THE STATE

Versus

COSMAS MUKONKA

And

MARTIN MARKO PHIRI

And

MOSES NCUBE

IN THE HIGH COURT OF ZIMBABWE
MANGOTA J with Assessors Mr Mabandla and Mr Sobuntu
BULAWAYO 26 MARCH 2024 AND 22 MAY 2024

Criminal trial

K.M Nyoni, for the state
A.J Dhliwayo, for the accused

MANGOTA J: The three accused persons are members of the Zimbabwe National Army ("the ZNA"). They are in the military police wing of the same. They were, at the time of the alleged offence, stationed at Khumalo Detention Barracks which are in Bulawayo Metropolitan Province. Their duty was/is to administer punishment to members of the ZNA who are tried and convicted of having violated the Army's laws, rules and/or regulations. They perform their duties in terms of the Defence Act (Chapter 11:02) ("the Act").

It is in the spirit of their course of work that they are alleged to have assaulted one Alphonce Nhengo ("the deceased") who was a member of the ZNA. He had been tried and convicted of an offence in terms of the Act and, in the process, caused the latter's death. The incident is said to have occurred at Khumalo Detention Barracks where the deceased had been admitted for having failed to comply with the army's laws, rules and/or regulations. It occurred on 29 April, 2014 according to the State. All three of them are alleged to have assaulted the deceased all over the latter's person. They, it is further alleged, caused the deceased to undergo rigorous exercises when he was of ill-health with the result that he succumbed to death and he died at United Bulawayo Hospitals on the mentioned date.

The State's further claims are that, when the accused persons assaulted the deceased or caused him to undergo rigorous exercises when he was of ill-health, they intended to kill the deceased and/or they realized that there was a real risk or possibility that their conduct might cause the death of the deceased and they continued to engage in the conduct their realization of the deceased's death notwithstanding.

The accused persons pleaded not guilty to the charge. They deny having ever assaulted the deceased. They also deny having ever subjected him to do rigorous exercises as the State alleges. They state that, when the deceased complained of a weak body, they took the matter to their superiors who excused him from the re-training exercises to which other defaulters who were in his category were subjected. They deny that they prevented the deceased from being medically attended to. They allege that a nurse who was stationed at the clinic in the detention barracks attended to the deceased. They challenge the contents of the post-mortem report. They state that getting such bruises as the doctor who examined the remains of the deceased recorded in his post mortem report was/is a natural consequence of the re-training exercises which military personnel sustain. They insist that they were acting within the course and scope of their duties when the deceased was brought to the detention barracks to undergo punishment. Their conduct, they state, is provided for in the Act. They claim that Section 268 of the Criminal Law (Codification and Reform) Act offers them a complete defence for acts which they perform whilst they are acting as members of the disciplined force. They move us to acquit them at the close of the State's case.

In an effort to prove its case against the three accused persons, the State lined up nine (9) witnesses. These comprise:

a) One Christine Mupunga,
b) One Chamunorwa Nhengo,
c) One Albert Tsoro Nhengo,
d) One Fundisai Ngonidzaishe Zvandasara,
e) One Jainos Musenyi,
f) One Sindiso Sibanda.
g) One Zororo Enock Chima,
h) One Victor Machokoto,
i) One Onisimo Muchemwa -and

j) One Dr. S Pesanai who conducted a post-mortem of the deceased following the latter's death at Bulawayo United Hospitals where he passed on on 29 April, 2014.

The State, with the consent of the defence, moved us to admit into the record the evidence of four (4) of its witnesses, These include witness numbers (b), (c), (f) and (h) (*supra*). The evidence of the mentioned witnesses was made part of the record in terms of section 314 of the Criminal Procedure and Evidence Act (Chapter 0:07). It produced the post-mortem report through Dr. S. Panganai. We marked it exhibit 1. It led evidence from its remaining six (6) witnesses in the order which it called them to the stand to testify. These comprise Dr Pesanai, Mr. Zvandasara who was the officer-in-charge of Khumalo Detention Barracks, Mr. Musenyi the nurse who manned the clinic at Khumalo Detention Barracks, Mr. Chuma who was a defaulter who underwent the re-training exercises with the deceased, Ms Christine Mupunga who is the deceased's wife and Mr. Muchema who was the investigation officer in the case which related to the deceased's death. With the *viva voce* evidence of its six (6) witnesses as read with the contents of the post-mortem report, the State closed its case as a result of which the defence moved us, in an application, to acquit the accused persons alleging that the State had not discharged the *onus* which rested upon it to establish a *prima facie* case against the one or the other or all of the three accused persons. This judgment, therefore, focuses on the application which the accused persons placed before us, through counsel, when the State closed its case.

