

THE STATE
versus
TECHERAI MAKARATI
and
NYASHA MUTIRONGO [2]

HIGH COURT OF ZIMBABWE
MAFUSIRE J
MASVINGO, 11 & 12 October 2016; 7 November 2016

Criminal trial

Assessors: Messrs Gweru & Mutomba

Ms *S. Bhusvumani*, for the State
Mr *F. Chirairo*, for the first accused
Mr *L. Muvengeranwa*, for the second accused

MAFUSIRE J: On 12 October 2016, in HMA 04-16, we delivered judgment in Accused 2's application for discharge at the close of the State's case. We dismissed the application. The trial then proceeded for both accused persons to give evidence. This now is the final judgment. It is expedient to reproduce the material parts of the judgment aforesaid and take the matter up from there.

The two accused persons were charged with murder as defined in s 47[1] of the Criminal Law [Codification and Reform] Act, [*Cap 9: 23*]. The allegations against them were that, whilst at a certain beer drink, they struck the deceased with clenched fists and a stone, intending to kill him, or, despite realising the real risk or possibility that their conduct might cause death, continued with it. The deceased later died on the way to the clinic.

The State's case was that on the day in question, in rural Chiredzi, the accused were seated outside some structure from which the beer was being served [hereafter referred to as "*the tuck shop*"]. There were several other patrons, including a 13 year old boy, one Simbarashe Taringana [*"Simbarashe"*]. He was related to both accused persons but in different respects. The deceased later came riding on a bicycle. On arriving at the scene he alighted, threw the bicycle aside, and went straight for Simbarashe. He started poking the young boy on the forehead with a finger, threatening to kill him. Simbarashe's hat fell to the ground. Accused 1 then stood up and struck the deceased on the head with clenched a fist. Deceased fell down.

He was bleeding from the mouth. Accused 2 intervened. Deceased picked a stool or log intending to strike Accused 1. Accused 1 blocked it. The two started fighting again. Accused 2 picked a stone and struck Deceased on the head. The two accused and others then tied Deceased's hands. Later Deceased was ferried to clinic in an ox-drawn cart. However, he died on the way.

Both accused persons pleaded not guilty.

The State planned to call seven witnesses. Of those, four had their outlines of evidence admitted by consent. Of the remaining three, one Newman Muyambo [*"Newman"*] was undoubtedly the star witness as against Accused 2. He was the only one that implicated Accused 2 directly. He was the owner of the tuck shop and the one serving beer.

Accused 2 was disabled. He wore an artificial leg. Newman said, among other things, as Accused 1 and Deceased fought, he saw Accused 2 trying to kick Deceased. But his prosthesis fell off. He then used it to strike Deceased's head three times. After that he picked a stone – estimated at 10 to 12 cm – and struck Deceased on the top of his head. Deceased's hands were eventually tied by rope and everyone waited for the arrival of a certain member of the neighbourhood watch, a fellow villager.

In Accused 1's defence outline, and during cross-examination by his Counsel, it was claimed that Deceased had an unhealed wound at the back of his head. Newman said he had seen no such wound but just an old scar on the side of Deceased's neck.

The other two State witnesses to give *viva voce* evidence were Florence Mlambo [*"Florence"*] and Timothy Masongwa, the neighbourhood watch member [*"Timothy"*].

Notable features of Florence's evidence were that she had been at the beer drink from about 9:00 hours. There were several other villagers, including Accused 2 who arrived after her. Later on, towards sunset, Accused 1 and Simbarashe had arrived. Except for Simbarashe, everybody else, including herself and Accused 1, were drinking. Around 17:00 hours the Deceased arrived on his bicycle.

Florence's evidence touched on the deceased's throwing or shoving his bicycle away and going straight for Simbarashe to poke him on the head; Accused 1 standing up and hitting Deceased on the head with a clenched fist; Deceased falling down, and bleeding from the mouth. Florence said the fracas frightened her. She jumped up and fled from the scene. She called Newman and alerted him about the fight. She then proceeded to fetch some water to rinse Deceased's mouth. Some fifty metres or so away she noticed that Accused 2's prosthesis

had come off. However, she did not see how this had happened. She then called out for Accused 2's wife.

