

THE STATE

versus

CAIN PHIRI

And

GILMORE MANUWERE

And

ISAAC MASEKO

And

NQOBILE MOYO

And

KUDZANAYI SHADRECK GOREDEMA

HIGH COURT OF ZIMBABWE

MUZOFA J

CHINHOYI, 22, 23 November 2022, 8, 9, 28 February, 13, 16 March & 12 May 2023

Assessors

1. *Mrs Mawoneke*
2. *Mr Manyangadze*

Criminal Trial

MUZOFA J [1] The five accused persons appeared before us facing a charge of murder in contravention of s47 of the Criminal Law Codification and Reform Act (Chapter 9:23). When the trial commenced the 3rd accused absconded and the trial proceeded against the 1st, 2nd, 4th and 5th accused persons after a separation of trials. The state alleged that in the early hours of the 16th of December 2019 and at Plot 27 Temperly Farm, Murereka, Chinhoyi

the accused persons acting in common purpose shot Reginaty Kagondo in the course of a robbery intending to kill her or realising that there was a real risk that their conduct may cause death.

[2] The accused persons denied the offence and each filed his defence outline. The defence outlines were marked annexures 'B', 'C'. 'D' and 'E' respectively. Their defences were almost similar. They denied being at the scene of crime. They said they did not know each other. They had no common purpose to commit the alleged offence. The 1st and 2nd accused persons denied selling any cellphones to the State witnesses. They even denied being at Murombedzi growth point where the alleged sale transactions took place. The 4th and 5th accused persons challenged the admissibility of the statements they made to the police alleging that they were not freely and voluntarily made.

[3] The admissibility of the 4th and 5th accused persons' unconfirmed warned and cautioned statements was determined in a trial within trial. In a separate judgment the court made a finding that the 4th accused's unconfirmed warned and cautioned statement was not freely and voluntarily made. The 5th accused person's unconfirmed statement was found to have been made freely voluntarily. It was accepted as evidence.

[4] At the close of the State case, the 2nd accused person's legal practitioner made an application for discharge at the close of the State case in terms of s198 of the Criminal Procedure and Evidence Act (*Chapter 9:07*). The application was granted and the 2nd accused was acquitted at the close of the State case in a separate judgment. The matter proceeded in respect of the 1st, 4th and 5th accused persons. Despite the fact that the 2nd and 3rd accused were no longer before the court, they have been cited for convenience as witnesses referred to them in their testimonies.

The State Case

[5] The State opened its case by tendering documentary evidence with the consent of the defence. The post mortem report which was marked exhibit '1' showed that death was due to acute anemy, heart bullet wound and severe thoracic due to bullet injury. The ballistics report of one spent cartridge case and one spent bullet recovered at the scene of crime was produced and marked exhibit '2'. The examination report confirmed that the spent cartridge was fired from a firearm that chambers live ammunition. Besides confirming that a firearm

was discharged at the scene of crime there was nothing from the report linking the spent cartridge to the accused persons. The sketch plan drawn from indications made by the state witnesses and accused persons was produced and marked as exhibit 3. The confirmed warned and cautioned statements made by the 1st and 2nd accused persons were also admitted by consent and marked exhibit '4' and '5' respectively.

[6] The evidence of Dr Mayedo who examined the deceased and completed the post mortem report, Dr Muchineripi who certified the deceased dead and Jealous Chinoko who admitted the deceased's body into the mortuary at Kadoma General Hospital was admitted into evidence as summarised on the outline of the state case.

[7] The evidence of four witnesses was admitted by consent as summarised in the State case. The evidence can be summarised as follows,

a) Webster Muzumala- he knew the 1st and 3rd accused persons. On the 23rd of December 2019 he was at Gabriel Madare's shop around 0700hours. The 1st, 2nd and 3rd accused persons arrived at the shop. The 1st accused produced three cellphones that he offered for sale to Gabriel for US\$80. The rest of his evidence was said to be similar to Gabriel Madare and Rosa Muzenda' evidence. These two gave oral evidence in court.

b) Remedy Kagondo, Takudzwa Kagondo and Bigboy Kembo's evidence was similar in all material respect to Giles Kagondo's evidence who gave oral evidence in court. The deceased was Remedy and Takudzwa's mother. Bigboy was employed at the farm. In brief their evidence was that on the fateful day, a group of men arrived at the farm homestead at night. They woke up to confront the intruders but they were overpowered. The three witnesses escaped each in his own direction. When they returned to the farm house they learnt of the deceased's death.