It is, as a matter of course, generally not encouraged for the court to refuse to hear the other side of the case when one side of the same has been heard albeit not determined. This is a *fortiori* the case where, as *in casu*, human life has been lost owing to an alleged misconduct- act or omission- of the accused person whom the State places before the court for trial. The very fact of the need on the part of the court to preserve and protect human life, a God-given gift to mankind, speaks volumes of the position which the courts take of the matter. It is for the mentioned reason, if for no other, that applications of the nature which the accused persons placed before us are not lightly raised let alone granted. They are only heard and/or granted where there is no shred of evidence which ties the accused person whom the State places before the court to the offence with which he (includes she) is charged or to any related offence which may arise from the evidence which the State adduces against him. It follows, from the above-stated rule of the law of evidence, that where the State has established a *prima facie* case against the accused person, the court has no option but to insist that he be put on his defence. This will

enable him to rebut the presumption of guilt which may have been proved against him at the close of the case for the prosecution.

At the other side of the scale, however, the courts have, on times without number, decreed that it is better that a criminal be allowed to go scot-free than to convict and punish an innocent man or woman. The decree applies, in the majority of cases, where the State has failed, either at the close of its case or at the close of the defence case, to prove by way of *viva voce*, documentary or other evidence, the guilt of the accused person. The decree is premised on the realization that courts are not immune to human error and that they do not throw bones to dicepher whether or not the accused person who is before them, at any given point in time, committed the offence with which he is charged. Their inner-voice, the conscience, perturbs them when they send an innocent man to the gallows or to jail in circumstances where they are not satisfied of his guilt. It is in such-described set of circumstances that the court is more inclined to acquit than to put an accused person on his defence so that he, in the process, nails himself to the cross, so to speak.

The law, as provided for by the Legislature, as read with decided case authorities speaks eloquently on the equation of the above-stated two positions. The Criminal Procedure and Evidence Act, for instance, states, in Section 198 (3), that, if at the close of the State case, there is no evidence adduced which establishes a *prima facie* case, the accused shall be discharged of the offence charged. The section, it is evident, is couched in a peremptory language. It therefore offers no discretion to the court but to return a verdict of not guilty where the State has not established a *prima facie* case against an accused person who is before it at the close of the case for the prosecution: *The State* v *Hartlebury & Another*, 1985 (1) ZLR 1 (H).

We are, in this instance, indebted to counsel for the accused persons who defines and explains the meaning and import of the phrase 'a *prima facie'* case. He does so through decided case authorities all of which the court employs to unravel the meaning of the phrase. He states, correctly in our view, that the courts have handed down decisions which assist, explain and establish the meaning of the phrase as it is provided for in the Criminal Law Procedure and Evidence Act. The three cases which he refers us to are apposite to the circumstances of the case of the accused persons.

A *prima facie* case was explained in *Attorney-General* v *Bvuma & Another*, 1987 ZLR 96 (S) at 102 to refer to a situation where there is no evidence which proves an essential element

of the offence. The same phrase was explained in *Attorney-General* v *Mzizi*, 1991 (2) ZLR 321 (S) at 323B to refer to a situation where there is no evidence on which a reasonable court acting carefully might properly convict. The phrase was also described in *Attorney- General* v *Jarwirei,* 1997 (1) ZLR 575 at 576 to refer to a situation where the evidence adduced on behalf of the State is so manifestly unreliable that no reasonable court could safely act on it.

The cases which counsel referred us to all emanate from the Supreme Court of Zimbabwe. What they show is that the court *a quo* acquitted the three accused persons who were then before it, each in turn, and the Attorney-General was dis-satisfied with the decision *a quo* as a result of which he appealed the same to the Supreme Court which, in turn, laid down a very good guiding rod which assists the court to convict or acquit accused persons whom the State places before it at any given point in time.

