

THE STATE
versus
MASHWELL KURAUONE

HIGH COURT OF ZIMBABWE
MUSAKWAJ
MASVINGO, 19, 20, 21 October 2015

ASSESSORS: 1. Mr Dhauramanzi

2. Mr Gweru

Criminal Trial

T Chikwati, for the state
C Maboke, for the accused

MUSAKWAJ: In this case life imitated art when it should be the other way round. The facts of this case are akin to works of fiction. It is even more worrisome that such gruesome acts took place in a would be serene rural set-up.

The accused is charged with one count of murder and another of attempted murder. He has already pleaded guilty to three counts of robbery and has been convicted accordingly. He actually pleaded guilty to all counts save that pleas of not guilty had to be entered in respect of the first two counts. This is because in respect of the charge of murder it is a requirement in terms of s 271 (1) of the Criminal Procedure and Evidence Act [*Chapter 9:07*] that an accused person who pleads to such a charge cannot be convicted without evidence being heard. Because of the interconnectedness of the two counts and the fact that the plea of guilty to the second count was contrary to instructions it was found proper to enter a plea of not guilty to that charge.

The facts can be summed up as follows: The accused, a fugitive accomplice and five other passengers boarded a Toyota Ipsum motor vehicle at Jerera Growth Point. The motor

vehicle was bound to Chiredzi. The accused and his colleague delayed the journey as they insisted that the fare to their destination was US\$1 whereas it was US\$2. They eventually relented after the ill-fated driver appealed to other passengers. The time was now around 9 p.m. The accused and his colleague initially intimated that they would disembark at Muzondidya but they changed and said they would disembark at Chekenyere.

At Chekenyere the deceased was told to lower the volume of the radio and an utterance was made to the effect that it had started. Evidence by state witnesses is to the effect that soon after the deceased lowered the volume and was repositioning himself in the driver's seat, he was shot in the lower back. The vehicle was still in motion. The accused and his colleague then got out. One of them opened the driver's door and pulled out the deceased who fell onto the tarmac.

Meanwhile, Innocent Mupoperi the complainant in the second count jumped out. He was then shot by the accused person. It is common cause that he was shot on the left thigh, with the bullet traversing and exiting through the right thigh. The other passengers in the vehicle were threatened and relieved of their cash and cell phones. The accused was later arrested whilst aboard a bus in which he had slept the night at Rudhanda. He was in possession of a 9mm Vektor pistol whose serial numbers had been erased.

In his defence the accused confirmed boarding the Toyota Ipsum vehicle driven by the deceased. He further claimed that his colleague Phillip Makore is the one who told the deceased to stop. After the deceased complied the accused told him to disembark. By then the accused had produced the pistol. When the deceased tried to flee the accused fired the pistol intending to hit the leg but the deceased was hit in the waist.

When Innocent Mupoperi also attempted to flee, the accused shot him in the leg. The accused and Phillip then proceeded to rob the other passengers.

As part of its case the state produced with the consent of the defence, the post-mortem report, a medical report on Innocent Mupoperi, the ballistics report, the Vektor pistol and warned and cautioned statements that were recorded from the accused person.

The evidence is really on the narrow issue of how the two victims were shot. Both Innocent Mupoperi and Emson Manyoka, a fellow passenger testified that the deceased was shot whilst the vehicle was in motion. Even after the shooting and jettisoning of the deceased the vehicle moved for a short distance.

Innocent Mupoperi was a front seat passenger. He stated that it was the accused who

told the deceased to lower the volume. The accused is the one who said things had started. As the witness who was seated in the front passenger seat looked back the accused who was seated on the left side of the middle seat produced a pistol and shot the deceased from point blank range.

The accused's colleague who was seated to the right of the middle seat got out of the vehicle, opened the driver's door and dragged the deceased out. The accused also got out. The witness then jumped out and lay on his side on the ground. The accused came to him, stood straddling him and shot him without saying anything. Later he got up and fled in a westerly direction. He realised that he had been shot. He tried to seek assistance from some nearby homes but the villagers were reluctant. He later returned to the scene and was attended to by some Police officers.

Emson Manyoka stated that he was seated at the back. He confirmed the wrangle about the fare. He differed with Innocent Mupoperi as he said the accused sat on the right side of the middle seat whilst the friend sat on the left. He was not sure which of the two told the deceased to lower the volume. However, he more or less described the same sequence regarding the shooting. But after the shooting he stated that it is the accused who opened the driver's door and pulled the deceased out. He further stated that the accused and his colleague moved between the vehicle and where the deceased lay as well as a big tree. They used flash lights from their cell phones. Crucially, he stated that they rolled over the deceased and searched him.

The accused testified on the robbery and the shootings. He claimed that the pistol belonged to Phillip who told him he used it for raising cash. The accused was shown how to use the pistol. The pistol was given to him that day. Phillip allegedly told him that difficult people can be shot in the leg.

