

THE STATE

vs

PINANA MANENJI

HIGH COURT OF ZIMBABWE

MAWADZE J

MASVINGO, 10 June & 15 & 26th July, 2019

Criminal Trial

Assessors 1. Mr Mutomba
 2. Mr Mushuku

Ms S. Masokovere for the state
C. Chinyama with *R. Tsvakwi* for the accused

MAWADZE J: The 22-year-old accused and the 33-year-old now deceased were persons well known to each other very well. They hailed from the same area together with accused's alleged accomplice one Goddie Zvenyika (Goddie) and the now deceased's friend Calton Zhou. Another common feature amongst them is that at the material time they were all gold panners, otherwise dignified as artisanal miners. They were all carrying out this activity at the seemingly very controversial and cursed mine called Lennox Mine in Mashava. This is so because we take judicial notice of the number of criminal and civil disputes emanating from this Lennox Mine in Mashava where the precious gold seems to be in abundance.

On 19 March 2017 the accused, and his alleged accomplice Goddie now at large, the now deceased and Calton Zhou (Calton) were all carrying out illegal gold mining around Lennox Mine in Mashava. The now deceased Elliot Kutsirayi was in the same pit with his colleague Calton.

The accused is facing a charge of murder as defined in section 47(1) of the Criminal Law (Codification and Reform) Act [*Cap 9:23*]. He was jointly charged with his alleged accomplice Goddie now at large hence a separation of trial was granted. The accused and his accomplice are said to have attacked both the now deceased and his colleague Calton with machetes leading to the now deceased's death and serious injuries on Calton. This was allegedly as a result of what can be called "gold wars".

The alleged facts are that on 19 March 2019 at around 1030 hrs the now deceased and his friend Calton were panning for gold in a pit at Lennox Mine when they were approached by the accused and his nephew Goddie. It is alleged the accused and Goddie demanded that the now deceased and Calton surrender the gold ore they had dug to the accused and Goddie. The now deceased and Calton refused. It is said this incensed the accused and his accomplice Goddie who withdrew machetes strapped and hidden on their waists. It is alleged that they simultaneously attacked the now deceased and Calton landing the blows on their head and hands. The now deceased's friend Calton Zhou, though severely injured managed to escape and made a report at ZRP Mashava. The now deceased was not so lucky as he was severely maimed. It is said a good Samaritan, Admore Muzamani ferried him to ZRP Mashava. Both the now deceased and Calton were taken to Masvingo General Hospital where they were admitted for 4 days. It is alleged that after being discharged the now deceased's condition deteriorated leading to his re-admission at Chivi District Hospital on 4 May 2017 where he later passed on 8 May 2017 due to head injuries allegedly inflicted by the accused and Goddie.

The accused's basic defence is a total denial of the assault of the now deceased and/or Calton.

In his defence outline, the same version he gave throughout the trial, which is in tandem with his confirmed warned and cautioned statement the accused had this version to make;

The accused said on the day in question he passed through the place where the now deceased and Calton were panning for gold. The accused said he was in the company of Goddie enroute to the local shops to buy food for his fellow artisanal miners. The accused said he decided to proceed to the site where the now deceased and Calton were extracting gold ore from a pit in order to wash his hands.

Apparently the accused said Goddie had had an altercation with both the now deceased and Calton the previous day. Upon getting to where the now deceased and Calton were, the accused said the now deceased picked stones and threatened to harm the accused. The accused who was aware of the previous dispute between the now deceased and Calton on one hand

versus Goddie on the other innocently inquired what was wrong. The accused said the now deceased threw a stone at him and as the accused ducked he fell into one of the pits at the site some 3.5 m deep. Whilst inside the pit the accused said he did not see what then transpired between his nephew and colleague Goddie on one hand and the now deceased and Calton on the other.

The accused said when he got out of the pit he saw that the now deceased had been severely injured on the head. Calton was nowhere to be seen. To his utter surprise the accused said his colleague and nephew Goddie was holding a machete and revealed that, he Goddie, had injured both the now deceased and Calton with a machete because of an undisclosed dispute they had the previous day.

