

THE STATE
versus
TAPIWA MADYA

HIGH COURT OF ZIMBABWE
ZHOU J
HARARE, 30 September, 1 October 2015, 21 June 2016 & 14 July 2017

Assessors: 1. Mrs E. Shava
 2. Mr Musengezi

Criminal Trial

A. Masamha for the State
A. A. Debwe for the accused

ZHOU J: The accused is facing a charge of murder as defined in s 47 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. The allegations against him are that on 7 December 2010 at about 2100 hours and at Kandeya Township, Mount Darwin, the accused unlawfully caused the death of the now deceased Alex Jomboro by shooting him in the head intending to kill him or despite realizing that there was a real risk or possibility that his conduct might cause death continued to engage in the conduct. The accused pleaded not guilty to the charge and tendered a defence outline which was produced to this court.

In seeking to prove its case the State led evidence from seven witnesses. Four of those witness – namely – Dzirimbi Tazvitya, Esther Tirivavi, Clemence Mutyambizi and Previous Mutata gave their evidence orally. The other three witnesses, Tafirei Matanga, Saradini Juza and Dr Gwagwa had their evidence admitted in terms of s 314 of the Criminal Procedure and Evidence Act [*Chapter 9:07*].

Dzirimbire Tazvitya was employed by the deceased as a security guard at Zemba Store at Kandeya Township, Mount Darwin. The deceased was the owner of the business which was being operated at that shop. The witness testified that on 7 December 2010 he was at the shop at about 1930 hours. At about 2100 hours two men got into the shop and closed the doors thereof. One of them proceeded to the counter and jumped over to the other side of the counter. The other one remained at the door. The man at the door was holding a gun. The two men were wearing black jackets and white t-shirts. The man who had remained at the door also advanced towards the deceased and fired a shot from his firearm. At that moment the witness ran out of the shop and told the other persons at the shopping centre. He later heard two more gun shots. He later returned to the shop and found Detective Sergeant Mutyambizi already there. The deceased was lying on the floor in a pool of blood. The deceased had already died according to the witness. He stated that there was candle light in the shop. In cross-examination the witness was asked if he knew the accused. He stated that he did not know him.

Esther Tirivavi, the second witness to testify, resided at Kandeya Township, Mount Darwin. The deceased was a brother of her husband, hence he was her brother-in-law. She occupied a room that was at the back of the shop from which the deceased operated his business. The room was in the same building as the shop. On 7 December 2010 at about 2100 hours she heard what appeared to be a sound of a person jumping over the counter. She then heard sounds suggesting that there was a scuffle, and could hear someone demanding money, while the deceased was answering that he had no money. She then heard the sound of a gunshot from the shop. There were two other shots which were fired. She then heard voices of two persons who were urging each other to leave the place as they had injured “this person”. She heard one of the persons stating that he could not leave “this person” alive because he had identified him. She subsequently went out of her room, and went to the shop. She observed the deceased person lying on the floor behind the door with blood around his body. She stated that she did not know the accused person.

Clemence Mutyambizi, a member of the Zimbabwe Republic Police was stationed at CID Mount Darwin. He went to Zemba’s shop after having heard a gunshot. He found the deceased’s body lying in a pool of blood, showing that he was in great pain. He observed a wound on the head of the deceased on the cheek. He warned the members of the public who had

gathered at the shop not to enter the shop or get close to the door. He asked one Tafirei Matanda who agreed to take the deceased to hospital. The deceased was pronounced dead by Dr Gwagwa upon arrival at the hospital. He took the body of the deceased to the mortuary after which he returned to the scene. Uniformed members of the ZRP were also at the scene about the same time that he arrived. With the light from electricity which had been restored, he was able to make observations. He and the other officers discovered a spent cartridge at the verandah of the shop. Inside the shop he discovered two 9mm spent cartridges. The following morning the body of the deceased was examined by Dr Gwagwa. A bullet head was extracted from the head of the deceased during the postmortem examination. He took the three spent cartridges and bullet head for ballistics examination. In 2011 he was telephoned by officers from CID Homicide in Harare that a firearm had been recovered from the accused. The firearm was taken to the same place where he had sent the spent cartridges and bullet head for examination. The examination revealed that this was the same gun which had been used to kill the deceased in December 2010, and that it was the gun from which the three spent cartridges and bullet head had been fired.

