

GOLDEN MUZIYONI

Versus

THE STATE

HIGH COURT OF ZIMBABWE  
MAWADZE J  
MASVINGO 29 OCTOBER & 13 NOVEMBER, 2020

**Criminal Trial**

*Ms M Mutumhe*, for the state  
*Mr J Chipangura*, for the accused

MAWADZE J: The 27 year old accused was arraigned before us facing the charge of murder as defined in section 47 (1) of the Criminal Law Codification and Reform Act [*Chapter 9:23*].

The charge is that on 19 March 2017 at Lennox mine, Mashava the accused caused the death of ELLIOT KUTSIRAYI by striking him several times in the head with a machete.

The facts in this matter are as follows:

The now deceased Elliot Kutsirayi and his friend Carlton Zhou were gold panners also known as artisanal miners plying their trade at the pits at Lennox mine, Mashava.

On 19 March 2017 the 33year old now deceased and his colleague Carlton Zhou were digging for gold ore in one of the pits at Lennox mine, Mashava at about 1000hrs. It was raining.

The accused and his alleged convicted accomplice Pinana Manenji (Pinana) then arrived at the scene.

The state case is that the accused and Pinana demanded that the now deceased and Carlton Zhou surrender their gold ore to accused and Pinana but they refused. The state alleges this incensed the accused and Pinana who proceeded to withdraw machets fastened on their waist belts and proceeded to simultaneously attack both the now deceased and Carlton Zhou on their heads and arms. It is the state cases that Carlton Zhou managed to flee and made a report at ZRP Mashava. The now deceased is said to have been left severely injured and was later assisted by some good Samaritan who ferried him to ZRP Mashava.

It is not in issue that the now deceased and Carlton Zhou were then admitted at Masvingo General Hospital from where they were discharged after 4 days. However the state alleges the now deceased's health problem continued to deteriorate and was readmitted at Chivi District Hospital on 4 May 2017 where he died on 8 May 2017. The now deceased cause of death is said to be severe head injury.

The accused on the other hand denies having a hand in the now deceased's death. He faltly denied attacking the now deceased or Carlton Zhou in any manner.

The accused's version of events is as follows;

The accused said on 19 March 2017 he had visited his relative Pinana in Chivi as accused is ordinarily residing in Kwekwe. The accused is a self-confessed gold panner and said he ordinarily carries out such the activities in Chegutu.

The accused said on the day in question he accompanied Pinana from their mine shafts at Lennox mine, Mashava to go and cut poles for the construction of a winch. The accused said he was unarmed but Pinana had a machet.

At the scene of crime, the accused said he saw the now deceased, Carlton Zhou and another man panning for gold and that it is these 3 men who were known to Pinanna. He said apparently these 3 men seemed to have an outstanding dispute with Pinana possibly over mining pits. The accused said the 3 men started to throw stones at Pinana as Pinana advanced towards them. All the accused did was to simply watch this unfolding drama.

The accused he did not see how the now deceased was injured but just observed that the now deceased's clothes were now blood soaked. The accused said he also saw Carlton Zhou fleeing from the scene. Thereafter the accused said he proceeded to Pinana's home after which he

left for Kwekwe and later Chegutu only to be arrested in connection with this case in January 2020.

This is virtually the same version the accused gave in Exhibit 2 his confirmed warned and cautioned statement. In that statement the accused was more explicit that it is Pinana who was involved in an altercation with the now deceased, Carlton Zhou and another 3<sup>rd</sup> man. He insisted that he did not see how the now deceased was injured save for the blood-stained clothes.

We therefore understand the accused's defence to be that he was simply an innocent bystander. Under cross examination however the accused said it is Pinana who attacked the now deceased and insisted that he played no role. When he was taken to task as to why he was being implicated, the accused he could not proffer any reason save to say that probably the now deceased and his friends were over powered by Pinana and therefore decided to falsely incriminate the accused. The accused said as a visitor he could not possibly have had any bone to chew with the now deceased, Carlton Zhou and the other man.

The accused under cross examination also sought to explain why he was only arrested some 3 years later in January 2020. The accused said he is surprised because after this incident he stayed at Pinana's homestead for 7 days after which he proceeded to his residence in Kwekwe and later to Chegutu where he pans for gold.

On the other hand the state relied on the evidence of 6 witnesses. However it is only Carlton Zhou the deceased's colleague and the attending police detail Sergeant Jakosi Majoti who gave *viva voce* evidence. The evidence of other 4 state witnesses was admitted in terms of section 314 of the Criminal Procedure and Evidence Act [*cap 9:07*]. For completeness of the record we shall simply summarise that uncontroverted evidence of Admire Muzamani, Kundai Juma, Sifelani Kutsirayi and Dr Calvin Maimba.

