

THE STATE
Versus
TALKMORE ALIAS KUDAKWASHE MAPOSA

HIGH COURT OF ZIMBABWE
BACHI MZAWAZI J
CHINHOYI, 04 June – 06 June 2024

Assessors: *Mr. Mutombwa*
Dr. Mashavave

Criminal Trial

R. Nikisi, for the State
T. K. Magavude, for the accused

BACHI MZAWAZI J: The deceased Malunga aged twenty-seven years suffered one of the most vicious, atrocious and brutal deaths at the hands of the accused person and two of his accomplices now at large. His most pivotal vital organs the heart and the lungs were lacerated. The Pathologist observed several knife stabbing wounds enlisted as;

1. Perforated 3cm long lacerated in the right hemithorax above, 2cm above the right nipple and to the left of it that penetrated the cavity 20 cm.
2. Incised wound on the lateral aspect of the left buttock, 4cm long perpendicular to the longitudinal axis of the body.
3. Incised wound located on the external lateral aspect of the right lumbar foss 3cm.
4. Moderate brain edema.
5. 3500ml haemothorax.
6. Haemorrhagic infiltrate at the end of pectoral muscle.
7. Lung laceration.
8. Pericardium lacerated.
9. Heart right ventricle laceration.

The cause of death was disclosed as 3500ml haemothorax, lung and hear laceration. Perforating stab wound in the right chest region.

To say the deceased was butchered is an understatement given the picture portrayed by the autopsy report admitted into evidence by consent as exhibit 1.

Accused and Integrity Nguruve were arrested in connection with the killing. They were charged with murder in terms of s47 (1) of the Criminal Law Codification and Reform Act [Chapter 9:23]. The third accused fled from justice. Integrity Nguruve also followed suit when he was admitted to bail.

The accused person admitted being present when the altercation giving rise to the numerous stab wounds commenced. He acknowledged fighting the deceased but stated that, the deceased overpowered him and he left. He however shifts all the blame to the fugitive, Integrity Nguruve who also confessed his own role in the murder to the police upon handing himself over. The accused person denied stabbing the deceased to death and in the manner alleged.

He also objects to acting in common purpose with Integrity Nguruve. He thus tendered a plea of not guilty and prayed for an acquittal.

The Facts

It is the State case that on the 26th of December 2023, the deceased was walking home with his friend Courage Mudzitiri. They came across the accused person and his mentioned colleagues, Tinotenda Bosha and Integrity Nguruve in a parked vehicle in the middle of the road close to some residential houses. When they got closer to the vehicle which initially had its headlights flashed, the lights were switched off. The three occupants of the vehicle then alighted and confronted deceased and his colleague. Accused is said to have been holding an axe and together with Tinotenda Bosha accosted the deceased accusing him of snatching other people's wives. It is said that they ordered both the accused and his friend to sit down whilst wielding the axe. The accused person handed over the axe to Bosha and they both pushed, pulled and shoved the deceased who refused to comply to the order. They then teamed to assault the deceased who stood his ground and fought back. In the process the accused produced a knife from his trousers thereby stabbing the deceased mercilessly. The deceased is said to have begged and pleaded with the gang but the accused's accomplice Integrity also knived the deceased whilst assaulting him all over his body with Bosha. The accused is said to have stabbed the deceased on the right side of the chest. Nguruve also stabbed the deceased twice on the chest and once on the right side of the hip with a Columbian knife. The accused persons then fled the scene and left the deceased screaming in

pain. The members of the public came to the deceased's aid and assisted in ferrying him to Chegutu Hospital where he died upon admission. The state alleges that the accused was only apprehended on the 17th of April 2024.

Amongst the documentary evidence produced unopposed in opening the State case were, the post mortem report, mortuary attendants' and doctor's affidavits, sketch plan and indications, accused's confirmed warned and cautioned statement as well as that of Integrity Nguruve. The summarized evidence of eight of the lined up ten State witnesses was produced uncontested. Oral evidence was led from Courage Dzikiti and Jennifer Nyoni. Of note, most of the contents of the summary of the State case and facts are made as of the first witness's testimony.

Courage Dzikiti, the first State witness confirmed that he and the deceased were bosom buddies who grow up together and inseparable. They stayed in the same neighbourhood. He also testified that the three accused persons grew up with him in the same locality and were well known to him. They often crossed paths in the neighbourhood, drinking joints and at mines where they engaged in artisanal mining. He stated that on the day in question at around 7pm to 8pm when coming from a drug seller's house and were close to the residential homes he and the accused saw a car parked almost in the middle of the road. It had its front lights flashed. Upon approaching the vehicle, the lights went out. Immediately, the occupants of the vehicle whom he identified as the accused, Bosha and Nguruve disembarked from the vehicle. He stated that at first there was one person outside acting as if the vehicle had developed a flat tyre and was attending to it. He also noticed that accused was not the person who was initially outside but that he alighted from the car wielding an axe in the company of Bosha.

Bosha and the accused confronted the deceased with the accusations alluded to earlier. The witness said both Bosha and the accused were pushing and shoving the deceased who had refused to comply with their instruction to sit down. The witness stated that he did not want to react as he feared the violence the trio exhibited. He said that the push and shove took the opponents from the vehicle to some distance even closer to people's homes. Though the witness said he could not clearly see the stabbings he said he saw the silhouette of accused and his accomplices' hands striking up and down with the deceased crying. He told the court that he heard the deceased pleading with the witness to come to his aid and also pleading with the gang not to stab him.

The witness stated that he saw the deceased trying to rise to his feet but fell. He watched the trio fled the scene. The witness then ran to call some friends. On cross examination he affirmed that he only left the scene after he had seen the trio fleeing from their victim.

