THE STATE
versus
ISAAC MLAMBO

HIGH COURT OF ZIMBABWE
BERE J
MASVINGO CIRCUIT, 6-9 October 2014

Assessors 1. Mr Dhauramanzi
2. Mr Mushuku

Criminal Trial

E. Chavarika, for the State
C. Ndlovu, for the Accused

BERE J: The accused is facing a charge of murder as defined in s 47 (1) of the Criminal law (Codification and Reform) Act [*Cap 9:23*].

The allegations against the accused stem from the tragic events that enveloped the community of Ngundu Business Centre on the morning of 26 December 2013.

The allegations as gleaned from the State summary are that on this fateful day the accused person and his accomplice who is still at large presented themselves as uninvited visitors of Ngundu Business Centre in the morning of 26 December 2013.

The deceased, Trust Tapera Chibaya who was self-employed and working as a money changer and airtime vendor joined his fellow workers close to Nyaningwe Supermarket, Ngundu Business Centre to embark on his routine work. Little did he know that that was the last time he would grace that place alive.

Without any warning and in a typical movie style the accused and his accomplice who up to this day remains unaccounted for started indiscriminately firing at the business centre sending people to scurry for cover in different directions. The deceased had the misfortune of

being chosen as a prime target among his fellow traders. In the commotion that followed the deceased was chased after by the accused who was armed with a cz pistol. As the deceased ran for dear life the accused followed him in hot pursuit ordering him to surrender the small black bag which the assailant had correctly assessed contained the deceased's cash.

Realising the futility of trying to escape from the menacing accused the deceased surrendered the bag and its contents. No sooner had he done that than the accused demanded and ordered the deceased to surrender all the money he had in his pockets. As the deceased was empting his pockets as per the accused's instructions, the accused gunned him down.

The accused then collected the deceased's bag which he slung on his neck after picking up some of the money thrown on the ground by the panic stricken deceased. Clutching his ill-gotten loot on his left hand and the murder weapon on his right hand the accused ran towards some mountain close by with the horde of crowd in hot pursuit of him. The deceased was rushed to Ngundu Clinic where he died on admission.

The post-mortem examination conducted on the deceased's remains by Dr S. Gomo on the 27th of December 2013 concluded that the deceased died due to penetrating trauma to the chest secondary to a bullet wound.

It is also the allegation of the State that as the accused was terrorising the deceased the other assailant, the accused's accomplice continued with his indiscriminate firing after which he escaped into nearby mountain and was never seen again.

The accused was not so lucky. He was pursued and apprehended by a menacing crowd before he could make good his escape. Both the deceased's bag and the firearm used by the accused were recovered firmly in the hands of the accused on being apprehended.

The accused denied the allegations levelled against him and to avoid any form of distortion of his defence outline I proposed to reproduce the most relevant portions of the summary to his defence outline. It reads as follows:

> "3. **SUMMARY OF EVIDENCE**
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> Accused person will not challenge the contents of the post-mortem report and forensic ballistic report. The rest of the evidence is challenged.
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> 4. (i) Accused person avers that he is a Mozambican national who was working in South Africa. Whilst in South Africa he met Mike Sithole (a Zimbabwean national) who befriended him. Later Mike Sithole requested him to accompany him to his home in Zimbabwe and the accused person accepted the request. It was his first time to visit Zimbabwe and was solely dependent on Mike Sithole.
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> (ii) On 26th December 2013 they arrived at Ngundu. Whilst they were at Ngundu, Mike Sithole produced two firearms and ordered everyone to lie down. He discharged the firearm(s) and people scurried for cover. The accused person was petrified for a

moment. When he regained his senses, he ran away. He was not in possession of a firearm and had not robbed anyone.

(iii) He was surprised to see people persuing him. The people caught up with him and brutally assaulted him. He was perplexed to see police officers joining in the murderous and unlawful attack on him."

The rest of the accused's defence outline was tailor made to challenge his confirmed warned and cautioned statement which the prosecution decided not to rely on in these proceedings. For these reasons that portion of his defence outline shall not be considered in this judgement.

I must hasten to add that although the confirmed warned and cautioned statement had been tendered as exh 1, the understanding had been that the court would not rely on it until after the conclusion of the recording of evidence to do with its admissibility were canvassed in accordance with the provisions of s 256 (2)[1]. Once the State indicated that it was no longer going to rely on it, the statement was mutually expunged from the record of proceedings. It is precisely for these reasons that no reliance or reference to that statement will be made in this judgement.

