

THE STATE
versus
TINASHE CHIKOSHA
and
WALTER NENYERE

HIGH COURT OF ZIMBABWE
ZHOU J
HARARE, 3, 4, 11 & 17 November 2016

Criminal Trial

Assessors: 1. Mr Mhandu
 2. Mr Barwa

H. Muringani for the State
Miss S. Vas for First Accused
T. J. Mafongoyo for Second Accused

ZHOU J: The two accused persons are being charged with murder as defined in s 47 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. It is being alleged that on 28 September 2013 and at Agrifoods Bus Stop, Mbare, Harare, the accused persons unlawfully and intentionally caused the death of the deceased Kenneth Chakauya by stabbing him on the right arm with an okapi knife thereby causing injuries from which the deceased died. Both accused persons pleaded not guilty to the charge.

The evidence of Dr Salvator Aleks Mapunda was admitted in terms of s 314 of the Criminal Procedure and Evidence Act [*Chapter 9:07*]. He is an independent forensic pathologist. He is the one who performed a postmortem examination of the deceased's body. The very detailed autopsy report prepared by Dr Salvator Aleks Mapunda which was produced in evidence as 'exhibit 1' gave the cause of death as "**haemorrhages and shock due to slash-cut wound due to sharp force**". In describing the weapon used to inflict the fatal injuries, the doctor in his

report states: “A pointed, bladed, sharp edged, longish object can cause the injury in question”. The doctor also observed that the slash-cut wound which was on the deceased’s right arm extended to the forearm severing vasculature and nerves. The slash-cut wound was 23 centimetres long.

The evidence of four other witnesses, namely, Peter Jeri, Blessing Chakandinakira, Ishmael Gaveta and Willis Makazhu was also admitted in terms of s 314 of the Criminal Procedure and Evidence Act. The State led *viva voce* evidence from two witnesses, Jane Ndaneta and Shepherd Muranda.

Jane Ndaneta was the deceased’s girlfriend. She did not know the two accused persons prior to 28 September 2013 which was the date on which the offence was committed. Her evidence was that on the day in question she and the deceased arranged to meet at an area called Magaba in Harare. She left her residence and met him as agreed. The two of them walked to a place at Agrifoods in order for the deceased to get transport to go to the city centre. They got to the bus stop after 7 o’clock in the evening. The place where they were was well lit. While they were waiting to get transport for the deceased the two accused persons approached them. The accused persons demanded to know what the witness and the deceased were doing at that spot. They introduced themselves as police officers and demanded that the witness and the deceased accompany them to the police station. The witness asked the accused persons to produce identity documents to prove that they were police officers, but they did not do that. As the witness and the deceased walked the second accused person grabbed the witness’s mobile phone from her. At the same time the first accused person charged towards her and produced an okapi knife in order to stab the witness. The deceased sought to ward off the blow but was himself stabbed with the knife by the first accused person. Both the witness and the deceased screamed, with the latter screaming that he had been stabbed. Meanwhile the second accused person had scaled over the nearby precast wall in order to escape with the mobile phone which he had snatched from the witness. The first accused person also attempted to run away. Persons who were at a nearby market chased after the first accused person. The witness stated that at that stage the deceased stated that he was feeling weak. He then fell down. She stated that she did not take note of what was taken from the deceased person by the accused persons. Members of the public who had responded to her screaming came and attended to the deceased by pouring some water and

bandaging the wound. She then lost consciousness during that time and only regained consciousness when she was in the police station. She became aware that the first accused person had been apprehended by members of the public and that the deceased had also been taken to the police station. She then made a police report. At the police station the witness was advised by the ambulance attendants that the deceased had died. She also became aware that the first accused person had been brought to the same police station and that the okapi knife used to stab the deceased had been recovered from him. She denied having a relationship with the first accused person and stated that she only got to know him in connection with this case.

Shepherd Muranda, the second witness for the prosecution, is an officer of the Zimbabwe Republic Police. On 28 September 2013 he was on duty at Matapi Police Station when the last witness reported the case of robbery and the stabbing of the deceased. He stated that while he was in the process of receiving a report from Jane Ndaneta a commuter omnibus arrived. The driver of the commuter omnibus and a group of persons who were in the commuter omnibus surrendered the first accused person to the police and indicated that he had been apprehended after he had stabbed the deceased person and had attempted to flee. The deceased was later brought by a person who was driving a Toyota Raum motor vehicle. The deceased had already died when he was brought into the police station. The witness did not record the particulars of both the commuter omnibus driver and the driver of the Toyota Raum. He stated that after the deceased had been brought to the police station the first accused person was detained. The persons who brought the first accused person also surrendered an okapi knife which they said had been used by the accused to stab the deceased. The knife had been recovered from the first accused person at the time that he was apprehended. The okapi knife was produced as exh 2. Two mobile phones, a G-Tel and a Samsung, were also surrendered which were said to have been recovered from the first accused person. The two phones were produced as exhibits after being identified by the witness. The two cellular phones belonged to the deceased.

