REPORTABLE (79)

(1) NORMAN TAPERA (2) COLLEN MUKOMBWE (3) SIMON TAPERA
v
THE STATE

SUPREME COURT OF ZIMBABWE
GWAUNZA DCJ, KUDYA JA & MUSAKWA JA
BULAWAYO: 17 JULY & 19 JULY 2024

T. Zhuwarara, for the appellants.
Miss N. Ngwenya, for the first respondent.

KUDYA JA: This is an appeal against the whole judgment of the High Court (court *a quo*) sitting at Bulawayo, which was handed down on 3 November 2023. The court *a quo* found the appellants guilty of murder as defined in s 47 (1) (b) of the Criminal Law (Codification and Reform) Act *[Chapter 9:23]* (Criminal Law Code) and sentenced each of them to 15 years imprisonment.

FACTUAL BACKGROUND

At the trial, the State led oral evidence from four witnesses. The evidence of four other witnesses, as summarised in the Summary of State Case, was admitted in terms of s 314 of the Criminal Procedure and Evidence Act *[Chapter 9:07]* (Criminal Code). The post mortem report on the deceased was produced by consent. The appellants were the only witnesses in their own defence.

The State's case against the appellants is as follows: - On 31 January 2022, the appellants invited the deceased Tonderai Doka to shop number 6, Lucky Five Supplies (the shop), Entumbane Complex, Bulawayo, which belonged to the third appellant, where they severely assaulted him. Thereafter they drove the deceased, whom they had handcuffed from the back, to his mother Patricia Doka's residence. The appellants informed her that the deceased had stolen a music speaker (speaker) from the shop, which he had taken to that residence. From there, they proceeded with the deceased and his mother to the place where the deceased resided together with his girlfriend, Sibongile Ndlovu and her daughter Attalia Ngulube. They failed to find the speaker and returned to Patricia Doka's residence. Whilst at the mother's residence, the second appellant kicked and stomped the deceased on the ribs. The appellants ignored her plea to take the deceased to hospital. Instead, they took him to Entumbane Police Station in his handcuffed state and lodged a report of theft. The deceased in turn made a report of assault against the appellants. Thereafter, the deceased was taken to Mpilo Hospital, from where he died on 7 February 2022.

The appellants pleaded not guilty, asserting that the deceased had been assaulted by members of the public after stealing a speaker from the shop. They stated that they merely escorted the deceased to his mother's house to search for the speaker, which they did not find, and subsequently handed him over to the police.

The deceased's girlfriend testified that whilst she and the deceased were taking a stroll at Entumbane Shopping Complex, the appellants invited him into the shop and went with him to the basement. She stated that at the material time the deceased was in good health. She waited for the deceased for some time and later called him on his cell phone but the call terminated upon being answered. Thereafter, further calls were unsuccessful. She went home,

where she received a report concerning the deceased from Attalia. She next saw the deceased on the following day at Mpilo Hospital. She bathed him and observed the state he was in. The deceased had soiled himself. He could not talk. His head was swollen. The skin was peeling off at the back like it had been burnt. The feet were swollen and bleeding. She disputed the appellants' assertions that the deceased had stolen a speaker and that he had been assaulted by a mob at the shop. During cross examination, she maintained her testimony.

The deceased's mother, Patricia Doka, testified that when the appellants brought the deceased to her residence, he was severely injured and "unlookable." He was lying on the floor of a commuter omnibus inscribed Tshova Mubaiwa, whilst in handcuffs. He was bleeding from the mouth, nose, ears, and legs. His head was swollen. He had burnt marks on the shoulders. The legs were green and swollen and feet cracked. She cried and pleaded with the appellants to take him to hospital but they refused and the second appellant threatened to whip her with a sjambok. When she was disembarking from the commuter omnibus the deceased was in, he entreated her not to leave saying "mum don't come out, they are going to kill me." The witness also maintained her testimony under cross examination. The evidence of this witness on the nature and extent of the injuries sustained by the deceased was confirmed to the hilt by Attalia.

Three police officers also testified. Sergeant Saul Rwatirera stated that, when the appellants brought the deceased to Entumbane police station, the deceased informed him, in the presence of the appellants, that he had been assaulted by the appellants at the shop. Assistant Inspector Emmanuel Gwatidzo and Constable Happy Nyoni, who conducted investigations, which included indications, established that the deceased had not been assaulted by a mob.