The relevant, various pieces of evidence which the court had to rely on in this judgement comprise of the following; the post mortem report exh 2, cz brown pistol bearing serial number A4342 (manufactured after 1900) exh II, empty magazine (exh IV), the forensic ballistic report- (exh V) and a small black back with its contents (exh VI).

In addition, the evidence of the following witnesses (Josia Chidhodho, Moses Chiora, Inspector Mutizwa and Dr S. Gomo) was admitted into the record of proceedings in terms of s 314[2].

Apart from the above, the court also had to pay regard to the evidence given by the State witnesses and the accused as well as the evidence of the two witnesses which the court decided to call *meru moto* as it was relevant to the issue before the court.

THE EVIDENCE

The State case was largely augmented by the viva voce evidence of Kaimos Gosa, Freeman Chiware and Paul Tsvangirai, whilst the accused gave evidence as the sole witness for the defence.

[1] Criminal Procedure and Evidence Act [*Cap9:07*]
[2] Criminal Procedure and Evidence Act [*Cap 9:07*]

Kainos Gosa:

The witness's evidence was to the effect that he knew the deceased during his life time as his workmate. The witness confirmed the commotion and confusion that gripped Ngundu Business Centre when the accused and his accomplice started indiscriminately firing and how people ran in different directions in their panic stricken state. When one of his workmates Kuda was shot at he noticed the accused's accomplice attempting to search Kuda.

The witness picked up some quarry stones and threw them at this man who attempted to search Kuda, in order to scare away this assailant.

He said he thought he heard seven or so shots fired indiscriminately as he stood by Mapuvire Shop. His first response to the gun firing was to run away but on second thoughts he found himself seated down as the indiscriminate firing confused him and he feared if he continued running he might have been seriously injured.

The witness's evidence was important in that he appeared to have been the only witness who kept his eyes on the accused's accomplice whom he observed climbing over the fence and running towards a mountain. He said that man was never apprehended after he had scared him away as he tried to search Kuda. He and others chased after that man but they failed to apprehend him.

The witness was candid with the court when he said that he did not see the deceased being shot at but that he only heard gunshots. He however discounted the theory that the man who escaped was the one who shot the deceased.

He also dismissed the allegations that only one of the two assailants had two firearms. He said the two assailants were independently armed. We accept his evidence. It was not calculated to mislead anyone. He gave it as it happened.

The only limitations to his evidence was that he did not witness the accused being apprehended but only saw him when he had already been arrested. He was however certain that the person who shot the deceased is the one who was apprehended by the mob.

Freeman Chiware

He was the second State witness to give evidence. He said he regarded the deceased as his nephew.

He said he saw the accused chasing after the deceased and ordering him to surrender the bag whilst pointing his firearm at him. He also testified to the effect that he personally

witnessed the accused being ordered to surrender everything in his pockets before being shot at at arm's length by the accused.

The witness said he clearly saw how the deceased was shot at as he was barely 30 metres or so from the spot where the deceased was shot. He said he was one of the mob that ran after the accused until he was disarmed of the gun and the bag recovered from him. His evidence that he saw the accused running away clutching his firearm on his right hand could not possibly have been an exaggeration because that evidence found firm corrobation from the evidence of Paul Tsvangirai, David Tsindikira and Takaidzwa Mananavire.

The bulk of this witness's cross-examination was calculated to demonstrate that the situation this witness observed was very mobile to the extent that he could not possibly have been able to identify the accused person.

We observe that almost every robbery act is characterised by a very mobile scene and it is invariably difficult to easily identify the culprit. That this was so in this case is evidenced by this witness's failure to explain the attire which the accused was wearing on the day in question.

The witness also struggled to state with certainty where the deceased was shot at. He could not tell us with certainty whether or not the deceased was shot at from the back or from the front as he was facing his assailant.

Our view is that this witness may not have seen the deceased being shot at but only heard the sound of shooting. We have no doubt in our minds that if the accused had to be identified via the identification parade this witness would have struggled to identify him.

The only salvation, as l will demonstrate later in this judgement is that the strict rules of identification of the culprit will not arise in this matter because of the manner in which the accused was apprehended as well as the nature of the accused's defence.

Paul Tsvangirai

This witness found himself involved in this case by sheer opportunity. He found himself participating in apprehending the accused after he heard the people shouting "Catch the thief, catch the thief". He immediately joined in the chase as he was on his way to work.

This witness's evidence substantially tallied with the evidence of Freeman Chiware, David Tsindikira and Takaidzwa Mananavire.

Whilst most of his evidence found corroboration from the other State witnesses, it is clear the witness was not quite candid with the court when he testified that he did not see the

accused being assaulted by the mob after he had been apprehended. That soft handling of the accused given the gravity of his conduct would have been most unusual. We therefore do not accept his version that he did not see the accused person being assaulted upon his arrest. Probabilitiesh favour the assault of the accused at the time of his arrest.