The accused said because of the gravity of the situation and the serious injuries inflicted on the now deceased he feared he could be arrested for a crime he did not commit. As a result, the accused said he boarded a bus and fled to Chegutu together with his nephew Goddie who just followed him. In Chegutu he separated from Goddie and continued with his illegal gold mining activities until his arrest some 5 to 6 months later in September 2017.

The accused denied harming the now deceased in any way indicating that he absolutely had no cause to do so as he had never had a dispute with the now deceased. The accused denied that he demanded for gold ore from the now deceased and Calton.

As regards the demise of the now deceased the accused said he believes the doctors at Masvingo General Hospital were negligent in how they treated the now deceased hence they contributed to his death. The accused also took issue with the contradictory information contained in the medical affidavit authored by the same doctor who initially attended to the now deceased on 19 March 2017 and later performed the post mortem on 10 May 2017 after the now deceased's death. The gist of the accused's query is why the 8 cm deep cut on the head later seen by the doctor when he carried out the post mortem examination on the now deceased had not been seen by the same doctor when he first attended to the now deceased. In that vein the accused believes the now deceased could have possibly been fatally injured on the head later well after his discharge from Masvingo General Hospital hence his death may not be linked to the alleged attack on 19 March 2017 at Lennox Mine, Mashava.

In a nutshell this is the version the accused stuck to throughout the trial.

In support of the case the state led evidence from the now deceased's colleague Calton, Admire Muzamani who helped the now deceased after the alleged attack, Sgt Jakosi Majoti who received the report from Calton and attended to both Calton and the now deceased at ZRP

Mashava and Dr Calvin Maimba who first attended to the now deceased upon admission at Masvingo General Hospital and later compiled a post mortem report after examining the now deceased's remains.

The evidence of Kundai Juma and Sifelani Kutsirayi was admitted in terms of s 314 of the Criminal Procedure and Evidence Act [*Cap 9:07*].

The accused gave evidence and he did not call any witnesses.

The state produced two Exhibits by consent, being Exhibit 1 accused's warned and cautioned statement and Exhibit 2 the post mortem report.

The accused also produced two Exhibits. These are Dr Calvin Maimba's statement to the police Exhibit 3 and Exhibit 4 a medical affidavit compiled by Dr Maimba upon examining the now deceased during his lifetime.

A brief comment on each of the Exhibit is in order.

Exhibit 1: - we did note that accused's confirmed warned and cautioned statement is consistent in all material respects with his defence outline Annexure B and his testimony throughout the trial. We have already summarised the accused's version of events.

Exhibit 2:- this is the post mortem report compiled by Dr Calvin Maimba. The doctor observed a large \pm 8cm laceration on the occipital parietal area and other unspecified injuries on the now deceased. The cause of death is said to be head injury. We shall deal with these findings later when analysing the doctor's evidence, the cause of the now deceased's death and assertions thereof made by the accused.

Exhibit 3:- is the doctor's statement to the police specifically paragraph 7. Apparently the accused suggested that the doctor had not seen the \pm 8cm laceration on the now deceased's head upon the initial examination of the now deceased during his lifetime when he was admitted at Masvingo General Hospital but only "realised" or saw this injury later during the post mortem examination.

Exhibit 4:- the medical affidavit in which Dr Calvin Maimba observed multiple lacerations on the now deceased's scalp, 3 broken right upper incisor teeth which injuries he said were inflicted by a sharp instrument. The doctor stated that the injuries were serious although no permanent injury would result nor was there potential danger to life. Again Exhibit 3 and Exhibit 4 shall be dealt with in dealing with the doctor's evidence.

Kundai Juma's uncontested evidence is that he ferried the injured now deceased in his motor vehicle on 19 March 2017 to ZRP Mashava. The now deceased had a bandaged wound on the head which was bleeding.

The uncontroverted evidence of Sifelani Kutsirayi the now deceased's father is to the effect that he proceeded to Masvingo General Hospital after being advised that the now deceased had been injured and admitted at the hospital. He said after the now deceased had been discharged the now deceased continued to complain of severe headache. As a result, he took the now deceased to Chivi District Hospital where he was admitted and died on 8 May 2017.