The pathologist, Dr Jekenya, testified and elaborated on the findings in his post mortem report. He confirmed that he conducted an external examination of the deceased body. He observed multiple bruises especially on the back, buttocks and upper limbs, swollen neck and face. He also observed wounds on the dorsal surface of the right foot, burns like skin eruptions on the shoulder and neck. He associated the gory injuries that he observed with torture. He further conducted a Polymerase Chain Reaction (PCR) test on the deceased body, which tested positive for Covid-19. He however ruled out COVID-19 as the proximate cause of death. He stated that the immediate cause of death was repeated trauma which caused skeletal muscle damage and resulted in kidney failure. He further indicated by reference to the clinical examination that was conducted when the deceased was admitted at Mpilo Hospital that his kidneys and respiratory organs were failing due to repeated trauma arising from complications from severe assault. Despite searching cross examination, he maintained that the cause of death was the trauma arising from assault and not COVID-19. He even asserted that the deceased had been admitted at Mpilo Hospital for assault related injuries and not for any Covid related symptoms.

Each appellant was the only witness in his own defence. They all adduced similar evidence. The first appellant denied the offence. He was a security guard at the shop, which is owned by his brother, the third appellant. A speaker had been shoplifted from the shop on the previous day. On 31 January 2022, he laid out a trap to ensnare the shoplifter by strategically placing the remaining speaker in the entrance of the shop. During the lunch hour, the deceased walked into the shop. He grabbed hold of the speaker and dashed out of the shop with it at break-neck speed. The witness gave chase shouting “Thief, thief”. An alert member of the public tripped the deceased and felled him to the ground. A mob of irate passersby and onlookers set upon him and delivered instant justice. The witness stopped them from further

assaulting him and retrieved the speaker. He telephoned his brother, who arrived at the shop in under 5 minutes. The deceased confessed to the theft of the missing speaker. The witness remained guarding the shop whilst the deceased led the third appellant, Petros Dhliwayo and one Eddie to Patricia Doka's residence in order to retrieve the speaker.

The second appellant stated that he joined the third appellant at Patricia Doka's residence. He observed that the deceased, who was seated in the commuter omnibus vehicle had injuries to his face. The speaker was not recovered. They also went to Sibongile Ndlovu's residence in search of the speaker but did not find it. They then returned to Patricia Doka's residence before proceeding to Entumbane police station where they made a report of theft against the deceased. He disputed assaulting the deceased at any time.

The third appellant stated that he was called to the shop by the first appellant. He established that the deceased had been assaulted by a mob and that he was in a bad state. The deceased confessed to the theft of the missing speaker and pleaded for mercy. He led them to his mother's residence, where they were joined by the second appellant. They failed to find the speaker. They then went to Sibongile Ndlovu's residence where they found Attalia present. They however, did not find the speaker. They returned to his mother's residence. He conceded Patricia requested him to take the deceased to hospital lest he died. He, however, preferred to take the deceased to the Entumbane Police Station, where he made a report of theft against him. He disputed assaulting the deceased.

THE CONTENTIONS *A QUO*

Counsel for the State placed reliance on circumstantial evidence. In support thereof, she cited the case of *S* v *Vhera* 2003 (1) ZLR 668 (H) at 679F-G. She submitted firstly,

that the deceased was taken into the shop by the appellants and Petros Dhliwayo. Secondly, when he was taken into the shop, he was in good health. Thirdly, when the deceased was driven by the appellants to his mother's residence he was badly injured. Fourthly, the nature of the injuries was such that the police summonsed an ambulance without delay. Fifthly, he died from the injuries sustained from the assault. Sixthly, the deceased sustained the injuries when he was in the custody of the appellants. Counsel further submitted that from the proven facts, the only reasonable inference that could be drawn was that the appellants were the perpetrators of the assault that led to the death of the deceased. She thus submitted that the nature of the assault was so severe (to the extent that the pathologist described it as torture) such that the appellants must have realized the real risk or possibility that their conduct might cause death but were reckless as to whether or not death ensued.

