

REGAI MUKODZI

Versus

THE STATE

HIGH COURT OF ZIMBABWE

BACHI MZAWAZI J

CHINHOYI, 5 April 2023

Criminal Trial

T.H. Maromo, for the State

F. Murisi, for the Accused

Introduction

BACHI MZAWAZI J: Generally, the police are the peace keepers and protectors of the people cum citizens. Paradoxically if life is lost at the hands of those who are tasked to protect it then it does not only shake but undermines public confidence in the system. Ironically, in this case, deceased, Mike Mudukuti, died of gunshot wounds to the head at the inside entrance of his own kitchen hut and homestead in broad daylight at the hands of law enforcement agents, the police. This boils to the question of the justification of the use of force, or excessive force in particular, in effecting arrest and during the course of investigations.

After the conduction of a fully contested trial, this court delivered an ex tempore judgment. This is the full version of the judgment.

The Charge

The accused is facing a single count of murder in contravention of section 47 (1) of the Criminal Law Codification and reform Act [*Chapter 9:23*]. He was defended by his pro deo counsel and he pleaded guilty to the charge.

The Summarised facts

It is alleged that the accused, a decorated member of the police force, in the company of more than nine other police officers responded to a report that had been made one, Steven Chidhumo, that the now deceased had threatened him with a spear. From the facts it is common cause that the police's main mission on the day in question was not solely to investigate the said report but to make a follow up on several others as they had no station vehicle. In that respect, they capitalised on the availability of a vehicle on the day in question.

The evidence on record also reveals that they had not gone to arrest the deceased but to investigate. This is so because there was no evidence of the report that had been entered in the police report book nor the statement of the complainant or any other person that was produced before the court. In addition, the same complainant was not called to testify in support of the report.

Be that as it may, upon arrival at the deceased's home, after establishing that the accused was sitting on a clay bench, alone in his kitchen hut, the police surreptitiously formed a horse shoe or cattle horn formation around the hut. They then identified themselves and called the deceased out but he refused to barge necessitating the throwing in of a gas cannister in order to smoke him out. No sooner was the gas cannister thrown, did the accused who was in charge of the firearm on the day, fire several repeated gunshots directed to the hut where the accused was. One of those shots hit the deceased on the head resulting in the fatal injuries. The deceased succumbed to the gunshot wound and died before arrival at the hospital.

The State Case

The State case is comprised of mainly the direct evidence from the police officers who were at the scene of the crime at the time of the commission of the offence. Whilst the evidence from these witnesses tallied in some respects it also differed in several material aspects as will be explored later. Indirect evidences also emerged from the testimony of the witnesses and circumstances surrounding the commission of the offence. It suffices, to note that of the nine lined up State witnesses, six gave oral evidence whilst the rest was admitted in terms of the relevant sections of the governing Criminal law statutes. The autopsy report, pathologist and morgue attendant affidavits, sketch plan and indications, photographs and the

confirmed warned and cautioned statements are among some of the exhibits tendered. Part of State evidence came from two independent but not eye witnesses.

Accused's Defence

The accused, in his defence admits to shooting the deceased as alleged but claims that he was acting in self- defence and that of his colleagues. He stated that he saw the deceased by the kitchen door bending and holding a spear just after the gas cannister had been thrown into the little hut. He then thought he and his workmates were under an imminent unlawful attack so he fired four shots, three warning shots and the last that hit the deceased on the head.

It is his argument that his conduct was necessary to avert the attack and the force used and harm inflicted was proportionate to the danger posed. Notably, the issue of warning shots was not part of the accused 's defence outline but was introduced during the course of the trial in the cross-examination of witnesses.

Witness Evidence

The first State witness to give evidence, is a serving police officer and a blood sister to the deceased. She was amongst the first independent persons to attend the scene after the police had left. She attested to seeing what she concluded as bullet holes on four separate places on the inside walls and the clay stool in the kitchen hut. She made indications and photos taken to that effect are on record marked exhibit 14(a).

She told the court that she saw a heavy blood trail behind the kitchen door and a cloth soaked in blood. From her perspective, the blood indicated that the deceased was bleeding in the room and never went outside. She also confirmed seeing some blood traces close to the entrance but inside. The witness stated that she had to clean the place in preparation for the funeral but during that process she recovered some metal objects which she was not sure of at the time but placed them by the dumpsite and later showed the investigating officer the site.

This witness also testified that the deceased had no history of violence and was not of a violent disposition.

The court found this witness credible. She was consistent and not shaken under cross examination. Although she did not actually witness the shooting, she was adamant that from

the blood stains she saw the deceased was shot whilst inside the house. Her evidence on this aspect was unchallenged and remained uncontroverted.

