

THE STATE
versus
GODFREY SHUMBA
and
JONATHAN ZAMBAKIYANA

HIGH COURT OF ZIMBABWE
MWAYERA J
MUTARE, 22 November 2018, 17 December 2018, 7, 11, 21 January 2019 and 6 March
2019

Criminal Trial

ASSESORS: 1. Mr Chagonda
2. Mr Chipere

M Musarurwa, for the State
Mrs Y Chapata, for the 1st accused
P Makombe, for the 2nd accused

MWAYERA J: Both accused pleaded not guilty to a charge of murder as defined in s 47 (1) (a) or (b) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. It is the state's contention that on 31 July 2016 and at around 0001 hours at Musanditeera Gold Panning Area, Chimanimani, the accused did one or both or more of them unlawfully and with intention to kill or realising that there was a real risk or possibility that their conduct might cause death continued to engage in the conduct despite the risk or possibility, assaulted Aaron Mtisi using stones, machetes and wooden sticks all over the body thereby causing severe injuries all over the body from which the said Aaron Mtisi died.

The post mortem report by Dr Willard Mushiwokufa outlined the cause of death as broken neck and excessive loss of blood. The post mortem report which outlined injuries observed on the body of the deceased was tendered in evidence as exh 2 by consent. Also adduced by consent is the sketch plan exh 1 refers depicting the general layout the scene of the alleged murder drawn per indications by one state witness, Innocent Mtisi. Both accused persons' confirmed warned and cautioned statements were also tendered as exh 3 and 4 respectively.

The first accused Godfrey Shumba in his defence outline basically adopted his confirmed warned and cautioned statement. He denied having killed the deceased. He pointed out that he was forced by one Maxwell and colleagues to go to the gold panning site where the deceased and his team were. The 1st accused in his defence outline stated that the deceased was in the habit of borrowing from tuck shop owners and not paying.

On the day in question, Maxwell who was in the company of 15 men instructed him to join them as they proceeded to the market and later to the gold panning area. According to the 1st accused, he joined the group for fear for his life and that upon arrival the deceased jumped into a river. He was pursued and he finally came out whereupon he was assaulted all over with machetes and sticks. The 1st accused in his confirmed warned and cautioned statement exh 3 pointed out that the deceased had also borrowed 3 tins of petrol and 3 loaves of bread from him but had refused to pay. The 1st accused denied having assaulted the deceased in any manner.

The 2nd accused's confirmed warned and cautioned statement was tendered as exh 4 by consent. In the statement the 2nd accused denied having assaulted or killed the deceased a version retained in his defence outline. The 2nd accused's version was basically that on the day in question he was with his girlfriend one Muchaneta Munamasi. They were trying to get to a place where there was network for mobile connectivity. It was then that the 1st accused and Maxwell took him to the market. Upon arrival there, they caused the accused and his girlfriend to be bound with a rope.

The 1st accused attempted to strike him using a catapult accusing him of having squandered his money together with the deceased Aaron. He was later untied and directed to walk with the 1st accused and Maxwell and group to the panning area. Upon arrival, the group reached up to the river in which Aaron the now deceased had jumped into. The deceased's brother Innocent Mtisi ran away. One of the group members spill petrol into the river in which there were reeds and set fire. The deceased came out and he was caught whereupon he was struck with machetes. The 2nd accused was by then under guard of 4 men. He also observed that the 1st accused, Godfrey Shumba arrived with a machete and catapult and that the 1st accused was shouting at the deceased for having squandered his \$400-00 thinking he was clever. Further the first accused instructed that he cut his fingers.

According to the 2nd accused, the deceased was indiscriminately assaulted by the 1st accused and the group of other men. The 2nd accused and others later returned to the tuck shops were part of the 1st accused's gang demanded for money and also forcefully took maize meal and dried fish, matemba and prepared a meal which they ate. The 2nd accused denied ever

committing the offence stressing that he observed accused 1 and his friends assault the deceased with sticks and machetes although he could not specify which blow landed on what part of the body since it was in the evening and the assault was indiscriminately done.

