault as he has already done by limiting his assaults to five blows under the soles.

The state witnesses who witnessed the assault did not confine the assault by the accused to the five blows. In any event the accused's claim was not put to the witnesses. The witnesses' testimony was generally straightforward save for minor discrepancies in respect of that of Lovemore Makiyi. I have already observed that this witness appeared to be confused about when the assault took place. The accused himself confirmed that they assaulted the deceased in the presence of the state witnesses.

The Police Constabulary is established in terms of s 27 of the Police Act [*Cap 11:10*]. In that vein s 27 (4) thereof provides that-

“A Constabulary member shall, while he is on duty, have the same powers, functions and authority, and be subject to the same responsibilities, discipline and penalties as a Regular Force member and shall be liable in respect of acts done or omitted to be done to the same extent as he would have been liable in the same circumstances if he were a Regular Force member, and shall have the benefit of any indemnity to which a Regular Force member would in the same circumstances be entitled.”

Subsection (5) of the same provision outlines the various obligations in terms of the schedule to the Act which bind a member of the Police Constabulary when he is on or off duty. These are onerous obligations and underscore the seriousness with which the issue of discipline is regarded. One example of misconduct that is provided in the schedule is-

“21. Using unnecessary violence towards, or neglecting or in any way ill-treating any person in custody or other person with whom he may be brought into contact in the execution of his duty.”

The accused was clearly in breach of this provision and could have been charged for such misconduct but for the fatal consequences that ensued. It must also be noted that s 50 (1) (c) of the Constitution of Zimbabwe provides that every arrested person must be treated humanely and with respect to their inherent dignity. The accused impressed as one who is ignorant of when a suspect may be subjected to force. He naively explained that he was taught to use minimum force without putting that in context. As it turned out, he and his colleague assaulted the deceased because he had wasted their time. That is the conduct for which he entertained the belief he could use minimum force. With such appalling knowledge he obviously does not qualify to be a member of the Police Force.

What emerges from the evidence before us is that the accused and his colleague wantonly assaulted the deceased. There is no evidence that either of them had authority over the other. They jointly associated in the unlawful conduct such that it can be accepted that they knowingly associated in the assault which resulted in the deceased's death.

As for causation, a person is not criminally liable for any consequence unless his conduct causes or substantially contributes to that consequence. In this respect see s 11 (1) of the Code. In addition subsection (2) of the Code further provides that-

“A person’s conduct shall be deemed to have caused or substantially contributed to a consequence for the purposes of subsection (1) if the conduct.

- (a) is the factual cause of the consequence, that is, but for the conduct the consequence would not have occurred; and
- (b) is the legal cause of the consequence, that is, the consequence
 - (i) was a reasonably foreseeable consequence of his or her conduct; or
 - (ii) was brought about by a new cause supervening after his or her conduct, which cause was itself a reasonably foreseeable consequence of his or her conduct.”

The State witnesses present when the deceased was assaulted testified that weapons were used. The assault was not confined to the lower extremities as the accused wanted the court to believe. There is evidence to the effect that either the accused or his colleague stepped on the deceased’s neck. Either way, the accused or his colleague could have inflicted the fatal injury. What is pertinent is that they intentionally assaulted the deceased. The doctor who testified ruled out fracture of the spine from a fall from a standing position unless this was from an elevated point. He also testified that the deceased could have been able to walk whilst nursing such a fracture. As it turned out he eventually succumbed to the injury.

As for intention we make a finding that the accused and his colleague did not deliberately set out to kill the deceased. However, they intentionally embarked on the assault without just cause. In the process they used weapons. The assault lasted for some time. Even on his own admission the accused stated that it lasted for about an hour. In so assaulting the deceased the accused and his colleague must have realised that there was a real risk or possibility that their conduct might cause death but persisted with the assault despite the risk or possibility.

In the circumstances the accused is found guilty of contravening s 47 (1) (b) of the Code.

Chirenje Legal Practitioners, accused’s legal practitioners