

STATE

versus

ADMIRE NCUBE

AND

TAIRUS KAIPENI

AND

AKIM SIBANDA

HIGH COURT OF ZIMBABWE

MUZOFA J

CHINHOYI 24, 25 January, 03, 17 February, 06, 24 March & May 2023

Date of written judgment – 24 May 2023

Assessors

1. Mr Chivanda
2. Mr Manyangadze

Criminal Trial

T H Maromo, for the State

U Saizi, for the 1st Accused.

T M Marinda, for 2nd Accused

F Mhishi, for 3rd Accused

MUZOFA J: [1] According to the State case, on 2 November 2021 at about 2300 hours, the accused persons approached the deceased one Melody Makaramba with fake gold. The deceased was a known gold smelter and gold buyer in this community of Etna 148 Mine, Kadoma. He would religiously attend to any person anytime. Thus, the accused persons could approach him as late as 2300hrs. When the deceased opened the door to attend to them, the accused pretended to give him gold, they immediately attacked the deceased and strangled him with a wire, and hit him with an iron pestle. The 1st accused stabbed the deceased with an okapi knife on the back of the neck. The deceased collapsed, the accused searched him and took an itel cell phone, a portable gold scale and a brown wallet with the deceased's particulars and an unknown amount of cash. For their conduct, the accused were arrested and charged with murder in contravention of s47 of the Criminal Law Codification and Reform Act (Chapter 9:23).

[2] The accused persons denied the offence. The 1st accused said he was at the scene of the crime but did not participate in the commission of the offence. His defence outline detailing his defence was produced and marked annexure 'B'. The 2nd and 3rd accused persons denied ever being at the scene of the crime. Their defence outlines were marked annexure 'C' and 'D' respectively.

The State Case

[3] To prove its case the State opened its case by producing the following exhibits with the consent of the defence,

- I. The post-mortem report marked exhibit 1. Doctor Wayne who examined the deceased concluded that death was due to manual strangulation and blunt force head injury.
- II. An application for a search warrant and the search warrant for the 1st accused's cellphone with the line 0716 043 962 marked exhibit 2 and 3 respectively.
- III. A forensic report in respect of a cellphone Huawei K11/21 with cellphone number +263712191205 where 40 instant messages,222 call logs,27 contacts,296 audios,206 images and 134 videos were extracted
- IV. A metal pestle weighing 6,5 kgs,42 cm in length and 5 cm in diameter marked exhibit 8.
- V. An okapi knife 23,5 cm long,2 cm at its widest part with a wooden handle of 2cm with a slightly discoloured blade marked exhibit 9.
- VI. Two wires, measuring 74cm and 44,5cm respectively marked exhibit 10.
- VII. A white Huawei phone IMEI number 1867922564 marked exhibit 11.
- VIII. A black Itel cellphone with a grey band, dual sim with Econet and Netone lines was marked exhibit 12.

[4] The evidence of 6 witnesses was formally admitted in terms of s314 of the Criminal Procedure and Evidence Act. The summary of the evidence is as follows;

- I. Stanley Mutemererwa-he knew the deceased as a resident of Etina 148 Mine Kadoma. He was in the business of buying and selling gold. He knew the accused as residents of Etina 148 Mine
- II. Norman Dhanana – he owned Etina 148 Mine. The deceased was his mine manager who used to buy and smelt gold at the mine. On 3 November 2021 he was advised of the deceased's death by one of his employees. He went to the scene. He observed the deceased's neck was tied with a wire and he had a deep cut above his left ear.
- III. Madabuko Goshokosho-he was a member of the Zimbabwe Republic Police stationed at Criminal Intelligence Unit Kadoma at the time. He did not know the deceased. He attended the scene of the crime. He found the deceased in a pool of blood, his neck tied with a wire and the body had a deep cut above the left ear stretching to the back of the head. He caused the deceased's body to be ferried to Kadoma General Hospital.
- IV. Blessing Chiwenga-a police officer who at the time was stationed at Eiffel flats Police Station. She knew the accused persons as gold panners. She attended the scene of crime. The rest of her evidence was similar to Goshokosho's evidence.
- V. Edmore Mudzingwa-a mortuary attendant who received the deceased's body from Norman Dhanana. He lodged the body in the mortuary at Kadoma General Hospital.