[9] Giles Kagondo was the first witness to give oral evidence. His evidence was punctuated by tears, the deceased was his wife. He narrated how on the 15th of December 2019 his family retired to bed. In the early hours of the following day, he heard his dogs barking incessantly. As the typical man of the house, he woke up to check. As he opened the door, he was confronted by some men who attacked him. He tussled with the intruders until he was hit with a stone. He eventually escaped and went to his neighbours to seek help.

[10] When he returned the intruders were still at his place. The intruders pelted them with stones and they once again retreated. He later returned after the intruders had left. He went to the bedroom where he left his wife, he found her lifeless body lying on the floor. Fortunately, his two sons and the worker had escaped unhurt. Neighbours had gathered and the police eventually arrived. He discovered that a number of items had been stolen which included seven cellphones, US\$1000-00 and ZWL\$5000-00 and a laptop.

[11] Although the state alleged that one cellphone was recovered, the cellphone was not produced through the witness to identify it. The witness tried to describe some of the assailants but he could not identify any of the accused persons. No identification parade was conducted for the witness to identify the assailants. In short, Giles' evidence established that a murder was committed and some items stolen from his homestead by a group of about eight people.

[12] Although one Gabriel Madare was the last state witness to give evidence, I found it convenient to deal with his evidence next for a proper chronology of events. He owns a shop at Murombedzi Growth Point. Part of his business was buying and selling cellphones. He said he knew the 1st and 2nd accused persons as regular customers that sold him cellphones.

[13] On a date he could not remember the 1st and 2nd accused persons in the company of their friend only known by his alias as Marubber approached him selling two cellphones. The 1st accused had a gold ITEL phone and Marubber had a red cellphone. He did not have any money so he advised them to help themselves with anything from the shop. He left them at the shop and proceeded to Harare. He later paid the 1st accused for the cellphones. He gave his wife the gold cellphone. Later, members of the criminal investigation department advised him that the cellphone was stolen. They recovered it.

[14] Rosa Muzenda was married to Gabriel. She operated the shop together with her husband at Murombedzi Growth Point. She said on the 23rd of December 2019 the 1st accused arrived at the shop around 0700hours. He was in the company of three other people. She did not have any prior knowledge of the 1st accused person. He had three cellphones for sale. He offered them to her husband for US\$80-00. Gabriel paid US\$20-00. They were advised to collect the balance in due course. Her husband gave her the gold ITEL for use. Eventually the police recovered it. Although she could not identify the other accused persons, she

remembered two aliases that they used, 'Khedha and 'Marubber'. She could not tell who 'Kedha' was or who was 'Marubber'.

[15] The last state witness was Detective Sergeant Chitiza. He was the investigating officer. He narrated how he conducted the investigations. He recorded a statement from Giles, the deceased's husband and obtained information about the stolen cellphones. He engaged the service providers and managed to trace the stolen phone to Rosa who was using the phone. From then on arrests were made. He also recorded statements from the accused persons.

[16] The State then closed its case. Ms Burukai and Mr Chakandida indicated their intention to apply for the discharge of the 1st and 2nd accused persons at the close of the State case in terms of s198 of the Criminal Procedure and Evidence Act. The learned legal practitioners undertook to file the applications by the 2nd and 3rd of March respectively. None of them filed the applications.

[17] Mr Chakandida then filed the application after being reminded. Ms Burukai simply remained mute until the date of continuation of trial when she apologised and abandoned the application. The court is alive to the fact that these are pro deo matters where the legal fraternity is giving back to society. However, it is disconcerting that a legal practitioner could make an undertaking to the court and renege on it without any explanation. Legal Practitioners are officers of the court and are charged with a duty to assist the court in the proper administration of justice as per their oath of office.

The Defence case

[18] The matter then proceeded to the defence case in respect of the 1st, 4th and 5th accused persons. The 1st accused adopted his defence outline and opted not to call any witnesses. He insisted that on the night in question he was at his place of residence. He denied selling the cellphone(s) to Gabriel. He said he neither frequented Murombedzi Growth Point nor gambled at any of the Bottle Stores which prompted him to sell cellphones to Gabriel.

[19] The 4th accused also adopted his defence outline. He did not make any further additions in his evidence in chief. The 5th accused also adopted his defence outline. He emphasized that he was sleeping at his house when the offence was committed. Although he

persisted with his assertion that he did not make the statements freely and voluntarily, the statement was admitted after a trial within a trial.