Like Newman, Florence had not, that day or any other time before, seen the alleged festering wound on Deceased's back, but a mere healed scar on the side of his neck. She neither saw Accused 2 hitting Deceased with his prosthesis nor striking his head with a stone.

Timothy, the village constabulary, said he had been called to the scene. The time was around 21:00 hours. He had been informed that Accused 1 and Deceased were fighting. His intention had been to arrest them both. On arrival at the scene, he saw Deceased seated with his head down. He handcuffed him on one hand, intending to remove the rope that tied both his hands. Deceased raised his head, muttering that he [Timothy] had come to arrest him as he regularly did. It was at that stage that Timothy noticed froth and blood oozing from Deceased's mouth and nose. Timothy changed his mind. He felt he could not arrest a person in such a condition. Instead, he called for a scotch cart so that Deceased could be ferried to clinic. One came. Deceased fell down as he tried to board. On his instruction the two accused persons helped Deceased into the cart.

The clinic was some 10 kilometres away. On arrival Deceased had already died. Timothy called regular police details from the charge office. The police station and the clinic were next to each other. A nurse from the clinic confirmed Deceased had died. The accused were then arrested.

The following morning, i.e. 7 July 2014, the police came to the tuck shop for investigations. There was some conflict in the State evidence. Newman said on that day he had not been around. He had only reported to the police station on the second day after the incident, i.e. 8 July 2014. The police had left a message for him to come and give his statement. But Timothy was emphatic Newman had been present on 7 July 2014 and had made indications to the police. Regarding indications, Timothy said he did not see Newman making any indications relating to any stone.

In Accused 2's defence outline, and during cross-examination by both defence Counsel, it was put strongly that when Timothy had first arrived at the scene on the night in question, and had tried to handcuff Deceased on the one hand, Deceased had reacted by punching Timothy on the chest with his tied hands. Timothy had reacted by tripping deceased who had then fallen to the ground. It was only thereafter that Timothy had then managed to cuff Deceased.

Timothy vehemently denied this scuffle with Deceased.

The outlines of the evidence of Simbarashe and one Maria Maravanyika [*“Maria”*] were admitted without objection. Simbarashe’s evidence corroborated that of Florence in relation to Deceased arriving at the tuck shop on a bicycle; how he threw it aside; how he proceeded to poke him on the head, threatening to kill him and how Accused 1 had stood up to floor Deceased with a single blow to the face. Simbarashe said at that point he fled from the scene and saw nothing else thereafter.

Maria’s evidence also corroborated that of Simbarashe and Florence. The only slight difference with Florence was on who had fetched the water to rinse Deceased’s mouth after he had been floored by Accused 1. Florence said it was she who did. But Maria’s summary said it was she who did. However, this difference is of little or no significance.

At the close of the State case Mr *Muvengeranwa*, for Accused 2, applied for discharge. His argument was that the State had adduced no such cogent evidence as would lead a reasonable court, acting carefully, to convict. He argued that Newman’s evidence had been so severely discredited as to be unworthy of belief. Among other things, Newman claimed to have given his statement to the police on 7 July 2014, a day after the incident. Yet in that statement, he was already claiming to have handed over to the police the piece of stone that he alleged Accused 2 had used to strike the deceased on the head. He said he had handed over the stone only on 16 August 2014, i.e. more than a month after his statement. It was obviously impossible. The statement could not have alluded to facts that would happen more than a month later.

The credibility of Newman’s evidence was also attacked on the basis that he claimed to have been absent from the scene on 7 July 2014 when the police had come for indications. Yet Timothy was emphatic that Newman had been present and had made indications to the police. Furthermore, Newman had claimed that when Accused 2 had struck Deceased with his artificial leg and the stone, the blows had landed on the top of Deceased’s head. Yet the post mortem report concluded that the cause of death was frontal skull depression, frontal lacerations and nasal bleeding.

Mr *Muvengeranwa* complained generally about Newman’s credibility. He said, among other things, Newman made certain concessions under cross-examination; for example, admitting that Accused 2 had used no stone, only to recant that position in re-examination and revert to what he had originally said.

Mr *Muvengeranwa* also argued that the rest of the State witnesses had exonerated the second accused, an argument that he later on refined to say that those witnesses had said nothing incriminatory of the second accused.