Previous Mutata is a Detective Assistant Inspector in the Zimbabwe Republic Police. On 3 March 2011 he interviewed the accused person in connection with cases of robbery which had been committed in and around Harare. He was accompanied by Detective Assistant Inspector Dube and Detective Sergeant Chidakwa. The interview took place at the CID Homicide Offices in Harare. The accused person had been arrested in connection with a case of robbery which had occurred at Ruwa Supermarket. The accused was one of three suspects who had been arrested. The other two were Justin Momela and Thembinkosi Mathuthu. The accused person admitted to having been involved in the Ruwa robbery and led the witness and the other officers to a place in Ruwa where he indicated that he had hidden the firearm which had been stolen from the owner of Ruwa Supermarket during the robbery. The accused led the police officers to a place near Ruwa Rehabilitation Centre where he claimed to have hidden the firearm. He failed to locate the firearm. Accused advised the witness that he believed that the firearm may have been moved by one Taurai Tsikudzawo who was with him when he hid the firearm. He led the witness and the other officers to an address where Taurai Tsikudzawo resided. Taurai Tsikudzawo led the witness and the other officers to a place where he had hidden the firearm after learning of the arrest of the accused. The firearm, a pistol, was recovered with the assistance of Taurai

Tsikudzawo who stated that he had taken the pistol from the place where the accused had hidden it when he became aware that the accused had been arrested. The place where the pistol was recovered is about 1.5 kilometres from the accused's residence, and about the same distance from Taurai Tsikudzawo's residence. The witness observed from the serial number that the firearm was the one that had been stolen from the owner of Ruwa Supermarket. The residence of Taurai Tsikudzawo is only about 20 to 30 metres from that of the accused. On 7 March 2011 the witness took the firearm for ballistics examination after completing the required forms. The results of the examination showed that this was the firearm which had been used in the murder of the deceased in the instant case. He informed the officers at Criminal Investigations Department in Mount Darwin about that discovery.

Tafirei Matanga's evidence is that on 7 December 2010 at about 2100 hours he assisted the police to convey the deceased Alex Jomboro from Zemba Shops, Kandeya Township, Mount Darwin, to Mount Darwin District Hospital.

Saradini Juza, a Detective Sergeant in the Zimbabwe Republic Police was at the material time stationed at C.I.D. Mount Darwin. On 20 December 2010 he took the three spent cartridges which were picked at Zemba Shops to CID Forensic Ballistics for examination.

Doctor Gwagwa is a medical practitioner stationed at Mt Darwin District Hospital. He conducted a postmortem on the remains of the deceased. His conclusion was that death was a result of gunshot wounds to head with transection of the spinal cord at level 2nd cervical vertebrae resulting in cardio respiratory arrest. He prepared a postmortem report which was produced in evidence, exh. 1, in which he recorded his findings and conclusions.

The State produced CID Forensic Ballistics Reports as exhibits 2, 3 and 4. From the reports, the firearm which was recovered at Ruwa is the one which was fired at the deceased and which killed him.

The accused's defence was an alibi. His position was that he never went to Kandeya Township in Mount Darwin on the day in question. In his defence outline, which he adopted in his evidence, he stated that he had last gone to Mt Darwin in 2009. The accused gave evidence himself and called no other witness. His evidence was that he spent all the days assisting his brother, Marvellous Madya, who is a mechanic to repair motor vehicles. He would wake up before 7 o'clock in the morning to go to work. He would only finish work around 1930 hours,

after which he would proceed home to watch movies up to about 2200 hours. His evidence regarding how he got implicated in the case was that one Justine Momela brought a motor vehicle for repairs by the accused's brother. He was advised that the motor vehicle required another battery. The accused then gave Justine Momela a second hand battery and, in return Justine Momela gave the accused a mobile phone as security pending payment for the battery. When Justine Momela failed to pay the money for the battery the accused sold the phone to one Spencer Muuya. Spencer Muuya is the one who implicated the accused when he was found in possession of the phone. The accused stated that Taurai Tsikuzawo and Thembinkosi Mathuthu made indications on how they had stolen the gun and that the indications were video recorded. He only got to know Taurai Tsikuzawo after the latter was arrested through Justin Momela. He denied leading the police to the recovery of the firearm. He stated that he was arrested on the basis that he had a phone which had been stolen during a robbery.

From the evidence summarized above, the following facts are common ground. On 7 December 2010 the deceased died as a result of injuries which he sustained from being shot at. The persons who entered and shot the deceased had entered his shop at night and demanded money from him before shooting him. The weapon used to shoot the deceased, as evidenced by the Forensic Ballistics Reports, is the one that the police recovered at Ruwa. The exact location of the firearm on the date that it was recovered was pointed out by Taurai Tsikudzawo.