The principles which the Supreme Court laid down in the three case authorities which are relevant to the present case are that the accused person is not only entitled to an acquittal but must be acquitted where:

i) there is no evidence which proves an essential element of the offence; or
ii) there is no evidence on which a reasonable court acting carefully might properly convict-and/or
iii) the evidence adduced on behalf of the State is so manifestly unreliable that no reasonable court could safely act on it.

The standard which the Supreme Court adopted in all the three cases is an objective one. It is that of a reasonable judicial officer. A reasonable judge is one who is not easily swayed in his thinking by emotion but one who is able to examine as well as consider the evidence which has been placed before him in an objective, impartial and dispassionate manner.

Whether or not the State established a *prima facie* case against the three accused persons is a matter of evidence. The evidence must show that the three of them acted with the relevant *actus reas* and the requisite *mens rea* or mental state to commit the offence of murder with which they stand charged.

Before we proceed to consider the substance of the application which the defence placed before us, however, it is necessary for us to make a comment or two in respect of the charge

which the State preferred against the accused persons. The charge, as is evident from a reading of papers for the State, is one of murder. It reads, in part, as follows:

> "…on the 29th of April, 2014 and at Khumalo Detention Barracks, Bulawayo…the accused persons assaulted Alphonce Nhengo all over the body and caused him to do rigorous exercises when he was of ill-health intending to kill Alphonce Nhengo or realising that there is a real risk or possibility that their conduct may cause the death of Alphonce Nhengo continued to engage in that conduct despite the risk or possibility".

The charge, it is evident, is not *in sync* with the evidence which the State led in court. It portrays the picture which is to the effect that all what the accused persons did was done on one and the same date, namely 29 April, 2014 and not earlier than the mentioned date. The evidence which the State led shows that the deceased was admitted at Khumalo Detention Barracks on 23 April, 2014, was treated of general body weakness at the same institution on 28 April, 2014 and was referred to United Bulawayo Hospitals for further treatment on 29 April, 2014 where he passed on a few minutes of his admission into the hospital. The charge was, therefore, not elegantly drafted. It left a lot of matters which are relevant to the case of the State unaddressed. It, in our view, should have been crafted in the following words:

> "During the period which extended from 23 April 2014 to 28 April, 2014 the accused persons assaulted Alphonce Nhengo all over the body and caused him to do rigorous exercises when he was of ill-health…."

Whilst the comments which we are making do not change the substance of the charge in any material way, the same go to show the ineptitude of the State in the manner that it prepared its papers which it placed before us to consider. It is, as a matter of course, important for each party to a case to pay particular and meticulous attention to detail when it prepares papers which it places before the court. A haphazard preparation and presentation of a case by a party has the effect of making its work to be misconstrued by the court with the result that its case will, in the majority of cases, be difficult, if not impossible, for the court to comprehend.

On the merits of the application, none of the nine (9) witnesses whom the State lined up to prove its case against the accused persons told us that he saw any of the accused persons assaulting the deceased. None of them told us that he saw the accused persons subjecting the deceased to perform rigorous exercises when he was of ill-health as the State is alleging.

Dr Pesanai whom we may refer to as the star witness for the State described the abrasions and/or wounds which he observed when he conducted a post-mortem of the deceased on 2 May, 2014. The wounds or abrasions which he said he observed on the deceased were

said to have been a natural consequence of the re-training exercises which authorities of Khumalo Detention Barracks administer on those who are admitted into the institution to undergo punishment for their misconduct in the ZNA. The accused persons state to an equal effect in their defence outline.

The evidence of Mr Zvandasara comes in handy on this aspect of the case. He states that the ground on which the re-training exercises are conducted is rough and the hurdles which defaulters have to undergo during the re-training exercises are designed in such a manner that none of the defaulters will want to return to that institution after he has completed serving his sentence at the same. His testimony is that the re-training exercises are so severe as to cause underlying ailments which are inherent in the trainee's body to resurface.

He states that the deceased was admitted into the institution which he oversees on 23 April, 2014. He states further that, on the following day, the deceased was brought to him for interview on the allegation that he was not trainable. He claims that the deceased told him that he (the deceased) was weak and could not do physical training. He alleges that he exempted the deceased from the normal training and directed him to do exercises which he was able to do without the supervision of the accused persons.