From a holistic analysis of all evidence led in court no traces of blood were reported to have been found or outside the hut the deceased was in. This is a crucial piece of direct evidence in piecing the puzzle together in the final analysis. Again, the blooded piece of cloth the witness saw was not denied by the suspect witnesses as they admitted that they tried to render first aid to the deceased after the gunshot.

The second state witness is also a sister to the deceased who resided in the same locality with him. She did not witness the shooting. She confirmed that the deceased had no history of violence. She is the one who first learnt of the shooting from the Village Head who instructed her to go and secure the now deserted homestead after the police had left with the seriously injured deceased. She however, discovered that the door had been closed by the police themselves after the shooting incident.

She in turn alerted the first witness and the rest of the family. This witness told the court that the recovered spear was an ancestral traditionally sanctified family relic kept with other spiritual paraphernalia at a sacred place within the homestead but not in the kitchen. This witness was unsophisticated, her evidence flowed naturally without exaggerations. The court found her evidence credible, it shaded light on the mysterious spear that is central to the commission of this offence.

The evidence of the rest of the State witnesses was more or less the same in many respects since they were at the scene and also active participants in the whole evolving saga. There were however some discrepancies in some critical areas of the case with some officers departing materially from the evidence they initially gave in writing. From the testimony of the rest of the state witnesses who testified in court as juxtaposed to the already admitted summarized evidence filed of record the following common cause facts emerged. As these are uncontested they become the proved facts and direct evidence to be tested against the indirect evidence emanating from the manner the offence had been committed.

Common Cause and Proved Facts

It is undisputed that the police in their numbers consisting of some high-ranking officers visited the deceased's place, during mid- day, with one of them the accused armed

with an FN rifle and several rounds of ammunition. They formed a horse shoe or cow horn formation surrounding the deceased in his hut and thereafter after spotting the deceased seated in his kitchen announced their identity and presence and ordered the deceased out of the room.

The deceased did not react or respond to the initial call prompting the throwing in of a tear gas cannister to flush him out. One of the Senior officers took charge in critical areas of the operation giving certain directions and commands. It is also a fact that the first shot was fired just after the tear gas cannister had been thrown into the room where the deceased was and that the tear gas fumes affected every one. There is irrefutable evidence that was no command or directive from a superior officer to start shooting.

The person whose, by his very actions in directing the mission, the decision to throw the gas projectile and other key areas of the operation of a higher rank visibly the superior officer was even startled by the first shot and ordered the shooter, accused to aim at the leg. A blitz of shots rang one after the other within the same space of time even after the command to shoot on the leg. These shots were fired by the accused and the deceased was shot in the head by one of those shots. Another, common cause fact from the testimonies of all the witnesses is that the deceased was shot whilst at the door entrance inside his kitchen hut before existing the kitchen. He never stepped an inch out of the little building and he died as a result of those injuries.

The blood stains were behind the door and very little traces by the inside main entrance door. There was a blood - stained cloth at the scene which the witnesses admitted to have used on the deceased whilst administering first aid. A spear was recovered. None of the witnesses attested that they saw the deceased charging with the spear but they only saw him holding it. None said he even stepped out of the room beyond his door step and into the yard.

There were holes akin to bullet holes in the hut. In one of the holes a bullet head was recovered embedded. Four empty bullet casings were sent to the ballistic laboratory and two were recovered, one embedded on the wall. The crime scene was combed before an investigating team and ballistic expert arrived.

The forensic expert arrived nine days late and admitted that his findings were inconclusive as the crime scene had been interfered or tampered with. He could not for certain determine the trajectory of the bullet or the angle of the shooter when he fired the

shots. He found the body buried and could not tell whether the fatal bullet was lodged in the head or had ricocheted and how far it would have landed with what force and direction if it had ricocheted.

A totally new and freshly typed ballistic report was produced in court with no explanation as to what had happened to the initial one.

Discrepancies in Witness Testimony

In analysing the testimony of the rest of the witnesses who testified. We found some discrepancies in their original written statements and the oral evidence given in court. In their oral evidence they claimed that they saw the gun being fired, but in their statements filed of record they had stated they only heard gun shots.

There are varied descriptions as to the position the deceased was seated in the hut and where the alleged weapons, knife, catapult and spear were when they arrived. One of those who testified said that he saw the deceased inside the house close to the door with the spear in hand as well as the knife and catapult upon arrival. The other one said the deceased was just sitting on the clay bench but the spear and knife were down below the clay stool when he peeped through the hut window before announcing their presence.