Per contra, counsel for the appellants, whilst conceding that the determination of the matter revolved upon circumstantial evidence, submitted that the State had failed to prove the requirements thereof. Counsel impugned the credibility of the State witnesses and submitted that the evidence of the State witnesses failed to establish beyond a reasonable doubt that the appellants were the ones who assaulted the deceased. He contended that the State had failed to disprove that the deceased had been assaulted by a mob. He further submitted that the pathologist had failed to exclude the possibility that death might have been caused by COVID 19. He premised his argument on the pathologist's admission that he had not conducted an internal autopsy on the deceased body. He therefore urged the court to acquit the appellants.

THE FINDINGS OF THE COURT *A QUO*

The court *a quo*, upon analyzing the evidence, found the State witnesses credible and the appellants untruthful, wherever their evidence differed with that of the State witnesses. It held that the appellants assaulted the deceased in the basement of the shop, leading to his death. It further found that the medical evidence unequivocally showed that the cause of death was due to the assault. The court determined that while the appellants did not have a direct intention to kill, they inflicted severe injuries on the deceased and must have realized the real risk or possibility of causing death through their actions. It therefore found them guilty of murder.

In sentencing, the court *a quo* took into account all the mitigating factors that were advanced by counsel on their behalf. These were that they were all first offenders with family responsibilities. It also considered that the second appellant was a young adult. It also considered the third appellant's social responsibilities and economic standing as an employer. It further took into account that the offence was not premeditated. It also considered that the appellants wrongly believed that they were punishing a thief who had stolen their speaker. It further took into account the principles and recommendations enshrined in the Criminal Procedure (Sentencing Guidelines) Regulations, 2023, SI 146 of 2023 (sentencing guidelines). The court *a quo* weighed the mitigatory features against the aggravating ones and arrived at the sentence that it imposed. The aggravating features were that the offence was serious. It also considered that the appellants had no right to take the law into their own hands. It further recognized the need to protect the sanctity of life. It was alive to the need to deter, punish and rehabilitate the appellants. It considered that their moral turpitude was the same and did not, for that reason, differentiate their sentences.

After weighing the mitigatory features against the aggravating ones and invoking the sentencing guidelines, it imposed a diminished penalty of 15 years imprisonment on each appellant.

THE GROUNDS OF APPEAL

Dissatisfied by the conviction and sentence, the appellants noted the present appeal. They raised three grounds against conviction and two against sentence. The first ground relates to the propriety of the indictment; the contention being that the indictment conflated the provisions of subs (1) (a) and (b) of s of 47 of the Criminal Law Code. The second and third grounds impugn the propriety of the conviction on the basis that the offence of murder was not proved on the evidence adduced by the State.

On sentencing, the two grounds basically attack the sufficiency of the weight given to both the mitigatory and aggravatory factors considered by the court *a quo*.

The appellants seek the following relief:

"**RELIEF SOUGHT**

1. That the instant appeal against conviction succeeds:

2. That the verdict of the Court *a quo* be set aside and substituted with:

> "The accused persons are found Not Guilty"

Alternatively:

1. That the appeal against sentence succeeds.

2. That the sentences of the appellants be set aside substituted with:

> "The accused persons be and are hereby sentenced to five (5) year imprisonment, of which three (3) years are suspended for a period of five (5) years on condition that they are not during that period convicted of an offence involving the unlawful death of another person and for which they are sentenced to a term of imprisonment without the option of a fine."

SUBMISSIONS BEFORE THIS COURT

At the onset of proceedings, Mr *Zhuwarara* for the appellants, submitted that the court *a quo* erred in convicting the appellants based on a defective and void indictment. Specifically, the indictment was manifestly defective in that it did not distinguish whether the appellants were accused of having contravened s 47 (1)(a) or s 47 (1)(b) of the Criminal Law Code.

Counsel argued that in an allegation of murder under s 47 (1)(a) and s 47 (1)(b), different factual inquiries are made. He contended that the indictment the appellants faced simply stated that they were accused of contravening s 47 of the Criminal Law Code without any proper distinction or particularity between the two subsections. Section 47 (1) of the Criminal Law Code postulates two different possibilities: (i) acting with intent to cause death [s 47 (1)(a)], or (ii) acting with realization that there is a real risk or possibility that one's conduct may cause death and continuing to engage in that conduct despite the risk [s 47 (1) (b)]. Therefore, counsel submitted that the conviction ought to be set aside due to the conflated charge.