VI. Doctor Anderson Mutanduri-he examined the deceased's body and certified him dead.

[5] Four witnesses gave oral evidence. Tawana Lego was the first witness. He was a driver at the mine. The deceased was his workmate. The night before the deceased was murdered, he was with the deceased. The deceased gave him a rifle for safe keeping. They parted ways and he went to sleep. He occupied a room adjacent to the deceased's room, which was used as the smelting room or gold room. Around 2 a.m. he heard some people at the deceased's door. He did not wake up. He simply sent a message to the deceased advising him of the people. He did this as he assumed that the people had brought gold for smelting since the deceased would attend to a customer even at night. He did not make further follow ups. The following morning, he looked for the deceased and found him dead in the smelting room. Sometime later he witnessed the 3rd accused making indications leading to the recovery of the okapi knife.

[6] John Mazhambe was the second witness. His evidence was that he shared a meal with the deceased the night before he was murdered. He did not see who murdered him. He was one of the deceased's workmates. He was called by the first witness advising him of the deceased's death. He proceeded to the scene of crime. He did not observe much about the deceased's injuries. In his words, he was too scared and overwhelmed by the amount of blood in the smelting room. In the course of employment, he had never entered the smelting room, entrance was restricted.

[7] Knowledge Madi was the investigating officer. On being allocated the matter to investigate he proceeded to the scene of crime the following day. He described the smelting room. It had gas bottles, a metal bar and a chair hung by the door. He received information from an informant about accused's cellphone which had certain information relating to the deceased's death. He arrested the first accused who made statements leading to the arrest of the 2nd and 3rd accused persons.

[8] The accused persons made statements and indications which they challenged. They all claimed they were heavily assaulted by the police. Consequent to the challenges by the accused persons a trial within a trial was conducted where the court ruled the statements and indications admissible. The 1st accused's warned and cautioned statement was produced and marked exhibit 13 and his indications were marked exhibit 14. The 2nd and 3rd accused persons' warned and cautioned statements as well as the indications were produced and marked exhibits 14, 15, 16 and 17 respectively. The State then closed its case.

The Defence Case

[9] The first accused adopted his defence outline. In his defence outline he stated that he did not commit the offence but he was at the scene of the crime. He said on the fateful night he accompanied his friend one Regis to deceased's place to sell some gold. They were four when they went, Regis and his friend, Medius and the accused. When they got to the deceased's place, he knocked and the deceased opened the door. Thereafter he remained by the door with Medius. Regis and his friend proceeded into the room where the smelting usually took place.

[10] The deceased and Regis had an altercation about some alleged fake gold. As they argued, Regis' friend kicked the deceased who then fell, hitting his head on a mineral grinder. The deceased pulled an okapi knife from his pocket and Regis stepped on the deceased's hand. The 1st accused grabbed Regis to refrain him, at that time Regis' friend had picked the mineral grinder which he used to hit the deceased on the head. The deceased fell helplessly on the floor. Regis searched the deceased and proceeded to the deceased's bedroom. Gripped by panic and fear he rushed to the motor vehicle. After a while, Regis and his friend followed to the car with the deceased's bloody knife. They then drove off. Regis threw away the knife through the window. Regis gave him US\$20-00 and an Itel phone when they drove him to his place.

[11] The following day he heard about the deceased's death. He suspected that Regis and his friend may implicate him. He checked the phone he was given by Regis, he discovered that it was the deceased's phone. He did not tell anyone about the incident. A few days later he told the 2nd accused that he had information about the deceased's death. The 2nd accused then advised him that he and the 3rd accused saw a bloody knife when they went to fetch firewood. The rest of his defence outline related to communication he had with his brother-in-law about the death of the deceased. He did not call any witnesses neither did he vary the defence outline.

