

THE STATE  
versus  
MUNETSI KADZINGA

HIGH COURT OF ZIMBABWE  
PATEL J  
HARARE, 13 to 15 February and 29 to 30 May 2006

ASSESSORS: MESSRS DANGAREMBIZI AND TUTANI

**Criminal Trial**

Mr *Mabesa*, for the State  
Mr *Matsika*, for the Accused

PATEL J: The accused is charged with the murder of a farmer, Charles Anderson, on the 2<sup>nd</sup> of June 2002 at Norfolk Farm, by shooting him in the head with an AK rifle. The accused denies shooting the deceased and states that it was his accomplice, Benedict Makumbe, who shot the deceased.

**Admissions**

At the trial of this matter, the State produced a forensic ballistics report, prepared by Chief Inspector Jeka on the 21<sup>st</sup> of June 2002. This was admitted with the Defence's consent as Exhibit 1. The report confirms that the AK rifle used to shoot the deceased was functional. It also confirms that the five cartridges, one spent bullet and one bullet jacket, which were uplifted from the scene of the shooting, emanated from that rifle.

The State was unable to locate the *post mortem* report compiled for the purposes of this case. However, what was made available at a later stage and admitted by consent, as Exhibit 4, was the relevant Form 231 (application for *post mortem* examination) which concludes that the cause of death was a rifle shot to the head resulting in brain damage and haemorrhage.

The evidence of the following State witnesses, as outlined in the State Summary, was also admitted with the consent of the Defence:

- (a) Cindy Anderson
- (b) Edmore Mapuranga
- (c) Jackson Ngandu
- (d) Detective Constable Mandeya

- (e) Detective Inspector Wakatama
- (f) Chief Inspector Jeka
- (g) Doctor Mapunda.

### **State Evidence**

#### **Michael Tom**

The witness was employed by the deceased as a gardener. On the 2<sup>nd</sup> of June 2002, he was working in the garden at Norfolk Farm when he was approached by the accused and his accomplice. The accused pointed a firearm at him and told him to raise his hands. (The witness identified an AK rifle - GM 5565/ZA 43271 - as being the weapon in question and this was admitted by consent as Exhibit 2).

The accused then ordered Tom to follow him to the front of the farmhouse. He was told to lie down and was covered with a blanket. The accused gained entry through an open window, while his accomplice remained outside. The accused then returned with the cook, Edmore Mapuranga, and opened the front door.

Inside the farmhouse all four men proceeded through the passage into various rooms within. Tom and the cook were asked to lie down at various stages, while the accused and his accomplice gathered diverse items of clothing, a cash box, a television set and some cassettes. At one stage, the accused threatened to shoot Tom and the cook but was restrained by his colleague.

When they were about to leave the farmhouse, the deceased arrived in his motor vehicle and called for Tom. The accused declared that he would shoot the deceased if he came into the house. The cook and Tom were again ordered to lie down under blankets in the main passage. They were being watched over by the accomplice, while the accused waited with his firearm in a toilet adjoining the passage.

The deceased then came into the house through the front door and entered the passage. The accused emerged from the toilet and shot at the deceased three times. At that point, the deceased fell to the floor. When questioned by his colleague, the accused confirmed that the deceased had probably died. Tom managed to peep through the blanket covering him and personally witnessed the accused shooting the deceased.

The accused retained control of the firearm at all times and appeared to be in charge of his accomplice. At no point did the accused hand the rifle over to his accomplice.

After the deceased was shot, Tom and the cook were told to carry the bags of loot outside. The deceased's rifle was lying near a hedge and the accused took it and slung it over his shoulder. (The witness identified the rifle, a Parker Hale Safari Deluxe A1075M, and this was admitted by consent as Exhibit 3).

The deceased's wife and young children were standing outside. The accused asked the deceased's wife for keys to a motor vehicle. She identified a red pick-up truck with its keys already in it. The bags of loot and the deceased's rifle were placed in the back of the truck. The accused kept his own rifle and proceeded towards the front gate. The accomplice told Tom and the cook to get into the back of the truck. He then drove up to the gate where the accused was waiting. However, he did not stop at the gate but drove on leaving the accused waving and running behind the truck.

At some distance of about 2 to 3 kilometres away from the Norfolk farmhouse, the truck overturned. All three men disembarked from the vehicle and dispersed in different directions.

