

THE STATE
versus
LUKE MUPFUMWA

HIGH COURT OF ZIMBABWE
MWAYERA J
MUTARE, 22 January 2019, 20 February 2019, 1, 28 and 29 March 2019

Criminal Trial

ASSESORS: 1. Mrs Mawoneke
2. Mr Magorokosho

J Chingwinyiso, for the State
HBR Tanaya, for the Accused

MWAYERA J: The accused was arraigned before the court on a charge of murder as defined in s 47 (1) (a) or (b) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. The state alleges that on 19 June 2017 and at Headlands Hotel, the accused acting with common purpose and in concert with Tawanda Chiruka who at the time of trial was still at large, unlawfully caused the death of Winchester Karichi by supplying an okapi knife to Tawanda Chiruka during an altercation and the knife was used to stab Winchester Karichi in the lower left side of the stomach with intention to kill him or realising that 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 injuries from which Winchester Karichi died.

The brief facts forming the basis of the allegations are that the accused and others were at Headlands Hotel. The accused was watching a game of pool between Tawanda Chiruka and an opponent. The deceased who was among the watchers remarked that the opponent of Tawanda Chiruka had played a nice shot. The remark did not go down well with Tawanda Chiruka culminating in a scuffle.

The accused pleaded not guilty to the charge and in his defence pointed out that he never acted with common purpose and in concert with Chiruka even though he gave Chiruka the knife in question. The accused's version was that he gave the accused the knife after the altercation and had no idea what the accused wanted to use the knife for. This version in

accused's defence outline was the same as accused's version in his warned and cautioned statement which was tendered in evidence as exh 2 by consent.

Also adduced in evidence by consent was the post mortem report exh 1, the sketch plan depicting the general layout of the place as per indications to the attending police details exh 3, certificate of weight of the okapi knife exh 4 and finally the okapi knife was tendered as exh 5 by consent. 10 state witnesses' evidence was formally admitted as it was not contentious. Oral evidence was adduced from 2 witnesses as follows:

Promise Kanyoza a friend of the deceased was at the scene of crime when pushing and shoving occurred after the deceased had remarked that one Tawanda Chiruka's opponent had played a nice shot during the game of pool they were playing. The remark did not go down well with Tawanda Chiruka who was of the view that the remark brought about the bad result of loss of the game on his part. Tawanda Chiruka then confronted the deceased on his action of urging his opponent which led to him to lose the game. It was then that the scuffle ensued. Tawanda Chiruka then stabbed the deceased occasioning injuries from which he died. The witness's evidence was on the common knowledge aspects of a scuffle having ensued at the pool table and deceased being fatally stabbed as his utterances were taken by Chiruka to have caused Chiruka to lose the game.

There is nothing to criticise about the manner the witness testified. The arguments by defence that the witness was a childhood friend of the deceased and wanted to see his friend's killer punished does not hold water as the witness clearly narrated what he observed. There was no exaggeration that accused together with Chiruka teamed up to assault the deceased which the witness could have easily done seeing that Chiruka the alleged perpetrator was not apprehended and was not before the court. He generally gave a straight forward account of what transpired and he gave his evidence well.

Clifford Chilakalaka also gave oral evidence. The witness was with the last witness, Promise Kanyoza and the deceased when they went to while up time. He actually gave the deceased a \$1-00 for beer at the bar while he remained playing pool game at the hotel. The witness told the court that upon the return of the deceased and Promise Kanyoza, a misunderstanding ensued between the deceased and one Tawanda Chiruka. The misunderstanding was over a comment made by the deceased commenting the nice shot by Chiruka's opponent. The comment was not well taken by Chiruka who believed such a comment caused his loss of the game. Tawanda Chiruka then confronted the deceased and there was pushing and shoving of each other.

The last witness Promise Kanyoza stopped the deceased from further engaging in the scuffle and the two of them left. The witness went into the cocktail bar where he watched television and was alerted by the last state witness Promise Kanyoza that the deceased had been stabbed with a knife. He went out to investigate and indeed he observed the deceased lying on the flower bed having been stabbed. The witness was firm that Tawanda Chiruka had a misunderstanding with deceased over a positive comment by deceased commending Tawanda Chiruka's opponent. The fracas was between the two, Tawanda Chiruka and deceased and when Promise Kanyoza intervened the two stopped. The witness did not see the actual stabbing as he had remained indoors. The witnesses' evidence was basically to confirm that there was a misunderstanding between the deceased and one Tawanda Chiruka. The parties separated and walked away and when the stabbing finally occurred the witness was not there.