The court queried whether counsel had excepted to the charge in the court *a quo*, given this submission. Following an exchange, counsel conceded that no exception was taken to the charge, hence this argument could not be sustained on appeal.

Counsel for the appellants further submitted that the appellants believed they were disciplining a thief. He contended that the court *a quo's* judgment lacked a specific finding regarding the moment the appellants realized their actions could, in line with s 47 (1)(b), result in the deceased's death. He argued that the court *a quo* misdirected itself by convicting the appellants of murder despite the absence of direct evidence proving that the appellants intended

to kill the deceased or realized their conduct could cause death and continued with their unlawful actions.

Counsel maintained that the evidence adduced by the State did not directly demonstrate the "realization" moment. He submitted that s 47 (1)(a) could not sustain the charge levelled against the appellants. He cited the case of *Keyter* v *Minister of Agriculture* 1908 NLR 522 at p 523 in support of the contention that the statutory framework requires a finding on realization, asserting that each word in a statutory provision ought to be given effect.

Counsel also submitted that there was uncertainty from the judgment of the court *a quo* as to whether the continued conduct after realization referred to the assault or the failure to take the deceased to the hospital. Additionally, he highlighted that one of the causes of the deceased's death was COVID-19, an affliction that the respondent never claimed was known to the appellants. Counsel argued that these factors should have been considered before the court *a quo* concluded that the deceased was murdered.

On sentence, counsel for the appellants contended that even if the conviction is sustained, the sentence imposed by the court *a quo* could not pass legal muster. He argued that the court *a quo* failed to provide cogent and cognizable reasons for the sentence imposed and did not properly address the submissions made in aggravation and mitigation. Specifically, the court *a quo's* failure to consider the second appellant's youthfulness indicated that the court *a quo* did not adequately address this issue.

Counsel emphasized that the court *a quo* should have taken into account the second appellant's youthful age, and its failure to do so suggests that the court did not fully consider all relevant factors before imposing the sentence.

Per contra, Ms *Ngwenya* for the respondent submitted that the charge was clear and specific as to what charge the appellants were facing. Thus, the appellants could not claim ignorance of the charge or the nature of the allegations levelled against them.

Furthermore, she argued that the court *a quo* properly relied on circumstantial evidence to conclude that the deceased died as a result of the assault inflicted by the appellants. Counsel highlighted that the pathologist, Dr. Jekenya, testified unequivocally that the cause of death was the assault and explicitly ruled out COVID-19 as the cause of death. During cross-examination, Dr. Jekenya remained steadfast that the cause of death was the assault, which he equated to torture.

Counsel further submitted that given the severity of the assault, the extent of the bleeding, and the grievous injuries suffered by the deceased, the appellants could not have failed at some point to realize that their actions could result in death. Therefore, she asserted that the conviction, although based on the circumstantial evidence, was proper.

On the issue of sentencing, counsel argued that the court *a quo* provided cogent and cognizable reasons for the sentence imposed. She noted that the deceased was severely assaulted in circumstances where the appellants had no right to take the law into their own hands much less to inflict the type of injuries that moved the pathologist to equate them with torture. Counsel submitted that the court properly took into account submissions made both in

mitigation and aggravation. Consequently, she argued that the court *a quo* judiciously exercised its discretion in imposing a sentence that was not disturbingly inappropriate. She, therefore, moved for dismissal of the appeal against both conviction and sentence.

THE ISSUES FOR DETERMINATION

In our view the issues that arise for determination are as follows:

1. Whether or not the appellants are guilty of murder.
2. Whether or not the sentence of 15 years imprisonment imposed on each appellant is appropriate.

THE APPLICATION OF THE LAW TO THE FACTS

Whether or not the appellants are guilty of murder.

Section 47 (1) of the Criminal Law Code provides as follows:

(1) Any person who causes the death of another person,

(a) Intending to kill the other person; or

(b) Realizing that there is a real risk or possibility that his or her conduct may cause death, and continues to engage in that conduct despite the risk or possibility; shall be guilty of murder."

