

THE STATE

Versus

MILOS MOYO

IN THE HIGH COURT OF ZIMBABWE
MATHONSI J
BULAWAYO 5 AUGUST 2010

W.Mabaudhi for the state
T. Muganyi for the accused

MATHONSI J: The accused is charged with the crime of murder in contravention of section 47
(1)(b) of the Criminal Law (Codification and Reform) Act, Chapter 9:23

That section provides as follows:

“Any person who causes the death of another person realizing that there is a real risk or possibility that his or her conduct may cause death, and continues to engage in that conduct despite the risk or possibility shall be guilty of murder”

Murder consists in the unlawful and intentional killing of another person. The crime of murder can only have been committed where X intends to kill his victim. The action of X must be both the Factual and Legal cause of the consequence.

X is the factual cause of the death if, but for his actions, the deceased would not have died when he did. The test for legal cause is whether it was objectively foreseeable or within the range of ordinary human experience that the accused's action would lead to the death of the deceased.

For this discussion, see *G.Feltoe, A Guide to the Criminal Law of Zimbabwe pages 101 to 103 and 106.*

See also P.M.A Hunt, South African Criminal Law and Procedure, Volume 2 pages 340 -341.

According to Hunt (supra) at page 341:

“Intent to kill is tested subjectively: whether the charge is one of murder or attempted murder, the state must prove either actual or legal intention: culpa is insufficient. Actual intention exists where X commits the *actus reus* meaning to kill Y: where the will is directed to compassing the

death of the deceased. Legal intention exists where X commits the actus reus foreseeing that it may cause Y's death."

There are however situations where the accused's blow is deflected and this arises where the accused intending to kill Y aims a blow at him but misses or the blow is deflected only to strike and kill D. Discussing that situation at page 106 *Feltoe (supra)* says:

"If X intends to kill Y and kills D instead, only liable for murder if he actually intended his death as well or if he subjectively foresaw the possibility of his death and proceeded recklessly. If there was no actual or legal intention to kill D but death of D is objectively foreseeable then X is guilty of culpable homicide. If D's death was neither subjectively foreseen by X nor objectively foreseeable, X is not liable for any crime in respect of the death of D."

It is this common law which has now been codified in the Criminal Law (Codification and Reform) Act, chapter 9:23. See chapter 5 Part 1 of that Act.

In terms of section 275 as read with the 4th Schedule of the Code, where a person is charged with the Crime of Murder, it is a permissible verdict for that person to be convicted of culpable homicide if such facts are proved.

Having set out the law on the subject it is proposed to now examine the evidence that was led by the state in an effort to prove its case against the accused person.

We will start with those facts that appear to be common cause. It is common cause that on the eve of the new year of 2007, a large crowd of people had gathered at a location between Fort street and Herbert Chitepo street along Leopold Takawira Avenue. The area is bound by Tredgold Building and Chicken Inn on the side of Fort Street and by Tredgold Building (which in fact stretches between Fort Street and Hebert Chitepo Street) and what was then Edgars Store and is now Afro Foods on the side of Hebert Chitepo Street.

It is common cause that there were a lot of vehicles that were skidding and screeching tyres at the intersection of Fort street and L.Takawira Avenue at the dawn of the new year as their way of celebrating the new year. At the same time other people were firing crackers and other fireworks making the traditional new year celebration noises.

It must also be taken as common cause that such behavior was illegal and under normal circumstances the police would be expected to act against the perpetrators.

At that time, the accused person arrived at the scene driving a police coloured mazda B1800 motor vehicle and witnessed what the merry makers were doing. At about the same time, a police defender open truck carrying riot police (referred to as PRG) arrived at the scene as well.

It is common caused that a red ISUZU truck also skidded and screeched its tyres at the same intersection just as the police defender carrying riot police arrived. After a while, the accused person

chased after that ISUZU vehicle for one reason or the other. As he did so, he fired 3 shots from his service 9mm Smith and Wesson pistol serial number A60609ZRP 130.

It is common cause that at about the same time, the deceased Artwell Magagada had just knocked off from work at Chicken Inn where he was employed. He and his other workmates were making their way on foot from Chicken Inn due south intending to catch their staff bus at TM Hyper.

It is common cause that as they were walking at the pavement of Tredgold Building on the Fort Street side just next to the Small claims Court the deceased Artwell Magagada was struck by an object on the head which penetrated his skull causing a skull fracture and it lodged in his brain.