*Ngoni Masoka*

This witness was the Permanent Secretary responsible for lands at the relevant time. On the 2<sup>nd</sup> of June 2002, he was driving in the vicinity of Norfolk Farm when he saw the accused on the road running frantically and holding a firearm. The accused claimed to be a guard at the Norfolk Farm homestead and said that there had been a robbery. He asked whether Masoka had seen a red truck and said that this was the truck that had been used by the robber. Masoka confirmed that he had seen the vehicle and asked about the owner of Norfolk Farm. The accused responded to say that the owner was in Bindura.

The accused requested Masoka to turn back and ferry him to follow the robbers. Masoka complied and drove along the road for about 3 kilometres until they arrived at the spot where the red truck had recently overturned. After looking around the area, the accused asked Masoka to take him to the Chiweshe area where the alleged robber would be found. When they approached Chiweshe Village, the accused pointed to a hut and said he wanted to accost the robber in that hut and proceeded in that direction. He did not return.

After waiting for 15 to 20 minutes, Masoka drove back to the scene of the accident. Michael Tom had returned to the scene and explained what had transpired at Norfolk Farm.

(In court, the witness identified the AK rifle, Exhibit 2, as being the firearm that was carried by the accused. He also positively identified the accused as the person he saw on the day in question. He was wearing blue denim jeans on that day).

Peter Ngandu

On the 2<sup>nd</sup> of June 2002, at Midzi Village in Chiweshe, he saw a visitor, the accused, talking to his brother, Jackson Ngandu. When questioned as to his identity, the accused became aggressive and assaulted his brother with a rifle magazine. Ngandu intervened and the firearm fell out of the accused's hands. A lengthy scuffle ensued between the accused and the Ngandu brothers. They eventually managed to overpower him and tied him up with a rope. Someone was then sent to call the police from Gweshe Police Post.

(The witness positively identified the accused in court and stated that the latter wore blue jeans on the day in question. He also identified the AK rifle, Exhibit 2, and its magazine as being the firearm in the accused's possession on that day).

Detective Sergeant Joseph Nemaïsa

The witness has been an attested member of the Zimbabwe Republic Police for a period of 8 years. On the 2<sup>nd</sup> of June 2002, he received a report of a murder having been committed at Norfolk Farm. He proceeded to the farm in the company of three other police officers.

At the farmhouse, they were first directed to the overturned red truck. At the scene of the accident, he observed the Nissan truck and met and interviewed the deceased's workers, Michael Tom and Edmore Mapuranga. They said that the deceased had been shot and identified his assailant as wearing a green wet-suit top. Nemaïsa recovered the stolen goods and the deceased's rifle from the truck.

At the farmhouse, the deceased's body was identified, lying in a thick pool of blood at one end of the corridor. Nemaïsa observed two holes, one large and the other small, in the deceased's head. He picked up about four or five spent cartridges and one unfired bullet and sealed them in a packet.

From what Nemaïsa observed within the farmhouse, both Tom and Mapuranga would have been able to witness the shooting of the deceased at the other end of the corridor from where they were told to lie down.

Nemaïsa then proceeded towards the Chiweshe Communal Area. At Gweshe Shopping Centre, he found the accused being held by the Ngandu brothers and others.

They handed over the AK rifle and magazine recovered from the accused. The accused was carrying a green wet-suit top and wore a striped shirt and blue jeans.

The accused said that he and his accomplice had robbed the AK rifle approximately two weeks before from an unknown motorist who had given them a lift. According to Nemaisa, this rifle was previously reported as having been robbed from the then Minister of Home Affairs John Nkomo's driver. The driver subsequently identified the AK rifle as belonging to him as well as some of the items that he had been robbed of and which had been recovered from the accused.

On the 18<sup>th</sup> of June 2002, he handed over the two firearms and the spent cartridges for forensic examination. The forensic ballistics report confirmed that the spent cartridges had been fired from the AK rifle recovered from the accused.

(In court, the witness positively identified the AK rifle, Exhibit 2, as the rifle handed over to him at Gweshe as well as the relevant ballistics report, Exhibit 1. He also identified the deceased's rifle, Exhibit 3, as the firearm recovered from the Nissan truck).

#### Other State Witnesses

At the end of the State case, it was indicated that Cindy Anderson, the deceased's wife, had relocated to Australia and the State was unable to meet the cost of her air travel to and from Zimbabwe for the purposes of testifying at this trial. As for Edmore Mapuranga, the deceased's erstwhile cook, he was said to be somewhere in the Guruve area but could not be presently located. Jackson Ngandu was not called to testify, even though he was available, in view of the fact that his evidence would have been substantially the same as that given by his brother, Peter Ngandu.