They also gave different versions of the position of the deceased, when he was then shot at the door. One said he was crouching down about a metre. The other said he was bending backwards. Whilst the other said he was just bending.

The witnesses were jittery in mannerism and were not forth with the issue of the command given to shoot on the leg. They also contradicted themselves on the mission of that particular day with one stating that, they as a station capitalised on the availability of a vehicle that had been made available on the day because of the shortage of transport so their mission was to make a follow up on several outstanding reports including that which involved the deceased. Some stated that their sole and ultimate mission was to investigate the report they had received relating to the deceased.

Given the inconstancies in the evidence of those who were directly at the scene, the court cannot help but conclude that they were economic with the truth. Their evidence was tailored to protect their interests rather than in baring the truth. In that regard they were not credible witnesses.

Issues

Given the set of facts and evidence, the central issue before the court is, whether or not the accused person was justified in discharging the firearm in the manner he did resulting in the death of the deceased?

Analysis of Facts, Evidence and The Law

The direct evidence, in this case places the accused at the scene in charge of a firearm. There is contradictory evidence from the very people who were at the scene as to whether he fired warning shots or not. In his defence outline, the accused omits to highlight this crucial aspect of warning shots. Had there been warning shots, surely officer Kudangarira would not have shouted at the accused to aim below the knee. The evidence on record shows that this superior officer shouted after hearing the surprising first shot. So, on this aspect of warning shots, we are of the view that there were no warning shots fired at all. This in itself is contrary to the police rules and regulations in the discharge of a fire arm.

A deductive analysis from the accused's written statement taken soon after the incident portrays that he was the person at the door of the hut where the deceased was as he had a gun. He attested that he saw the deceased as if he was charging at him and he had no option but shoot in order to defend himself and other. Visualising this testimony, in motion when then could he have decided to fire four warning shots when face to face with the adversary. It is not logical. The only logical conclusion is there were no warning shots. This is the indirect evidence borne out of the direct evidence.

The accused said he acted in self defence and that of others. In dispelling the aspect of others, as a follow up from the image that accused was the one facing the door, others were surrounding the house, against a person with a long Shona traditional throwing spear, not a short stabbing Matebele assegai, the only person who could have been in the line of fire is the accused. Assuming but not concluding that there was an imminent attack, then he was the only person possibly in danger. (which the court rejects).

Further, the positioning of these trained officers whom the deceased was not aware of meant they could simply have emerged from all sides and overpowered this fellow. Hence, the defence of third parties is eliminated.

Coming to the accused's defence of self-defence. It is both a common and statutory law defence. If one succeeds in satisfying all the essential requirements of this defence cumulatively, as outlined in s253 of the Criminal Procedure and Evidence Act [*Chapter 9.07*] s253(1), he or she is entitled to an acquittal. See *S v Mabvure* HH39/16 and *S v Mungoza* HMT 1/2018. The onus lies on the person seeking to be shielded by the defence to prove each one of those elements.

In the exercise of their judicious discretion courts are enjoined by s253(2), to take into consideration the accused person's fears and beliefs when faced with such a situation. In other words, to wear the accused's shoes. The test should be subjective not objective. The phantom of the reasonable person yard stick is discouraged. See *R v Mpofo* 1968 (2) RLR 319, *S v Tevedzayi* HH206/2018 and *S v Muchemei* HH561/13 amongst others.

The case of *Mupande v The State* SC82/14, states that self-defence is a full defence where the facts cumulatively show that the accused was under an attack, his or her conduct was necessary to avert the attack, the means used were reasonable in the circumstances and that harm or injury was directed to the attacker, and that the means used was proportionate to the attack.

In casu scrutinizing the accused's, position as per his statement alluded to above, was there an imminent lawful attack directed at him? There is evidence that the deceased never left the hut. He died in the hut without moving even an inch outside. This means judging from the position of the accused at the door the deceased was shot inside. This does not allow room for warning shots. Given that the deceased, is said to have been holding a long spear the deduction is he was shot right in the middle of the house not at the very door step the accused was. This supports the traces of blood found behind the door and in the house.

Contextualising, this aspect with the fact that, the shots were fired just after the release of the tear gas projectile resulting in an obnoxious toxic ridden atmosphere which affected all and sundry, did the accused really saw the deceased holding and threatening to throw the spear at him? This is assessed against the background that there is conflicting evidence as to where the spear was in the first place and the absence of evidence as to when then the deceased had armed himself with the same.

The police witnesses were not in view of the deceased as they were firstly surrounding the house. Secondly, they scattered due to the adverse well-known effects of tear

gas smoke. The witnesses said they had to go where the wind was blowing to clear the stinging and pungent tear gas effects. Amidst this pandemonium outside the hut, there is evidence that this little room had only one small triangular brick window meant for kitchen smoke and general ventilation.