Ms *Bhusvumani*, for the State, opposed the application. In substance, she argued that although Newman lacked confidence in his testimony, and was at times given to exaggeration, nonetheless, his evidence was consistent with the post mortem results. The head injuries sustained by the deceased were consistent with some hard object having been used with severe force to strike the deceased on the head. That, according to her, had been the substance of Newman's evidence.

Ms *Bhusvumani* argued that at that stage the court was not being called upon to assess the evidence for proof beyond any reasonable doubt. All that the court had to do was to see if the State had made out such a *prima facie* case as would warrant calling the accused to explain.

After a brief analysis of the law on applications for discharge at the close of the State case, we concluded that the evidence led by the State had established such a *prima facie* case against both accused persons as to require them to come and give their side of the story. Among other things, Newman might have seemed contradictory in some respects. But given the results of the post mortem report, his evidence was, in our view at that stage, the only explanation of the probable cause of the fatal injuries sustained by the Deceased. As Ms *Bhusvumani* had pointed out, there had been no *novus actus interveniens* that might have broken the chain of causation and explain those injuries to Deceased.

We considered that there was some *prima facie* evidence of Accused 2 having committed the crime with which he was charged. He was present at the scene. That was common cause. He was involved in the fracas. That was also common cause. It was only the nature of that involvement that was in dispute. His own case was that he had tried to stop the fight between Accused 1 and Deceased. But Newman said Accused 2 was the one who assaulted Deceased, initially with his prosthesis, and later on with a stone. The post-mortem report seemed to confirm the smashing by a hard object, or objects, of Deceased's head.

The emphasis by Counsel for Accused 2 that Newman said the blows had landed on the top of the head, instead of the front part, as the post mortem report seemed to suggest, was to require pin-point precision. We felt it to be an impractical and armchair approach, especially given that it was an unregulated brawl that the witnesses were recounting more than two years later. The substance of the matter was that blows had landed on Deceased's head. Deceased had subsequently died. One of the State witnesses had fingered Accused 2 as the one who had

inflicted those blows. Accused 2 had been involved in the fracas. So he had to come and explain, not to prove his innocence, but his role in the matter. We felt it unsafe to acquit at that stage. All the possible evidence concerning the incident, including from the accused persons, had to be led. Only thereafter would the credibility of any individual witness be assessed.

After that, both accused persons gave evidence.

Accused 1 pleaded not guilty to murder but guilty to assault. His evidence was that before his physical confrontation with him at Newman's tuck shop at around 17:00, he had, earlier on in the day, had an altercation with Deceased. It had been over Simbarashe. He said as he and Simbarashe were riding in an ox-drawn cart, Deceased had materialised from somewhere. He had gone straight for Simbarashe. Deceased claimed the young boy had insulted him the previous day. He was threatening to beat him up. Accused 1 felt responsible for the boy's safety. He had to return him back to his parents unharmed. They had entrusted the boy to assist him with his firewood selling business that day. So he restrained Deceased from assaulting Simbarashe. Deceased had then turned onto Accused 1. He accused him of being the one who had incited Simbarashe. Deceased had eventually left, promising to settle scores later.

Certain aspects of Accused 1's evidence were common cause with that of the State. For example, he confirmed the fight with Deceased at the tuck shop. He explained how he had struck Deceased with a fist. Deceased had fallen to the ground, bleeding from the mouth. Someone had rinsed Deceased's mouth with water. Newman had intervened and quelled the brawl. But it had flared up again once or twice later. On all the occasions Deceased was coming worse off. At one stage Deceased was running away. Accused 1 tripped him. Deceased fell headlong. Deceased was apprehended. His hands were tied with a canvass rope. They had all waited for the arrival of the village constabulary. Deceased was later transferred to a clinic. However, he died on the way.

There were some material differences between Accused 1's evidence and that of the State. For example, he denied that Newman had witnessed the start of the altercation. He said Newman had been busy inside the tuck shop, or somewhere at the back. He denied that Accused 2 had at any stage struck Deceased with either the prosthesis or a stone. Instead, Accused 2 had also restrained the fight. Accused 2's prosthesis had come off when Deceased had kicked him.

Another material difference between Accused 1's evidence and that of Newman related to the alleged wound Deceased had allegedly been nursing on the day of the fight. Accused 1 said it had been a festering wound at the back of Deceased's head which he had sustained from

a machete cut by some villager sometime back and which had gone septic. Newman, and of course the rest of the State witnesses, knew of no such wound, but merely some old and inconsequential scar on the side of Deceased's neck.

