

STATE
versus
LAZARUS DAPIRA

HIGH COURT OF ZIMBABWE
MUZENDA J
MUTARE, 14, 20 and 27 September 2021

Assessors: 1. Mr Mudzinge
2. Dr Sana

Ms *T.L. Katsiru*, for the state.
P. Makombe, for the accused

MUZENDA J: The accused was arraigned for Murder as defined in s47 (1) (a) or (b) of the Criminal Law (Codification and Reform) Act, [*Chapter 9:23*]. The state alleged that on 14 September 2017 and at Dzingire Village Chief Muusha, Chimanimani, accused unlawfully caused the death of Benson Mazvierengwi by shooting him in the head with a 12 Bore Optima Shotgun intending to kill him or realising that there was a real risk or possibility that his conduct might cause death and continued to engage in that conduct despite the risk or possibility resulting in injuries from which Benson Mazvierengwi died.

Accused pleaded not guilty. In his defence outline Annexure B, he denied unlawfully and with intent causing the death of the now deceased. On 13 September 2017, as a Rescommon Estate Security guard, he was instructed to accompany his senior Getrude Vesi and Constable Nedson Nthoro of the Zimbabwe Republic Police to go and arrest the now deceased for crimes committed at the estate. He was further accompanied by fellow security guards Bourbon Mupembe, Clever Matambo and Solomon Mlambo. Accused and Bourbon Mupembe were instructed to carry their service shotguns. Solomon Matambo had a pepper spray gun. Constable Nthoro and Getrude Vesi had each a torch light. Accused had been advised that where they were going was a risky zone where Bourbon Mupembe had been attacked by a rowdy mob and badly assaulted, disarmed and left for dead.

Accused and his team were driven to the scene by Charles Marapira. At the scene guards were assigned tasks to guard whilst Nthoro and Vesi proceeded where deceased was believed to be. Accused was later asked to join the rest of the team and go where Nthoro and Vesi were.

On arrival at the cabin Clever Matambo, Solomon Mlambo and accused were instructed to enter the cabin and arrest now deceased whilst Nthoro and Vesi remained standing at the entrance of the wooden cabin. Accused and his colleagues failed to effect the intended arrest. Now deceased and his worker Chenjerai Mashava resisted and fought them. The security guards were overpowered and Clever Matambo and Solom Mlambo dropped the pepper spray gun and handcuffs inside the cabin and fled leaving accused wrestling the deceased and Chenjerai. Accused stated that the occupants, now deceased and Chenjerai wanted to wrestle the shotgun from the accused and it was during that skirmish that the gun accidentally discharged. There was no light inside the cabin so accused stated that he did not know on that day that the gun had killed the now deceased. He only learnt the following morning that deceased was shot during the tussle. He indicated in his defence outline that he was going to call Clever Matambo and Bourbon Mupembe to give evidence and support his defence.

The summary of the state, annexure A states that deceased was aged 34 years at the time of his death. On 13 September 2017 accused went to deceased's homestead armed with a 12 bore optima shotgun accompanied by a police constable and four security guards intending to arrest the now deceased. Accused and his colleagues stormed into the deceased's room around 0100 hours on 14 September where deceased resisted the alleged arrest arguing that accused ought to have come during the day. Accused shot the deceased in the face and he died on the spot. Accused disappeared from the scene together with his colleagues. A pathologist after examining the corpse of deceased concluded that the cause of death was cerebral and cerebellar damage, skull base fracture, and maxillary fracture through bullet injury.

In order to prove its case, the state with the consent of the defence applied in terms of s314 of the Criminal Procedure and Evidence Act, [*Chapter 9:07*] to have the evidence of Rejoice Mhlauri, Taurai Mtisi, Charles Marapira, Jakosi Majoti, Chipso Pachavo, Brian Makumbe, Alderton Ratambwa Xavier Shadreck Chitoko, Agenata Mandhlazi and A J Mutizwa as outlined in Annexure A to be admitted by the court as not being dispute.