The last witness who was to give oral evidence is Thomas Mukata whose evidence was formerly admitted by consent as the witness did not turn up for court. Essentially, the witness's version was that there was a scuffle between Tawanda Chiruka and the deceased. The witness just observed that after the scuffle re-emerged outside, the deceased sustained a stab wound. Nothing of substance really arises for discussion. The accused maintained that he was not involved in the fracas and altercation that occurred. He stated that he actually went outside where Chiruka approached him and requested for a cell phone to send some messages. He was still using his phone so he advised Chiruka to wait. Chiruka further asked for a knife and he handed it over as earlier Chiruka had used the same knife to peel cucumbers.

Accordingly to the accused, Chiruka then walked towards the road as if going home and shortly after he heard Chiruka call his name asking him to run in his direction. It was then that Chiruka informed him that they should leave the place since Chiruka had stabbed someone. The accused's evidence was generally straight forward. The accused was consistent that he gave Chiruka a knife at the time when the altercation had died down. On the aspect of there being a break in the scuffle his evidence tallied with the state witness's version. The accused left the scene after being beckoned by Chiruka who advised he had stabbed someone using the knife.

From the totality of the evidence adduced, the court is to determine whether or not the accused is liable for the offence of murder charged or any competent verdict. It is settled the state in criminal matters has the onus to prove its case beyond reasonable doubt. On the other hand the accused has no duty to prove his innocence. Once the accused's explanation is reasonably and possibly true then he ought to be acquitted. See *R v M* 1946 AD 1023, *S v*

Makanyanga 1996 (2) ZLR 231 and *S v Kuiper* 2009 (1) ZLR where GREENBERG J quoted with approval in *R v Difford* 1937 AD 370, the learned judge had this to say:

“... no onus rests on the accused to convince the court of the truth of any explanation he gives. If he gives an explanation even if that explanation be improbable, the court is not entitled to convict unless satisfied, not only that the explanation is improbable, but that beyond any reasonable doubt it is false. If there is any reasonable possibility of his explanation being true, then he is entitled to an acquittal.”

The charge of murder entails both the *actus reas* and *mens rea*. It is not in dispute that the deceased was stabbed by Chiruka causing injuries from which he died. The state witnesses and accused's evidence is opposite. The degree of liability of Chiruka is not failing for discussion here as Chiruka at the time of trial was at large. It is not in contention that the accused in this case is the one who gave the okapi knife used to inflict the fatal blow. The issue to be determined is whether or not the accused by giving the okapi knife used to stab the deceased was acting with common purpose and in concert with Chiruka as the principal perpetrator. If the answer is in the affirmative then the accused is liable for the offence committed by the principal perpetrator.

That the principal perpetrator and co-perpetrators associated for purposes of an act or omission occasioning crime is the basis for liability. The fact that one or two or more of a team acting with common purpose and concert have not been arrested, and or arraigned before the court does not exonerate a co-perpetrator from liability. For liability to attach there has to be clear association and concert and common purpose. In the present case the accused and Tawanda Chiruka were well known to each other and they proceeded to while up time together at the hotel. Both Tawanda Chiruka and accused came from the same rural home, Marange, and were working together in brick moulding at Headlands. This association per se is not criminal and is not sufficient to ascribe liability on the accused. A close look at the sequence of events leading to the fatal blow reveals that the persons who were central to the altercation pushing and shoving were Tawanda Chiruka and the deceased.

The altercation emanated from the comments in praise of Tawanda Chiruka's opponent at the pool table. The altercation occurred in the hotel and upon intervention by colleagues some whose evidence was adduced in court, the fracas cooled down and or stopped. The accused was not given as part to the pushing and shoving as he just walked following Tawanda Chiruka and a group of people. While outside evidence on record is that people were just milling around and there was no commotion. It can safely be concluded that the accused was not involved in the altercation. The accused clearly had no direct intention to kill the deceased as he did not participate and was not part of the fracas. It is apparent that after the initial pushing

and shoving died down the accused who was on his phone was approached by Tawanda Chiruka who asked for a knife. It is that okapi knife which the accused supplied which was used to stab the deceased. The question is, given the stage at which the knife was supplied was the accused conscious of what his colleague wanted to do with the knife. If he was, then whatever the consequences would squarely fall on him and if he was not conscious then he cannot be held liable for Tawanda Chiruka's actions and or omissions.