Accused 1 said after Deceased had been apprehended and had had his hands tied, they had taken him to one Mbaimbai Sorafu's homestead, a small distance away from the tuck shop. As they awaited the arrival of the village constabulary, one Catherine Mbaimbai [*"Catherine"*] had dragged Deceased by his tied hands. She had an unresolved grudge with him. Also one Kufasi had assaulted Deceased with a 12 to 14 cm size cup.

The bulwark of Accused 1's defence was that when Timothy, the village constabulary, arrived at the scene and had tried to cuff him, Deceased reacted by lashing at him with his tied hands. Timothy had retaliated by tripping Deceased. Deceased had fallen hard on the ground. Timothy stamped him on the chest with his booted feet. Afterwards he cuffed him on one hand. Before that, Deceased could talk and walk unassisted. But after the assault by Timothy he was no longer able to walk by himself.

Accused 1 insisted it must have been Timothy's assault that had led to Deceased's death.

Accused 2 also gave evidence. It was substantially similar to that of Accused 1. For example, he denied vigorously that he had at any stage assaulted Deceased with his prosthesis, late alone with a stone. He also said he was the one who had called the police. However, regular police details had been at Buffalo Range at the time. So they had to wait for the village constabulary. Like Accused 1 before him, Accused 2 felt that it was the assault on Deceased by Timothy that had proved fatal.

However, there were some notable differences between Accused 2's evidence and that of Accused 1. For example, Accused 2 said he did not witness Catherine Mbaimbai pulling Deceased by the rope, or Kufasi assaulting Deceased with a cup.

That was the case before the court.

In our analysis, it was undoubtedly during the altercation at Newman's tuck shop that Deceased had sustained the fatal injuries. There had been no *novus actus interveniens*. A *novus actus interveniens*, or *nova causa interveniens* is an abnormal, intervening act or event, judged according to the standards of general human experience, which serves to break the chain of causation: see *South African Criminal Law and Procedure*, vol. 1, 4th ed., by JONATHAN BURCHELL, at p 102.

The post mortem report said Deceased had died from head injury. That injury consisted of a frontal skull depression, a frontal laceration and nasal bleeding. The question is: who had

delivered the fatal blow or blows? Was it Accused 1? Was it Accused 2? Was it both of them? Was it Timothy? Did Deceased die of the alleged wound the accused persons said was at the back of his head and had become septic?

Starting with the alleged septic wound at the back of Deceased's head: this was manifestly a long shot. It was of no moment. There simply had been no such wound. Probably an old scar on the side of Deceased's head which virtually everyone else, including the accused persons themselves, talked about. All the State witnesses said there had been no such wound. Accused 2 at first said there was a healed wound. Later on he conceded and downgraded it to a scar. Accused 1, the major proponent of the wound theory, at first said it was a fresh wound that had turned septic. However, he also later on downgraded it to a wound that had healed on the outside but probably still festering inside. Still later, he conceded that he had last seen the alleged wound some five to six months prior to the incident and that it had probably healed. But most importantly on that issue, the post mortem report did not say Deceased had died of some wound at the back. It said he had died of a head injury, being a frontal skull depression, a frontal laceration and nose bleeding.

Of Timothy, the court discounts the version of the accused persons that it was him that had fatally assaulted Deceased. Firstly, Timothy vehemently denied this. Admittedly, such denial is worth little. We have to consider all the evidence objectively.

In our view, the claim that as Timothy tried to cuff him, Deceased had lashed out with his tied hands, catching Timothy in the chest, was, for Accused 1, manifestly an afterthought. It was not in his confirmed warned and cautioned statement that was recorded two days after the incident and produced in court without objection. That statement was so consistent with the State case in many material respects.

In Accused 1's defence outline there was reference to some scuffle between Deceased and Timothy as the latter tried to handcuff him. This defence outline was prepared some two years and four months after the incident, and some six days before the trial. It had some suspicious detail added and another omitted.

It was alleged in Accused 1's defence outline that upon his arrival, Timothy had tripped Deceased to the ground where there had been some stones. Deceased had allegedly fallen on his back and had started to bleed from the mouth. Yet every witness, including Accused 1 himself, testified that the bleeding had happened the first time Accused 1 had struck Deceased with clenched fists back at the tuck shop. In other words, the bleeding had not started with the alleged scuffle with Timothy at Mbaimbai Sorafu's homestead.