Peter Jeri's evidence was that he stopped his motor vehicle when he noticed the deceased person lying on the ground with his body drenched in blood. He then conveyed the deceased to Matapi Police Station.

Blessing Chakandinakira, a police officer, stated that he was at Matapi Police Station when Jane Ndaneta made the report referred to above. He interviewed the first accused person on

the whereabouts of the second accused person. From the information given by accused one the police were able to arrest the second accused person in Epworth. The mobile phone of Jane Ndaneta, a Samsung Android, was recovered from one Ishmael Gaveta following the arrest of and information provided by the second accused person.

Ishmael Gaveta's evidence was that the second accused person came to his workplace selling the Samsung Android mobile phone. The second accused person was in the company of one Willis Makazhu. The witness purchased the mobile phone from the second accused person for US\$10 and surrendered his small Samsung phone in addition to that amount. The witness's evidence was that the second accused person started buying beer using the US\$10 which had been paid for the phone.

The two accused persons gave evidence themselves and called no other witnesses. They both adopted their defence outlines as part of their evidence. The first accused person's evidence was that Jane Ndaneta was his girlfriend. The second accused person was his nephew. He stated that on the day in question the second accused person visited him at his residence in Glen Norah C, Harare. Jane Ndaneta telephoned her so that they could meet. He and the second accused then went and met her at Matute Bar in Mbare. While they were at that bar the deceased arrived. From deceased's interaction with Jane Ndaneta the first accused person got the impression that the two of them were boyfriend and girlfriend. He and the second accused left that bar to avoid giving the impression that they were competing for the woman with the deceased. They went to another bar. Jane Ndaneta and the deceased also came to that bar. A misunderstanding ensued regarding a mobile phone which the first accused said he had bought for her and which she was using. Jane Ndaneta and the deceased left the bar first. He and the second accused subsequently left as he intended to accompany the second accused to a place where he could find transport to go to his residence in Epworth. They then found Jane Ndaneta and the deceased at that place where the second accused was to look for transport. He stated that the deceased then confronted them asking if they were trailing him and Jane Ndaneta. He told the deceased to leave him and the second accused alone. He demanded the phone which he had bought for Jane Ndaneta. The deceased tried to assault him. At that time the second accused snatched the phone from Jane Ndaneta and left the scene. Jane followed the second accused person but later returned. The other persons at the bus stop had gathered and joined the deceased in assaulting him. He then

left the scene and walked away. After he had walked some distance four men confronted him and accused him of having killed someone. He then suggested to them that he be taken to the police to explain his side of the story. However, they assaulted him until he lost consciousness. He stated that he only regained consciousness the following day when he was in the police station. He denied having the cellphones and okapi knife in his possession at the time that he was apprehended. He was asked by his counsel during examination-in-chief that the allegation against him was that he was the one who had produced a knife and stabbed the deceased. His response was: "I do not know anything."

The second accused person, stated that he did not know the complainant and Jane Ndaneta prior to the date in question. His testimony was that he was not related to the first accused person in any way, but that the first accused person was introduced to him on 28 September 2013 by his friend, Andrew Maenda (hereinafter called 'Maenda'). That was the first time that he met the first accused person. Maenda told him that the first accused person was a former soldier who had been arrested and imprisoned and had been recently released from jail after serving his imprisonment term. He stated that Maenda then requested him to accommodate the first accused person at his residence for a few days since his (Maenda's) wife had come from the rural areas and it was not convenient to be with the accused person since he was renting only one room. That request was presented to him in the afternoon after 2 o'clock. He then advised Maenda and the first accused to return later on that day. The two returned just before the second accused finished work at 6 o'clock in the evening. The second accused then agreed to accommodate the first accused person at his residence. He suggested that if the first accused person had money for bus fare he could come along with him that very day. Maenda left the two. The two accused persons proceeded to the bus stop at Agrifoods in order to get transport into town. They found the deceased and Jane Ndaneta at the bus stop. Second accused stated that at that stage the first accused person advised him that he did not have money for bus fare to come back the following day. The first accused person then suggested that they rob the deceased and Jane Ndaneta of their belongings. He stated that he then advised the first accused person that he could only snatch the handset which Jane Ndaneta had. He then walked about five steps, snatched the phone and ran away. He scaled the nearby precast wall using a point where some panels had fallen. He denied that he had consumed any alcohol. He produced a transcript of the

proceedings in the Magistrates Court, Exhibit 5, in which he was charged with and pleaded guilty to the offence of robbery involving the cellphone belonging to Jane Ndaneta which he snatched on the day in question. He stated that he was not aware that the deceased had been stabbed during the robbery. He also did not know that his co-accused had an okapi knife.