[12] The 2nd accused also adopted his defence outline. He opted not to call witnesses. In his defence outline he said on the night of the 2nd of November 2021 he was asleep at his homestead. On the 6th of November he went to fetch firewood with the 3rd accused. They saw a bloodstained knife. On the 7th of November the 1st accused advised him that he had some information on how the deceased was murdered. That is when he narrated to the 1st accused that they saw a bloodstained knife while they were fetching wood. When he was arrested on the 16th of November, he led the police to where they saw the knife and it was recovered.

[13] The 3rd accused adopted his defence outline. He denied the offence. He said he only saw a bloodstained knife while fetching firewood with the 2nd accused. On being arrested he led the police to the recovery of the knife. He did not call any witnesses in his defence.

After cross examination the defence case was closed.

The common cause facts

[14] The following issues are common cause;

- (1) On the 2nd of November 2018, the deceased was murdered by people who accessed his room under the pretext that they were selling gold.
- (2) The 1st accused was in the company of the said people.
- (3) The 2nd and 3rd accused led to the recovery of the knife that was used to stab the deceased.
- (4) The 1st accused led to the recovery of the deceased's cellphone.

[15] In their warned and cautioned statements the accused persons confessed to the commission of the offence. Their statements are detailed and pretty the same and can be

summarised as follows. On the 2nd of November 2021 they were drinking beer at Zvamuri Bar in Etna together with one Medius. The 1st accused suggested that they must go and rob the deceased since he was buying a lot gold. They wanted the money and not the gold. They agreed to the plan.

[16] They moved to the next bar leaving behind Medius who was talking to his lover. They continued to drink beer in the next bar until the 1st accused suggested that they should leave Medius who had not joined them and go to execute their plan to rob the deceased. They gathered the weapons for use in the commission of the offence. They passed through the 3rd accused's house where the 3rd accused collected his okapi knife. They proceeded to the deceased's place.

[17] On arrival at the deceased's place the 3rd accused picked some wire for tying the deceased and the 2nd accused wrapped a seed in a paper to make it look like gold. The 1st accused knocked the deceased's door. The deceased opened the door as the accused persons indicated that they intended to sell gold to the deceased. They proceeded to the gold processing room. The 1st accused took the fake gold which was the seed and placed it on the processing table.

[18] When the deceased bent down to process the 'gold' the 1st accused throttled him, the 3rd accused then tied the deceased's throat with the wire. The 2nd accused hit the deceased with an iron pestle on the back. The deceased fell. The 3rd accused produced the okapi knife but the 1st accused snatched it and cut the deceased on the back of the neck. The 1st accused searched the deceased's pockets and took an Itel cellphone.

[19] When they realised that the deceased was dying, they must have panicked and fled from the scene. The 3rd accused hid the knife in a bushy area near his house.

[20] On their arrest they made indications leading to the recovery of the cellphone and the knife as already stated.

[21] Two issues arise for determination in this case, whether the accused persons acted in common purpose and whether they committed the offence with actual intention or legal intention to kill.

The law

[22] For a court to convict on a charge of murder it must be satisfied that the state has proved its case beyond a reasonable doubt. It must be shown that the accused unlawfully and intentionally killed the deceased. It must be proved that the accused was both the factual and legal cause of the death. The intention may be actual intention or legal intention where the accused foresaw that their conduct may cause death but reconciled with the fact and proceeded in their conduct despite the foresight.

[23] In this case the accused persons are said to have acted in common purpose. The common law doctrine of common purpose has now been codified under s196A of the Criminal Code. It follows then that the principles on common purpose enunciated in cases prior to the codification of our law are still applicable. The section provides,

‘196A Liability of co-perpetrators

(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 requisite *mens rea* to commit the crime, whether by virtue of having the 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.