It is also common cause that the deceased fell to the ground after being struck, was rushed to Materdei Hospital where he was attended to and that he died on the 5th January 2007. When a post mortem was conducted on his body on the 9th January 2007, the object lodged in the deceased's head was retrieved and it has been produced in court as exhibit 9.

It is common cause that the accused's service pistol was recovered from him on the same day of the shooting, was conveyed to Ballistics in Harare together with the fragment extracted from the deceased's head for examination. A ballistic report was compiled.

The state led evidence from Sibangilizwe Gwabalanda Mathe an employee of Innscor Company which runs Chicken Inn who was a work mate of the deceased who testified that at the material time he had seen a red combi vehicle skidding at the intersection of Fort Street and L. Takawira Avenue and had also seen what he called "a small police truck" parked along L.Takawira Street facing Chicken Inn. Mathe said he and his colleagues were walking to board their staff bus at TM Hyper and he had just stepped up the pavement of Tredgold building along Fort Street when he heard 2 or 3 gunshots from behind him.

The noise of gun fire caused him to turn looking back to see what was happening and although he did not see where the shots were fired from he beheld the small police truck which had previously been parked along L.Takawira facing east making a U-Turn which was a right turn up L. Takawira avenue towards H. Chitepo Street. According to Mathe, when he heard the shots the police vehicle was passing the centre parking electric pole executing a U-turn and it was about 4 to 5 metres away from the right lane of L. Takawira Avenue but just close to Fort Street. He strongly disagreed with the suggestion that the shots were fired when the police vehicle was close to H. Chitepo Street which would have been a considerable distance from where he was.

Mathe testified that 2 shots were fired in quick succession after which the deceased who was about 5 paces ahead of him fell to the ground. A third shot sounded later.

The state also led evidence from Noget Hwara, a lady who is also employed by Innscor, was a workmate of the deceased and was walking side by side the deceased on their way to catch a staff bus home at TM Hyper when she heard a sound. She then heard a second sound after which the deceased

fell down. According to this witness the deceased fell just next to the Tredgold Building door where civil marriages take place. The sound she had heard was different from that of fire crackers as it was louder. Although she was unable to tell where it came from, when she looked back to where they had come from she observed a white police truck facing their direction.

This witness was adamant that the deceased fell after the second sound. If the evidence of these 2 state witnesses is to be accepted then the deceased must have been hit at a time when the accused had just commenced chasing the red vehicle he was chasing and he was in the process of negotiating a U-turn up L. Takawira Avenue.

If no other gun except that of the accused was fired at that particular time and if the shot which struck the deceased came from the accused's weapon and if the accused's explanation that he fired 2 warning shots is accepted, then it must follow that the deceased was struck by one of the warning shots and not the direct hit aimed at the wheel of the ISUZU that was fleeing.

We shall return to determine that controversy later.

The evidence of the other employees of Innscor who were present on the fateful day, that is Rex Pairamanzi and Sikhuphukile Ndimande was admitted by consent in terms of section 314 of the *Criminal Procedure and Evidence Act, Chapter 9: 07*. Also taken in terms of that section was the evidence of Sergeant Mishack Sithole, Constable Jericho Gandiwa (both members of the PRG which was called to attend the scene). Sara Imbayago Samuel, the nurse at Materdei Hospital who admitted the deceased into the Intensive Care Unit, Doctor Oliver Chrispin Ntoto- Mambote who treated the deceased and certified him dead on the 5th January 2007, Sergeant Isiah Chikanda who conveyed the accused's weapon (exhibit 7) and the bullet fragment (exhibit 9) to Ballistics in Harare and D/Contable Saul Mutepaire who took photographs of the post mortem examination and the indications made at the scene.

The other admitted evidence was that of Detective Sergeant Nkathazo Nyoni who witnessed the post mortem examination and recorded the accused's indications, D/Sgt Tsoarelo Moyo who drew up a sketch plan from indications made and Doctor R.K.H Chigangacha, the government pathologist who performed the post mortem and compiled exhibit 4.

The foregoing evidence was tested by intensive cross examination and remained intact as there was nothing to suggest that any of the cited witnesses had falsified their evidence or that they had any motive to do so. To us these witnesses, especially the Innscor employees, gave their evidence extremely well and completely innocently.

The ballistic report, exhibit 6, was produced by consent. It had been compiled by Inspector F. Cole then of ZRP C.I.D Forensic Ballistics in Harare. Inspector F. Cole had examined the weapon (exhibit 7) and the bullet fragment (exhibit 9) and drew the following conclusion:

“Examination of weapon (a) (exhibit 7) showed that it was functional. Examination of the barrel and chamber of weapon (a) were found to contain fire arms residue, indicating that weapon (a) had been fired. Examination of exhibit (b) showed that it is a bullet fragment. I am unable to make a comparison with exhibit (b) due to no characteristics. Weapon (a) was manufactured after the year 1900”.

