

**THE STATE**

**Versus**

**ERNEST EZEKIEL**

**And**

**CRISPEN CHIKWATA**

**And**

**RABSON CHIKWANDA**

**And**

**TARIRO KOMBORA**

**And**

**TINASHE MASHAZHU**

IN THE HIGH COURT OF ZIMBABWE

BERE J with Assessors Mr W.T. Matemba & Mrs C.J. Baye

GWERU CIRCUIT COURT 4, 5 & 6 OCTOBER 2017

**Criminal Trial**

*M. Shumba* for the state

*S.R. Mafa* for 1<sup>st</sup> accused

*A.Mhaka* for 2<sup>nd</sup> accused

*D. Mujaya* for 3<sup>rd</sup> respondent

*H. Ndlovu* for the 4<sup>th</sup> accused

*Mrs P. Mutatu* for the 5<sup>th</sup> accused

**BERE J:** It was really a tragedy. The brutal and tragic events surrounding the demise of the deceased on the evening of 2 December 2016 is the reason why the five accused persons, viz Ernest Ezekiel, Crispin Chikwata, Rabson Chikwanda, Tariro Kombora and Tinashe Mashazhu (the accused persons) stand charged with the deceased's murder in violation of section 47(1) of the Criminal Law (Codification and Reform) Act, [Chapter 9:23]. All the accused

persons have denied the charge. The facts as provided by the state can be summarised as follows:

In the early evening hours of this day two young men Ernest Ezekiel and Crispen Chikwata (accused 1 and 2 respectively) who erk out a living through gold panning found themselves in Zevezeve Bar, in Shurugwi and within minutes had picked up a quarrel with the deceased who disarmed them of the machete and chased them out of the bar. The two accused persons unceremoniously left Chizevezeve Bar. The deceased's premonition sense informed him that the accused persons would return to Chizevezeve bar with reinforcements to deal with him. The deceased shared this thought with his close relations with whom he was drinking beer.

True to the deceased person's prediction, the accused persons returned to Chizevezeve bar with additional manpower in the form of 3<sup>rd</sup>, 4<sup>th</sup> and the 5<sup>th</sup> accused persons. On realising that his life was in serious danger the deceased who had strategically positioned himself by drinking in a shade out of the bar ran for dear life with the accused in hot pursuit. Accused 1 and 2 were armed with spears. The deceased's final destiny had been pre-determined. He was found dead on the morning of 3 December 2016. The severe injuries to the deceased's stomach had ruptured his intestines.

Exhibit (1), the post mortem report described the cause of death as:

1. Hypovolemic shock
2. Damage of Epsilon; and
3. Stabbing injury.

All the accused persons denied the allegations but in doing so they firmly placed themselves at the scene of crime and they seemed to have this misconception that the offence had nothing to do with those who did not use the spear on the deceased, but that if anything the offence would have everything to do with the person who delivered the stabbing itself.

The two witnesses called by the state, *viz* Tinashe Kasere and Tawanda Vengesa who had the misfortune of witnessing both the 1<sup>st</sup> and second encounters between the first two accused persons and then all the accused persons as they chased after the deceased in typical hunting manner gave graphic details of how the first two accused persons arrived at Chizevezeve Bar and picked up a quarrel with the deceased, It was clear from the witnesses' testimony that the first and second accused persons were provocative and ready to assault the deceased after accusing him of having caused problems for them at some other previous encounter at Wanderer Mine, to which the deceased pleaded his innocence. The response by the deceased led to the 2<sup>nd</sup> accused pulling out a machete from the waist of his pair of trousers and handing it to the 1<sup>st</sup> accused person who ended up wrestling for the machete with the deceased who fortunately succeeded in disarming the 2<sup>nd</sup> accused of the machete and use it to chase the two accused persons out of Zevezeve Bar.

The two witnesses further testified that within 15 minutes or so of their hurried departure the two accused persons returned to the bar armed with two spears but in the company of 3 more people whom they were unable to identify. The deceased, on seeing them and having been warned of the imminent danger posed by these people jumped over the perimeter fence of Chizevezeve Bar with all the five accused persons chasing after him.