Rejoice Mhlauri is the wife of the now deceased. On 13 September 2017 she did not share the bedroom with deceased, she had just given birth and deceased slept in the kitchen cabin with Chenjerai Mashava, deceased's employee. In the early hours of 14 September 2017. She heard a gunshot from the direction of her kitchen. Moments later she heard another gunshot a distance away and heard someone calling out the name "Mupembe" she proceeded to the kitchen where she found deceased lying in a pool of blood, and had a wound on his left cheek. She recovered a white pepper spray gun next to the now deceased's body. At around 7am

Roscommon Security guards returned to the scene firing guns resulting in mourners scampering for safety, she refused to give the security guards the spray gun.

Taurai Mtisi's evidence relates to reporting the matter to the police. When he was a kilometre away from the deceased's homestead he heard gunshots and he met villagers fleeing from the deceased's homestead. Chipso Pachavo's evidence is that Clever Matambo arrived at Chikukwa Clinic where she works, indicating that he had been hit by a log on the right limb by unknown thieves. She observed a deep cut on the upper right limb. Detective Assistant Inspector Xavier Shadreck Chitoko's evidence is that he found deceased's body in a pool of blood with a gunshot wound on the face, indicating that he had been shot in the mouth with the bullet exiting through the left cheek just below the eye. He is the one who ferried the body for post-mortem. The pathologists removed three metal bullets from the deceased's head.

By consent of the defence the state produced before the court the shotgun, ballistic report, the post mortem report and the confirmed warned and cautioned statement as exhibits.

The state led further testimony from Chenjerai Mashava. He told the court that deceased was sleeping in the cabin with him. On 14 September at 0100 hours he was awakened by a sound of a falling chair which had been used to secure and keep the door closed at night. Suddenly people entered the cabin one of the people approached where he was lying and removed a blanket cover from his head. His face was torched and the person uttered words to the effect that he was not the target. He noticed the presence of three men in the room, two were at the entrance and one of them confronting the deceased. The one who went to where deceased was had a gun and a torch, he removed a blanket covering now deceased, deceased woke up and stood. The armed person pronounced to deceased that he was under arrest. Deceased protested and resisted arrest asking the arresting detail why they did not come during day time than coming at midnight. The witness suddenly heard a gunshot and sporadic movement going out of the cabin. He went out of the cabin but failed to see no one. He returned into the cabin, lit a light and saw deceased lying, blood oozing from the mouth. He awakened deceased's wife and advised her. He also advised neighbours. He denied participating in trying to wrestle the gun from the accused. He denies assaulting any of the guards. When the gun discharged he was almost out of the cabin and all the guards left the room after the gun shot. He also denied assaulting Matambo with a log and injuring him. He added that the cabin was lit from the source of light brought in by the guards which they used to identify the deceased.

The state went on to call Nedson Nthoro who is now a sergeant in the police force. He is the one who was in the company of the security guards on the day in question. He was aware

that deceased was wanted by police for various cases of armed robbery and had been reported to Roscommon Security Company for having stolen macadamia nuts. On the night in question they proceeded to deceased's homestead, it was him who had the arresting powers and no one else. Upon arrival at deceased's homestead, he proceeded towards deceased's main house leaving the security guards standing by the wooden cabin. Before he got to the main house he saw the guards fleeing from the cabin, then heard a gun fire. He got panicked and ran into the banana plantation. He later got to the security office and enquired about the gunfire. Accused informed him that he (accused) had fired a shot in the air as deceased was trying to disarm him. Around 2 pm on that day the witness learnt about the death of the deceased. He denied delegating the arresting powers to the security guards, it was him only who was legally permitted to effect an arrest. The witness denied that he was the one who held a torch light and stood by the entrance door to the cabin lighting into the cabin. He never gave instructions to the accused to enter the cabin and search and arrest the suspect. He denied leaving the scene in the company of Mupembe and also was not there when Mupembe discharged the Second gunfire. The security guards were under the command of their senior employee of the security company, the guard's mandate was only to accompany him and he had the duty to effect an arrest and under cross-examination he repeatedly told the court that he did not order the guards to enter the cabin where the deceased was.