Admire Muzamani (Admire)

Admire is a 41 year old resident of Lennox Mine Mashava. On 19 March 2017 he was at his house in the morning when Carlton Zhou ran past. He observed Carlton Zhou was injured and bleeding. This prompted Admire to proceed to nearby mine pits to check what was going on. At the mining pits he found the now deceased lying in a pool of blood severely injured on the head and arms. Upon inquiry the now deceased revealed to him that he, the now deceased, had been attacked by accused and Pinana with machetes. He

administered first aid. Thereafter he sought for help from Kundai Juma who drove the now deceased to ZRP Mashava.

Kundai Juma (Juma)

Juma is 32 year old resident of Mashava. He was unknown to all parties in the matter. On 19 March 2017 he was driving past Lennox mine when. Admire stopped him and asked him to ferry the now deceased to ZRP Mashava. He obliged. He observed that the now deceased had severe head injuries and was bleeding.

Sifelani Kutsirayi (Sifelani)

Sifelani is 76 years old and is the now deceased's biological father. He was advised on 19 March 2017 that his son the now deceased and Carlton Zhou had been severely injured at Lennox Mine in Mashava. He found them admitted at Masvingo General Hospital from where they were discharged after 4 days. Sifelani said his son, the now deceased never recovered from the injuries as he constantly complained of pain in the head. As a result, he had to take him to Chivi District Hospital where the now deceased was readmitted in May 2017 but passed on while still admitted on 8 May 2017.

Dr Calvin Maimba (Dr Maimba)

Dr Maimba examined the now deceased's remains and authored the post mortem report Exhibit 1: As per Exhibit 1 he observed a "*large ± 8cm laceration on the parietal area*" and "*other external injuries* " not specified.

However before the now deceased passed on Dr Maimba first attended to the now deceased at Masvingo General Hospital on 19 March 2017 after he had been admitted. On that occasion he observed multiple lacerations on the sculp and 3 broken incisor teeth all caused by a sharp object.

The cause of the now deceased's death is not an issue.

The narrow issue in this matter which is a factual is whether the accused also attacked the now deceased. Before dealing with this issue we shall dispense with the evidence of the attending detail one sergeant Jakosi Majoti

Jakosi Majoti (Sgt Majoti)

On 19 March 2017 Sgt Majoti attended to both Carlton Zhou and the now deceased at ZRP Mashava. In relation to the now deceased he said the now deceased had severe head injuries, could hardly talk as he said he felt like his (the deceased's) head had been cut into half. The now deceased's clothes were soaked in blood and were muddy. He had to lift the now deceased into the vehicle which ferried the now deceased and Carlton Zhou to Masvingo General Hospital as the now deceased could not walk. When he visited the scene of crime nothing of value could be found as it was raining. He also failed to find Pinana or the accused.

The only eye witness to the now deceased's attack is Carlton Zhou who coincidentally was also a victim. It is his evidence which should be juxtaposed with the accused's version to ascertain if the accused attacked the now deceased.

Carlton Zhou (Carlton)

The 25 year old Carlton said on 19 March 2017 in the morning he was working in a mine, pit at Lennox mine, Mashava, with the now deceased his colleague. He is well known to Pinana as they hail from the same area, grew up together and attended the same school. The accused was not known to him prior to this day.

Carlton said as they were busy in their pit Pinana and the accused approached them. He said Pinana asked them why they were taking long to wash their gold ore. This question puzzled them. He said the now deceased then asked Pinana if Pinana and accused wanted to dig in the same pit.

Carlton said both accused and Pinana replied that they had no time to waste digging for gold ore. At that point he said both Pinana and accused simultaneously pulled out matchets which were concealed around their waists and attacked both the now deceased and Carlton. Carlton explained in detail this attack and exhibited to us the healed scars on his hands and head arising from the attack with the matchets. In summary he said the following;

- (a) That it is the accused who first attacked Carlton with a matchet directing the blows towards Carlton's head and that Carlton had to use and sacrifice his hands to ward off

- the blows. As a result he was cut on right thumb and left side of the head. He still has visible scars.
- (b) Simultaneously he said Pinana attacked the now deceased with a matchet.
  - (c) Thereafter both accused and Pinana would interchangeably attack Carlton and the now deceased with matchets
  - (d) Carlton was unable to count the blows either the accused or Pinna delivered on to the now deceased or to Carlton.
  - (e) Carlton has visible healed scars on his left hands and one on his veins on that hand is sutured.
  - (f) He said blows on the now deceased were directed on to the head hence the the severe head hence injuries the now deceased sustained and also three broken teeth.
  - (g) According to Carlton the matchets used by both accused and Pinna were very sharp.

The testimony of Carlton is that in the midst of this brutal attack he managed to flee from the scene but left the now deceased at the mercy of both accused and Pinana who were still attacking the now deceased as the now deceased cried out for help. Carlton said the accused was boasting as he viciously attacked both of them that he would kill them.

