

THE STATE
versus
MINDANO MINDANO

HIGH COURT OF ZIMBABWE
MUSAKWA J
HARARE, 18, 19, 20 and 21 November 2014,
28 June 2016, 15 July 2016 and 18 November 2016

Assessors: 1. Mr Gweme
2. Mr Mhandu

Criminal Trial

E. Nyazamba, for the state
T. Zhuwarara, for the accused

MUSAKWA J: The accused person pleaded not guilty to a charge of murder. It is alleged that on 14 July 2012 and at Danangwe Primary School, Chegutu the accused unlawfully and with intent to kill murdered Godfrey Chikava by shooting him in the head with an FN rifle.

Both the accused and the deceased were members of the Zimbabwe Republic Police. They were deployed to Danangwe Primary School to provide security to cotton buyers. The accused person was issued with an FN rifle whilst the deceased was issued with a G3 rifle. They shared a room. It is not in dispute that on the fateful day the deceased was shot and the accused immediately left for Harare. He was subsequently arrested whilst trying to withdraw money from the bank.

The accused's defence was that whilst investigating the theft of a cotton bale it came to his attention that one Clarice Zuze had material information. When the accused attempted to interview Clarice Zuze, she was hostile. Clarice Zuze subsequently made false allegations against the accused to the effect that he had attempted to rape her. The deceased played a part in the false allegations.

On 13 July 2012 the accused confronted the deceased who taunted him. The accused later left to attend to a report of assault. In the process the accused cocked his rifle although he did not fire it. He later proceeded to a beer hall where he consumed some beer. He subsequently returned to their quarters where he again remonstrated with the deceased. The deceased again mocked him and even moved to arrest him over the false allegations. When the deceased made as if to pick the firearm that was beside him, the accused panicked and accidentally discharged the FN rifle, thereby shooting the deceased. The accused never intended to kill the deceased. He was not in the right frame of mind owing to provocation and intoxication. In such confusion he dumped his firearm in Chegutu and went to Harare where he lived in the streets until his arrest.

The evidence leading to the shooting of the deceased is largely not in dispute. Even, according to the accused's own admission he used to drink beer whilst on duty and armed, a violation of the Firearms Act [*Chapter 10:09*]. This was confirmed by one of the state witnesses, Calvin Manzunzu who told the court that the accused would even cock the firearm whilst in the beer hall.

Calvin Manzunzu also confirmed the matter involving Clarice Zuze whom he did not identify by name. The accused was the first to tell Calvin Manzunzu that the deceased had alleged he had attempted to rape Clarice Zuze. When Calvin Manzunzu asked the deceased, the latter laughed it off and did not regard it as a serious issue. Nonetheless, the deceased had resolved to report the accused for unlawful discharge of a firearm. The accused later came when Calvin was discussing with the deceased. The accused expressed his displeasure with what the deceased had done before he left in the company of Blessed Mandere.

Calvin Manzunzu had left his cell phone on a charger in the room the room the accused and the deceased shared. On the following morning he saw the cell phone outside. When he opened the door he found things scattered inside. The deceased's legs were by the door and he wore blue stockings. Having failed to awaken the deceased he removed the blanket that covered him and noticed blood on the chest, eyes and hands. The deceased's firearm lay under him and it had no magazine. He also noticed that the clothes that the accused previously wore were in the room. There was a blood-stained shoe print. The witness then alerted others.

During cross-examination Calvin Manzunzu gave further details on the shooting incident involving the accused. He stated that the accused had discharged the firearm at the dam. The deceased cautioned him and the two had almost fought as they shoved each other.

The accused insisted that the firearm had been issued to him. The witness later clarified to court that the accused had let his girlfriend fire the gun three times.

Blessed Mandere told the court that the accused had proposed to a girl at the tuck shop. Later the deceased also proposed to the same girl. It is the deceased won the affections of the girl. At some stage the accused cocked his firearm whilst at the tuck shop. This happened towards the end of June 2012.

On 12 July 2012 the witness' niece Claris Zuze made a report to him concerning the accused. The witness approached the accused who denied the allegations. He referred his niece to community elders. The deceased was sent to summon the accused. The witness did not attend the deliberations. Later the deceased told the witness to ask her niece not to make a report to Police. The witness did not talk to his niece.