The state adduced oral evidence from 3 witnesses. The other 5 witnesses' evidence was formerly admitted in terms of s 314 of the Criminal Procedure and Evidence Act [Chapter 9:07]. Takesure Gurudzo's evidence was basically that he was with the deceased and Innocent Mtisi panning for gold. Further his evidence was that the accused and other men approached armed with machetes and threw stones. He and Innocent Mtisi managed to escape while deceased battled to escape.

Tinago Hamadziripi's evidence was basically the same as that of Calistus Nyamakope. Both witnesses are police officers who went to the scene and retrieved the body of deceased. The police officers were accompanied by personnel from the Zimbabwe Parks and Wildlife Authority. Also formerly admitted was the evidence of Dr Willard Mushiwokufa. Of interest is the fact that the doctor just like the police details Tinago Hamadziripi and Calistus Nyamakope observed deep cuts on the left ankle, left knee and hand. The evidence formerly admitted was basically on none contentious issues and as it simply confirmed that the deceased was severely assaulted thereby sustaining injuries from which he died.

Oral evidence was adduced as follows:

Innocent Mtisi a brother to the deceased gave oral evidence narrating how on the fateful day the deceased met with his demise. According to Innocent Mtisi, the 1st accused appeared to be the leader of the group. The witness just like the 2nd accused pointed out that accused 1 was armed with a machete. He recounted how the group approached and viciously attacked the deceased who unfortunately could not swim. The witness together with Takesure Gurudzo swam across the river while the deceased sought refuge in some reeds in the river.

The deceased was exposed when petrol was poured and a fire lit in the reeds. The witness told the court that the deceased was viciously assaulted sustaining several serious injuries from which he bled profusely and lost his life. According to the witness, the first accused and his group only stopped when the deceased was lying down in a helpless state. The witness tried to assist his brother but the deceased passed on shortly after the assault and before he could take him any far. The witness was firm even during cross examination. He maintained that accused 1 was the ring leader and that he severely assaulted the deceased. The witness impressed the court as a candid witness as he did not seek to exaggerate his evidence. He observed from a distance across in the evening and could not say with exactitude where the

blows landed. He made it very clear that he did not witness the 2nd accused assault the deceased but assumed that accused 2 led the group to the panning site since he knew the place. Even though he lost his brother he did not seek to exaggerate his testimony by narrating details which would incriminate both accused. The witness impressed the court as an honest witness who sought nothing more than justice. The witness's evidence tallied on material aspects with that of accused 2 and the second witness.

Sifelani Chivheya, a duly attested member of the Zimbabwe Republic Police also gave oral evidence. It was clear from the witness's evidence that about 5 months later on the 20th of January 2017 he arrested the 2 accused persons in Chimanimani town. The arrest followed a tip off from members of the public. According to the witness, the 2nd accused cooperated with the police. The witness told the court that accused 1 resisted arrest although he was eventually over powered and arrested. The witness's evidence was straight forward and basically just on the arrest of the accused persons.

The last witness who gave oral evidence was the investigating officer of the case, Daniel Kunaka. The investigating officer narrated how he compiled the docket. The witness did not take the two accused persons for indications pointing out that the terrain and general outlook of the area near the Mozambique border would have caused the accused to escape. He stressed that the place was inaccessible and had no habitants except for the dangerous illegal gold panners. He relied on indications of the state witness Innocent Mtisi and came out with sketch plans. It also emerged from the witness that the only evidence linking the 2nd accused was the implication by accused 1. According to him, the other state witness did not speak of accused 2's involvement or manner of involvement. It was also clear from the witness that he gathered there were more other people from the group including Maxwell that attacked the deceased. The omission of not taking the accused for indications and coming up with 2 sketch plans of the same scene of the crime were shortcomings in the manner the investigations was carried out.

However, given the common cause aspects that the deceased was attacked by a group and then died shortly after at the gold panning site. The flow of evidence was not disputed by the omissions. We must mention the investigating officer could have done better. Based on what he told the court even admission of the omissions the witness was generally honest. He did not seek to exaggerate his evidence so as to implicate the accused persons. For example, it was clear from the witness that accused 2 was only present but he did not establish his role if

any in the demise of the deceased. The witness admitted that he did not interview witnesses supplied by the 2nd accused namely Muchaneta Munamasi, Farai Chimwere and Tinaro.