Factual and legal analysis

[20] The State bears the onus to prove its case beyond a reasonable doubt. In this case, the state must prove that the accused persons were both the factual and legal cause of the deceased's death. The accused's intention maybe inferred from their conduct. It is a factual issue .We assess the liability of each accused separately.

[21] Cain Phiri

Cain is linked to the offence by the cellphone he is alleged to have sold to Gabriel which was recovered from Rosa.

[22] In its closing submissions the state seemed to blow hot and cold. At one point it submitted that there was ample credible evidence against the 1st accused person. The accused was not a credible witness. We were not told why the state said he was not a credible witness. Contrary to the initial submission, in its concluding remarks it submitted that the 1st accused must be given the benefit of doubt. No justification was given for this benefit.

[23] The submissions by the State were not supported by any proper analysis of the evidence placed before the court.

[24] For the accused, it was submitted that the evidence linking the accused to the offence was the cellphone. However, there was no proper identification of the accused person. The defence relied on the confession by the 5th accused person under cross examination that the 1st accused was not part of the people that committed the offence.

[25] We have no doubt that the 1st accused person sold the cellphone to Gabriel. Webster's evidence was uncontested. It was admitted as summarised in the outline of the State case. The admission amounts to an admission in terms of s314 of the CPEA.

[26] According to Webster, the accused sold the cellphone to Gabriel on the 23rd of December 2019 about seven days after the commission of the offence. He was in the

company of the 2nd and 3rd accused persons. This evidence was corroborated by Gabriel and Rosa who bought the cellphone.

[27] The defence raised the issue of identification of the accused by Gabriel and Rosa and argued that there is a high likelihood of mistaken identity. Gabriel said the 1st accused was known to him, he was a regular patron at a nearby bottle store. He had entered into previous transactions with him. This prior knowledge of the accused by the witness excludes mistaken identity. Identification of an accused has been said to be fraught with error and courts must be cautious where the parties did not know each other. In such circumstances the court must consider certain factors like the lighting, the time that the witness spent with the accused and the particular features that the witness identified on the accused among other factors. See *S v Dhliwayo & Anor* 1985 (2) ZLR 101 (S) at 107A-D).

[28] The way the accused was eventually arrested gives us some solace in the finding we make. Gabriel saw the accused at court and identified him. He then advised the police that he had seen the person who had sold the cellphone to him. When he identified the accused, there were no police officers, he was just about his business.

[29] Having made that finding the court must consider the accused's defence. We have to consider the accused's explanation whether it is reasonable. He does not have to prove it. However, it must be considered in light of all the evidence.

[30] The accused's explanation was that he was at his place of residence at number B3334 Gunhill Extension, Chinhoyi on the date the offence was committed. The investigating officer said they investigated his alibi and found it to be false. There was no truth in the officer's evidence. He did not go to the given address to investigate. The Gunhill address was provided in the warned and cautioned statement. There was ample time to investigate. Instead of going to Gunhill, the investigating officer went to Gadzema. We wondered why he went to verify the accused's alibi in Gadzema instead of Gunhill. Secondly, he said at the Gadzema address he saw the accused's uncle who said the accused did not reside there. This maybe correct since the accused did not even claim that he was at that address on the night in question. We find the alibi to be true.

[31] We also take note of the fact that under cross examination, the 5th accused person confessed that he committed the offence. He indicated that the 1st accused was not part of the people that went to commit the offence.

[32] After considering all the evidence, we come to the conclusion that the 1st accused person was not part of the people that attacked the deceased. We find that he sold the cellphone to Gabriel. The 5th accused indicated that they threw away the cellphones. The probabilities are that the 1st accused must have picked the cellphone and sold it.

Nqobile Moyo

[33] The only evidence against Nqobile was the confession by the 5th accused person. In its closing submissions the State urged this court to find the accused guilty of murder with actual intention on the basis of the 5th accused person's confession. It was argued that the confession is an exception to s259 of the Criminal Procedure and Evidence Act (CPEA). We were referred to two cases on this issue, *The State v Sibanda* 1992 (2) ZLR 438 (S) and *The State v Governor HH 9/07*. Despite that averment there was no further elaboration how the confession fell within the exceptions.

[34] The defence's task was fairly easy. It submitted that s259 is clear, no confession made by any person is admissible against any other person. The section is couched in mandatory terms. Therefore the 5th accused's confession is not admissible against the 4th accused.