On the 13th the witness met the accused at the shops. Since the witness indicated that he wanted to go to Davit's shop the accused told him they would proceed together as he wanted to follow up on some suspects. They passed through the accused's and the deceased's quarters where they saw the deceased in the company of Calvin Manzunzu. As they proceeded the accused recounted his problems with the deceased. He told the witness that the deceased wanted to arrest him and take him to the Police Station. The accused also told him he and the deceased had a problem on sharing the room they used but this had been resolved. The witness later bought some beer which he shared with the accused. They subsequently parted ways.

Under cross-examination this witness stated that he was assaulted by detectives from Chegutu Criminal Investigations Department. He stated that he was kept at the Police Station for three days. It would appear this was related to the fact that he had been seen in the accused's company. The effect was such that in his statement he claimed to have heard a gunshot. However, he disputed that aspect. He also confirmed that the accused drank beer in his presence.

Evidence regarding the accused's arrest is not contentious. On 25 July which happened to be pay day, Police officers liaised with the accused's bank. When the accused failed to withdraw money from an automated teller machine he went into the banking hall. Whilst his 'query' was being attended to by the manager, he was then nabbed. Evidence regarding the indications recorded from the accused was also led. The only blemish is that the video recording was poorly done. The recording is not continuous and some of the footage is not upright. The least one can say is that it was not professionally recorded.

It is also not in dispute that the accused led detectives to Chegutu Show Grounds. He indicated a drain near a swimming pool. From the manhole was retrieved the FN rifle which had a bullet in its chamber. He also indicated where he had hidden the FN rifle magazine as well as magazines for the G3 rifle which were hidden in the grass. There were also two spent cartridges hidden in the grass.

The ballistics reports in respect of the FN rifle and spent cartridges were produced by consent. Inspector Mutizwa who conducted the examination and compiled the reports also testified. He holds a Bachelor of Science Honours in Physics. He underwent firearms examination training in South Africa as well as in-house training within the Zimbabwe Republic Police.

Inspector Mutizwa testified that FN and G3 rifles use the same 7,62mm calibre ammunition. He concluded that the spent cartridges were fired from the FN rifle. He also confirmed that the rifle can be fired using one hand. Accuracy will depend on physical strength as the gun has kickback (recoil). Accuracy also depends on the range of the target. The closer the target, the more there is accuracy.

Concerning the spent cartridges he was of the view that they had not been fired on the same date. On how a bullet is ejected from a gun that has been cocked, he explained that the magazine is first removed and then the firearm is cocked again.

Concerning accidental discharge of a firearm, he explained that a properly functioning firearm like the FN rifle would not accidentally discharge. This is because a certain amount of pressure is required to be exerted on the trigger. On whether a startled person can involuntarily pull the trigger, he stated that procedurally one is not supposed to keep a live firearm. He also added that when holding a firearm one should not have a finger on the trigger. However, he further stated that it is possible for one whose finger is on the trigger to discharge a firearm if startled.

The witness also stated that the FN rifle weighs about 4,5kg without a magazine and about 5,5kg with a magazine. He further added that the magazines for FN and G3 rifles are not interchangeable.

The accused's version of events is along that of the defence outline. Concerning the allegations by Clarice Zuze he stated that he attended a meeting with members of the community. It was suggested that Clarice Zuze lodge a report with Police and a motor vehicle was flagged down for her to board but she declined. The accused confirmed that he was upset and took up the issue with the deceased. They parted amicably before he went to the

compound to look for a suspect who had assaulted Blessed Mandere. He also admitted having partaken beer but conceded that he appreciated what he was doing.

One other significant development that emerged from the accused's testimony is that when he encountered the assault suspect, the latter emerged in a rush and made as if he was charging the accused. The accused then cocked his gun but did not fire it. Surprisingly he said he did not render the firearm safe. This, he said he did because he was due to conduct night patrols. It was his testimony that they conducted night patrols with cocked firearms. But we know that he was later to pass by some fishmonger's place on his way to their quarters before he was to conduct patrols.

The accused further testified that as he readied to embark on his night patrol he again picked an argument with the deceased who was lying down as he toyed with his phone. The argument related to Clarice Zuze. The deceased told him he was going to lose his job and that he was proceeding to arrest him. The deceased told him to put down his firearm. The accused stated that in his intoxicated state he panicked. He did not realise that he was firing the gun. He was surprised that the deceased was shot in the process.

The accused says he was shocked when he saw the deceased bleeding. He covered the deceased who had fallen down with his (accused) blanket. He then took his firearm and magazine from the deceased's firearm and set out for Chegutu Police Station. Before he got to the Police Station he feared surrendering himself. He then discarded the weapon and ammunition where it was eventually recovered. The rest of his testimony regarding subsequent developments is not in dispute.