Both Chenjerai Mashava and sergeant Nthoro were subjected to an intensive and self-searching cross-examination by defence counsel but they were not shaken. There were some intermittent inconsistencies and contradictions in the two's testimony but to us they were not material contradictions. This is a 2017 criminal case and for Sgt Nthoro, he has been handling thousands of cases from 2017 to date, it's very natural and normal for a police detail to lose trend in some of the facts, due to lapse of time but it cannot be concluded that the inconsistencies are fatal to the state case. The court accepts the portion of evidence that is partly confirmed by the accused and reject that which is corroborative of the state case. Overallly the state witnesses gave evidence very well, they did not or exaggerate what happened on the day in question. We found their evidence truthful, credible and plausible.

Accuse gave evidence and basically stuck to what is contained in his defence outline. He decided to dispense with the calling of the defence witnesses his fellow security guards. He was tasked by the state counsel to explain how he was holding the shotgun on the night in question and he virtually struggled to explain the events that led to the discharging of the gun. Moreso he could not explain how deceased was injured in the tussle over the gun which was

between accused and Chenjerai. He could not show exactly the position of the barrel at the time the gun released the bullet. He could not explain the position of the deceased and why the deceased was shot on the face. Accused did not mention that aspect of the accidental discharge of the gun to the police. That version only surfaces in his defence outline in court. Accused could not satisfactorily explain in court why he told Sgt Nthoro that he has fired the gun into the air when he realised that it was about to be taken from him by the deceased. In his evidence in chief he was adamant that at the time the gun discharged it was Chenjerai who was wrestling with accused and not deceased. To us the accused did not fair well under cross-examination and we reject his version that the gun accidentally discharged. We are satisfied that accused pulled the trigger himself in an attempt to effect an arrest on the deceased.

Most facts in this matter are to the court not in dispute. Accused in the company of his fellow guards and a police detail embarked on a mission to apprehend a suspect who is now the deceased. Upon arrival at deceased's homestead the security guards without instructions from the police detail present proceeded to invade the suspect. The now deceased using his constitutional rights protested over the time the guards were arresting him. It's not disputed that the suspect resisted arrest and a struggle ensued. It is the nature of struggle which accused has been trying to explain in court and it is that struggle which will liberate accused or entangle him in this matter. It is not in dispute that deceased was shot by the accused in the face resulting in his death.

The question for this court is whether accused should be found guilty of murder or culpable homicide or as espoused by the defence whether he should be found not guilty and be entitled to an acquittal.

In its submission the state contends that accused's defence is built upon the foundation of defence of self and proceeded to outline the requirements of s 253 of the Criminal Law (Codification and Reform) Act, [Chapter 9:23]. The prosecution also cited the matter of *State v Luke Mungoza* HMT 1/18 and averred that all the requirements of s 253 should be met in order for the defence to succeed. It was submitted by the state that the defence did not meet all requirements of s 253. It was added that accused did not run away though he had ample time to flee, he did not fire a warning shot and was not in imminent danger. According to the state accused felt that deceased was resisting arrest, he fired a fatal shot at deceased right in the face which killed him on the spot. The state dismissed accused's argument of an accidental shot as merely an afterthought. It was the argument by the state that accused being a well experienced

gun handler failed to handle his gun properly and fired the firearm in the direction of the deceased in a poorly lit room. The state urged the court to accept that though accused did not have the intention to kill but submitted that he should have seen the real risk and possibility that by aiming towards the deceased, there was a possibility that he would cause death, thus the state prayed that accused be found guilty of murder with constructive intent.

To the *contra* the defence heavily criticised the state witnesses and urged this court to found them incredible and inconsistent. It was submitted by the defence further that the onus is on the state to prove that accused intentionally caused the death of the now deceased. In *casu* it was contended that from the evidence adduced on behalf of the state no one saw the accused shooting the deceased and the court was urged to make a finding that accused's version cannot be disputed. Accused does not rely on defence of self as submitted by the state, rather accused's defence is bankrolled on accidental discharge during a tussle. The defence added that accused's version is reasonable and highly probable and prayed for an acquittal.