So logically, if a gas cannister is released in such a confined space was the deceased attempting to attack anyone or to escape from the toxic gas affecting even those outside including the accused.? Would there have been enough visibility for the accused to see that he was approaching or charging at him with a spear? More so, when he fired the first shots right after the release of the gas cannister?

The reasonable inference that can be drawn from the circumstances and indirect evidence evolving from that chain of events at the exclusion of the accused's testimony, is that there was no imminent and unlawful attack. The only reasonable conclusion is that through the pandemonium caused by the tear gas and the perception of a spear the police were labouring under the accused then released shots. As such his conduct was not to avert an attack but negligent, overzealous and trigger-happy discharge of a firearm. This is supported by the barrage of gunshots he fired.

Even if, it were to be assumed there was an imminent attack, which this court has already rejected, the gunshots were not proportionate to a primitive spear and the shot aimed at head of and the killing of a civilian as a result was not proportionate to the attack. Especially, when there is evidence and admission from the defence that the police had visited the deceased's residence to investigate not to arrest. The insinuation by the defence that the deceased was resisting arrest fell flat on its face hence their admissions in cross-examination.

Further, the fact that the accused was given the onerous task to be in-charge of the firearm means he was trained in the discharge and handling of those firearms. As a trained police officer, it is common knowledge that he as well as, his accompanying colleagues had been trained on how to deal or handle with volatile situations and characters without resort to excessive use of force.

Police are schooled at aiming their shots to disarm and incapacitate, not to kill. The victim in this case had already been subdued by tear gas. The police in their huge numbers had already put in motion a plan to pounce on him as soon as he emerged from the room. He could have been facing one but the rest were trained to overpower him, if it were to be

believed but has already been dispelled. Therefore, the use of a firearm in that situation was negligent.

It is evident from the written evidence of one Granger Danda, that the accused was commanded to aim below the knee after Sergeant Kudangarira had been startled by the wreck less rapid repeated shots. Not only that, the accused in his own confirmed warned and cautioned statements which is exhibit 13. admitted to having shifting positions when firing all the shots. This is consistent with a shooter aiming at a moving target not an innate subject. How could that be so when, it is on record that the deceased never left the room. From all the proved facts, he died by the door of his kitchen without stepping outside.

It is also an irrefutable fact that the accused was the one at the door, not metres or a distance from the door and supposedly in the line of attack. As already noted, in an atmosphere shrouded by tear gas smoke how was he able to see movements inside that small hut engulfed by the toxic fumes enabling his shifting of position like a movie star the likes of the film star of 'Terminator', Arnold Schwarzenegger.

A holistic assessment of the evidence leads to a reasonable inference that the State has placed sufficient direct and circumstantial evidence that the accused was negligent in causing the death of the deceased. Even though the State failed to call other independent witnesses in a village full of people, the direct evidence from the accomplice witnesses themselves buttressed several aspects of the indirect evidence adduced.

The authors, Hoffman and Zeffertt *South African Law of Evidence* 4 ed at pp 575-6, describe an accomplice as not necessarily a person who participated or assisted in the commission of a crime or accessory after the fact, but amongst other factors denotes a person who appears to know a good deal about the offence and has some reason to serve in his evidence and such evidence should be regarded with caution.

As a word of caution the State should have done more by calling Steven Chidhumo, the village head and the teenage boy whom the other witnesses as well as accused mentioned was at the scene. This could have further demonstrated whether indeed a report on the deceased had been truly made and the nature of the report

In *Smyth v Ushewekunze & Anor* 1997(2) ZLR 544(S) at 530 it was pointed out that, the State owes it to justice to work hand in glove with the police by calling up all crucial

witnesses and to direct but not superintend the police whose preserve is to investigate, on areas that need further investigations.

In Chaskalson et al '*Constitutional Law of South Africa*' at 2718-19, the author had this to say,

“The duty of the prosecutor to place before the court all material essential for the investigation of the truth, is justified on the ground that the prosecution have all the resources of the state, including the finances, the police and vital information at their disposal. But it is not for the prosecutor to involve himself in the investigations.”

See, *R v Naledi & Anor* 1942 OPD 162 at 163, *R v Nigrin* 1948 (4) SA 995 (C) at 996, *S v Nkushubana* 1972(4) SA638.