Such omission of not investigating witnesses or even interviewing of the independent tuck shop owners could have assisted in shading light on the mode of operation of the group and could also have helped on the veracity of accused 2's assertion of having been abducted. To this end, the investigating officer took a lot of aspects for granted and left loose ends in an unusual manner given the seriousness of the allegations. It is understandable geographically the actual scene is very difficult to access and the police feared the accused would escape. Although this fear could have been allayed by proper manning by armed details. What is not understandable is why the tuck shop owners not suspects or accused were not interviewed for more details to be revealed. An investigating officer should properly and thoroughly leave no stone unturned so as to assist not only the state but the court in coming up with a just decision. The investigation officer in this case could have done better given the explanations of the two accused persons.

The 1st accused was the only witness in his defence case. 1st accused was adamant that he was forced by Maxwell to join the group. According to the 1st accused, the deceased was in the habit of robbing others at the gold panning area. The 1st accused himself had lost fuel and bread at the hands of the deceased and his brothers. He insisted that he did not participate in the assault which led to the demise of the deceased. The 1st accused was exposed during cross examination by both the 2nd accused counsel and state counsel. He could not dispute that he was armed with a machete and that at one stage he wanted to strike the 1st accused a friend of the deceased with a catapult.

Further, accused 1 could not dispute his utterances which were effectively an indication for desire to revenge for his lost property. The motive of the group was to deal with the problematic deceased who was regarded as a robber. The 1st accused had been robbed and his grievances squarely aligned with the group. The 1st accused could not explain how he was not part of the group given his motivation. It appears from the 1st witness, Innocent Mtisi and 2nd accused the 1st accused was actually the leader. If he was compelled to go upon being met on the road then one wonders at what stage he armed himself with a catapult and machete. The first accused was placed right in the middle of the fracas and his version exposed as a misrepresentation to mislead the court.

The 2nd accused in turn gave evidence in his case and also adduced evidence from a witness one Muchaneta Munamasi. He maintained he was compelled to be part of the group

when the group came across him and his girlfriend Muchaneta Munamasi while searching for network. His version that he was tied with a rope together with his girlfriend was confirmed by the first accused. That 1st accused wanted to strike him with a catapult was also not refuted by accused. The 2nd accused's version that he was forced into the group to go and show them the panning site was not disputed. While at the scene, according to the second accused he was under guard when he observed the deceased being savagely attacked by 1st accused and the group using machetes and sticks. The 2nd accused was consistent and forthright in the manner he testified. The sequence of events confirm his version that he was compelled as a friend of deceased to direct and take the group to the panning area.

The first state witness Mtisi confirmed that he did not witness the second accused participate in the fatal attack on his brother. The 2nd accused's version was straight forward. His evidence in so far as how he came across 1st accused and the group was corroborated by Muchaneta Munamasi. The witness was not taken to the scene of crime at the time 1st accused was forced to go with the group. After, the return, her evidence which was not on material aspects tallied with that of accused 2. She alluded to how the group forced tuckshop owners to pay them and how they prepared more food ate and drank. Nothing much arises from the witness's version. That the witness and accused 2 are boyfriend and girlfriend did not cloud their evidence as their versions on material aspects were confirmed by the first state witness Mtisi's and to a large extent by accused 1. It was open from her evidence that accused 2 was forced to join the group.

The evidence cannot be discounted simply because the second accused and defence witness Muchaneta did not report to the police. The dealings by second accused and the others, the illegal panning and tuck shop operations would be exposed by any approach to the police. This was also confirmed by Mtisi who revealed to the court that a lot of atrocities and crime are committed. He mentioned that many people had been killed at the area with no one bothering to report. This time he gathered courage to report because his blood brother had been killed. To this end the delay in reporting the abduction by accused 2 should be reviewed in the context of illegalities in the area but certainly it should not be the reason for discounting the second accused's version and defence.