[35] We appreciate the difficulty that the State had to face in light of the 5th accused person's detailed explanation in his warned and cautioned statement. The 5th accused disclosed how he, together with his accomplices Nqobile Moyo, Gift Masvanike, Brandon Chademana, Broadwell Chademana Zvikomboreo and Nduma went to rob one Shumba, who we believe was Giles. They drove to the farm homestead and committed the offence. He said although Nqobile shot the deceased, at the time they went to execute their nefarious plan he was unaware that Nqobile had a firearm. This was a confession for all intents and purposes.

[36] The issue that arises is whether this confession is admissible against Nqobile. In the *Sibanda* case (supra) at 441-2 which the court in the Governor case relied on, the court had this to say on the exceptions,

"It is only in two exceptional situations that an extra-curial statement may be admitted not only as evidence against its maker but also as evidence against a co-accused implicated thereby. The first is where the co-accused, by his words or conduct accepts the truth of the statement so as to make all or part of it a statement of his own. The second exception applies in the case of conspiracy or any crime which was committed in pursuance of a conspiracy. Statements of one or two conspirators made in the execution or furtherance of a common design are admissible in evidence against any other party to the conspiracy. See *R v Miller & Anor* 1939 AD 106 at 115; *R v Mayer* 1957 (1) SA 492 (A), at 494F".

See also *S v Ndhlovu* 2002 SA 305 (SCA).

[37] It would appear that the exceptions are common law exceptions. It is doubtful that they are applicable in our case after the codification of our law under the Criminal Code. The starting point is the section that excludes a confession. Section 259 provides 'No confession made by any person shall be admissible as evidence against any other person.' It is a statutory provision couched in mandatory terms. There are no exceptions provided for in the section. It is absolute in its terms. However, since no proper submissions were made on this issue, we leave the issue open.

[38] Even if the exceptions are still applicable in our jurisdiction, the 5th accused person's confession does not fall within the said exceptions.

[39] The first exception is that the co-accused must, by either conduct or his words associate himself with the statement. The exception is understandable in that by associating with the statement the co-accused would technically be adopting the statement as his own.

[40] In this case Nqobile consistently denied the offence. Neither his conduct nor his words suggested any association with the 5th accused's statement. What we can only say is that when the 5th accused then said he had decided to tell the truth while in the witness' stand. He narrated how they committed the offence and how Nqobile shot the deceased. Nqobile who sat in the dock watching the 5th accused suddenly was uncomfortable and faced down and could not face the 5th accused until he came to the end of his confession. Nothing much can be inferred from his conduct but we observed that his demeanor had changed.

[41] In the *Governor* case (supra) the court found that the co accused had made indications similar to the person who made the confession. The court concluded that by conduct the co accused had associated himself with the confession. Besides the confession in that case there was evidence providing the co- accused's guilt.

[42] The second exception relates to conspiracy or any crime which was committed in pursuance of a conspiracy. Section 188 of the Criminal Code defines a conspiracy as follows,

'188 Conspiracy

(1) Any person who enters into an agreement with one or more other persons for the commission of a crime, whether in terms of this Code or any other enactment—

(a) intending by the agreement to bring about the commission of the crime; or

(b) realising that there is a real risk or possibility that the agreement may bring about the commission of the crime; shall be guilty of conspiracy to commit the crime concerned.

(2) For an agreement to constitute a conspiracy—

(a) it shall not be necessary for the parties—

(i) to agree upon the time, manner and circumstances in which the crime which is the subject of the conspiracy is to be committed; or

(ii) to know the identity of every other party to the conspiracy;

(b) it shall be immaterial that—

(i) the crime which is the subject of the conspiracy is to be committed by one, both or all of the parties to the agreement;

(ii) one or more of the parties to the conspiracy, other than the accused, did not know that the subject-matter of the agreement was the commission of a crime.'

[43] Conspiracy requires that there must an agreement to commit an offence. Generally, robbery involves a conspiracy but it may be dangerous to take this as a rule of thumb. Some robberies can be spontaneous where opportunity presents itself. In this case, the state case did not establish that the offence was committed in furtherance of a conspiracy. It therefore means that the 5th accused's confession does not fall within the second exception.

[44] What that means is that there was no evidence against the accused Nqobile to prove that he committed the murder as charged.

Kudzanayi Shadreck Goredema.

[45] The accused's unconfirmed warned and cautioned statement was held admissible in terms of s256 of the CPEA.

[46] The accused narrated how he and his accomplices executed the robbery in the process causing the death of the deceased. The state proved that the offence was committed. The accused was therefore the factual cause of the deceased's death.

