

THE STATE
versus
TALENT MICHAEL MATAMBO

HIGH COURT OF ZIMBABWE
MWAYERA J
MUTARE 5, 11 February 2019 and 12 March 2019

Criminal Trial

ASSESORS: 1. Dr Sana
2. Mr Chagonda

Mrs J Matsikidze, for the State
Mr T. S Jakazi, for the accused

MWAYERA J: This is a case in which the accused is charged with murder as defined in s 47 (1) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. The state alleges that at Railway Motor Services, Mutare, on 15 February 2018 the accused unlawfully caused the death of Wellington Tatenda Museve by shooting him in the head with a pistol intending to kill him or realising there was a real risk or possibility that his conduct might cause death and continued to engage in that conduct despite the risk or possibility resulting in head injuries from which Wellington Tatenda Museve died. The accused pleaded not guilty to the charge of murder.

The brief summary of the state case is as follows. That the accused hatched a plan to rob the deceased of the Honda Fit vehicle which the deceased was using as a taxi. On the fateful night the accused approached the deceased under the pretext of hiring the deceased's vehicle. The accused requested to hire the vehicle to Road Motor Services Depot in the industrial area. The deceased drove to the purported destination whereupon arrival he was asked to stop the vehicle following which the deceased was shot in the head by the accused. The bullet on exiting the deceased's head shattered the vehicle driver's window. After the shooting the accused drove the vehicle and dumped the deceased's, body at Maruni Farm. The body was later recovered there from in a decomposed state. After the incident the accused drove the car back to his lodgings in Chikanga where he intimated to his friends that he had obtained the vehicle from a friend. The pistol used in the shooting was also later recovered just like the car and key

from the accused. The pistol was in the accused's suitcase. The accused was arrested on the following day and the car was recovered from him.

The accused's defence was basically that he is not the one who shot the deceased. It was one Brian Chakandinakira who laid an ambush at the scene of crime. Unbeknown to the deceased this Brian was armed with a firearm. The plan was simply to overpower the deceased and steal the motor vehicle since the said Brian was owed money by the deceased.

The accused's confirmed, warned and cautioned statement which was tendered as exh 6 by consent was more or less along the same lines of defence. It was then pointed out in the defence outline that the accused upon return to town drove the deceased's vehicle to his place of residence. The state adduced evidence from a total of 14 witnesses, 12 of whose evidence was formerly admitted in terms of s 314 of the Criminal Procedure and Evidence Act [*Chapter 9:07*] and 2 witnesses gave oral evidence. We must point out that most aspects of this case are common cause. It is common cause that on 15 February 2019 deceased was shot dead with a Makorov Pistol, admitted in evidence as exh 1. It is common cause that after being shot the deceased immediately died and that his body was dumped at Maruni Farm from where it was later recovered.

It is also not disputed that the cause of death as observed by the pathologist Dr T Javangwe was head injury due to bullet wound. The doctor gave oral evidence narrating how he examined the decomposed body. He also observed some plastic tying on the body in line with photographs taken in the mortuary and also taken by the police at the place where the body was recovered. The photographs were also tendered as exh 8. Further it is common cause that the same pistol used to shoot the deceased was recovered from the accused. That accused admitted to having stolen the firearm in question is not in contention. Further it is not in dispute that the deceased's taxi, the Honda Fit tendered as exh 9 was recovered from the accused the following day and that accused had the keys. The fact that accused is the one who hired the deceased's vehicle and lured him to an isolated place is not in contention. That after the shooting the accused drove the vehicle to his residence is common cause. Also not in dispute is the fact that cell phones belonging to the deceased was recovered from the accused person.

The only issue calling for close analysis is regarding the fatal attack itself. The question is simply whether or not the accused's defence that it is Brian Chakandinakira who pulled the trigger exonerates the accused from the commission of the offence. It is clear from evidence adduced that the accused gave the version that Brian Chakandinakira is the one who fired the fatal shot after the accused had lured the deceased to a secluded place for purposes of

facilitating the theft of car in lieu of a debt owed to Brian by the deceased. The police investigated Brian Chakandinakira and came up with one Brian Chakandinakira who resides in Chimanimani. The accused denied any knowledge of this Brian Chakandinakira. All other checks with the Registrar general's Office proved futile as no other Brian Chakandinakira was located. Assuming that indeed Brian Chakandinakira shot the deceased given the involvement and association by the accused would not pulling the trigger exonerate the accused. The answer is in the negative as will be demonstrated below. There is no way two people would have pulled the trigger at the same time. What the state needs to prove is simply that the actual perpetrator and co-perpetrator associated with common purpose and in concert. The liability of one would squarely fall for the other. In this case, going by the accused's version the accused was to forcefully get the car. Any resistance was to be foiled so as to get the car. The use of force was part of the plan and as such there is no way if Brian Chakandinakira fired the accused would not be equally to blame. What strikes the court as absurd however is the pivotal role played by the accused. If this was about a debt owed to Brian Chakandinakira one wonders why accused had to lure deceased to the scene of crime. Why after the crime accused proceeded to dump the body. Even after running out of fuel why the accused went to town to get fuel and came back instead of leaving Brian who had planned to steal the car in lieu of what he was owed.

Further glaringly shocking is why Brian who had killed and managed to take the car to square up what he was owed abandoned the car. The car was left in accused's custody that very night and accused drove and cleaned the same to get rid of any traces of human blood. Logically Brian Chakandinakira had achieved his purpose so what was the purpose of leaving the accused with the car. All these questions tend to confirm that Brian Chakandinakira's name was just raised as a way of misleading the police and court. The police fortunately in this case thoroughly investigated and established Brian Chakandinakira was none existent. The accused himself in his defence outline para 2 conceded such a person did not exist at the National Registry record.