From the totality of the evidence adduced before the court there are common cause aspects. It is common cause that the deceased was involved in illegal gold panning together with others. It is also not in dispute that the deceased was causing problems by taking other people's wares forcefully without paying. Further, it is not in dispute that accused 1's petrol

and bread were lost to the deceased as he did not pay. That a group was organised to confront and deal with deceased on the fateful day is not in dispute. The group which included one Maxwell and accused 1 was armed with machetes. That they approached the deceased is a fact. Also common cause is the fact that deceased was cornered when fire was lit exposing his hiding place in the reeds in water. Further not in dispute is the fact that the deceased was stuck indiscriminately with machetes and sticks thereby sustaining injuries from which he died (as a result of neck injury) and excessive loss of blood. Finally it is common cause that the assault was perpetrated by a group which included accused 1.

Evidence adduced has revealed that accused 1 was quite central as he had lost his goods and was out to do “justice”. From the analysis of evidence it can safely be concluded that the 1st accused cannot escape liability. He was not only there but actively assaulted the deceased. Accused 2 was there. He led the way. Evidence adduced shows he might have been acting under compulsion in going there. The second accused did not assault the deceased as confirmed by accused 1 and the state witness. The question is whether or not by giving directions and being there he actively associated himself with the commission of the offence. I propose to come back to this question after a close look at the issues for determination.

What falls for determination here is whether or not the State has discharged the required onus and proved murder beyond reasonable doubt *visa vis* the two accused persons.

Murder as defined in s 47 (1) entails actual intention which occurs when one sets out with an aim to kill someone and proceeds to kill or when one realising that there is real risk or possibility that his conduct or her conduct may cause death and he continues to engage in that despite the risk or possibility. In the case of *S v Mungwanda* 2002 (1) ZLR 574 intention was ably described.

In casu the first accused together with others, a group of up to 15 men inclusive of men hired from Mozambique held a meeting to strategise how to hunt down the deceased. The deceased was notorious for cheating and robbing the tuck shop owners and accused 1 had been robbed of petrol and bread. The group proceeded while armed with machetes and sticks. The second accused was a friend to the deceased and he knew the whereabouts. He was roped in to make sure deceased would be located and dealt with accordingly. Such clear planning and setting out to attack the deceased shows clear intention to achieve the goal. It has been stated in decided cases that the nature of assault, the weapon used and the body part on which the blow is aimed can be used to deduce the type of intention. See *S v Munodawafa* SC 220/95 and

S v Memu HH 143/14. Also *S v Lovemore Kurangana* HH 267/17. HUNGWE J in conviction of murder with actual intention had this to say:

“Where a person uses a patently lethal weapon like a knife or an axe on another person’s delicate part of the body such as the head, an inference that the accused intended to kill is unavoidable.”

In the present case machetes were used directed at the neck, tendons, ankles and all over the body occasioning severe injuries and loss of blood. The deceased was left for the dead. The deduction from the intensity of the attack by a machete points to death being substantially certain. The aim was to deal with the problem of being robbed once and for all and even during the perpetration of the assault accused 1 threatened to kill and proceeded to kill. The circumstances of the case show that murder with actual intention was committed by accused 1 and the gang. The question remains though whether accused 2 by giving directions of whereabouts of the mining site which was common knowledge to accused 1 and other illegal panners the second accused can be said to have acted with common purpose and in concert with the co-perpetrators. What is central is *mens rea*. Professor Feltoe in his book *A Guide to Criminal Law in Zimbabwe* 3rd ed at pp 43-47 states the legal position as follows:

“If X is an accomplice to Y in a criminal enterprise, X will be liable for crimes committed by Y which fall within their common design. X is liable because he participated in Y’s crime with the necessary mental state, that is, he participated wrongfully on foreseeing that Y would commit the crime in question ...” Underlining my emphasis.

Section 196 A (2) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] equally emphasises the need for the requisite intention to be there for liability to attach as a co-perpetrator. For liability to attach as a co-perpetrator the participation with the requisite intention has to be proved beyond reasonable doubt by the State. Mere presence at the scene of crime without active intentionally associating with commission of the crime is not what is envisaged in s 196 of the Criminal Law (Codification and Reform) Act see *S v Samuel Chikwanda and Another* HH 575/17, *S v Lovemore Mlambo Mafukidze* HH 255/17 and *S v Patrick Chimbuya and Others*.