The question of consciousness is pivotal to establish intention and that together with physical presence would assist establish the requisite *actus reas* and *mens rea*. Section 196 A of the Criminal law (Codification and Reform) Act [*Chapter 9:23*] is instructive on defining liability of a co-perpetrator for the crime committed by the principal perpetrator. Section 196 A on liability of co-perpetrators state:

“(1) If two or more persons are accused of committing a crime in association with each other and the state adduces evidence to show that each of them had the *mens rea* to commit the crime, whether by virtue of having intention to commit it or the knowledge that it would be committed or the realisation of a real risk or possibility that a crime of the kind in question would be committed then they may be convicted as co-perpetrators, in which event the conduct of the actual perpetrator (even if none of them is identified as the actual perpetrator shall be deemed also to be the conduct of every co-perpetrator, whether or not the conduct of the co-perpetrator contributed directly in any way to the commission of the crime by the actual perpetrator.”

In *S v Samuel Chikwanda and Another* HH 575/17 at p 5 HUNGWE J made pertinent remarks in defining a co-perpetrator when he stated:

“To be a co-perpetrator the person must be physically present with the actual perpetrator when the actual perpetrator was committing crime and must have knowingly associated with the crime committed. It is not necessary that there be a prior conspiracy with the actual perpetrator for a person to be guilty as a co-perpetrator, in other words, the common purpose with the actual perpetrator by joining in a crime before it is committed and without having conspired with the actual perpetrator in advance to commit the crime.’

In casu the accused gave Tawanda Chiruka an okapi knife upon being requested by the latter. At that time people were just milling around outside. The fracas had died down in the hotel. In fact according to the accused he said Tawanda Chiruka initially requested for the accused's phone to message and then requested for the knife. This sequence of events does not denote urgency. The state witnesses spoke of accused handing over an object to Tawanda Chiruka while people were outside and not in the hotel where the fracas occurred. There was no evidence that Tawanda approached in heist seeking for a knife during the altercation. The accused pointed out that the knife had earlier been used to peel cucumbers and that it was a knife they commonly used with his colleague Tawanda. He was unaware what Tawanda wanted to use the knife for when he handed out the knife. Tawanda walked away with the knife.

He did not run such that accused could have suspected any sinister motive. According to the accused, Tawanda Chiruka walked in the direction of the road towards their home. The circumstances surrounding the giving of the knife and the fact that the altercation had died down buttresses the accused's version that he remained sending messages on his phone. He only moved upon responding to Tawanda Chiruka's call and that is when he, in a panic mode ran away after disclosure by Tawanda Chiruka that he had stabbed someone with a knife.

It is speculative to hold that accused knew what Tawanda Chruka wanted to do with the knife. To hold that the accused held common purpose and he joined Tawanda Chiruka in commission of the crime by handing over an okapi knife in the absence of consciousness on his part would be erroneous and assumptive.

The accused supplied a knife but given there was no altercation occurring and that the knife had earlier been used to peel cucumbers one cannot deduce that the accused was aware of the intended use of the knife by Tawanda Chiruka. Even if one was to take it that the accused was an accomplice there is no evidence that the accused incited or conspired with the actual perpetrator to commit a crime. From the totality of the evidence adduced that the accused joined Tawanda Chiruka before the commission of the offence with common purpose is not the only inference that can be drawn from the facts. It is possible the accused innocently handed over the knife to his colleague as there was no more commotion. It is also possible he handed over the knife to his colleague for fear that there were many people against Tawanda Chiruka. Further many suppositions can be deduced from the evidence. Given the onus which rests on the state of proving its case beyond reasonable doubt in this case the glaring gaps speak volumes of failure to discharge the required onus. Section 18 (4) of the Criminal law (Codification and Reform) Act is pertinent on degree and burden of proof in criminal cases. It reads:

“Except where this Code or any other enactment expressly imposes the burden of proof of any particular fact or circumstance upon a person charged with a crime... shall rest upon the prosecution.....”

It is clear the accused has no duty to prove his innocence. Where there is doubt then the accused ought to be granted the benefit of doubt. See *S v Nyirenda* 2003 2 ZLR 70. His explanation that he handed over the knife is not only probable but reasonably possibly true as there was no commotion when he handed over the knife. That the accused possessed a dangerous and prohibited knife is not in contention. Such possession is however not a competent verdict for murder. The accused was not charged of the offence of possession of an okapi knife and as such he cannot be convicted of what has not been charged. In the

circumstances the evidence falls short of proving the accused's involvement in the commission of the offence of murder with actual intention or constructive intention. Equally in the absence of evidence of existence of fracas and commotion at the time of handing over the knife one cannot ascribe negligence on the part of the accused such that even the competent verdict of culpable homicide has not been proved.

The state has failed to prove beyond reasonable doubt that the accused acting with common purpose and in concert with Tawanda Chiruka committed the offence. Accordingly. The accused is found not guilty and acquitted.

National Prosecuting Authority, State's legal practitioners
Tanaya Law Firm, Accused's legal practitioners