Carlton dismissed accused version as false. He denied that the now deceased and himself were in the company of another third person but that the person nearest to them was in his own pit and also fled when the attack started. He denied that any stones were thrown by himself, the now deceased or any other person. He insisted that accused participated in the attack and that he in fact was the more vicious one and on the fore front. Lastly Carlton said he had no cause to lie against accused a person he even did not know and had no issues with him.

Indeed it was as uphill task for *Mr Chipangura* to meaningfully cross examine Carlton. Likewise the closing written submissions by *Mr Chipangura* are understably luke warm and takes accused's case no further. He is in an invidious position.

Carlton's evidence is free flowing, lucid and clear. As already said he is both a victim and any eye witness. He has visible scars as evidence of his ordeal. In our view the accused was a stranger to him. What would be Carlton's reason to falsely incriminate the accused?

This incident happened in broad day light. Carlton could not have failed to see the role played by the accused if any.

Given Carlton's testimony it is foolhardy for the accused to try and shift the blame to Pinana, a convicted accomplice. We have no cause not to accept Carlton's evidence.

Our findings is that the accused was not an innocent by stander. He acted in common purpose with Pinana. In fact the accused's *bona fides* is betrayed by the fact that he was at large from 19 March 2017 until his arrest in Chegutu 3 years later in January 2020. Accused's conduct is therefore not consistent with innocence.

It is not correct that the accused's guilt arises from the fact that he is related to the convicted Pinana or that he was at the scene of crime. It arises from Carlton's clear evidence. Further, it is a fact now that Pinana is convicted accomplice and we fail to appreciate Mr Chipangura's discomfort with such a factual issue. It is not Pinana who testified implicating the accused but Carlton.

Our finding therefore is that the accused indeed attacked the now deceased in the manner well explained by Carlton. Flowing from this finding is that a lethal weapon, a machet was used. The blows were directed at the vulnerable part of the now deceased, the head. Several blows were delivered with severe force. The now deceased had to be hospitalised twice.

As already said the cause of the now deceased is not in issue. It matters not, in our view, as to who possibly inflicted the fatal blow on the now deceased between accused and Pinana as they both acted in common purpose. The chain of evidence leading to the now deceased's death shows that there was no some *novus actus interveniens*. There is a clear causal link between the attack on the now deceased on 19 March 2017 and his demise on 8 May 2017.

The only benefit which we can give the accused is that the he may not have had the actual intent to cause the now deceased's death. However, we are satisfied that accused, in attacking the now deceased in the manner he did, he did foresee or realise that there was a real risk or possibility of death but nonetheless proceeded for attack the now deceased, oblivious of the consequences of his conduct. We therefore find the accused guilty of murder with constructive intent.

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

SENTENCE

You now stand convicted of murder with constructive intent.

A proper assessment of both the mitigatory factors and aggravating factors shows that the scale weighs more on side of aggravating factors.

Murder is inherently a serious offence punishable with lengthy custodial sentence unless in exceptional circumstances. The sanctity of human life can not be over emphasised.

It is saddening that our youths are engaging in mind boggling and senseless machet wars leading to loss of both life and limb. This vice should be nipped in the bud by handing down deterrent and exemplary sentences. We should never lose this war and our moral compass to the extent of valuing gold as more precious than human life.

It is clear that this was a preplanned and premeditated gang offence. You approached the victim already armed with hidden machets and you took your victims by surprise.

The attack itself was not only vicious but unprovoked. The reason for the attack was simple greed as you wanted to reap where you did not sow.

There is nothing to show that you are contrite. After viciously attacking the now deceased you left him for dead. You offered no help. You thereafter proceeded to Chegutu where you continued with gold panning as if nothing had happened. Throughout the trial you raised flimsy defences unwilling to own up to your wrong doing. In fact you were determined to avoid the long arm of the law as you were at large for 3 years.

The attack itself on the now deceased was vicious and cruel. Severe injuries were inflicted hence the now deceased was hospitalised twice at Masvingo General Hospital and Chivi District Hospital but still succumbed to the injuries. This demon which had apparently seized you should be exorcised at all costs.

This is your first conviction at 28 years of age. Your family comprising of your wife, your ailing father and three minor children who solely survive from what you realise from apparently illegal gold panning would be greatly prejudiced during your incarceration.

Since your arrest in January 2020 you have been in custody for a period of now 11 months.

We however find nothing mitigatory in circumstances surrounding the commission of the offence.

Our task of assessing what should be the appropriate sentence is much easier as your accomplice Pinana has already been convicted and sentenced. The principle of uniformity in sentences in the absence of any objective factors to treat jointly charged persons in the same manner should apply. You acted in common purpose and your moral blameworthiness is the same. In the result we are obliged to treat you in the same manner with your accomplice Pinana.

You are sentenced as follows,

*"20 years imprisonment"*

*National Prosecuting Authority, counsel the state*

*Chuma, Gurajena & Partners, pro deo counsel for the accused.*