Section 47 (1) delineates between two mental states: intent to cause death (s 47 (1)(a)) and realization of real risk of death (s 47 (1)(b)). Mr *Zhuwarara* argued that these distinctions should guide the court's determination, emphasizing that the precise wording of the law should dictate the outcome. He contended on the basis of the case *Keyter* v *Minister of Agriculture, supra,* that the court *a quo* did not give effect to the wording of s 47 (1)(b) by failing to pinpoint the moment at which the appellants realized that there was a real risk or

possibility that their conduct could cause the deceased's death. Further, that despite such realization the appellants continued to engaged in the conduct that resulted in death.

The court in *Keyter, supra,* at p 523 stated as follows:

> "It is the duty of the court to give effect to every word which is used in a statute unless necessity or absolute intractability of the language employed compels the court to treat the words as not written."

Contrary to Mr *Zhuwarara's* submissions, the court finds that the court *a quo* gave effect to every word in s 47 (1)(b) of the Criminal Law Code. The court *a quo* properly considered that the matter fell to be determined on circumstantial evidence. It considered the severity and life-threatening injuries suffered by the deceased and properly, in the court's view, determined that the appellants could not have failed to realize at some point that their continued assault on the deceased could cause his death. The facts of this case establish that the appellants acted with a reckless disregard for human life, thereby meeting the threshold for realisation of real risk or possibility as outlined in s 47 (1)(b) of the Criminal Law Code. Following the assault, the deceased sustained multiple injuries, including bleeding from the nose mouth, ears and feet. Upon arrival at the hospital, he presented with a swollen face, neck, and shoulders, and experienced significant breathing difficulties. A chest x-ray revealed adult respiratory distress syndrome. His condition was so severe that he was unable to speak upon admission. The x-ray also revealed that the deceased had developed acute kidney failure secondary to skeletal muscle damage and breakdown as a result of the assault.

After his death, the post-mortem examination revealed multiple bruises on the deceased's back, buttocks, and upper limbs, a swollen neck and face, wounds on the dorsal surface of the right foot, and burn-like skin eruptions on the shoulders and neck. The

pathologist's affidavit, corroborated by oral testimony, indicated that the cause of death was acute kidney and respiratory failure resulting from the injuries sustained in the assault.

In addition, the actions of the police officers, who upon observing the deceased's condition, immediately called for an ambulance when he was brought to the police station after the assault, further substantiate the severity of the injuries. The decision to call an ambulance upon seeing the deceased's condition is indicative of the obvious severity of the injuries, which the appellants would have foreseen as carrying a risk of death.

The totality of the evidence presented unequivocally supports a conviction of murder. The severity and nature of the injuries, as described by medical report and observed by medical personnel, as well as the witnesses indicate that the appellants assaulted the deceased with a level of brutality that inherently carried a high risk of causing death.

The medical evidence establishes a direct causal link between the assault and the deceased's death. The multiple injuries demonstrate that the assault was the proximate cause of death. The fact that the deceased developed such life-threatening conditions as a direct result of the assault underscores the serious nature of the attack and the substantial risk of death inherent in the appellants' actions.

The evidence proves beyond a reasonable doubt that the appellants, through their actions, foresaw or realized that there was a substantial risk of causing death and continued their assault regardless of that risk. This meets the legal threshold prescribed in s 47 (1)(b) of the Criminal Law Code. The severity of the injuries, the medical testimony, the deceased's

statements, and the appellants' actions collectively establish that the appellants are guilty of murder.

In the case of *Musimike* v *The State* SC 104/20, the court remarked that:

> "What constitutes proof beyond a reasonable doubt was pronounced by DUMBUTSHENA CJ in *S* v *Isolano* 1985 (1) ZLR 62 (S) at 64G-65A thus:
>
> > 'In my view the degree of proof required in a criminal case has been fulfilled. In *Miller v Minister of Pensions* [1947] 2 All ER 372 (KB), LORD DENNING described that degree of proof at 373H as follows:
> >
> > > '…… and for that purpose, the evidence must reach the same degree of cogency as is required in a criminal case before an accused person is found guilty. That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence 'of course it is possible, but not in the least probable, the case is proved beyond reasonable doubt, but nothing short of that will suffice.'"