He insisted that he shot the deceased when he was outside the vehicle. He shot the deceased because he had attempted to flee. He did not intend to kill the deceased but just to immobilise him.

As for Innocent Mupoperi the accused claimed that he also wanted to flee. He again had no intention to kill him.

The warned and cautioned statements that were produced do not support the version given by the accused. The impression given in the warned and cautioned statement in respect of the second count is that the accused intended to shoot at the front wheel and that he did not

know that the complainant was injured. Surprisingly he now claimed that the statement was crafted by Police officers. I cannot conceive how Police officers would be so generous to a suspect who had shot their colleague. The confirmed statement was admissible on its mere production in terms of s 256 (2) of the Criminal procedure and Evidence Act [*Chapter 9:07*]. The accused belatedly sought to challenge the contents of the statement and yet consented to its production. Such challenge cannot be genuine.

The warned and cautioned statement in respect of the murder charge states that the shooting happened inside the vehicle. This is what the state witnesses maintained. Any doubt that the shooting took place inside the vehicle is removed by the admitted evidence of Assistant Inspector Tarusenga Mbika. On the fateful day he happened to be travelling along the Roy-Chiredzi road. At Chekenyere turn-off he saw the deceased's body in the middle of the road. The body had blood stains at the back. He removed the body from the road with the help of other motorists. Upon searching the vehicle he found a spent cartridge on the seat behind the driver's seat. This discounts the accused's claim that the shooting took place outside the vehicle. Even considering the injury on the deceased, it would not really have mattered where the shooting took place other than for purposes of considering the issue of intention.

Count 1

The state submitted that the accused actually meant to kill and should be found guilty accordingly. The defence submitted that the accused's motive was to rob and he should be found guilty of murder with constructive intent. The term constructive intent is no longer part of our law. It was substituted by the term realisation of real risk or possibility. In this respect see s 15 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*].

Murder is the unlawful and intentional killing of a person. Within the confines of our law it is committed where the perpetrator either desires to kill or where he realises the real risk or possibility of causing death but persists with such conduct despite the real risk or possibility. Robbery is the intentional use of violence or the threat of immediate violence to steal another person's property.

The accused claimed that their plan to rob was formulated whilst they neared Chekenyere. However, it must not be forgotten that the accused testified that he had earlier on been shown how to use the pistol. He had also been told that the gun was used for fund

raising, euphemism for robbery. When they whiled time at Jerera it is inescapable that they must have planned to rob the passengers and driver of the Toyota Ipsum.

The accused must have then known that at some stage he would use the firearm. When the shooting took place the deceased had not resisted. The deceased had complied with the request to lower the volume. An utterance was then made to the effect that things were now happening.

Even without the benefit of forensic evidence it is without doubt that the deceased was shot from point blank range. The witnesses described the part hit as the lower back, just above the waist. The post-mortem report noted a deep penetrating wound on the back. It is not clear whether the slug exited the body.

Since there is no other excuse for the shooting we conclude that the accused meant to kill. He must have desired to kill and he did kill. He is accordingly found guilty of murder in terms of s 47 (1) (a).

Count 2

Mr *Chikwati* submitted that the complainant was shot from close range. The complainant was at a place he could not have easily got medical help. The accused did not care about the consequences of his conduct. He referred to *James Basopo Moyo v S* SC 12-85 and *S v Dube* 1992 (2) ZLR 338.

Mr *Mavoke* submitted that the accused explained why he shot the complainant. If he meant to kill he could have shot at a vital part of the body. If the intention was to kill the accused could have shot more than once. He sought to distinguish the two cases cited by Mr *Chikwati* on the basis that they involved random shootings.

We accept the complainant's evidence concerning the shooting. We doubt that the accused only intended to injure him. The complainant stated that the accused stood over him. He was then shot from that close range.

Intention to kill is not necessarily established by the part of the body that was hit although in some cases it helps in establishing such intention. For example, what if the accused had shot at the complainant who was standing but missed him completely? Would a charge of attempted murder be ruled out simply because the victim would not have been injured?

Various factors might have led to the complainant sustaining the resultant injuries. The

complainant stated that the accused just pointed the firearm and shot. This suggests the accused did not take careful aim and thus did not care where he shot. This imports the element of recklessness. It is also known that guns recoil upon discharge. For those who practice target shooting they are taught to hold their breath before they squeeze the trigger. This minimises the chances of a shot going wide. The accused could not have known this. In addition, he could hardly have been calm at the time he shot the complainant.

That the accused intended to kill arises from the fact that he shot from close range. The other factor was that the complainant was lying down. We do not accept the accused's version that the complainant was ahead of the accused and that he shot him at an angle. Therefore, the accused must have realised the real risk or possibility that he might kill the complainant but was reckless of such a consequence. In any event the accused had tendered a plea of guilty to the charge and could have been convicted accordingly but for the discordance with instructions to counsel.

Accordingly, the accused is found guilty as charged.

National Prosecuting Authority, legal practitioners for the state
Ruvengo Maboke and Company, accused's legal practitioners