From the above evidence, there are facts which are not in dispute. It is common cause that on 28 September 2013 at or about 7 o'clock in the evening the deceased person and Jane Ndaneta were at a bust stop at or near Agrifoods in Harare. It is not in dispute that the accused persons arrived at that bus stop. The second accused person snatched a mobile phone belonging to Jane Ndaneta and ran away. The deceased person was stabbed during the robbery. Both accused persons have been convicted of the robbery by the Magistrates Court. The mobile phone belonging to Jane Ndaneta which had been stolen during the robbery was returned to her after the conviction of the two accused persons as it had served its purpose as an exhibit. The only two issues to be determined are (a) whether the deceased person was stabbed by the first accused person, and (b) whether, if the deceased was stabbed by the first accused, the second accused person was acting in common purpose with the first accused.

The evidence of Jane Ndaneta was that the deceased was indeed stabbed by the first accused person using an okapi knife when he sought to intervene as the first accused was directing the attack upon her. That evidence has not been challenged. Jane Ndaneta's evidence remained intact even after cross-examination. The suggestion of inconsistencies relating to who got to the police station first between the witness and the first accused person or the witness and the deceased is immaterial as it has no bearing on how the offence was committed. She was a credible witness. She had no motive to tell any lie as the two accused persons were unknown to her prior to that date. Her evidence regarding the manner in which her mobile phone was taken was corroborated by the accused persons. Her evidence was also corroborated by the evidence of Shepherd Muranda that the first accused person was apprehended by the members of the public who recovered the okapi knife and the deceased's cellphones from him. Muranda stated that the knife was bloodstained when it was brought to the police station. That was clearly the knife that was used to attack the deceased. The first accused suggested without categorically stating so that someone else stabbed the deceased person. But there were no other persons present other than the two victims and the two accused persons when the stabbing took place. Further, the

accused's version is a typical pass-time fabrication that cannot stand scrutiny. His claim that the first witness, Jane Ndaneta, was his girlfriend was rejected by the latter. It was also contradicted by the second accused person. In fact, the first accused person lied in almost everything material that he sought to tell the court. He did not produce any proof of the alleged relationship with Jane Ndaneta. He later contradicted himself during cross-examination when he stated that Jane Ndaneta was only a prostitute who went around the beerhalls and bars dancing. Why would he go out of his way to purchase a mobile phone for a commercial sex worker? The second accused contradicted the first accused person's evidence as regards their relationship as well as the events of the 28th September 2013, as shown by their conflicting versions set out above. Second accused person denied the visits to two bars or the alleged meeting with Jane Ndaneta at those bars. The second accused person testified that their agreement with the first accused person was to rob the deceased and Jane Ndaneta. That they accomplished, and in the course of that robbery the first accused person stabbed the deceased person thereby causing his death. The evidence of Dr Salvator Aleks Mapunda, including the autopsy report, establishes that the deceased person died as a result of the injuries caused by the slash-cut wound. The first accused person clearly had the intention to cause the death of the deceased as evidenced by the weapon used and how the attack was carried on. The okapi knife is a lethal weapon. The knife has a long blade. The slash-cut wound was 23 centimetres long, and severed vasculature and nerves which cause the deceased to lose blood. It was not a mere scratch. It was an attack meant to completely destroy the victim. That no doubt explains why the deceased died within a few minutes following the attack. The attack was meant to immobilise the deceased person and his companion so that the accused persons would steal from them. That is the reason why the first accused was able to take away the deceased's mobile phones after he had stabbed him. The claim that he had no knowledge of the two cellphones which were produced in evidence must be rejected out of hand. He suggests that some other person must have given his or her cellphones to the police merely in order to implicate him. That is manifestly false.

As regards the question of whether the two accused persons were acting in common purpose, the second accused testified that his only intention was to snatch the mobile phone and flee, and that when the stabbing took place he had escaped. The first accused person also sought to give evidence that exculpates the second accused person by suggesting that he left the scene

soon after he took the cellphone. He stated that the second accused person did not run but just walked away from the scene. That is contradicted by the second accused person whose evidence was that he ran away. Jane Ndaneta also stated that the second accused ran away from the scene.