Furthermore, Accused 1's defence outline made no mention of Timothy stamping Deceased on the chest. Both the defence outline and the warned and cautioned statement made no mention of the alleged assault on the Deceased by Catherine and Kufasi.

In his confirmed warned and cautioned statement Accused 2 did allege an assault by Deceased on Timothy, and the latter tripping and stamping on Deceased's chest. We still discount that version, or that it was at that stage that the fatal blow or blows had been delivered. Deceased had been seated or lying down when Timothy arrived. Thus, Timothy would not have had to trip him to the ground. Deceased might not have cooperated. Reasonably, Timothy might have had to subdue him. But there would have been no need to use that much force. Among other things, Deceased's hands were already tied. Furthermore, he had been beaten up several times before and had been bleeding. The only version of events at that stage that makes sense is Timothy's. He said he had wanted to undo the rope around Deceased's hands in order to cuff him properly with his handcuffs. But on noticing the dire condition Deceased was in, namely blood and froth coming out of the mouth and nose, Timothy had changed his mind. Instead, he had called for transport to the clinic.

So if it was not Timothy who delivered the fatal blow on Deceased, who, between the two accused persons did?

Starting with Accused 2: if Newman's evidence is disbelieved, then unless the doctrine of common purpose should apply, Accused 2 should be found not guilty of murder.

As said before, Newman was the only witness who testified of Accused 2's alleged assault on Deceased. However, there were some disturbing aspects of both the quality of his evidence and his demeanour in the witness box.

The State had to concede that Newman was given to exaggeration at times. At first he gave the impression that he had witnessed the brawl right from the onset. Later he admitted he had only been alerted about it by Florence. That is what Florence said also.

At first Newman did not mention Accused 2's own efforts to stop the fight between Deceased and Accused 1. He only mentioned it under cross-examination. This was despite the fact that the State's summary of his evidence had alluded to the combined efforts of himself and Accused 2 in quelling the fight.

The most unsatisfactory aspect of Newman's evidence related to the mainstay of the State's case against Accused 2. In evidence, Newman said Accused 2 had used his prosthesis to strike Deceased three times on the head. Yet nowhere else other than in court had he

mentioned this crucial piece of evidence. He did not mention it to the police. The State made no mention of it in its synopsis.

Regarding the allegation that Accused 2 had used a stone to strike Deceased, there had been an attempt by the State to produce some khakish-grey stone, 10 to 20 cm long, as being the one allegedly used by Accused 2 on the evening in question. But Newman denied resolutely that it had been the right one. He claimed the correct one had been blackish in colour, albeit of the same size. That was curious.

Newman, according to his testimony, had been several metres away when Accused 2 had allegedly smashed Deceased's head with the stone. At that stage the sun had just set. Thus, visibility must have become compromised. Newman could not even remember the colour of the clothes worn by either the accused persons or Deceased on the day. He had not picked the alleged stone to preserve it for the police. Not that he had been obliged to. But the particular stone he meant would have been one of several others lying loose at the area. How he would then be so precise as to remember its size and colour, almost two and half years later, when on the evening in question he had done nothing extraordinary to identify it later, is very suspicious.

Still on the issue of the stone, Newman said he had handed it to the police on 16 August 2014, i.e. more than a month after the event. He denied that when the police had come to the tuck shop for indications the following day after the incident, i.e. 7 July 2014, he had been around. Yet Timothy was emphatic that Newman had been around. Timothy was also adamant that Newman had been one of those who had made indications. Timothy recalled that at no stage had Newman made indications relating to any stone. It does not end there.

Newman's statement to the police was dated 8 July 2014. Thus, he could not possibly have mentioned handing over the stone to the police more than a month later. In our view, Newman's statement seemed doctored.