Isaac Mlambo

The accused opted to adopt the blame game when he testified. He, for understandable reasons chose to shift the shooting of the deceased squarely on the shoulders of his accomplice who escaped arrest.

His evidence was to the effect that he did not have a firearm on the fateful day. He said it was his colleague Mike Sithole who shot the deceased. He said upon his arrest nothing was recovered from him. The accused struggled to support his own defence outline when he exhibited difficulties in telling the court the number of firearms which his accomplice was holding. He said he saw his colleague with a firearm (contrary to his defence outline which spoke to two firearms) but could not remember the type of the firearm. In one breadth he said he did not think it was his accomplice who fired but someone else. The accused story was hard to follow or believe.

The accused confirmed that from South Africa right up to the scene of crime he was in the company of his accomplice. Even at the time of shooting he was a few metres from his accomplice although he claimed not to have seen the firearm that was being used by his accomplice.

The accused struggled to put up a coherent story justifying why he ran away from the scene of crime if his association with his accomplice was an innocent one.

Most importantly we found the story by the accused to be jumbled up and most unconvincing. It was a hopelessly false story which we are certain he did not believe in it himself.

For starters if indeed, the accused had panicked due to the unexpected conduct of his accomplice there would have been no need for the accused to run away clutching the deceased's bag. A person who has panicked in the manner projected by the accused in his testimony does not run away with the proceeds of robbery.

We unanimously found the story told by the accused to be hopelessly false because it went against the weight of the uniquely credible and corroborated evidence of the State witnesses and the two witnesses called by the court.

What cannot be disputed from the evidence accepted by the court is that when the accused and his accomplice arrived at Ngundu Business Centre on the fateful day they had a common objective. They had properly planned to commit robbery and they were acting in common purpose. This is evidenced by their combined effort in almost simultaneously firing their firearms at the business centre to create a conducive atmosphere for the robbery that followed. This is the tenure of the evidence accepted by this court.

If it is accepted that the two were acting in common purpose in embarking on this violent criminal enterprise (as it should be), then the main defence of the accused person of trying to shift the blame on his accomplice, even if it had succeeded would certainly not exonerate him from the murder of the deceased. The doctrine of common purpose would not afford him any defence. But in this case we have not even been persuaded to take that cumbersome route to determine this case. There is overwhelming evidence which even the blind can see that the accused authored the demise of the deceased.

Takaidza Mananavire and David Tsindikira

These two witnesses were called by the court *meru moto* in terms of s 232[3] after the defence case had been closed. Our conviction as a court was that these witnesses' testimony was clearly relevant to the issue which the court had to grapple with.

If ever there was any doubt on the authenticity of the simple story told by the State witnesses that doubt was completely obliterated by the credible evidence of these two witnesses. Their evidence cemented beyond any shadow of doubt the credibility of the allegations against the accused person.

The two witnesses confirmed chasing the accused as he made an abortive attempt to flee from the marauding Ngundu Business Centre crowd after the heinous shooting of the deceased. It was through the heroic deeds of these witnesses that the accused was apprehended.

The two witnesses testified that upon hearing people shouting "thief, thief" they abandoned what they were doing and gave chase to the accused who was holding a firearm in his right hand and the deceased's small bag with his left hand.

In a typical movie style the then 23 year old Takaidza Mananavire tripped the unsuspecting accused and fell him to the ground, pinning him in such a way that the firearm

[3] Criminal Procedure and Evidence Act [Cap9:07]

was pointed to the ground to avoid another injury in the event of the accused making an attempt to shoot again.

With the timeous arrival and intervention of his colleague David Tsindikira the accused was disarmed much to the relief of the chasing crowd who responded by meting out instant justice to the accused upon his apprehension.

The two witnesses further gave a credible account as to how the deceased's bag and its contents was recovered from the accused person. The witnesses' evidence was flawless.

David Tsindikira, the man who actually succeeded in disarming the accused had difficulties in confirming whether or not the recovered firearm was the exact one he recovered from the accused.

The witness vaguely remembered that the one he recovered appeared to have a wooden butt as opposed to the firearm which was presented to court as an exhibit. In addition his memory appeared to fail him when he was asked about the deceased's bag although he was clear that it was a small black bag resembling a purse.

Under cross-examination the witness was asked about the recovered firearm and he responded as follows:

> "Maybe I did not see properly since it is something that happened within a short space of time"

The short space of time alluded to by the witness referred to his examination of the firearm at the scene immediately upon disarming the accused person.