What is in contention is whether the police who were investigating the issue of the firearm were led to its recovery by the accused person. If the accused indeed led the police to recover the firearm the next issue arises, namely, whether the recovery of the firearm through the indications of the accused person links him to the murder of the deceased. The evidence of Previous Mutata was that the accused person is the one who led them to Ruwa and when he failed to locate the firearm at the place where he had hidden it he then led the police to the residence of his friend, Taurai Tsikudzawo whom he believed to have removed the pistol to some other place. Through the involvement of Taurai Tsikudzawo the police were then able to recover the firearm. That evidence has not been challenged by the accused person. What the accused sought to do was to suggest that he himself was not the one who pointed out the place where the firearm was. The accused person did not dispute that he is the one who led the police to the residence of Taurai Tsikudzawo. He states that he was only seated in the motor vehicle when the

police were led by Taurai Tsikudzawo to the place where the weapon was hidden. That version accords with the evidence of Previous Mutata insofar as it illustrates that the accused person was indeed present when Tsikudzawo went with the police to the place where he had hidden the firearm following the arrest of the accused. The accused suggests that he was only arrested because he had been given a mobile phone belonging to Justin Momela to whom he had sold a car battery. In his defence outline the accused states that Justin Momela is also known as Justin Tsikudzawo, which means that he is probably related to Taurai Tsikudzawo. Significantly, although in his defence outline the accused stated that on the date that the offence was committed he was in Ruwa and spent the night with his brother Marvellous Madya, the brother was not called to testify. More than that, the accused himself was non-committal in his evidence regarding his whereabouts or movement on that day, including in the evening of the same day. His responses were very general and did not pertain to the 7th December 2010 when he was being examined by his legal practitioner. For instance, he was asked where exactly in Ruwa he was on that day. His response was: “All the days I would wake up going to repair vehicles with my brother.” He was asked about the time that he woke up on that day. His response was, “I would not know the time which I woke up but on daily basis we would wake up before seven and go to our work place”. When asked about the time that he had left his work place his response was equally general, as he said, “We mostly knock off duty at 7:30.” He was asked if he remembered what he did after work on that day. His response was, “After finishing our work we go home since my brother does not drink beer as well as myself “(sic). He was asked a specific question on how he spent the night on 7 December 2010. His response was, “After feeding we watch films, and we would sleep around 10.”

The responses show that the accused person failed to explain where he was on 7 December 2010. His connection to the recovery of the firearm was established by the evidence led. If he was not the one leading them to Ruwa and Taurai Tsikudzawo’s residence the police officers would have had no reason to have him in their motor vehicle. He does not explain what he was doing in that motor vehicle. The accused exhibited so much knowledge about the other cases involving Justin Momela and Taurai Tsikudzawo, but does not explain his connection to them. The evidence placed before this court shows that his residence is within the same area as that of Taurai Tsikudzawo. It makes sense then that he knew Taurai Tsikudzawo, and is the one

who led the police to his residence. It does not matter that he is not the one who actually pointed out where the firearm had been hidden. He would not have known that since, as Previous Mutata explained, it had been removed by Taurai Tsikudzawo. If, as the accused would like this court to believe, the police had intended to falsely implicate him they would have simply stated that he is the one who pointed out where the firearm was to them without involving Taurai Tsikudzawo. The accused is the one who knew the person who had removed the firearm. He led the police to that person, and the firearm was recovered. He has not explained his possession of that firearm or how he came to be involved with it. The firearm is the weapon that was used to kill the deceased. The evidence of the Forensic Ballistics Reports was not challenged. In the absence of an explanation of his possession of the firearm, the court is entitled to come to the conclusion that the accused is the one who fired the shot that killed the deceased.

The prosecution is required to prove its case against the accused person beyond reasonable doubt. The authorities are clear that beyond reasonable doubt does not mean beyond a shadow of doubt. In the present case, once the court finds, as it has done, that the accused is the one who had possession of the firearm used to murder the deceased, and that he had hidden it but found it having been removed by Taurai Tsikudzawo, and that he was able to lead the police to the person who had changed the place where the weapon was hidden, the absence of any explanation as to how he came to be in possession of the firearm renders any suggestion that another person may have used the weapon to kill the deceased fanciful and speculative. The court is convinced that beyond reasonable doubt the case against the accused person has been proved, namely, that he is the one who unlawfully and intentionally killed the deceased Alex Jomboro.

In the result, the accused is 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
Ashton Ashilly Debwe, Pro deo counsel for accused