Jainos Musenyu, the nurse who manns the clinic in the detention barracks, told us that the deceased visited the clinic only on 28 April, 2014 complaining of general body pains. He told us that he treated the deceased and advised those in authority over him of the condition of the deceased. His evidence is that, on 29 April 2014, the deceased was transferred to United Bulawayo Hospitals where he died shortly on arrival.

The only person who could have shed light on what occurred to the deceased before he met his death is, in our view, one Zororo Enock Chuma who was a defaulter at the time and was serving his sentence together with the deceased. His statement is that he was detained together with the deceased on 23 April, 2014. He states that, after about a week of their detention at the institution, the deceased developed a problem which was characterized by body weakness and exhaustion. The problem made the deceased fail to cope with the re-training exercises which were being administered on them as defaulters. The deceased, he alleges, was then exempted from doing punishment and was assigned to lighter exercises. His evidence ends on that note.

There is a general thread which runs through the evidence of Mr Zvandasara as read with that of Mr Chuma. The thread is that, at some point in time during the re-training exercises, the deceased approached and told Mr. Zvandasara of his general body weakness. The thread stretches to the allegation that Mr Zvandasara excused the deceased from doing heavy re-training exercises. The two of them, however, contradict each other as regards the time that the deceased approached and told Mr Zvandasara of his body pains. He alleges that the deceased approached him on the day which followed the day of his admission into the institution. Mr Chuma states that the deceased approached Mr Zvandasara a week after his admission into the institution.

We find the evidence of Mr Chuma to be more credible than that of Mr Zvandasara on the point which under consideration. The wounds and abrasions which Dr Pesanai observed on the remains of the deceased are, in our view, consistent with the re-training exercises which the deceased underwent during the period which extends from 24- 27 April, 2014. He would not have sustained those if he was directed to perform light re-training exercises on 24 April. 2014 as Mr Zvandasara claims. Be that as it may, the mere contradiction of the evidence of witnesses of one party to a case shatters the prospects of the party's case to a point of no return.

The post-mortem report, Exhibit 1, which Dr Pesanai compiled on 2 May, 2014 describes the cause of death of the deceased as having been bronchial aspiration, compartment syndrome and/or severe assault. He states, in-chief as well as under cross-examination, that the deceased died of bronchial aspiration which, in common parlance, is known as chalking. This, he advises, is caused by any foreign article entering the lungs of a living person. The article may be water or food particles or any fluid. It, according to him, affects the lungs causing the person to chalk. Vomiting also results in bronchial aspiration or chalking, according to the doctor.

Jainos Musenyi, the nurse who attended to the deceased on 28 April, 2014 states that the deceased was vomiting when he visited the clinic. His testimony is to the effect that he treated him of the ailment and the vomiting stopped. What he does not say is whether or not no food particles had entered the lungs of the deceased when the vomiting stopped. If they had, as the Dr found that he died of chalking, then the deceased cannot be said to have died of assault or the rigorous re-training exercises which he underwent during the period 24-27 April, 2014. The cause of death cannot, in the circumstances of the case, be said to have been that of the

alleged assault of him by the accused persons or their causing him to perform rigorous re-training exercises as the State is alleging.

The State, in our view, did not establish a *prima facie* case against the accused persons. The probabilities of the matter are far removed from the accused having caused the death of the deceased. Whilst the death of the deceased remains unfortunate and regrettable, no reasonable court can safely conclude that the three accused persons have a hand in the same. Nothing connects them to the offence of murder or to any offence which may arise from the evidence which the State placed before us. They cannot, on the evidence, be placed on their defence to prove that they attempted to murder the deceased or that they acted negligently in respect of him for them to be convicted of culpable homicide which is a competent verdict for the offence of murder or that they assaulted the deceased.

On the basis of the foregoing matters, therefore, the application of the defence has merit. It succeeds. It succeeds because the evidence which the State adduced is so manifestly unreliable that no reasonable court can safely act on it. The State, in short, failed to prove the essential elements of the crime of murder/ attempted murder/ culpable homicide or even assault of the deceased by the accused persons. The accused persons are, in the premises, found not guilty and are discharged at the close of the case for the State.

National Prosecuting Authority, state's legal practitioners
T. Hara and Partners, accused's legal practitioners