Having noted that, the court's findings are justified in that, it is trite that in this jurisdiction it is permissible to convict on circumstantial evidence. Zeffert and Praizes in *The South African Law of Evidence*, p99 state that, ‘That all evidence requires the trier of facts to engage in inferential reasoning. Thus, the court can convict on indirect evidence on the basis of inferences drawn from proved facts and upon the assessment of the whole case and evidence holistically at the exclusion of all factors that point to the exoneration of the accused person. In other words, the court is enjoined to counter balance the factors in favour of the accused 's innocence against those leaning towards his guilt. If the scale weighs in favour of the accused then, off he goes scot free.

The oft cited *locus classicus* case of *S v Blom* 1939 AD 188 at 202 -203 outlines what needs to be observed in the application of circumstantial evidence. These guidelines have been well detailed in several authorities. I need not repeat them herein.

In *S v Mada* ZWCHHC30/2022, (unreported) this court had the occasion to note that, the reasonable inference drawn from the circumstantial evidence should be such that it is incapable of any explanation or hypothesis other than that of the guilt of the accused. In other words, such evidence should not only be consistent with the guilt of accused but inconsistent with his innocence. See, *S v Shonhiwa* 1987 (1)215, *S v Marevanhema* HB87/21, *S v Mutsure* SC62/21, *Sv Muyanga* SC62/2021.

From the foregoing, the State has not managed to prove beyond a reasonable doubt that the accused had the actual or constructive intention to kill the deceased. However, the

direct evidence married to the indirect evidence surrounding the commission of the offence eliminate any pointers to the innocence of the accused in respect to the negligent shooting of a civilian. He is thus found not guilty and acquitted of murder in terms of section 47, He is found guilty of culpable homicide in terms s49 of the criminal Law codification and reform Act [*Chapter 9:23*]

In sentencing the court has taken into account all the submissions in mitigation including the age of the accused and his family responsibilities. His final contributions to the deceased bereaved family shows some remorse. The fact that the mere thought that his actions led to the loss of life will be a perpetual sword of fire constantly hanging over his head. The societal stigma of being labelled a ‘murderer will haunt him forever. Mr Murisi, for the defence submitted that since he is a police officer he should be treated differently by giving him a non-custodial sentence. He advocated for a wholly suspended sentence or a fine.

In aggravation however, the State emphasised on the excessive use of force and called for a stiffer exemplary penalty.

Life is precious. It is God who gives life and it is him who is empowered to end it. Life was needlessly lost at the hands of those who are supposed to protect it. The evidence on record holistically, points that the accused, as a trained police officer used unwarranted excessive force in shooting a man in the head who had already been subdued by tear gas. Being in charge of the gun meant he was supposed to act responsibly and aim below the knees. He defied a superior order to shoot below the knees. He should have been more calculative enough to wait until visibility had cleared. The use of lethal force was not necessary in the circumstances.

This is exacerbated by the fact that the members of the police tried to cover up their acts by tampering with the crime scene before an independent investigating team was assigned. They bandaged a serious and ugly wound when the autopsy report says there was a clearly visible exit wound which ordinarily is very huge. They also removed the bullet casings. Their evidence clearly shows that they were trying to conceal what clearly took place. It cannot be ruled out that through their tampering with evidence they planted the spear under the deceased. How could a person who had raised a spear fall flat on the spear without it injuring him or being let loose to a different direction from his grip? The ballistic expert visited the crime scene nine days late and he admitted that his findings were inconclusive.

The body had been buried and he could not tell the path of the bullet, rendering his evidence on bullet holes redundant.

One also wonders, that four-gun shots pierce the serenity of a mid- afternoon of a small a village full of people but no one saw what transpired or is willing to testify. This is an illustration of the extent of the trauma and terror the actions of the police including the accused had on the people of this village. It undermines the confidence of the civilians in the police force. This is different from a riotous clash or confrontation were the excessive use of force, in rare and sparing instances maybe warranted to restore order.

This a case where the court would not have hesitated to sentence the accused to a sterner penalty. No one is above the law. The rule of law dictates that everyone irrespective to one's station in life is subject to the law. No one is allowed to take the law into their own hands. The accused played the roles of the judge, jury and executioner.

However, in weighing both the aggravation and mitigation factors, the court is of the view that justice should be tampered with mercy and every case should be considered on its own merits. *S v V* 1972(3) SA 611(A) at 614. *S v Shariwa* HB37/03 See, *S v Bere* HMT1/2016.

Accused is sentence to four years imprisonment of which two years imprisonment is suspended on condition that he does not commit a similar offence involving violence, assault or murder, upon which if convicted will be sentenced to imprisonment without an option of a fine. Effective two years.

Murisi and Associates, Pro deo Counsel for the accused

National Prosecution Authority for the State