Accused in his defence outline contends that he wrestled with both deceased and Chenjerai Mashava who wanted to wrestle the shotgun from him and it was during the tussling when the gun accidentally discharged. In his evidence in chief accused attributed the discharging of the firearm nine out of ten to the conduct of Chenjerai Mashava who could have possibly destabilised the safety pin as well as the trigger. Chenjerai was cross-examined at length about this, but he constantly denied getting into contact with the accused on the day in question. The defence failed to crack the line of his evidence. Accused himself told the court that there was poor lighting in the cabin so how did deceased and Chenjerai see that accused had a gun? Accused was at sixes and sevens to explain the position of the butt as well as the barrel at the time the gun fired. He failed to explain the position of the deceased at the time the firearm discharged and further failed to explain given such positions how deceased was shot on the face. It is trite law that the onus of proof is on the state to prove that an accused is guilty of an offence, but where an accused is expected to explain the plausibility of his defence, no onus is placed on him, he is required to explain salient facts to buttress his defence and accused in this case failed to do so, moreso where Chenjerai Mashava's evidence faired so well as compared to that of the accused.

We are not satisfied that accused's gun accidentally discharged. Accused believed that given the presence of a police detail, he was allowed to effect an arrest on the deceased. We have no hesitation to make a finding, that right from the onset accused believed his superiors instructions that they were going to arrest a dangerous criminal and hence when accused got

into the cabin where suspect was the gun was already cocked. When the suspect resisted arrest accused fired at the deceased in the dark and fatally injured him. We dismiss accidental discharge of the firearm. We also dismiss accused version that at the time the gun was fired he was having a tussle between deceased and the other two guards caused the two guards to drop the pepper spray gun and a pair of handcuffs but in our assessment there was no tussle between deceased and accused, accused fired at deceased thinking that since his two other guards had ran away he was going to be attacked by the deceased then he resolved to fire in the direction where deceased was. We also accept as true that accused told Sgt Nthoro that he (accused) had fired the gun into the air and not that the gun accidentally discharged as submitted by the defence. We fail to see the inconsistency of Sgt Nthoro on that aspect and there is no reason why Sgt Nthoro would lie against the accused on the aspect of the firing of the gun in the air. It was only but a report made by the accused which report came out to be so critical in this matter. We have no hesitation to reject accidental discharge and treat it as an after thought.

The state submitted that accused be found guilty of murder with legal intent. Facts established in this matter are not so clear so as to establish constructive intent. Accused was on duty and requested to accompany a police detail. He entered a cabin and spotted the a suspect. Accused did not have the arresting powers the best he could have done in the circumstances was to alert constable Nthoro and guard deceased from escaping. He did not do so, he entered into a cabin with a cocked a gun and discharged it in a dark cabin in a bid to arrest a suspect. Accused ought to have taken safety precautions to secure the arrest of the suspect than firing at deceased in the dark. Accused acted negligently in the circumstances and he should be found guilty of Culpable Homicide.

Vedict

Not guilty of murder but guilty to culpable homicide.

Sentence.

In assessing an appropriate sentence I will take into account both the aggravating and mitigating features in this case. Accused is a first offender and committed the offence in the course of duty. However death could have been avoided in the circumstances. Deceased left a toddler, just a few weeks old and that child will grow without a father. Use of guns should be sparingly used to avoid loss of life. Deceased was but a suspects and not a convict and suspect must be arrested during the day and if need be a warrant of apprehension has to be obtained in

appropriate circumstances. Accused should have called the police detail to effect arrest than firing at the deceased.

Accordingly you are sentenced as follows:

5 years imprisonment of which 2 years imprisonment is suspended for 5 years on conditions within that period accused is not convicted of an offence involving violence to which he is sentenced to imprisonment without an option of a fine.

National Prosecuting Authority, for the state

Makombe & Associates, legal practitioners for the accused.