Clearly therefore the ballistic report was inconclusive. While the finding of Inspector F. Cole was that the item recovered from the deceased’s skull was of bullet fragment, he failed to link that bullet fragment to exhibit 7, the accused’s weapon. The reason for that was that it lacked characteristics for comparison to be made.

We assume it was because of these difficulties that the state found it necessary to call Inspector Admire Mutizwa also of CID Ballistics in Harare. He is the holder of a Bachelor of Science (Honours) degree in physics obtained from the University of Zimbabwe. He also undertook a 2 year police training course specializing in the identification of firearms cartridges and anything to do with explosives.

While Inspector Mutizwa is not the author of the ballistic report, exhibit 6, the defence did not challenge the decision to call him to come and interpret the report. Be that as it may, he told the court that he was part of the team that conducted the forensic examination of exhibits 7 and 9.

According to this witness the tests carried out which included dissecting a 9mm bullet head(exhibit 8) led them to the conclusion that the bullet fragment extracted from the deceased’s head (exhibit 9) was in fact a fragment of a 9mm bullet head. He conceded however that this only means that the fragment may have emanated from a bullet fired from any 9mm weapon. Therefore this only means accused falls within the group of those who were in possession of a 9mm weapon on that fateful day who may have fired in at the time resulting in a fragment finding its way to the deceased’s head.

The ballistic evidence was strong challenged by the defence which brought its own ballistic expert Retired Chief Inspector Makanda who testified that the fragment (exhibit 9) contained enough copper with lead in it to such an extent that the ballistic experts should have managed to positively link it with exhibit 7 (the weapon) if at all it had been fired from that weapon. He took the view that because the copper jacket of a bullet leaves traceable marks in the barrel these would enable a ballistic expert using a microscope to establish if it had or had not been fired from a particular gun.

It was Makanda’s evidence that he could not tell whether exhibit 9 was a bullet fragment or not but generally bullets are made in such a way that they do not disintegrate or fragment on impact. His view was that depending on the surface that it collides with a bullet that has been fired would ordinarily fall down harmless or be found squashed on that surface especially if the surface is flat.

Asked if a bullet would not fragment in hitting a hard surface Makanda maintained that bullets are not made to fragment but would perhaps do so if that bullet is faulty. His view was that while a bullet can ricochet, it does so as a complete whole and not as fragments.

Makanda's biggest problem is that he did not examine the exhibits, he did not have a microscope, an equipment he last used while he was based at ballistics in Harare and for all that it is worth his evidence was generalized. While he is clearly an expert in that field having been trained in armoury by the army for 3 years before joining ZRP where he spent 26 successful years, he was incapacitated by his inability to expertly examine the exhibits using proper examination tools. In the end his evidence was reduced to concessions that using the naked eye he could not deny that exhibit 9 was a bullet fragment and he could not contradict Mutizwa's conclusion that it was a bullet fragment.

What we are then left with is the uncontroverted findings of the ballistic expert that exhibit 9 which killed the deceased was a bullet fragment which had been fired from a 9mm weapon which brings us to the inquiry of the source of that bullet fragment.

The evidence that is available is to the effect that the accused fired 3 shots about the time that the deceased was struck what proved to be the fatal blow. By his own admission, even without reference to the warned and cautioned statement he sought to distance himself from albeit unsuccessfully, he first fired 2 warning shots and a 60 degree angle as he pursued the fleeing ISUZU vehicle. If this is juxtaposed against the evidence of the state witnesses, which we have already accepted, to the effect that when the first 2 shots were fired the accused's mazda B1800 motor vehicle was just negotiating a U-turn next fort street from the left lane of L.Twkawira street to the right side to drive west towards H. Chitepo street, and that the deceased fell after the second shot, the inescapable conclusion is that the deceased was struck by the accused's warning shot.

There in lies the accused's decision to shift the shooting including the warning shots to as far away from Fort Street as possible. He may have realized that in the haste to fire warning shots at 60 degree angle he completely overlooked the fact that there was a tall building namely Tredgold Building. It is more than likely therefore that one of the warning shots deflected from that stone building (a hard surface indeed) and its fragment struck the deceased on the head thereby causing his subsequent death.