Counsel for the State noted that the evidence of all three witnesses, as outlined in the State Summary, had been accepted and admitted by consent at the beginning of the trial.

#### Assessment of State Evidence

Michael Tom was the principal witness for the State. He gave his evidence in great detail and remained clear and consistent throughout his testimony. He was not discredited under cross-examination nor when he was questioned by the Court. His evidence was amply corroborated by that of the other State witnesses who gave evidence in court. It is also corroborated by the evidence of Cindy Anderson and Edmore

Mapuranga, which was admitted by consent as outlined in the State Summary. The Court found Michael Tom to be a very credible and reliable witness.

As regards the evidence of Ngoni Masoka, Peter Ngandu, and Joseph Nemaisa, the Court was also impressed by the clarity and consistency of their evidence. Their testimony was not meaningfully challenged or countered under cross-examination. They too proved to be credible and reliable witnesses.

However, the Court notes that Nemaisa's evidence as to the manner in which the accused came to be in possession of the AK rifle, viz. by robbing it from Minister Nkomo's driver, is essentially hearsay. It must therefore be disregarded for present purposes.

### **Defence Evidence**

#### **Munetsi Kadzinga (the accused)**

On the 2<sup>nd</sup> of January 2002, he was at his home in Bindura. He was approached by his friend, Benedict Makumbe, who was carrying a black bag. Makumbe asked the accused to accompany him to his mother's house in Chiweshe to collect some maize.

En route to Chiweshe, Makumbe opened his bag and produced a firearm. He said that it had no bullets and that he had obtained it from Minister Nkomo's driver. He also said that the Minister and other "superiors" had assigned Makumbe and the accused to threaten and frighten away the white farmers in the Chiweshe area. The accused did not refuse to comply because he thought that Makumbe would use the firearm against him. At a later stage along the way, Makumbe told him that they were going to Norfolk Farm in order to rob the homestead. The accused assumed and believed that Minister Nkomo had instructed Makumbe to carry out the planned robbery.

Upon arrival at Norfolk Farm, they found the gardner outside the farmhouse. Makumbe told the accused to hold the rifle and smashed a window pane to gain entry into the house. All three men went into the house through the broken window. Once inside, Makumbe demanded the rifle back from the accused. They then found the cook and both he and the gardener were ordered to lie down. Makumbe told the accused to collect blankets, items of clothing and a television set. The accused proceeded to do so.

Whilst the accused was in one of the rooms where the workers had been ordered to lie down, he heard Makumbe shout "hands up" and he then heard three

gunshots. A short while later, Makumbe came into the room carrying two rifles. He handed over the second rifle to the accused. Makumbe said he had shot the deceased because he had failed to put his hands up. The accused did not see the deceased's body.

Makumbe then ordered the gardener and the cook to carry the loot and load it into a red Nissan truck. The accused placed the second firearm into the back of the truck. Makumbe and the accused sat in the front of the vehicle, while the two workers sat in the back. At the front gate, Makumbe gave the accused the AK rifle and told him to open the gate. Once the accused had opened the gate, Makumbe did not wait but drove off and the accused gave chase.

Whilst he was giving chase, he encountered a green motor vehicle being driven by one man (Ngoni Masoka). The latter agreed to pursue the red truck which they soon found overturned about 3 to 4 kilometres away. There was no one at the scene of the accident. The accused told Masoka that the thief usually frequented his mother's house in Chiweshe. The accused then walked towards Chiweshe on his own.

At Gweshe Village he was confronted by two men who asked where he was going. The accused was holding the rifle covered beneath his jacket. The two men asked him to show what he was holding. As he was about to uncover the rifle, they began assaulting him. A struggle ensued and the accused was felled to the ground. The two men then tied him up with a rope and took him to Gweshe Police Base at the Gweshe Shopping Centre.

At the Shopping Centre, the accused was handed over to the police. One of the police officers (Joseph Nemaïsa) struck the accused thrice on his head with the AK rifle butt. He was then restrained by one of his colleagues. The accused was subsequently handcuffed and taken to Bindura Hospital to treat the head injuries he had sustained.

At Bindura Police Station the following morning the accused told the police officers that Makumbe had killed the deceased. The officers threatened and assaulted the accused and tortured him with electric rods. The accused eventually succumbed and admitted to killing the deceased because he was in great pain.