Finally, on Newman's overall allegation that Accused's 2 blows with the prosthesis and the stone had landed on top of Deceased's head, this was not quite consistent with the post mortem report. The post mortem report referred to injuries on the forehead. Although in the application for discharge at the close of the State case we rejected the requirement for pin-point precision on this particular aspect, it was because at that stage all that the State had been called upon to show was a *prima facie* case against the accused persons. That is a very low standard of proof. However, now with all the evidence having been led, and with the court now deciding finally the guilt or innocence of the accused persons, the onus rises sharply to proof beyond any reasonable doubt. It must be the only inference to be drawn from the facts that Accused 2

did hit Deceased in the manner alleged. We find that it was not. This aspect shall become more apparent when we come to analyse the evidence in respect of Accused 1.

Newman's general demeanour was unsatisfactory. Apart from general exaggerations which the State conceded to, he was also contradictory at times. For example, under cross-examination, he conceded that Accused 2 had not participated in assaulting Deceased, only to revert to saying he had during re-examination.

We find it unsafe to rely on Newman's evidence. It was doubtful. The law says that any such doubt must be exercised in favour of the accused.

Therefore, we find that Accused 2 did not assault Deceased in the manner alleged by Newman, or at all.

That leaves Accused 2 only in danger with regards to the doctrine of common purpose. Was he common cause with Accused 1 as the latter brawled with Deceased? Could they be said to have been acting in concert with each other?

The doctrine of common purpose says that where two or more people agree to commit a crime, or actively associate in a joint unlawful enterprise, each will be responsible for specific criminal conduct committed by one or other of them which falls within their common design. Liability arises from their 'common purpose' to commit the crime: see JONATHAN BURCHELL *Principles of Criminal Law*, 5th ed. at p 477.

In murder cases, the act of one in causing the death of the deceased is imputed, as a matter of law, to the other or others. Prior planning is not significant. A common purpose need not be derived from an antecedent agreement. It can arise on the spur of the moment and can be inferred from the facts surrounding the active association with the furtherance of the common design: see *S v Safatsa & Ors*¹.

The requirements for common purpose are:

- [i] presence at the scene of crime;
- [ii] knowledge of the criminal act;
- [iii] intention to make common cause with the actual perpetrator of the crime;
- [iv] manifestation of a sharing of a common purpose with the actual perpetrator of the crime by the performance of some own act of association with the conduct of the perpetrator;

¹ 1988 [1] SA 868 [A]

[v] *mens rea*, [either in the form of *dolus directus* or *dolus eventualis*] in respect of the perpetration of the crime;

See *S v Mgedezi & Ors*²

In casu, just about paragraph [i] above and, to an extent [ii], could probably be said to have been established in relation to Accused 2. Plainly paragraphs [iii] to [v] do not apply. Accused 2 did not make common cause with Accused 1 in fighting Deceased, let alone in killing or even assaulting him. He acted to stop the fight. That is the opposite of common purpose. That should be the end of it in relation to him.

Finally, Accused 1. From the evidence, it can hardly be said he had an intention to kill Deceased. The court must not be blinded by the fact that Deceased eventually died from the brawl. It must carefully analyse the sequence of events.

According to Accused 1 himself, he had physical violent contact with Deceased at least on three occasions during the brawl. The first was when he stood up to floor Deceased with a single blow to the face as Deceased poked Simbarashe. Given that the place, from everyone's evidence, had loose stones scattered all over, Deceased might have hit one of them when he fell. But what was Accused 1's intention in striking Deceased at that stage? Ultimately the purpose was to protect Simbarashe. That was undisputed. But that was only the motive. Accused 1 did intend to hit Deceased, and he did hit him. That was an assault. So he intended to assault Deceased. It does not matter that they might have been fighting.

Was the force by Accused 1 excessive? We think not. The confrontation had become physical. They had had an unpleasant verbal exchange earlier on in the day. The Deceased had promised to have it resolved later, obviously not amicably.

As he hit Deceased on that first occasion, did Accused 1 realise the real risk or possibility that by striking him Deceased would fall head long and hit a stone lying loose somewhere on the ground, and sustain fatal injuries, but nonetheless continued? We also think not. This happened in the spur of the moment. At any rate, there was no telling from the post mortem report that it was at that stage that Deceased sustained the fatal injury. Furthermore, there was no evidence that when he fell at that stage Deceased hit his head against a stone or some hard object. It is just speculation.

The second occasion when Accused 1 and Deceased had physical violent contact was when they exchanged blows after Deceased had tried to smash Accused 1 with a wooden stool

² 1989 [1] SA 687 [A]

which he had deflected. The evidence established that the fight was quelled successfully. There was nothing suggesting that Deceased had been hit by any hard object. The court believes it was not at that stage that Deceased might have sustained the fatal blow or blows.