The evidence of the now deceased's father shows that the now deceased had not recovered when he was discharged from Masvingo General Hospital as he still complained of severe headache. It also suggests that it is this same ailment which led to the now deceased's re-admission at Chivi District Hospital until his death. The evidence of the now deceased's father which is uncontroverted discounts the possibility of a new intervening act or a *novus actus interveniens* leading to his death. This speculation was raised by the accused in his defence outline but fizzled out when accused gave evidence as the accused could not substantiate that allegation. In fact, the accused conceded that the cause of the now deceased's death is or was the head injury. In light of the accused's defence one wonders why accused sought to compromise his credibility by not only seeking to speculate on the cause of the now deceased's death but alleging some intervening act when in fact his defence is simply that he did not assault the now deceased.

We now turn to *viva voce* evidence led by the state.

In our view nothing turns on the evidence of Admire Muzamani. He was a fellow gold panner at Lennox Mine. He comes from the same area with the accused, Goddie, the now deceased and Calton. In fact, they grew up together.

Admire Muzamani said on the day in question he saw Calton running and had been injured. Calton was simply running for dear life and did not answer to his inquiries as to what had happened. Moments later he said he heard a faint voice calling for help. He answered to the distress call. It was the now deceased. He noted that the now deceased had a deep cut on the head which was very big. The now deceased was virtually holding his head pressing it together from both sides as if preventing it from cracking apart. The injury was severe. He also noted injuries on the now deceased's hands and fingers.

Admire Muzamani said he inquired from the now deceased what had happened. In response he said the now deceased said the boys from Admire Muzamani's being Zvenyika (Goddie) and Pinana (accused) had injured him. In view of the severity of the injuries inflicted on the now deceased he did no proper further but rushed to find a motor vehicle which ferried

the now deceased to ZRP Mashava. He also accompanied the now deceased to Masvingo General Hospital.

In cross examination *Mr Chinyama* for the accused sought to take issue as to whether in the said report by the now deceased to Admire Muzamani the now deceased implicated the accused in the assault of the now deceased. Besides seeking to clearly introduce hearsay evidence unless it would be assumed to be dying declaration we found no ambiguity in Admire Muzamani's evidence.

It would appear that during the course of the trial the accused sought to put the cause of the now deceased's death into issue. This can be discerned from his defence outline and cross examination of Doctor Calvin Maimba. This also explains why the accused produced Exhibit 3 Doctor Maimba's statement and Exhibit 4 the medical affidavit.

Doctor Calvin Maimba testified that he attended to the now deceased at Masvingo General Hospital upon his admission on 19 March 2017. It was on that basis that he compiled Exhibit 4 the medical affidavit. His recollection was that the now deceased had serious injuries which warranted medical intervention hence his admission. Naturally, he could not recall how the now deceased was subsequently treated or discharged without reference to his or other doctor's notes.

Doctor Calvin Maimba said coincidentally after the now deceased's death at Chivi District Hospital he carried out the post mortem examination after which he compiled the report Exhibit 2. He concluded that the \pm 8cm wound on the head caused the now deceased's death.

In our view the lengthy and at times repetitive cross examination of Doctor Calvin Maimba did not yield any new facts. In some instances, he was probed on general questions ranging from how patients are discharged, the scarcity or otherwise of prescribed drugs to patients and how hospital fees are levied. We find no good cause to indulge in these general matters in view of the issue at hand. Suffice to state that the doctor indeed confirmed the well-known scarcity of drugs in public hospitals and that indeed patients can be discharged upon their request for various reasons. It remained as hazy as fog as to how the accused alleges medical staff were negligent in treating the now deceased at Masvingo General Hospital more so in view of accused's defence that he had no hand in the now deceased's injury or assault.

Doctor Calvin Maimba pointed out that there was no contradiction between the medical affidavit Exhibit 4 and the post mortem report Exhibit 2. He explained that in the medical affidavit he was simply outlining the injuries he observed and proffering an opinion on some issues but in the post mortem report his call was to specifically deal with the proximate cause

of death. He explained that despite other injuries on the now deceased like broken teeth and minor lacerations the cause of death was the injury on the head caused by the \pm 8cm wound on the head. In our view nothing really turns on his assessment in the medical affidavit that at that material time he believed there was no potential danger to life as thereafter a number of variables come into play like the subsequent nature of medical intervention, how the patient responds to treatment and the fact that such a conclusion is merely an opinion not an issue settled with mathematical precision.