(2) The following shall be indicative (but not, in themselves, necessarily decisive) factors tending to prove that two or more persons accused of committing a crime in association with each other together had the requisite *mens rea* to commit the crime, namely, if they—

(a) were present at or in the immediate vicinity of the scene of the crime in circumstances which implicate them directly or indirectly in the commission of that crime; or

(b) were associated together in any conduct that is preparatory to the conduct which resulted in the crime for which they are charged; or

(c) engaged in any criminal behaviour as a team or group prior to the conduct which resulted in the crime for which they are charged.’

[24] In their closing submissions the state referred the court to one of the leading cases on common purpose *S v Mgedezi and Others* 1989 (1) SA 687. The doctrine is now trite, *Burchell and Milton* (at 393) define the doctrine of common purpose in the following terms:

“Where two or more people agree to commit a crime or actively associate in joint unlawful enterprise, each will be responsible for specific criminal conduct committed by one of their number which falls within their common design. Liability arises from their “common purpose” to commit the crime.”

[25] The liability requirements arise out of two instances. It arises firstly where there is a prior agreement, express or implied, to commit a common offence. Where no such prior agreement exists or is proved, the liability arises from an active association and participation in a common criminal design with the requisite blameworthy state of mind. See also *S v Mubaiwa* 1992 (2) ZLR 362 (S), *S v Khumalo & Ors* 1991 (4) SA 310, *S v Chauke and Others* 2000 (2) ZLR 494 (SC).

[26] Liability of each accused person under common purpose is based on individual *mens rea*. However, the intention is not derived or confined to the individual’s conduct *per se* to cause the death, but on the acts that he intentionally associates himself with to cause the death.

[27] A reading of s196A of the Criminal Code and case law shows that for conduct to constitute active association, the accused must have been present at the scene, he must be aware of the assault on the deceased, he must intend to make common cause with those who perpetrated the assault, he must have manifested a sharing of a common purpose with the perpetrators of the assault by performing some act of association with the conduct of the others and he must have had the requisite *mens rea* (intention).

[28] The rationale for the doctrine assists at a practical level where the causal links between the specific conduct of an accused and the outcome cannot be clearly ascertained. Recourse to the doctrine is usually resorted to consequence crimes in order to overcome the “prosecutorial problems” of proving the normal causal connection between the conduct of each and every participant and the unlawful consequence. See *S v Thebus* 2003 (6) SA 505 (CC) for an in-depth discussion for the rationale behind the doctrine.

Analysis

[29] For convenience we will analyse the evidence in respect of each accused person.

Admire Ncube

[30] The State produced an extract exhibit 4 of a conversation between the accused and his brother-in-law Nowa. The conversation does not reveal much except to confirm that the accused knew about the deceased’s death. It is Nowa who promised to organize something for the accused. In cross-examining the accused the State sought to stretch the ‘something’ that Nowa was organising to be some cleansing for the murder of the deceased. This insinuation was not supported by the facts derived from the conversation between the two. In fact, from exhibit 4 the accused only communicated once with Nowa, advising him of the deceased’s name. There is no background conversation that led to the name of the deceased being supplied to Nowa. That conversation only confirmed that the accused was aware of the deceased’s death. He did not disclose how the deceased met his death.

[31] The deceased’s cellphone was recovered from the accused a few days after the commission of the offence. The accused tendered an explanation for his possession in his defence outline. The court is enjoined to consider if the explanation is probable. See *R v Difford* 1937 AD 370. The approach as enunciated in that case is that the court must not simply reject the accused’s explanation as false. He has no onus to prove the veracity of his explanation. The court must find the explanation false beyond doubt.

[32] In this case, the veracity of the accused’s explanation in the defence outline is measured against his statement in the warned and cautioned statement together with the totality of the evidence against him. He said he was given the cellphone by Regis who committed the offence in his presence.

