

THE STATE  
versus  
MAXWELL TENDAI FARIRAI

HIGH COURT OF ZIMBABWE  
HUNGWE J  
HARARE, 27 October 2005, 27 April 2006 and 8 July 2015

### **Criminal Trial**

*Mrs F Chimbaru*, for the State  
*A Mutungura*, for the defence

HUNGWE J: The accused pleaded not guilty to three counts of murder, the allegation being that on 15 January 2000 at 7 Flamingo Road, Greenside, Mutare he unlawfully and with intent to kill murdered Jack Allan Good by stabbing him several times in the neck and hands.

In count 2 the allegation was that on 6 March 2001 at 15 Starling Road, Greenside, Mutare, he unlawfully and with intent to kill murdered Sylvia Jean Van der Walt by striking her with an iron pipe on the head and neck.

In count 3 the allegation was that on 39 June 2001 at 136 Leerd Street, Mutare, he unlawfully and with intent to kill murdered Patrice Anne Cliffe by striking her on the head with a blunt object.

The summary of the whole case is set out in exh I. I will not repeat all of it now. I need to point out that the summarised evidence of ten state witnesses was admitted of record as it appears in exh I the State Summary in terms of s 314 of the Criminal procedure and Evidence Act, [*Chapter 9:07*].

These witnesses are

1. Daniel Van Royen
2. Doctor Bvirakare
3. Joel Marange
4. John Nyamande

5. Richard Chitondwe
6. Dr Tshiani
7. Alice Maraire
8. Edwin Winter Zimbizi
9. Dr Mhlanga
10. Arimon Mirimbo.

In the event the State relied on the evidence of Assistant Inspector Never Chipembere, Detective Constable Muchazondida Phaniel Nyakuwanikwa, Detective Superintendent Edgar Mtebuka, Phillip Edward Cliffe and Shepherd Manyande.

Shepherd Manyande was employed by Sylvia Jean Van der Walt, the deceased in count 2 in March 2001. He recounted how in the morning of 6 March 2001 he discovered the body of the deceased lying in a pool of blood inside her bedroom. The house had been ransacked the gate had been left wide open as was the driver's door of deceased's light truck. Its keys hang from the driver's door. The rear grill gate to the house was also open.

Inside, the property had been strewn all over. The axe hedge cutter and a hacksaw lay in the corridor. She had been murdered. He called on the neighbour who telephoned the police.

When police came, they took photographs and searched for finger prints. He was also photographed. These photographs are exhibits 4 to 12.

This witness' evidence was not contested.

The doctor who conducted a post mortem on the deceased recorded on exh 4 that deceased suffered a broken neck, two cuts on the head one on the forehead and a deep cut on the chin. He concluded that she died from a broken neck.

Phillip Cliffe also testified how he found his mother murdered on the morning of 30 June 2001.

He contacted the police who came and searched for finger prints. He signed for exh 19 a set of finger prints lifted from the house. Property was stolen from the house. His evidence was not contested.

His mother is Patricia Anne Cliffe, the deceased in Count 3. Dr Mhlanga found two big lacerations on her skull, subural haematoma. He concluded that she died of head injury.

Daniel Jacobus Van Royean's evidence was that on 13 January 2000 he visited his in-laws Mr and Mrs Good. The following day he had breakfast with both of them and left for

a -Seminar in town.

Later that morning he was telephoned by a neighbour. He learnt of the death of his father-in-law Jack Allan Good. He found him lying in a pool of blood. There was a blood stained knife next to the body. His clothes were blood stained. Property had been strewn all over. Some of it including his own had been stolen. Dr Bvirakure confirmed in exh 3 the post mortem report that stabbing to the left side of the neck severed the carotid and jugular veins. He also confirmed that the deceased suffered cuts on his head.

The deceased died as a result of stab wounds that severed the neck vessels.

This evidence was not contested.

Assistant Inspector Chipembere was attached to scenes of crime. His duties involved attending to scenes of crime, examining for finger prints, searching for finger prints, filing incoming finger prints and identifying people by means of finger prints. He also maintained Manicaland Mini Bureau in which is kept finger print tape cards and related material. He updates other sections of outstanding crimes and any related information.

Ha had custody of all uplifted tape cards that were still outstanding.

On 6 March 2001 he was assigned to attend to a murder scene at 15 Sterling Road, Greenside, Mutare together with Lot Kanyandu.

He met Shepherd Manyande and proceeded to take photographs of his observations in exh 4 to 12.