In our view we find no basis to allege some *novus actus interveniens* or that he now deceased sustained the \pm 8cm wound on the head after his discharge from Masvingo General Hospital. In any case when the accused gave evidence it turned out that all this was simply hot air as he said he had no reason to put into issue the now deceased's cause of death. Thus the so called negligence of medical staff and some alleged intervening act were simply much ado about nothing!

Sgt Jakosi Majoti is the police detail who first attended to Calvin when he arrived injured at ZRP Mashava. Calvin's report was that he and the now deceased had been attacked with machetes by the accused and Goddie. He said Calvin was indeed severely injured as his clothes was soaked in blood. Sgt Jakosi Majoti said some 40 minutes later the now deceased arrived in a motor vehicle also severely injured. The now deceased could not walk on his own and had several cuts or lacerations on the head. He observed that the now deceased had difficulties in breathing and was speaking in a very low voice. All the now deceased could say was that he felt as if his head had cracked. It is therefore clear from Sgt Jakosi Majoti's evidence that the now deceased had been severely injured hence he rushed him to Masvingo General hospital.

The simple question in this matter is whether the accused attacked the now deceased. In order to answer this question, we shall consider the evidence of Calton an eye witness and that of the accused.

According to Calton he and the now deceased were in perfect health as they were busy extracting gold ore on 19 March 2017 from a pit at Lennox Mine in Mashava. He said the accused arrived together with Goddie at their pit. Calton said accused inquired why they were taking too long to extract gold ore. In response Calton and the now deceased inquired as to what interest accused and Goddie had in their gold ore. They further probed as to whether accused and Goddie wanted to also join them in extracting gold ore in that pit. Calton said in

response the accused said he had no time to engage in that type of task or work and would rather simply benefit from the sweat of the now deceased and Calton.

Calton said before he and the now deceased could answer the accused and Goddie simultaneously pulled out machetes hidden on their waists. The machetes had very sharp blades about 40 cm long, made of steel and \pm 7 cm handles made of rubber.

Calton said Goddie struck him with the machete but Calton blocked the blow with his hand and was injured on the wrist. He showed us a healed scar on the wrist. Calton said the now deceased was hit by the accused on the head with a machete. Thereafter he said both accused and Goddie simultaneously and interchangeably used machetes to attack both the now deceased and Calton. As a result, Calton tried to fend off the blows with his hands which ended up injured, were numb. Calton said he bled from the head and hands.

Calton testified that he managed to escape leaving the now deceased being attacked by both accused and Goddie. He fled to ZRP Mashava. The now deceased later arrived being ferried in a motor vehicle injured. The now deceased's head had been bandaged. They were taken to Masvingo General Hospital where the wounds were sutured. They were detained and discharged on the 4th day. Calton said due to high medical bills and unavailability of prescribed drugs both the now deceased and Calton decided to request to be discharged from hospital although they had not fully recovered. He later learnt of the now deceased's death.

Calton was subjected to lengthy cross examination by *Mr Chinyama* but the colour of his evidence never changed. Calton was adamant that both the accused and Goddie attacked him and the now deceased. In fact, Calton stated that it was futile for the accused to deny attacking him and the now deceased. In fact, Calton said he had no cause to falsely incriminate the accused or Goddie as he had no previous issues with both of them.

Calton was clear that both the now deceased and himself were severely injured and that the wounds inflicted had to be sutured. He stated that the now deceased had a more serious injury of the head and said he would not survive. At the hospital this head injury initially produced puss and later some watery substance.

Calton denied that he had had any previous misunderstandings with the accused or Goddie. He dismissed the accused's defence outline as completely false.