Under cross-examination, the accused accepted that when he was first shown the firearm by Makumbe they were still about two to three hours away from Norfolk Farm. However, he did not attempt to escape because he was afraid of being shot by Makumbe, even though the latter was his childhood friend. Again, when Makumbe handed the AK rifle to him at Norfolk Farm, both before and after the robbery, he did

not take flight because he was afraid of Makumbe and of being reported to Makumbe's superiors. For the same reasons, he did not think of reporting the robbery to the nearest police station, either in Gweshe or in Bindura. He also did not tell Masoka the truth because he panicked at that time.

When questioned by the Court, the accused stated that he had lied to Masoka in order to obtain his assistance to look for Makumbe. At that stage, he said he was no longer afraid of confronting Makumbe. As regards Makumbe's conduct at Norfolk Farm, the accused was totally unable to provide any satisfactory explanation as to why Makumbe should have handed the AK rifle to him, initially when they arrived at the farm, and later when they were leaving through the front gate.

### **Assessment of Accused's Evidence**

The accused contradicted himself in several crucial respects, particularly under cross-examination and when questioned by the Court. Equally significantly, he failed to provide the Court with any credible explanation as to his state of mind, motivation and conduct before during and after the admitted robbery.

Throughout the trial proceedings, the accused gave the impression of a witness who had fabricated his version of events beforehand and who was constrained to modify it as his testimony progressed in response to probing questions. The Court found the accused to be a thoroughly unsatisfactory witness and rejects his version of what transpired on the day in question as being extremely implausible and incredible.

### **Uncontested Evidence**

As already indicated, the State was unable to locate the *post mortem* report compiled in respect of the deceased. However, the fact of his death and the cause thereof are not in dispute and were admitted by consent in terms of section 314(1) of the Criminal Procedure and Evidence Act [Chapter 9:07]. These facts were also established by dint of the contents of Exhibit 4 and the evidence of Detective Sergeant Nemaïsa.

Similarly, there is no dispute as to which firearm was used to shoot the deceased. The AK rifle, Exhibit 2, was clearly identified as being the weapon in question through Nemaïsa's evidence and the findings contained in Exhibit 1. It was further identified through the chain of evidence given by Michael Tom, Ngoni Masoka, Peter Ngandu and Joseph Nemaïsa.

The evidence of Cindy Anderson, Edmore Mapuranga and Peter Ngandu, as set out in the State Summary, was also admitted by consent. Their evidence as outlined must therefore be taken as being uncontradicted. As appears from the State Summary, the evidence of Cindy Anderson corroborates that of Michael Tom as regards the events that took place outside the farmhouse when the deceased was shot and immediately thereafter. The evidence of Edmore Mapuranga would have been materially similar to and corroborative of Michael Tom's evidence, while the evidence of Jackson Ngandu is virtually the same as that of Peter Ngandu.

### **The Court's Findings**

It is clear from the evidence adduced at the trial that the accused and his accomplice, Benedict Makumbe, went to Norfolk Farm on the fatal day with the common purpose of committing a robbery at that farm. It is also clear that the accused was armed with an AK rifle loaded with ammunition.

As already stated, the accused's version that he was coerced into this enterprise by Makumbe, who was acting on so-called superior instructions, is exceedingly difficult to accept. If what the accused alleges were true, he had ample opportunity to escape from Makumbe not only on their way to Norfolk Farm but also at the farm itself when he was allegedly given the AK rifle by Makumbe on two separate occasions. Again, after the robbery, instead of charging in hot pursuit after Makumbe and lying to Masoka as to his reason for so doing, he could have reported the incident to the nearest police authorities at the earliest opportunity. However, he did none of these things and was unable to proffer any persuasive explanation as to why he did not. In the event, the Court concludes that his version of events is wholly unbelievable and must therefore be rejected.

The Court finds that it was the accused and not Makumbe who was in charge of their joint venture. Although both of them might have planned and agreed to commit the robbery, it was the accused who dictated and directed their common purpose. More significantly, the accused retained full control of the AK rifle in question throughout the period under consideration and he was clearly prepared to use it in the event that they met any resistance.

Having regard to all the evidence before the Court, it is abundantly clear that it was the accused who fatally shot the deceased. The clear and unequivocal testimony of Michael Tom that he personally witnessed the accused shooting the deceased is entirely

credible. The Court is unable to perceive any reason why Tom should fabricate his firm and unwavering identification of the accused as the person who shot and killed the deceased. There was no suggestion or indication before the Court of the possibility of false incrimination and Defence counsel quite properly conceded this point.