As correctly submitted by the state counsel, the witnesses' credibility was beyond reproach as evidenced by their unanimous position that they were not in a position to identify three of the persons who were in the company of the two accused persons who were armed with two spears. The yawning gap in the state evidence in failing to identify the 3 other accused persons was remedied by virtually all the accused persons who in their confirmed, warned and cautioned statements firmly placed themselves at both Chizevezeve Bar and the exact place where the deceased's remains were recovered.

It is not necessary to go into a detailed or thorough analysis of the evidence presented in this court as we were all agreed that the evidence given by the state witnesses and the accused themselves had demonstrated beyond doubt that on the 2<sup>nd</sup> of December 2016, all the accused,

acting in common purpose had teamed up, armed with a machete and two spears one of which was exhibit (7) and pursued the deceased to the point where his remains were recovered the following morning. It also became common cause that when the deceased's body was located, his intestines were found protruding out of his stomach.

It also became common cause that virtually all the accused persons had seen the deceased at the place of the murder and at a time that he was still able to talk but having been seriously injured and that at the time the accused persons saw him, the deceased indicated to them that they had seriously injured him.

It was not in dispute that none of the accused person rendered the deceased any assistance to the deceased despite his desperate plea for help to them. The third accused person, on seeing the deceased, in the presence of his co-accused snatched the machete which the deceased had fled holding and that machete was never recovered.

We can only conclude as a court that the only reasonable inference to be drawn from the deliberate failure by all the accused to render assistance to the deceased was a realization that when they saw the deceased seriously injured part of their common objective had been achieved. Like hunters they had caught the hunted animal hence their unanimous decision under the leadership and guidance of the third accused who appeared to be the natural leader of the gang to go home and sleep.

Accepted, there was no direct evidence led by the state to show that the five accused persons had sat down to plan the murder of the deceased person. To us, sitting as a court, that is neither here nor there. The facts for this case speak for themselves. The warned and cautioned statements of all the accused persons show beyond doubt that all the accused persons chased after the deceased fully aware that some of them were armed with lethal weapons in the form of spears. The only reasonable inference is that all the accused persons had conspired to act in the manner they did.

The liability of the five accused persons is what was envisaged by section 196A<sup>1</sup> which is framed as follows:

**“196A Liability of co-perpetrators**

- (1) If two or more persons are accused of committing a crime in association with each other and the state adduces evidence to show that each of them had the requisite *mens rea* to commit the crime, whether by virtue of having the intention to commit it or the knowledge that it would be committed or the realization of a risk or possibility that a crime of the kind in question would be committed, then they may be convicted as co-perpetrators in which event the conduct of the actual perpetrator (even if none of them is identified as the actual perpetrator) shall be deemed also to be the conduct of every co-perpetrator, whether or not the conduct of the co-perpetrator contributed directly in any way to the commission of the crime by the actual perpetrator.
- (2) The following shall be indicative (but not, in themselves, necessarily decisive) factors tending to prove that two or more persons accused of committing a crime in association with each other together had the requisite *mens rea* to commit the crime, namely, if they –
  - (a) were present at or in the immediate vicinity of the scene of the crime in circumstances which implicate them directly or indirectly in the commission of that crime; or
  - (b) were associated together in any conduct that is preparatory to the conduct which resulted in the crime for which they are charged; or
  - (c) engaged in any criminal behaviour as a team or group prior to the conduct which resulted in the crime for which they are charged.”

We are aware that when all the accused persons gave chase to the deceased they were fully aware that two of them were armed with spears one of which is exhibit (7) which weighed 2,892kgs with a sharp blade of 12cm in length. We have no doubt in our minds that the accused were each aware that these spears were meant to be used against the deceased.

We are also fully aware that during evidence in court accused 2 told the court that it was him who stabbed the deceased when the deceased was threatening him with a machete. We do not believe that given the chasing of the deceased as described to us by the accused persons in their individual confirmed, warned and cautioned statements, the accused had an opportunity to

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<sup>1</sup> Criminal Law (Codification and Reform) Act [Chapter 9:23]

threaten any of the accused persons because the situation he found himself in was clearly overwhelming. In any event, to show lack of candidness on the part of the 2<sup>nd</sup> accused person he speaks to something entirely different in his confirmed, warned and cautioned statement when he alleged that the deceased was stoned by accused 4 and stabbed by 1st accused person.