In our assessment Calton's evidence is very lucid. He is an eye witness on the now deceased's attack and also a victim himself. He had healed scars to confirm injuries inflicted on him. The attack happened in broad day light and he clearly saw what happened. The attack took place at Calton and the now deceased's pit. He had visibly scars on the left hand below

the wrist, across the left palm, right thumb and right side of the head. He is lucky to be alive. Calton was clear that severe force was used with very lethal weapons and that the now deceased had more severe injuries especially a gaping wound on the head. We find no possible motive for Calton to falsely incriminate the accused and none was suggested to him. His credibility cannot be doubted. Indeed, as he said it is simple futile for the accused in the circumstances to try and distance himself to this attack.

The accused's version of events cannot possibly be true. It is the accused and Goddie who went to the pit where the now deceased and Calton were busy extracting gold ore. The accused was in the company of Goddie. From the clear evidence of Calton they had machetes hidden on the waists. Their motive can clearly be inferred as the accused conceded he had no issues with the now deceased or Calton. The only possible motive for the attack was the accused and Goddie's desire to reap where they did not sow.

We are not persuaded that the accused was simply an innocent bystander in all this fracas let alone also a victim. If indeed he was a victim, he should have proceeded to the police at ZRP Mashava to report as was done by Calton and the now deceased. The accused has no explanation for the failure to do that. Worse still the accused still in the company of Goddie fled to Chegutu and was clearly in hiding for 5 months until his arrest. As correctly said by his counsel *Mr Chinyama* only the guilty are afraid and his conduct is not consistent with innocence. If indeed Goddie alone had attacked the now deceased and Calton why would the accused flee more so in Goddie's company. Again the explanation for such conduct is simply incredible. What was he afraid of? Why would he be implicated if he had played no role? Why would he fail to assist the now deceased whose life was in danger and had sustained injuries which even scared the accused himself.

It is our finding that the accused indeed attacked the now deceased in the clear manner explained by Calton. The accused used a lethal weapon, a machete on the vulnerable part of the body, the head and inflicted fatal injury. The evidence clearly shows he acted in common purpose with Goddie in the attack. The now deceased died of a head injury caused by this assault. Severe force was used. Several blows were indiscriminately delivered and the accused did not render any help. Indeed, the accused by acting in that manner may not have intended to kill but he did realise that there was a real risk or possibility that death may result.

In the result we find the accused guilty of murder with constructive intent.

Verdict:

Guilty of contravening s 47(1)(b) of the Criminal Law (Codification and Reform) Act [Cap 9:23]: - murder with constructive intent.

Sentence

You now stand convicted after a protracted trial of murder with constructive intent.

You confirmed that you are not a first offender as in 2017 you were convicted at Chegutu Magistrates Court of attempted murder and sentenced to 2 years imprisonment with 6 months imprisonment conditionally suspended for 5 years on the usual conditions of good behaviour. Both counsel agreed that we proceed to sentence you without tendering proof of that conviction. If indeed there is any need to bring into effect any suspended sentence you can always be called to show cause why that sentence should not be brought into effect.

What is clear is that you have no respect for the law at all. This explains why probably you were not contrite at all throughout the trial. An innocent life was lost at your behest and the now deceased had not wronged you at all. It is unfortunate that you are a person of violent disposition. All we can do is to warn you that you will never win the war with the law. You would spend the most of your productive life working for nothing in prison.

It is saddening that cases of violence involving artisanal miners are very prevalent where gangsters are engaged in so called 'machete wars' in Mashava, Shurugwi, Gwanda and Kwekwe. A number of people have lost their lives and it is incumbent upon the courts to ensure that those involved in artisanal mining do so lawfully and peacefully.

The facts of this case clearly shows premeditation. It was a gang offence. You approached the now deceased armed with a hidden machete. The attack was unprovoked. It is aggravating that the attack itself was vicious, merciless and indiscriminate. After such an attack you simply walked away without offering any help. Your moral blameworthiness is very high.

Your counsel was understandably at pains to address us in mitigation. There is very little which can be said in your favour.

Although you were in custody since September 2017 awaiting finalisation of this matter you were serving a prisoner.

We take note that you are single, unemployed with no family responsibilities. Beyond that we did not find any mitigatory factors.

In the result a sentence of 20 years imprisonment is appropriate.

National Prosecuting Authority, counsel for the state
Chinyama Attorneys, counsel for the accused