Takaidza Mananavira appeared more forthright in confirming the recovered firearm and the bag. He took us through a brief talk initiated by the accused as he pinned him down. It was his testimony that the accused persuaded him to take the deceased's bag and the money in it and let him go. The witness said he told the accused that he was not interested in that except to apprehend the accused as he continued to pin him down.

As a court we do not read much into the minor discrepancies in the testimony of David Tsindikira. Whether the recovered firearm had a plastic or wooden butt is neither here nor there.

The indisputable net effect of the witnesses' testimony was that they both saw the accused running holding both the deceased's bag and a firearm and that these were with the accused person when he was apprehended. The credibility of these witnesses' testimony is beyond reproach and it adequately cements the State case.

What this means is that the accused must not be believed when he suggests that the recovered murder weapon and the deceased's bag were planted on him by the police. That is too cheap a theory to sell to this court because it went against the natural floor of the evidence accepted by this court.

It is significant to note that the witnesses who gave chase and eventually apprehended the accused person never lost sight of him as he made his abortive attempt to escape.

The brief talk the accused person had with both Tsindikira and Mananavire concerning the accused's possible involvement with banditry activities in Mozambique and his attempt to give the stolen loot to Mananavire speaks volumes towards the guilt of the accused in murdering the deceased.

This brings me to deal with the issue which we were urged to seriously consider by the accused's defence counsel when he made his closing submissions. Counsel drew the court's attention to the need to exercise extreme care by reminding us of the accepted legal principles on the law of identification. Counsel made reference to one of the most recent cases which incidentally I had the privilege of presiding over with my brother HUNGWE J, *viz S* v *Farai Kambarami and Anor*[4] . In that case, my brother HUNGWE J, in handing out his judgement had this to say:

> "Questions of identification are always difficult. This is the reason why extreme care should always be exercised when it is proposed to carry out identification parades, that is to prevent the slightest hint reaching the witness of the identity of the suspect. People often resemble each other and it is not uncommon that strangers are sometimes mistaken for old acquaintances. In *S* v *Dhliwayo and Another* 1985 (2) ZLR 101 (SC) it was held that:
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> > 'Where an identifying witness has been shown to be careful and truthful, it is not always necessary for the witness to be asked to give details of every feature by which he identified the accused. Evidence of identification, however, must be treated with some caution and the reliability of the witnesses's evidence must be tested against the cumulative weight of such factors as lighting, visibility and eyesight, his proximity to the accused: his opportunity for observation, the extent of his prior knowledge of the accused the accused's features and appearance, the result of an identification parade and the accused's evidence'."

The firm view that I take regarding this cautious approach is that this case is quite distinguishable from the situation that had to exercise our minds in the *S* v *Kambarami* case where the question turned on the identification of the accused.

In the instant case, issues of the identification of the accused do not arise. This is so given the nature of the accused's defence outline where he admits that he was the person chased after by the angry mob after the shooting. He admits that he is the very person who

[4] HH 273-14 @ p3

was apprehended by this marauding mob which was baying for his blood. His only denial is that he was never found in possession of the murder weapon and the deceased's bag. These are matters which do not require the accused to be identified via an identification parade where greater caution would be required. The assessment of his defence does not require to be done through his identification because this case does not turn on the identification of the accused.

Even if the identification of the accused was an issue in these proceedings the accused would still not be on firm ground because those who chased him and apprehended him never lost sight of him from the shooting of the deceased right up to the time of his apprehension.

The accused's counsel also referred us to the case of *Pension Mavanga* v *The State* [5] per DUMBUTSHENA A.J.A. Again what was in issue in this case was the consideration of the evidence of identification of the robber and the manner the identification parade was conducted.

These issues do not arise in the case that we are seized with. There can be no danger of false identification of the accused, although he was a total stranger. Against this is the undeniable fact that he was seen committing the offence, chased after and apprehended before he could make good his desired escape. This is so particularly in this case where the witnesses and the accused himself are agreeable that the person who was running away is the same person who was arrested. Such cases must be distinguishable from those cases where the culprit is chased after, lost out in the process and is then put on an identification parade for purposes of identifying him.

I have already dealt with the doctrine of common purpose in this matter. Given the findings of this court it was really not going to matter even if the evidence was to establish that the accused's accomplice had pulled the trigger that took the deceased's life. But as already stated, this does not arise in this case because of the overwhelming evidence against the accused in causing the death of the deceased.

We must now decide on the verdict itself. The evidence that we accept is that on the day in question the accused chased after the deceased pointing a loaded firearm at him demanding that he surrenders the bag. When the deceased complied he was then ordered to empty his pockets and surrender all the money that he had after which he was gunned down.