One must also bear in mind that according to the evidence in court all the accused persons said when they had lost track of the deceased owing to darkness, they were called by the 1<sup>st</sup> accused person to where the deceased was lying seriously injured.

Because the court has virtually no direct evidence surrounding the actual killing of the deceased, but is clear that the deceased died at the hands of all the accused persons. The accuseds' liability must therefore be anchored on constructive or legal intention which Burchell and Hunt<sup>2</sup> define as follows:

“Legal intention in respect of a circumstance consists of foresight on the part of the accused that the circumstances may possibly exist coupled with recklessness as to whether it does or not”

See also *S v Ndebu and Another*<sup>3</sup> and (1) *Enock Ncube* (2) *George Moyo vs The State*<sup>4</sup>.

Counsel for the accused persons, during court addresses conceded that the evidence in this case was both overwhelming and compelling that by conducting themselves in the manner they did, all the accused could not escape conviction of murder with constructive intent. We agree.

Consequently all the accused persons are found guilty of murder with constructive effect.

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<sup>2</sup> Criminal Law and Procedure, Volume I at p 128

<sup>3</sup> 1986 (2) SA 133 (25)

<sup>4</sup> Judgment No. SC-58-14

**Sentence**

We accept as unanimously agreed by all counsel that this murder was not committed in aggravating circumstances. In assessing sentence we will be guided by the following factors in both mitigation and aggravation.

**Mitigation**

For accused 1, we accept as submitted that the accused is only 24 years old, married with one child and that he only went as far as grade seven with his education.

We also take into account as submitted that the death of the deceased will probably haunt him for the rest of his life. The accused, like all his co-accused persons has suffered pre-trial incarceration of 10 months.

Accused 2 - We will take into account that he is a youthful first offender aged 19 years who has also been kept in remand for the past 10 months awaiting the conclusion of this case. The accused, like the 1<sup>st</sup> accused only went as far as grade 4 with his education. There is need to seriously consider imposing a sentence that will enable him to undergo some form of rehabilitation.

Accused 3 - The accused person was the more mature one of the five accused persons and their natural leader. He is 35 years old, single and a first offender.

We will also accept as submitted on his behalf that he is a single parent with two minor children exclusively dependent on him.

Accused 4 - We will take into account that he is a school drop-out and an unsophisticated individual aged 25 years old, and a first offender.

Accused 5 - We will seriously consider that he is the youngest of the accused persons and that he must have been largely influenced by the conduct of his senior co-accused persons.

The accused is now approaching 17 years old. We will also consider that this accused has not had the benefit of positive early socialization having lost both parents at a tender age. The accused is also a school drop-out.

### **Aggravation**

We have had the benefit of hearing all the accused persons testify in this court. None of them has shown any remorse for this heinous conduct. Once again life has been lost at the hands of misguided artisanal miners who seem to have this misconception that every conflict must be resolved by killing fellow human beings. The accused behaved in the most brutal and heinous manner. They hunted the deceased like they were hunting a wild animal. There is need to respect life. The accused persons completely failed to do so in this regard with the result that the deceased died the most painful and cruel death.

The third accused person must have a sentence different and more severe than others because of the influence he had on the rest of the accused persons. He was the most mature and the leader of this gang.

Because of his youthfulness, the fifth accused will be given a sentence reflective of his peculiar situation

Accused 1, 2 & 4 - 20 years imprisonment

Accused 3 - 22 years imprisonment

Accused 5 - 5 years imprisonment

*National Prosecuting Authority*, state's legal practitioners  
*Dzimba Jaravaza & Associates*, 1<sup>st</sup> accused's legal practitioners  
*Mhaka Attorneys* 2<sup>nd</sup> accused's legal practitioners  
*Mawadze & Mujaya Legal Practitioners*, 3<sup>rd</sup> accused's legal practitioners  
*Chitere Chidawanyika & Partners*, 4<sup>th</sup> accused's legal practitioners  
*Mutatu & Partners* 5<sup>th</sup> accused's legal practitioners