[33] In the defence outline the accused said he went to the deceased’s place with Medius, his friend together with Regis and his friend. He referred to Regis as the perpetrator of the crime yet in his narration of what transpired it seems Regis did not do much. It is Regis’ unnamed friend who kicked the deceased and fell hitting his head on the mineral grinder. Regis’ friend picked the mineral grinder and hit the deceased’s head. Regis stepped

on the deceased's hand when the deceased tried to reach for a knife from his pocket. From that narrative Regis did not assault the deceased, we wondered why the accused referred to him as the perpetrator.

[34] His explanation does not connect all the dots that lead to the injuries observed on the deceased. For instance, the deceased was found with a wire around his neck. In his description of how Regis and friend assaulted the deceased he does not mention the use of the wire. He does not disclose how the knife was used yet there is evidence that the knife was used. The knife was subsequently recovered. In his warned and cautioned statement he explained how the wire and the knife were used confirming how the deceased sustained the injuries observed on him.

[35] Since the accused said Regis was his friend, he did not provide any information about this Regis to be apprehended. We reject that there was any Regis. Regis was but a creation of the accused to escape liability. Similarly, we find his explanation highly improbable and it must be rejected.

[36] In any event even if the accused's explanation would be reasonably possibly true, he is still liable as an accessory. He stood by when the offence was committed. He was given part of the loot after the commission of the offence. Even after realising that the cellphone belonged to the deceased, he opted to keep quiet about it. His conduct after the commission of the offence, though on its own does not make him liable but taken in totality with the circumstances of the case points to his guilt.

[37] We wondered if it was a coincidence that when the 1st accused decided to confide in someone, he confided in the 2nd accused who incidentally had seen the knife that was used in the commission of the offence. We do not find this as a coincidence but that the three knew exactly what had transpired.

[38] The accused was the first person to throttle the deceased making way for the 3rd accused to strangle the deceased's neck with the wire. He stabbed the deceased on the neck. The injuries were confirmed on the post mortem report. He actively participated in the murder of the deceased. We find that the accused was the factual cause of the deceased's death. The state managed to prove its case beyond a reasonable doubt.

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[39] The only issue for consideration is whether the 2nd and 3rd accused are liable under the doctrine of common purpose as codified in s196A of the Criminal Code.

[40] They are linked to the offence by the recovery of the knife that was used in the commission of the offence and their statements to the police.

[41] We reject the explanation that the 2nd and 3rd accused saw the knife when they were fetching firewood. The offence was committed on the 2nd of November 2021 and the knife was thrown away in the bush. The 2nd and 3rd accused persons went to fetch firewood on the 6th of November.

[42] Without claiming any expertise in science, it is reasonable to assume that the blood must have dried by the 6th of November. The knife would just be discoloured if the blood would still be there. However, it would be difficult for an ordinary innocent person to see such a discoloured knife and conclude that it was blood unless they possess some mystical powers. So how is it that when the 1st accused told the 2nd accused about the murder the 2nd accused also disclosed about the bloody knife they saw. How did the 2nd accused even imagine that a knife was used in the murder of the deceased unless he knew exactly what happened? The court had sight of the knife, it was simply discoloured, the state did not even insist that the discolouration was due to blood.

[43] We do not accept that it was a mere coincidence that the 1st accused told the 2nd and 3rd accused about his knowledge of the offence yet these two also had seen the knife. The probabilities are that the three accused persons were very much aware of what transpired and if they discussed anything it was how they can come up with a defence.

[44] Accordingly we find that the 2nd and 3rd accused persons acted in common purpose with the 1st accused and assaulted the deceased in the manner they described in their warned and cautioned statements.

[45] The last issue is whether the accused persons committed the offence with actual intention or with legal intention.

[46] For the first accused it was submitted that there was no actual intention, because when the accused planned to commit an offence, they planned to rob the complainant and not to cause his death. Therefore, he must be found guilty of murder with constructive intention.

[47] On the other hand, the state argued that the accused must be found guilty of murder with actual intention. We were referred to the case of *S v Mugwanda* SC 19 /02.