The Court accordingly finds that the accused shot and killed the deceased in the course of committing an armed robbery. It appears that the deceased might have carried his firearm with him when he approached the farmhouse. However, there is no evidence that the deceased had his rifle in hand when he was actually shot. The uncontroverted evidence of Michael Tom was that the deceased was unarmed at that time. What is unquestionably clear is that the accused was armed with a lethal weapon. He waited in hiding for the deceased to enter the farmhouse, fully prepared to shoot him as and when he appeared. He did not attempt to warn or stop the deceased. He deliberately shot the deceased in the head in what can only be described as an act of cold-blooded murder.

### **Verdict**

On the evidence before it, the Court is satisfied that the accused's guilt has been proven beyond any reasonable doubt. Accordingly, the Court finds the accused guilty of murder with actual intent.

### **Extenuation**

In terms of section 337 of the Criminal Procedure and Evidence Act [*Chapter 9:07*], the High Court is enjoined and required to pass the sentence of death upon an offender convicted by it of murder unless it is of the opinion that there are extenuating circumstances, in which case the Court may impose a sentence of imprisonment for life or some other appropriate sentence. By virtue of section 338, the High Court is precluded from passing the death sentence upon an offender who is a pregnant woman or who is over the age of seventy years or who was under the age of eighteen years at the time of the offence.

The exceptions enumerated in section 338 are not relevant for present purposes. The question that therefore arises for consideration in this case is whether or not there are extenuating circumstances surrounding the murder of the deceased by the accused.

*Mr. Matsika*, for the accused, submits that the accused was coerced into accompanying his accomplice, Benedict Makumbe, to commit the robbery at Norfolk Farm. He complied with Makumbe because he believed that the latter was acting under superior instructions from the then Minister of Home Affairs, John Nkomo. As regards the killing of the deceased, it is submitted that the deceased was probably armed with his rifle at the time that the accused confronted him and that the accused acted on the spur of the moment under the threat of being attacked by the deceased.

For the State, *Mr. Mabesa* submits that there are no extenuating circumstances in this case. He cites precedent to the effect that capital punishment is ordinarily warranted where murder is committed in the course of an armed robbery. He is unable to find anything in the accused's favour and urges the Court to impose the death sentence.

In *Mubaiwa & Another v The State* 1992 (2) ZLR 362 (S) at 368, McNALLY JA observed that:

“It has been said often enough in this court that those who take a dangerous weapon such as a firearm on an expedition to rob can expect little mercy if the firearm is used and someone is killed.”

In similar vein, in *The State v Sibanda* 1992 (2) ZLR 438 (S) at 443, GUBBAY CJ stated as follows:

“Warnings have frequently been given that, in the absence of weighty extenuating circumstances, a murder committed in the course of a robbery will attract the death penalty. This is because, as observed in *S v Ndlovu* S-34-85 (unreported):

‘... it is the duty of the courts to protect members of the public against this type of offence which has become disturbingly prevalent. People must feel that it is possible for them to enjoy the sanctity of their homes, to attend at their business premises, or to go abroad, without being subjected to unlawful interference and attack.’”

The Court's findings on the evidence before it clearly militate against the submissions proffered on behalf of the accused. His version of what transpired on the fatal day is extremely untenable and is unreservedly rejected by the Court.

The accused was the dominant and lead protagonist in a premeditated armed robbery. He was armed with a lethal weapon, an AK rifle loaded with ammunition. As regards the deceased's rifle, the only clear evidence is that of Michael Tom who testified that the accused picked up the deceased's rifle when he found it lying outside the farmhouse, away from the spot where the deceased was shot. There is therefore no

evidence to support the submission that the deceased was probably armed at the time when he was shot by the accused. As for the fatal shot itself, the accused did not warn the deceased that he was armed and shot the deceased in the head at close range.

**Sentence**

On these facts, it is clear that the killing of the deceased was deliberate and inexcusable. The accused murdered the deceased with an actual intent to kill. The Court is unable to discern any feature that diminishes the accused's moral culpability *in casu*. Accordingly, the Court is of the unanimous opinion that there are no extenuating circumstances in this case. It follows that I have no option but to impose the morally invidious but legally inescapable sentence of death upon the accused.