The third and last occasion when they had physical violent contact was when Accused 1 tripped Deceased as he was running away. The evidence established that Deceased fell head long. Accused 1 insisted Deceased broke or cushioned the fall with his hands. But we are not sold on that story. How Deceased fell could hardly have been Accused 1's pre-occupation at the time. It was getting dark. At any rate, it is common cause from the post mortem report that Deceased sustained a frontal skull fracture and frontal lacerations. It is a reasonable inference to be drawn from all the surrounding circumstances that it is at that stage that Deceased might have sustained the death-causing injury.

If Deceased sustained the fatal injury during the last encounter, did Accused 1 intend to kill him? Or did he realise the real risk or possibility that his conduct at that stage might cause Deceased's death but nonetheless continued?

We believe that Accused 1 neither actually intended to kill Deceased nor realised the real risk or possibility that his conduct in tripping Deceased would result in his death but nevertheless continued. In other words, Accused 1 lacked both *dolus directus* and *dolus eventualis*. Thus he lacked the requisite *mens rea*.

The evidence that we accept was that Deceased had at that stage realised that the police had been called. He was trying to flee. Apparently he had some pending criminal cases and so did not want the police anywhere near him. At that stage Accused 1 had moved some distance away from the tuck shop. People were shouting that Deceased was running away from the police. Accused 1 tripped Deceased to stop him from running away. He was in some way furthering a citizen's arrest.

If Accused 1 did not intend to cause the death of Deceased, was he nonetheless negligent, particularly in failing to reasonably realise that by tripping Deceased who was in full flight, and desiring Deceased to fall down, as he obviously did, there was a chance Deceased could hit his head against some stone or rock, as probably happened? If he was negligent, then Accused 1 would be guilty of culpable homicide.

According to section 49 of the Criminal Law Code, culpable homicide consists of causing the death of a person negligently or, having realised that death might result from one's conduct, failing to guard against that possibility.

Section 16 of the Code, particularly sub-section [2], as read with paragraph [c] of sub-section [1], says that in determining the criminal liability of any person accused of, *inter alia*, culpable homicide, where the type of negligence concerned is, *inter alia*, constituted wholly or partly by a consequence resulting from the conduct of an accused, the test for such negligence is objective and that it falls into two parts. The first part is to enquire whether or not the accused person failed to realise that his conduct might produce the relevant consequence. The second part is, if the accused person did fail to realise that his conduct might produce the relevant consequence, whether or not such failure was blameworthy, in the sense that a reasonable person in the same circumstances would have realised that the relevant consequence might be produced and should have guarded against it.

In casu, the relevant consequence produced by Accused 1's conduct which he failed to realise but which it might be said a reasonable person in his circumstances would have realised and have guarded against was Deceased's death.

However, the difficulty in this case is that for the court to impute the degree of negligence as contemplated by the Code, it has to resort to some speculative analysis. There was no direct evidence that Deceased actually died from some impact after Accused 1 had tripped him. There was no evidence as to the exact time of death, or direct evidence as to which particular blow or blows proved fatal. When Accused 1's whole conduct is considered from the time he floored Deceased with a fist, back at the tuck shop, to the time when he tripped him as he was running away, it is difficult to impute negligence unless the court is satisfied that indeed the place was so rocky that it was foreseeable that any person that fell down under any circumstances would most likely hit his head against some rock. It is difficult to reach that conclusion.

Accused 1's circumstances were a borderline case between culpable homicide and assault. In terms of s 88 of the Code, an assault is, *inter alia*, any act by a person involving the application of force, directly or indirectly, to the body of another person, whereby bodily harm is caused to that other person. It does not always follow that where such bodily harm results in death, then the assault should automatically be elevated to culpable homicide or murder. Sometimes, the assault, as in this case, should remain an assault, despite that death might have ensued. *In casu*, we believe from the circumstances of the case that assault is the only safest conclusion in respect of Accused 1.

In the circumstances:

- 1 Accused 2, Nyasha Mutirongo, is hereby found not guilty of the murder of Rindai Ndlovu, and is hereby discharged;
- 2 Accused 1, Techerai Makarati, is hereby found not guilty of the murder of Rindai Ndlovu, and is hereby discharged.
- 3 Accused 1, Techerai Makarati, is hereby found guilty of assault in respect of the death of Rindai Ndlovu.