He dusted for finger prints and obtained a set from the built-in cupboards, the bedroom doors and other small items.

He mounted one set from the spare bedroom on police form 29 and referenced it 145 of 2001. It is exh 14.

On 20 November 2003 he received a batch of finger prints from CCB in Harare for his records. Amongst them was one for the accused marked Maxwell Tendai Farirayi.

He pulled out his outstanding tape cards and made a comparison with this set. The finger prints from Harare marked Maxwell Tendai Farirayi matched that he uplifted from 15 Sterling Road, Greenside Mutare on 6 March 2001.

He advised the relevant authorities that the accused was a suspect for the murder of Sylvia Jean Vander Wall.

Accused was then arrested by Constable Nyamuwanikwa at his home. This officer appears then recorded accused's finger prints on 24 November 2003 exh 17. A comparison of

accused's finger prints showed that it matched exh 14.

He made similar comparisons with tape cards referenced 43/2000 from exh 157 Flamingo Drive, Greenside where Mr Good was killed and tape card 299/01 exh 19. He found that these matched with accused's finger prints.

He then forwarded these tape cards and accused's finger prints to Harare for a different opinion and expert analysis.

In Harare Detective Superintendent Mutebuka made his own analysis and comparison. He determined that the tape card exh 14 from 15 Sterling Road, Greenside revealed accused's left middle finger and that exh 14 from 7 Flamingo Road revealed accused's right four fingers excluding the thumb. He took the middle right finger print impression from exh 17 and enlarged it. He also took the middle right finger from exh 15 picked from 7 Flamingo Road Greenside and enlarged it.

He then mounted the two enlargements under by side and marked 12 ridge that appear in the same position relative to each other.

He put this exercise as exh 16 for count 1 and exh 18 for count 2.

As for exh 19 the tape card from count 3 that is 136 Second Street he could only find for such ridge characteristics. As such could not vouch for the sufficiency of that evidence.

According to his experience no two impressions from different ridge surfaces have the same ridge characteristics appearing on the same position relative to each other. In simple parlance fingers from different people have not been known to create the same ridge characteristics as he demonstrated in exh 16 and 18. What this means is that the same person from who exh 17 was taken made the impressions picked up from 7 Flamingo Drive and 15 Sterling Road Greenside Mutare. It is the accused. He is not a lawful resident of these two addresses.

Faced with this evidence, all the accused could do was deny ever being at these addresses. He cleared he was at home.

In respect of count 3 accused claimed that he was present during the commission of the offence but says that their purpose was to break in and steal not to kill the deceased. He did not make common purpose to kill but to steal.

Accused admits to being an accomplice to the criminal enterprise that he, Christopher Mvume and one Archibald convened to execute. He says when they arrived at 13 Second Street Christopher stripped the residence's main switch. The deceased came out to switch it

on as the place had been plunged into darkness. Christopher then struck her with a stone. She died. He went inside and began looting items of property.

Since the liability of a *socus criminis* is dependent upon his own act and his own state of mind it is from his own admitted acts and statements that this court should decide whether or not he formed common purpose with Christopher and Archibald. *R v Nemashakwe & Others* 1967 (3) SA 520.

He admits that they all planned to go and break into the house. On arrival presumably and in terms of their plan, one of them plunged the premises into darkness by tripping of the main switch. They knew an elderly lady lived there alone. She came out. One of them struck her on the head with a stone killing her instantly. They then looted the premises.

By his own conduct, he approved of this murder. He did not withdraw from the enterprise on realising that deceased had been killed.

It must be stated that in a robbery the accused is determined to forcefully take the victim's property. He plans meticulously how he will achieve this. He takes all precautions to break any resistance that the victim may put up. Thus, in armed robberies the accused is armed for the specific purpose of breaking up any resistance to the pre-planned taking of property. In all such cases the robber foresees death or serious injury to his victim. He plans it. He anticipates it. He carries through his evil design whether resistance is offered or not.

In our view this is the state of mind that the accused and his gang had when they approached deceased in count 3. He cannot be held to say that he did not make common purpose to kill deceased yet he proceeded with their enterprise on realising that deceased had been killed.

By his own conduct he ratified the killing of the deceased. He anticipated that a victim may resist and may be killed in the process.

We therefore reject his claim.

He is found guilty of murder with actual intent in all three counts as charged.

*Prosecutor General's Office*, the State's legal practitioners  
*C Mutsahuni Chikore & Partners*, the defence's legal practitioners