The evidence presented *in casu* satisfies the standard of proof beyond a reasonable doubt. The deceased's direct implication of the appellants, corroborated by the testimonies of multiple witnesses, establishes a consistent and credible narrative of the events leading to his death. The detailed medical reports and the post-mortem examination provide incontrovertible evidence linking the severe injuries sustained by the deceased directly to the assault by the appellants.

The sum of this evidence, including the immediate response of police officers who deemed it necessary to call an ambulance, paints a clear and unambiguous picture of the appellants' reckless conduct. Thus, the prosecution managed to demonstrate, beyond a reasonable doubt, that the appellants' actions directly resulted in the deceased's death, satisfying the requirements for a conviction of murder. The court *a quo* cannot be faulted for finding that the evidence presented sustained a conviction of murder.

There is therefore no basis for this Court to interfere with the court *a quo*'s findings on the conviction of the appellants.

Whether or not the sentence of 15 years imprisonment to each of the appellants is appropriate

Mr *Zhuwarara* challenged the sentence imposed by the court *a quo*, arguing that the court failed to provide cogent and cognizable reasons for the sentence. He further submitted that a thorough investigation of the appellants' personal circumstances would have mitigated the appellants' culpability, potentially resulting in a significantly shorter sentence with a portion suspended on condition of future good conduct. However, it is crucial to note that s 358 (2) of the Criminal Procedure and Evidence Act [*Chapter 9:07*], as read with the Eighth Schedule, excludes murder from sentences that may be suspended. This exclusion is further reinforced by s 20 of the sentencing guidelines, which also emphasize that murder is among the offences for which the court is precluded from suspending a portion of the sentence.

A court that convicts an accused person of murder must have regard to the provisions of s 337 of the Criminal Code to pass a sentence that is in accordance with the law. Section 337 reads:

> "**Sentence for murder**
>
> (1) Subject to s 338, the High Court may pass a sentence of death upon an offender convicted by it of murder if it finds that the murder was committed in aggravating circumstances.
> (2) In cases where a person is convicted of murder without the presence of aggravating circumstances, or the person is one referred to in s 338 (a), (b) or (c), the court may impose a sentence of imprisonment for life, or any sentence other than the death sentence or imprisonment for life provided for by law if the court considers such a sentence appropriate in all the circumstances of the case."

In determining the appropriateness of the 15-year sentence imposed, reference must be made to the sentencing guidelines SI 146 of 2023. According to these guidelines, if

murder is committed by a person, group of persons, or syndicate acting together in furtherance of a common purpose or conspiracy, the offender is subject to a presumptive 15 years' imprisonment, provided that the deceased was participating or had participated in the criminal conduct.

The case of *S* v *Munakamwe* SC 121/23 emphasizes that sentencing is primarily within the discretion of the trial court. The court's discretion allows it to select the most appropriate sentence based on the circumstances of each case, including the mitigating and aggravating circumstances. An appellate court can only interfere with the trial court's sentencing discretion if the sentence is disturbingly inappropriate or if the discretion has been exercised capriciously or upon a wrong principle. As MALABA DCJ (as he then was) stated in *Muhomba* v *The State* SC 57/13:

> "The appellate court would not interfere with the exercise of that discretion merely on the ground that it would have imposed a different sentence had it been sitting as a trial court."

In *casu*, the court *a quo* determined that the appellants' actions, committed in the furtherance of a common purpose, warranted the presumptive 15-year sentence. The severity of the injuries inflicted and the circumstances of the assault supported this conclusion. The court finds the court *a quo*'s decision to be in conformity with the principles outlined in the sentencing guidelines. Therefore, the court finds no basis for interfering with the sentence imposed by the court *a quo*.

DISPOSITION

In light of the foregoing the court finds no basis for interfering with the conviction and sentence imposed by the court *a quo*.

Accordingly, it is ordered as follows:

"1. The judgment of the court *a quo* be and is hereby upheld.
2. The appeal against both conviction and sentence be and is dismissed in its entirety."

GWAUNZA DCJ : I agree

MUSAKWA JA : I agree

Dube, Tichaona & Tsvangirai, appellant's legal practitioners.

National Prosecuting Authority, the respondent's legal practitioners.