Sentence

Section 89[3] of the Code says in determining the appropriate sentence to be imposed upon a person convicted of assault, the court shall, without derogating from its overall power to consider other relevant factors, have regard to the following:

- [a] the age and physical condition of the person assaulted;
- [b] the degree of force or violence used;
- [c] whether or not any weapon was used;
- [d] whether or not the accused was in a position of authority over the victim;
- [e] [*not applicable*]

Accused 1 was 23 years old at the time. Thus, he was no longer a juvenile. However, I treat him as a youthful offender. Youthful offenders are prone to make immature decisions. As State Counsel submitted, though in a different context, Accused 1 could have simply pulled Simbarashe and walked away. A more mature person in his shoes would probably have. The fight with Deceased could probably have been avoided. But the point is: probably due to his youthfulness, Accused1 decided not to walk away but to fight on.

On the other hand, at 33 Deceased was 10 years older than Accused 1. We think he should himself have been more circumspect and should have exercised more restraint. But he was the aggressor all day long.

Regarding the degree of force used, this aspect is not directly relevant. It was never established which blow or blows led to Deceased's death. The inference that has commended itself to us, is that when Accused 1 tripped him, Deceased fell headlong and hit his head against

some piece of stone or some such hard object. Probably because of the momentum that Deceased had built up in his flight, the impact of the head against a hard object like a stone had cracked his skull. But what Accused 1 did was simply to plant his leg in Deceased's path in order to trip him. So one cannot say the degree of force used was minimal or moderate or excessive.

Regarding weapons, there were none used.

Regarding intention to inflict serious bodily harm, we go by our analysis of the evidence. We do not think Accused 1 had at any stage formulated an intention to inflict serious bodily harm on Deceased.

Finally, Accused 1 was not in a position of authority over Deceased. They were both fellow villagers.

We have taken other factors into account. We find that the mitigating features outweighed the aggravating circumstances. The only aspect that may be considered aggravating, as State Counsel urged us, was that Accused 1 had no right to fight Deceased. Ms *Bhusvumani* urged us to accept that instead of tripping Deceased to stop him from running away, Accused 1 should have let him go and called the police.

However, we are not about to adopt such an armchair approach. It is obviously informed by the hindsight knowledge of Deceased's death. It is unfortunate that life was needlessly lost. But Deceased partly authored his death. The State witnesses said he was clearly drunk. He was very aggressive. But the accused had also taken a considerable quantity of alcohol. Probably that also inhibited his sense of judgment and perspective. But we do not find that the degree of force that he might have used was any more excessive than the situation demanded. Among other things, he felt compelled to avert the danger that threatened Simbarashe who was under his guard on that day. He also felt compelled to stop Deceased from running away from the law.

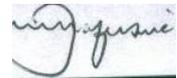
One of the most significant mitigating features was that upon his arrest Accused 1 spent almost 1 ½ years in custody before he was released on bail. So he has been punished significantly.

Accused 1 is a first offender. It is the general policy to keep first offenders out of jail.

Therefore, taking all the factors into account, we have felt the following sentence to be in accordance with real and substantial justice:

Twelve [12] months imprisonment of which six [6] months imprisonment is suspended for five [5] years on condition that during this period Accused 1 is not convicted of an offence involving violence and sentenced to a term of imprisonment without the option of a fine. The remaining six [6] months imprisonment is suspended on condition that Accused performs two hundred and ten [210] hours of community service at Mareya Primary School, Chiredzi. The community service shall be performed every day from Monday to Friday, except on public holidays, from 08:00 hours to 13:00 hours and 14:00 hours to 16:00 hours. The community service shall be performed to the satisfaction of the person in charge of the school who may for any good cause grant leave of absence, but such leave of absence shall not form part of the community service. The community service shall start from Monday, 14 November 2016.

8 November 2016

A handwritten signature in blue ink, appearing to read 'M. J. J. J.', is written over a horizontal line.

National Prosecuting Authority, legal practitioners for the State;
Saratoga Makausi Law Chambers, legal practitioners for the first accused, *pro deo*
Legal Aid Directorate, legal practitioners for the second accused, *pro deo*