Having realized the predicament he was in, the accused then came up with the defence that other shots were being fired during the celebration that was taking place and that any of them could have struck the deceased. Unfortunately, other than his say so, and the horribly unbelievable evidence of Taurai Chideme, there is no evidence that other shots were fired contemporaneously with the fall of the deceased. This is also supported by the fact that not only did all police officers available at that place do nothing about such shots, but also that no other witnesses heard the shots.

We therefore find as a fact that the only shots that were fired from a 9mm gun were the 3 fired by the accused. Again the inescapable conclusion especially considering the proximity of the deceased is that the 2 warning shots were fired next to Fort street and one of them deflected hitting the deceased. The contention surrounding the warned and cautioned statement then pales into insignificance.

Having said that, we need to mention that, the accused explained that the reason he chased after the red ISUZU and fired shots was not so much because the vehicle had been skidding at the intersection but because he had observed that the driver was armed. The state has sought to rubbish that explanation on the basis that if indeed the Isuzu driver was armed and had cocked his gun, the accused would not have allowed him to squeeze past his vehicle before giving chase and that a police officer of the accused's standing would not have behaved that way.

It is contended that no-one else witnessed the incident or saw the gun in the possession of the Isuzu driver. The state however has not advanced any evidence from the "multitude" of people who were present to disprove that story.

In our view the explanation given by the accused is plausible. To the extent that he had observed an armed suspect making good his escape, the accused was entitled to use his service pistol to effect an arrest.

To the extent that we have already made a finding that the deceased was struck by a deflected warning shot, can it be said that the accused had an intention be it actual or constructive, to kill the deceased? Can it be said that the accused had an intention to kill the driver of the Isuzu driver?

For the court to find the existence of constructive intent as urged by the state, there must be more than negligence on the part of the deceased see *S v Gumbi* 1994 (2) ZLR 323 (S) at 327 E-H where Ebrahim JA said:

"The point, in essence is that there must be more than negligence and more than gross negligence to constitute that form of recklessness which amounts to constructive intent or dolus eventualis----- There must be, in the mind of the accused person what has been called 'a volitional component' ---- In other words he must, in effect, say to himself, 'I know I may kill this person if I shoot. But I am going to shoot anywhere'".

See also *R v Kadongoro* 1980 ZLR 54 (G). In *S v Richards* 2001 (1) ZLR 129 (S) at 130 F-H and 131 A-B the supreme Court said, per Ebrahim JA:

" Culpable homicide consists in the unlawful negligent killing of a human being--- In Milton's *South African Criminal Law and Procedure* Volume 2, 3rd edition at page 365, the learned author states:

'(4) The role of negligence in culpable homicide is thus to determine whether the killing was an accident (and thus not punishable) or an unlawful (albeit, unintended) killing which is deserving of punishment. The test of negligence is formulated in such a way as to investigate whether in the circumstances the conduct of the actor in bringing about the death of the deceased complied with established norms terms of care in undertaking an activity which carries a risk of harm to other persons. In other words, the law 'turns the criminality of (negligent) actions entirely on a calculus of utilities: how great the probability that life will be lost, how socially

important the purposes served by the action, and how feasible the use of less risky measures to achieve the same--- (Unlike intended killings) these utilitarian assessments are the standard factors in judging unintentional killings. ---

(5) The test of negligence is formulated in terms of the notion of the 'reasonable man', a figure who is 'the embodiment of all the qualities which we demand of the good citizen, a device whereby to measure the (criminal's) conduct by reference to community valuations'

Applying the law as already set out above to the facts of this case, the answer to both questions of whether the accused intended to kill the deceased and the driver of the Isuzu, should be NO. We come to the conclusion that the elements of murder have not been proved in this case.

We have already alluded to section 275 of the Criminal Law (Codification and Reform) Act, chapter 9:23 which provides that if a person is charged with murder it is a permissible verdict to convict of culpable homicide. It is therefore imperative to address the issue of whether the proved facts establish the crime of culpable homicide. In that regard we are indebted to the state for its well researched closing submissions in which reference is made to a number of useful authorities.

It seems to us that considered with the principles set out in *S v Richards (supra)*, the accused cannot escape liability. He was also armed with a dangerous lethal weapon. He chose to fire it in a crowded area. The area in question had tall buildings but instead of firing perpendicularly into the air he fired at a 60 degree angle resulting in a ricochet that killed the deceased.

Accordingly, the accused is found not guilty and acquitted of the charge of murder but is found guilty of culpable homicide.

Criminal Division, Attorney General's Office states legal practitioners
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