The common-purpose doctrine applies where two or more people agree to commit a crime or actively associate in a joint unlawful enterprise. See Jonathan Burchell, *Principles of Criminal Law 5th Ed.*, p. 477; and the cases of *Thebus* 2003 (6) SA 505(CC) and *S v Mgedezi* 1989 (1) SA 687 (A) which are cited at that page. In such a situation each of the persons involved is held responsible for specific criminal conduct committed by the other or one of the members of the group which conduct falls within their common scheme. The criminal liability of those other persons, such as the second accused person, arises from their ‘common purpose’ to commit the crime. It is not necessary for the prosecution to prove beyond reasonable doubt that the second accused person’s conduct contributed to the death of the deceased. It is enough for the State to prove that the first and second accused persons agreed to commit a particular crime or actively associated themselves with the commission of the crime by one of them with the necessary *mens rea*. Once that is proved then the conduct of the accused person who inflicted the fatal blow is imputable to the other participant.

In the instant case there was a prior agreement to commit robbery. The murder which ensued is a consequence crime. It was reasonably foreseeable to both accused persons. Burchell (*Supra*) at p 478 sums up the position of the law as follows:

“So, for instance, an accused who agreed, as a member of a criminal syndicate, to commit (or participate in the commission of) housebreaking with intent to commit a crime or robbery would be liable for murder if the resultant death was foreseen as a possibility of engaging in the agreed crime. As was said in *Madlala*:

‘An accused may be convicted of murder if the killing was unlawful and there is proof . . . that he was party to a common purpose to commit some other crime, and he foresaw the possibility of one or both of them causing death to someone in the execution of the plan, yet he persisted reckless of such fatal consequence, and it occurred.’”

The above principles apply to the facts of this case. The principles have been accepted in this jurisdiction. See *S v Chauke & Anor* 2000 (2) ZLR 494(S) at 497A-B, in which the Court went a step further (p. 497D-H) and accepted the principle in *S v Nhlapo & Anor* 1981 (2) SA 744 (A), that where security guards were attacked by robbers and one of the guards was killed

during the shoot-out by a bullet fired by his colleagues the robbers would be convicted of the murder. In the case of *S v Nhlapo & Anor (supra)* at 750H-751B VAN HEERDEN AJA said:

“ . . . the robbers knew that they would have to attack and overpower guards who were armed for the specific purpose of using their firearms to thwart any attempted robbery. It may be conceded that they hoped to overpower the guards without a shot being fired by the latter, but they must have known that the guards would endeavour to use their firearms when attacked. It follows that they must have known that their attack on the guards could lead to a gun battle during which anybody, be it a guard, one of the robbers or an innocent bystander, might be killed in the envisaged cross-fire. Consequently, they also foresaw the possibility of one guard being killed by a shot fired in the direction of the robbers by another guard or, for that matter, a person such as a staff member of Makro witnessing the attack. In sum, the only possible inference, in the absence of any negating explanations by the appellants, is that they planned and executed the robbery with *dolus indeterminatus* in the sense that they foresaw the possibility that anybody involved in the robbers’ attack, or in the immediate vicinity of the scene, could be killed by cross-fire.”

See also the case of *S v Mubaiwa & Anor* 1992 (2) ZLR 362(S) at 370F-H;

A robbery involves the use of violence or force to subdue the victim. The second accused person has pleaded guilty to and has been convicted of robbery. He therefore intended the use of violence to commit the offence. He does not state the precise nature of the violence he intended to use, understandably in order to minimize his degree of participation. Although he stated that he did not know that the first accused person had an okapi knife in his custody this court does not believe him for the simple reason that he does not explain how he believed that the two of them would overpower an equal number of persons without the use of a weapon. His agreement with the first accused person was to commit a robbery and not just to snatch the mobile phones. The robbery was not limited to the cellphones, but related to the victims’ “belongings”, according to his testimony. He therefore foresaw the possibility that a weapon, in this instance a knife, would be used, and that death would ensue. The law is clear that what must be foreseeable is the “possibility” of death. The second accused’s version that he contrived a robbery with a person whom he had known for just a few minutes is clearly as false as is his claim that he did not know how they would subdue the victims.

It is clear that the second accused did not withdraw from the design to commit the robbery, but furthered the enterprise by snatching the cellphone of one of the victims. See *S v Beaham* 1991 (2) ZLR 98 (SC) at 118C-121F. Running away from the scene at the same time

that the deceased was being stabbed by his co-accused does not in any way resemble a withdrawal from the design.

Section 47(1) of the Criminal Law (Codification and Reform) Act provides as follows:

“Any person who causes the death of another person –

- (a) Intending to kill the other person; or
- (b) Realizing that there is a real risk or possibility that his or her conduct may cause death, and continues to engage in that conduct despite the risk or possibility;

shall be guilty of murder.”

This Court therefore finds that the second accused person acted in common purpose with the first accused person in committing the offence of murder. The murder was committed with actual intent to kill.

In the result, both accused persons are found guilty of murder as defined in s 47 (1) (a) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*].

National Prosecuting Authority, legal practitioners for the State
Scanlen & Holderness, first accused’s legal practitioners
Matsikidze & Mucheche, second accused’s legal practitioners