[47] The court must determine if he had actual intention or constructive intention. As already stated, a finding on intention is a factual matter. It can be inferred from the circumstances of the case.

[48] The state submitted that the accused must be found guilty of murder with actual intention. His assertion that he was not the one who pulled the trigger does not exonerate him. His mere association with the criminal intent to commit the offence he associated himself with the conduct of anyone of them. The liability arises from their common purpose to commit the offence. This is the proper position of the law as expounded in a line of cases both in our jurisdiction and other jurisdictions like *Sv Safatsa* 1988(1) SA 868, *S v Ndebu & Anor* 1985 (2) ZLR 45 (SC). In this case the accused actively participated in the commission of the crime. Even after the deceased was shot, he is the one who ransacked the house in search of valuables they could take although he said he acted under the 4th accused' s instructions. He did not dissociate himself at all.

[49] The doctrine of common purpose is clear, the conduct of one is ascribed to all the members of the group. The accused cannot therefore benefit from the fact that he did not pull the trigger. The conduct of one is the conduct by all.

[50] For the accused it was submitted that the court must consider that when the accused and his accomplices set out to commit the offence, they set out to commit a robbery and not to cause the death of the deceased.

[51] Having regard to the circumstances of this case, we find that although the accused and his accomplices set out to commit a robbery each one of them subjectively

foresaw that death may result but they proceeded in their conduct. In this case there was no evidence that the accused was aware that the 4th accused had a firearm until the time of the shooting. It therefore behooves the court to find him guilty of murder with constructive intention.

[52] For completeness we set out the verdicts for all the accused who appeared before the court.

1st accused not guilty and acquitted

2nd accused not guilty and acquitted at the close of the state case

4th accused not guilty and acquitted.

5th accused guilty of murder with constructive intention.

Sentence

[53] In coming up with an appropriate sentence we considered that the accused was convicted with a serious offence. Both counsels conceded that the murder was committed in aggravating circumstances in terms of s47 (2) (a) of the Criminal Code. The murder was committed in the course of committing a robbery.

[54] The offence was committed by a group of about seven or so persons. They pounced on the homestead and there was pandemonium. The occupants of the house were traumatized such that each fled for their life without second thoughts to what happened to the next person. They were literally terrorized. Members of the public must feel safe in their houses and not vulnerable to such unruly behaviors. The court can only play its part in stepping out this cancer that has infested our society by imposing deterrent sentences. In this regard GUBBAY CJ, in the case of *S v Sibanda* 1992 (2) ZLR 438 (S) at p 443, had this to say:

“Warnings have frequently been that, in the absence of weighty extenuating circumstances, a murder committed in the course of a robbery will attract the death penalty.”

[55] In this case the accused's age saves him from the death penalty. The accused is a fairly young first offender aged 21 years. He committed the offence when he was 18 years old. In terms of s48 (2) (c) of the Constitution a death penalty cannot be imposed on any person under the age of 21 years. The state correctly conceded that his age is highly mitigatory and saves him from the death penalty in terms of s338 (a) of the CPEA. A sentence between 30 to 35 years was proposed by the state. In our view the accused is not a hard-core criminal, which was evident from his breaking down and stating facts as they happened. He just happened to be in the wrong company.

[56] In mitigation it was submitted that the accused's confession must be treated as remorse. For the purposes of sentence I find nothing in the way of accepting the confession as showing remorse. In this case had the accused not confessed, the State would not have secured a conviction. The accused has been in custody for about 18 months. Pretrial incarceration is highly mitigatory. See *S v Difiri 2001 (2) ZLR 411 (H)*. The court will also take in consideration the 18months pretrial incarceration.

[57] Generally it has been said in such serious offences, the accused's personal circumstances pale into insignificance. The court must consider a sentence that instils some of confidence in the justice delivery system that crime does not pay. Similarly, such offences attract retributive sentences. The court must also balance the need to protect the public, the interests of justice and the accused's interests.

[58] Despite the gravity of the offence, the accused was fairly young and it is trite that young people are still impressionable and some of their decisions are tainted with immaturity. He showed some remorse and has been in custody for a considerable period.

Accordingly, he is sentenced as follows.

25 years imprisonment.

National Prosecuting Authority, the State's legal Practitioners.

Burukai and Associates, the 1st accused's *pro deo* counsel.

Chakandida and Associates, 2nd accused's *pro deo* counsel.

Murisi and Associates, 4th accused's *pro deo* counsel.

Choga and Associates, 5th accused's *pro deo* counsel