During cross-examination the accused demonstrated how he carried the firearm. For the first time he suggested that the safety catch tended to slip as it chafed against his body. From his demonstration of strapping the firearm on his back when not conducting patrols, the side with the safety catch would be against the body. However, from the demonstration of strapping the firearm during patrols, it was evident that the safety catch would not chafe against the body. In addition, the hand would not be on the trigger but holding the top of the stock.

A statement of indications recorded from the accused person was also produced during the trial. In that statement the accused indicated a shebeen belonging to Francis Davit where he drank beer in the company of Blessed Mandere. It is whilst he was at that place that he formulated the intention to kill the deceased. In the same statement he stated that he shot

the deceased as he lay down after lighting him with a torch. He then took \$60 from the deceased's pocket as well as the G3 magazines.

The state and defence were directed to file written closing submissions by 25 July 2016 (for the defence). There was no compliance, except that the state did file something on 7 September 2016. I must point out that there was not much input from the state apart from a summation of the evidence. What is expected is applying the law to the facts.

On the other hand, after several follow-ups defence counsel finally on 11 November 2016 indicated that he was unable to advance any argument in favour of the accused. It must be noted that it is the duty of counsel to engage in research. The duty to engage in such research and to assist the court even entails that adverse decisions be brought to the attention of the court. In this respect see *Vengesai and Others v Zimbabwe Glass Industries Ltd* 1998 (2) ZLR 593 (H) and *Doecam (Pvt) Ltd v Pichanick and Others* 1999 (1) ZLR 390 (H). It is in the latter judgment where GELLESPIE J observed that the duty of persuasion is that of the advocate.

At the end of the day, it is noted that facts of the matter are straightforward. It was inevitable that the discovery of the deceased's corpse would lead to a manhunt for the accused. This arose from the fact that the two had been deployed together and shared the same sleeping quarters.

The evidence also shows that the accused was familiar with the use of firearms. There is also a worrisome element of the accused's negligent if not reckless handling of his issued firearm. There are three incidences that come to mind. The first one relates to the accused permitting a girlfriend to fire the gun. The second incident arises from the accused's own admission that he would carry the firearm whilst under the influence of liquor. The third one related to the cocking of the gun in the beer hall as testified by Calvin Manzunzu. A trained Police Officer is not expected to exhibit such conduct. A firearm is a dangerous weapon that must be handled with care. An intoxicated person should not be in charge of a firearm.

Part of the confirmed warned and cautioned statement that was produced reads as follows-

"We then left the beer drinking place and Blessed Mandere went to his house while I proceeded to where I was staying with the now deceased. While at the gate I cocked my rifle which I kept with me always. At the house where I slept I opened the door and pointed my gun at the deceased who then woke up. He was lying on the stretcher bed on his back and he asked me why I was pointing the gun at him. I answered by telling him that he could shoot me first since he had threatened to shoot me with his gun. I immediately fired my gun once aiming at his head and he died instantly. I thought of fleeing and I searched his pockets and I

took US\$60, 00 from his shirt pocket. I then took the spent cartridge and removed a magazine from his G3 rifle. I took another magazine from his bag and closed the door after I had covered his corpse with a blanket and a stretcher bed.”

The post-mortem report on the deceased noted an entrance gunshot wound on the upper left lip. There was an exit gunshot wound on the occipital area. The cause of death was multiple skull fractures and brain damage due to gunshot wound.

It must be noted that the statement on indications and the confirmed warned and cautioned statement were produced by consent. These statements amount to confessions. They were rendered admissible in terms of s 256 of the Criminal Procedure and Evidence Act [*Chapter 9:07*]. During his testimony the accused did not attempt to challenge the statements. The statements constitute unequivocal admissions of guilt.¹ Although motive is irrelevant it is clear that the accused had issues with the deceased concerning allegations of his (accused) having attempted to rape Clarice Zuze. In light of the unchallenged confession, the defence proffered by the accused was contrived.

We come to the conclusion that the accused resolved to kill the deceased. The confirmed statement puts paid to the accused’s claim that he accidentally discharged the firearm when the deceased attempted to disarm and arrest him. He shot the deceased as he lay down. Essentially he brought his will to bear on killing the deceased. He even stole from the deceased after killing him.

In the result the accused is found guilty of murder in terms of s 47 (1) (a) of the Code.

National Prosecuting Authority, legal practitioners for the state
The Chambers, accused’s legal practitioners

¹ R v Beck 1949 (2) SA 626; R v Becker 1929 A.D. 167