[48] In the *Mugwanda* case the court discussed the import of actual intention and legal intention. An actual intention exists where the accused desires to cause the death of the deceased and succeeds in his endeavours. For legal intention the accused must have subjectively foreseen the possibility of his act causing death and was reckless of such result.

[49] We are not persuaded that the accused persons should be found guilty of murder with actual intention. They planned to rob the deceased of the money. They armed themselves with an okapi knife and some wire. Death may not have been their actual intention, but to disable the deceased so that they can access the money. The accused indicated that, when they realised that the deceased was dying, the 1st accused searched the deceased's pockets and took a cellphone. They actually abandoned their plan to get money for they did not even look for the money from the gold room. They fled. This is different from robbers who after killing the deceased then proceed to ransack the premises to achieve their primary purpose.

[50] The accused having planned to rob the deceased, armed themselves with potentially dangerous weapons. When they attacked the deceased, they were reckless as to the outcome or realising that death may ensue, they proceeded nonetheless thus reconciling themselves with the murder of the deceased.

Accordingly, the accused persons are found guilty of murder with constructive intention.

Sentence

[51] In assessing sentence the court will consider both the mitigatory and aggravating factors as submitted on their behalf.

[52] Their personal circumstances are almost similar. They are first offenders, artisanal miners, no savings and married with family responsibilities. At the time of the commission of the offence their ages were 27,25 and 21 years respectively. They spent almost 18 months in custody pending the finalization of the trial. Pretrial incarceration is considered highly mitigatory. Every accused person has a right to a fair trial within a reasonable time, 18 months cannot be said to be reasonable time.

[53] The offence was committed in aggravating circumstances in terms of s47 (2) of the Criminal Code as properly submitted by both the state and defence counsels. The offence was committed in the course of a robbery under the cover of darkness. The accused persons were known to the deceased. The brutality in the commission of the offence shows that the accused persons have lost some sense of humanity. The deceased was strangled, stabbed with a knife and hit on the head. This ruthless and barbaric conduct must be visited with a retributive sentence.

[54] In balancing the interest of justice and that of the accused persons the court must seriously consider the impact of such crimes in society. Such offences make the public feel vulnerable and exposed even in their homes. Homes have become a death trap. In *S v RO and another* 2010 (2) SACR 248 (SCA) at paragraph 20 the court noted,

“to elevate the appellant’s personal circumstances above that of society in general would not serve the well-established aims of sentencing including deterrence and retribution.”

And also in *S v Swart* 2004 (2) SACR 370 (SCA) at paragraph 12 the court said,

“Serious crimes will usually require that retribution and deterrence should come to the fore and that the rehabilitation of the offender will consequently play a relatively smaller role.”

I totally agree with the sentiments. Such serious offences call for retributive and deterrent sentences.

[55] Although the offence was committed in aggravating circumstances the court has a discretion in respect of the sentence regard being made to the circumstances of the case. See *S v Chihota* HH236/15. In this case all the legal practitioners were agreed that a death penalty may not be appropriate considering the pre trial incarceration, that the accused were intoxicated when they planned and executed their evil plans.

[56] As properly submitted by the State, the 3rd accused was at the border of youthfulness and adulthood. His sentence must be differentiated from the 1st and 2nd accused persons. In fact in terms of s48 (2) (c) of the Constitution he cannot be sentenced to death.

[57] The offence was committed as a result of pure greediness. It was committed in a mining community where some members of these communities have lost human dignity. The right to life is meaningless to them. Life can be taken away at the slightest dispute or one evil thought as in this case. A deterrent sentence is therefore most appropriate. Courts must play their part in dealing with such serious offences.

Accordingly, the accused are sentenced as follows.

1st accused person, life imprisonment.

2nd accused person, life imprisonment.

3rd accused person, 30 years imprisonment.

The National Prosecuting Authority, the State's legal practitioners

Saizi Law Chambers, 1st accused's *pro deo* counsel

Masawi and Partners, 2nd accused's *pro deo* counsel

Legal Aid Department, 3rd accused's *pro deo* counsel