[5] Judgement No. SC7/82

The proper verdict can only be one. This is a clear intended murder. Before concluding this judgement the court would want to pay tribute to the heroic conduct exhibited by Takaidza Mananavire and David Tsindikira who was only 23 years old at the time. They exhibited rare courage. We acknowledge that. This compliment is also extended to those who took part in the chase of the accused. It was extremely risk, but all these people put their lives on the edge in ensuring that the accused would not succeed in his determined attempt to escape.

Verdict – Guilty of murder with actual intent.

SENTENCE

After pronouncing our verdict we deliberately adopted a double barrelled approach when we invited both Counsel to address us on extenuation in line with the provisions of s 337[6] and the implications of s 48 [7] of the Constitution which has obviously generated so much debate on the propriety or otherwise of the imposition of death penalty in this country ever since the coming into effect of the new Constitution.

Both the defence and the State Counsel were agreed, and in our view for good reasons that there was no extenuation in this case.

Both Counsel were also agreed that this particular murder was committed in aggravating circumstances as informed by s 48 (2) of the Constitution of the Republic. As a court we entirely accept the characterisation of this murder **as** perceived by both counsel.

In mitigation of sentence the accused's defence had virtually no compelling submissions to make. It was submitted on behalf of the accused that the accused was a Mozambican National who until this fateful day had been working in South Africa and had visited this country at the invitation of his escaped accomplice, Mike Sithole, a Zimbabwean National.

In aggravation, the State Counsel submitted that he was unable to discern any feature in accused's mitigation which would diminish the moral culpability of the accused in view of the callous killing of the deceased. We agree.

We are particularly concerned as a Court that at the time the deceased was shot at, he was standing there defenceless and terrified by the unprovoked conduct of the accused. The deceased was not at all a threat to the accused and he posed no harm to him. He had

[6] Criminal Procedure and Evidence Act [Chapter9:07]
[7] Constitution of Zimbabwe Amendment (No.20) Act 2013.

surrendered his small bag that contained all his money to the accused upon demand. For all that cooperation with the accused the deceased was rewarded by being shot at at arms length with a pistol that tragically ended his life. That was callous killing by any imagination.

As stated earlier on s 48 (*supra*) has generated much debate in this country on the propriety or otherwise of the imposition of death penalty.

My brother Judge Hungwe, in a recent case of *State* v *Jonathan Mutsinze*[8] expressed the view that until such time an Act of Parliament is promulgated defining "the terms on which courts will impose the death penalty", including the definition of "aggravating circumstances" it may not be proper to impose a death penalty.

With all due deference to my brother Hungwe J, I do not share his sentiments for the following reasons.

There is no need to pretend that until s 48 (*supra*) was enacted our common law position through precedent had not defined "aggravating circumstances" Our courts have always expressed the view that murder committed in the furtherance of other crimes such as rape or robbery amounts to murder committed in "aggravating circumstances" to warrant the imposition of death penalty.

I shudder to think that the enactment of s 48 (2) of the Constitution should be interpreted to have changed our common law position. That argument does not sound attractive to me because the legislature could not have intended to create such a *lacuna* in our law.

There are numerous instances in our law when the Courts have determined and made specific findings of the existence of aggravating circumstances and went on to impose death penalty. See *Elias Mahiya Chauke and Stephen Chidhumo* v *S*[9], *Thompson Sibanda* v *S* [10]and *S* v *Sibanda*[11].

In the instant case I am persuaded to restate the concluding remarks made by Gubbay CJ in *S* v *Sibanda* (*supra*) when he stated:

> "In this case the trial Court found that the appellant had murdered the deceased with actual intent to kill. It was unable to discern any feature which diminished the appellant's moral culpability in the callous and brutal killing of a defenceless and terrified man who had done him no harm. And so it found that the death sentence was imperatively called for.-----."[12]

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[8] HH 645-14
[9] SC 139/2000
[10] SC 5/87
[11] 1992 (2) ZLR 438 (S)
[12] 1992 (2) ZLR 438 (S) at 444

The quoted observation squarely fits into the case before us. Our unanimous view is that the callous manner in which this particular offence was committed is a passionate plea to this Court by those in the mould of the accused person or similarly inclined individuals to retain death penalty in this country despite all the noise that continues to be made against it. By any stretch of imagination, there can be no doubt that this murder was committed in aggravating circumstances as envisaged by s 48(2) (*supra*). This case screams loudly for the imposition of death penalty.

Consequently the accused shall be returned to custody where the sentence of death shall be executed against him according to law.

National Prosecuting Authority, State Counsel
Ndlovu & Hwacha, Accused's Counsel