In the present case accused 2 was in the vicinity by compulsion. He was under guard by men armed with machetes. He was forced to go with the group which was determined to bring deceased to book and if they failed to locate the deceased the second accused who was the friend was to face the music. The crime of murder committed requires both the *actus reus* and *mens rea*. The second accused having gone to the place under compulsion lacked the requisite intention to commit the crime of murder. He also evidently did not participate in the

preplanning and in the assault leading to the demise of the deceased, neither did he associate with the unlawful and intentional killing of the deceased.

The defence of compulsion relied on by the 2nd accused is provided for in s 243 as read with s 244 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. Section 243 (1) (a) (1) reads:

“(1) Subject to this Part, the fact that a person accused of a crime was subjected to compulsion when the person did or omitted to do anything that is an essential element of the crime shall be a complete defence to the charge if-

(a) the compulsion consisted of a threat-

- (i) unlawfully to kill him or her or cause him or her serious bodily injury or to kill or cause serious bodily injury to some other person; or
- (ii) unlawfully to cause him or her financial or proprietary loss; and
- (b) he or she believed on reasonable grounds that implementation of the threat referred to in paragraph (a) had begun or was imminent; and
- (c) the threat referred to in paragraph (a) was not brought about through his or her own fault; and
- (d) he or she believed on reasonable grounds that he or she could not escape from or resist the threat referred to in paragraph (a) and that his or her conduct was necessary to avert the implementation of the threat; and.....”

Given the threat on his life the accused could not have escaped so as not to be part of the group. The requirements of the defence of compulsion have been fully met by 2nd accused. Thus entitling him to the defence. The answer to the question whether or not by giving directions to the mining site which area was known to accused 1 the second accused can be held liable for the conduct of accused 1 and the gang is in the negative. This obviously stems from the fact that he second accused lacked the requisite intention to kill the deceased. The second accused’s narration of events of the day in question gives the impression that he was not part to the criminal enterprise. The State cannot in the absence of proof beyond reasonable doubt seek to impute liability on the second accused. The issue of being compelled to go to the area negates intention.

Accordingly the first accused is found guilty of murder with actual intention as defined in s 47 (1) (a) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*].

The second accused is found not guilty and acquitted.

Sentence: Accused 1

In passing sentence we have considered mitigatory factors submitted by Mrs *Chapata* on the 1st accused’s behalf. You are a first offender with some siblings who are dependent on him for support. You have been in custody for a year. That is all that can be said in your favour.

We have also considered the aggravatory factors advanced by Mr *Musarurwa* for the State. Accused stands convicted of a grave offence committed by a gang against a defenceless cornered individual. The manner in which the offence was committed is indicative of desire to achieve the unlawful enterprise. The pouring of petrol and lighting a fire at the place in which deceased was hiding was not only callous but cruel as the deceased could potentially have been set ablaze. The perpetration of a heartless and brutal attack indiscriminately using machetes and sticks on the deceased further aggravates the offence. The manner of attack left the deceased with no chance of survival. Despite the deceased's desire to escape from the mob attack led by yourself you were determined to achieve the end as you severely assaulted the deceased and left him for the dead. You actually during the assault bragged that someone was going to die. Effectively this shows you were not merciful or sorry for fatally striking a fellow human being. No one has a right to take away another's God given right to life. Our Constitution s 48 is clear. The sanctity of human life should never be under understated.

The legislature in its wisdom provided for capital punishment, life imprisonment or any other shorter term as a way of expressing that murder is viewed with abhorrence by society. The courts have to weigh in and in appropriate circumstances impose death penalty. In the circumstances of this case it is our considered view that a lengthy imprisonment term is called for given the manner in which you teamed up with a gang for purposes of taking away another life. In seeking to strike a balance between the offence and the offender while at the same time tempering justice with mercy in such a manner as not to have society lose confidence in the justice delivery system we feel a lengthy imprisonment is appropriate.

You are sentenced as follows:

20 years imprisonment.

National Prosecuting Authority, State's legal practitioners
Henning Lock, 1st accused's legal practitioners
Makombe & Associates, 2nd accused's legal practitioners