During cross examination when all these glaring issues were canvassed with the accused, he was exposed as a man clutching on straw in face of a heavy flood. The accused in face of the clear and straight forward version of the state case failed dismally in trying to discredit the state case. I am alive to the fact that the accused has no duty to prove his innocence. *R v Difford* 1937 AD 370, in this case the accused's explanation was not only incredible but improbable and false.

The suggestion of a none existent accomplice or co-perpetrator does not exonerate the accused in any manner. Clearly even if he was with another the accused did not remove or dissociate himself from the intentional and unlawful enterprise. The accused lured the deceased to the secluded place and then the deceased was shot dead and the body dumped by the accused. The accused was involved throughout. Sight should not be lost of the fact that the pistol used was a pistol the accused had stolen even if he was with others he admitted stealing the firearm. The pistol was recovered from the accused after the killing, the accused drove away the deceased's car. The sequence of events clearly points to one conclusion as regards the accused's involvement. In the case of *R v Bloom* 1939 AD 188 at 202-203, the court had this to say in respect of the circumstantial evidence:

“In reasoning by inference there are two cardinal rules of logic which cannot be ignored

1. The inference sought to be drawn must be consistent with the proved facts. If it is not the inference cannot be drawn.
2. The proved facts should be such that they exclude every reasonable inference from them save the one sought to be drawn. If they do not exclude other reasonable inferences, then they must be a doubt whether the inferences sought to drawn is correct. ”

In this case there is both direct and circumstantial evidence linking the accused to the commission of the offence.

In the circumstances of this case, it is clear the accused was determined to use force and violence to take the deceased's motor vehicle. He indeed wanted the deceased's motor vehicle at all costs. Whether he was with an accomplice or not is immaterial in the face of his clear involvement. The accused was determined to achieve his goal and used a lethal weapon, a firearm to facilitate the robbery. The firearm was targeted on the head a vulnerable part of the body. That shooting in the head by a lethal weapon in itself is an indication of intention to kill. See *s V Zimondi* HH 179/15. See also *S v Muchaparara* HH 99/04 wherein it was stated

“...he aimed the shots on vulnerable parts of the body. The inescapable conclusion is that he shot with the requisite intention.”

The same sentiments were expressed by HUNGWE J in *The State v Lovemore Kurangana* HH 267/17 wherein he remarked that intention can be inferred from the accused's conduct and circumstances surrounding the commission of the offence. He remarked:

“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.”

The state in this case has proved beyond reasonable doubt that the accused unlawfully and intentionally shot the deceased in the head thereby causing his death during an armed robbery. The death was substantially certain and accused cannot escape liability in the circumstances.

Accordingly, the 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*].

Sentence

In our endeavour to reach at an appropriate sentence we have considered all mitigatory and aggravatory circumstances submitted by Mr *Jakazi* for the defence and Mrs *Matsikidze* for the State. The accused is a youthful offender who committed the grave offence of murder at the age of 20 ½ years. That the accused is an immature adult is the only meaningful mitigatory factor advanced. Nothing further can be said in mitigation. The accused throughout the trial showed no iota of remorse and seemed unperturbed even when the mother of the deceased testified. The accused although he has no relevant previous conviction of use of violence of the person of another is not a new comer to the courts and has infringed the law when he was convicted of unlawful entry and theft of firearm. The accused started his criminal and unlawful enterprise at the deep end and he showed determination in committing graver offences.

The accused used the stolen pistol to murder the deceased so as to steal a motor vehicle. The circumstances in which the offence was committed are indicative of preplanning and determination. The accused lured an unsuspecting taxi driver under the pretext of hiring the taxi. He lured him to a secluded place where the accused mercilessly in a cruel fashion fired the fatal shot in the head, a vulnerable part of the body. The accused was unrelenting as he proceeded to throw away the deceased's body in a fashion meant to conceal the death while he proceeded to enjoy the benefits of the unlawful enterprise. The accused drove away the deceased's car and cleaned it to remove traces of human blood. Such conduct is despicable as it clearly shows no respect for precious human life. No one has a right take away another's life and the legislature in its wisdom provided for severe penalty inclusive of death, life or lengthy imprisonment.

Section 48 of the constitution guarantees the fundamental right to life. The courts have to weigh in and emphasise the sanctity of the precious human life, a God given life and constitutional protected right. In this case life was needlessly lost because of the accused's greedy conduct. The deceased an equally young man was trying to earn an honest living and

helped to sustain his mother and siblings from hard work. He was robbed of his life at a tender age by the lazy and greedy accused who had decided to earn a living through unlawful enterprise. The murder was committed in aggravatory circumstances as it was clearly murder during a crime of robbery. The offence would ordinarily call for capital punishment. The legislature however, saw it fit in its wisdom to exclude youthful offenders from such capital punishment. It is our considered view that indeed youthfulness can cloud the judgment of an individual as occurred in this case. Life imprisonment would have been considered appropriate in this case. However the manner in which accused carried on after the commission of the grave offence is indicative of immaturity and failure to fully appreciate the gravity of the offence. It is with the consideration of immaturity that we have decided to move to a lengthy imprisonment term. In trying to match the offence to the offender while at the same time upholding societal interests and blending justice with mercy a lengthy imprisonment term is called for. The accused is a menace to the community and as such his removal from circulation is called for.

The accused is sentenced as follows:

35 years imprisonment.

National Prosecuting Authority, state's legal practitioners
Maunga Maanda and Associates, accused legal practitioners