On cross examination, the witness was asked why he left out some details in his statement to the police, details like the three accused left the car all at once when in court he said the other two left the car at different intervals. The other discrepancy referred to by counsel for the defence is that the witness in his statement to the police he did not mention that the deceased was crying that he had been stabbed. These previous inconsistent statements of a very minor nature cannot be held against the witness. They do not address crucial issues. They also do not have any effect on the rest of his evidence.

In our considered view, this witness gave his evidence very well. He stuck to his version that the deceased called to him thrice even after being asked from different angles by the defence counsel. It is clear that his evidence was even more detailed than the one he supplied to the police. It looks like each question triggered his memory and recollection of events which may have escaped him when his statement was recorded by the police. The discrepancies were minor and did not destroy his evidence.

It should be borne in mind that not many people have photogenic memory. Neither are many people of average intelligence. Some reveal finer details after being probed. Many a times have witnesses or accused responded to the question “Why did you not say that before?” Their reply is always “I was never asked that question”. Thirdly it can’t be ruled out that people who may have witnessed very disturbing events may be traumatised or recovering from shock making their rendition of events to the police more difficult. Further, the police environment itself may intimidate some people leading them to shut out or black out. Lastly, the police as humans may give their own interpretation to words given to them at cross purpose with what the person intended or meant. Also, the police may miss out some information said by the person during the recording. This coupled with the fact that statements made to the police are not given under oath and are, just like the state case skeletal. The flesh will then be filled in during oral testimonies. They are extra curiae statements which fall within the purview of hearsay evidence and the admissibility of such evidence. See s253 & 259 of the Criminal Procedure and Evidence Act [*Chapter 9:07*].

In that regard witnesses cannot be held to ransom because of minor imperfections. We make a finding that he was a credible witness. The accused person in his *viva voce* also corroborated most, if not ninety percent of this witnesses' evidence. Their point of departure was only at the last stages of the fight.

Jennifer Nyoni's evidence corroborated that of the first witness in that, she viewed the fight from a distance from fear of being a victim. She saw four men fighting with one at the receiving end. It was a very violent scene. She heard them accusing the one being ganged up against, about wife snatching. She attested that the struggle took a long time. She then saw the other three leaving the scene whilst the other one lay moaning and injured on the floor.

She and another neighbour then moved in, trying to help the deceased. She said after the deceased had asked for his shirt to be removed, she saw a very scary and nasty upper right chest deep cut. She also saw an axe which had been discarded at the scene. However, as she did not see where the scuffle had initially started, she did not see any vehicle. Nor did she notice the accused fleeing in the car. This witness repeated that she saw all the three men ganging on the man who turned out to be the deceased. She also saw the three assailants departing the scene of the crime together. Her evidence though she could not see the degree of participation of each of the accused, tallied with that of the first witness.

Estery Jonas, who did not testify orally attested that the fight took place close to her residence as she heard some noises. Later on, she peeped through the window and saw deceased lying on the ground soaked with blood. She poured water on him at his request. She is the one who assisted in informing the police and securing transport from a neighbour to ferry deceased to the hospital.

The court had the liberty in observing the body language of Jennifer Nyoni. She is a middle-aged woman who was also a very convincing keen witness. We find her consistent and credible. Jennifer Nyoni's evidence places the accused at the scene of the offence and the time of the violent assaults. This was not disputed by the accused that he was at the scene and at the time and attacked the deceased. The only point of departure is the claim by the accused that he left the scene earlier than his colleagues. Again, on this point the accused prevaricated. He claimed to have left the scene on his own. Technically, insinuating that he left Boshu continuing with the onslaught. Later on, he then changed goal posts and he said he left with Boshu and was later joined by Nguruve before reaching his homestead.

The defence led evidence from the accused. He adopted his defence outline as part of his defence. The accused testified that the woman who had been snatched was his wife. He confirmed that his friend Bosha interrogated the deceased on this issue when they accosted him and his friend as highlighted by the first witness. He said that he was the first to assault the deceased because of his rude response when he was evidently in the wrong infuriated him. The accused person admitted to teaming up with Bosha in assaulting the deceased.

The court found the accused to be an unsatisfactory witness. In his evidence in chief, he did not want to mention that he was in the company of Integrity until after cross examination. He also did not disclose what role Integrity played when the two of them fought the deceased. He only stated that after he and Bosha fought the deceased they were overpowered and left the scene only to catch up with Integrity some distance away. The defence counsel Ms Magavude herself did not challenge or through, the accused the evidence of Jennifer Nyoni who said three people attacked the deceased up to the end and left the scene together after the fatal injuries had been inflicted.

In a nutshell, two witnesses saw the accused in the company of his accomplices attacking the deceased simultaneously and leaving the scene together. Their evidence supports each other. It is accused's single word against that of the two on this crucial aspect. The court is alive to the dicta in *R v Difford 1937 AD* that all the accused persons needs to do is to raise a probable defence. If it is not probable then the court is entitled to draw inferences. The multitude of discrepancies in the accused defence makes his defence unreliable and improbable. He was not a credible witness.

The issues that then arise are;

1. Whether or not the State has proved beyond a reasonable doubt that the accused individually and or in common purpose caused the death of the deceased.
2. Whether or not accused can be found guilty of murder with actual or constructive intention otherwise.

Common cause facts that have been proved:

- a) The accused was in the company of his two accomplices on the day, place and time of the stab attacks.
- b) Accused person started the assault on the deceased because of the response he had given to his friend.

- c) Accused and his colleagues were the aggressors and the provokers.
- d) Accused is the one whose wife was said to have been snatched by the deceased. It is this issue that triggered the wrangle.
- e) One of the accused gang members had an axe which was seen by two State witnesses.
- f) The deceased was stabbed to death. In other words, he died from the stab wounds inflicted by the accused and his accomplices.
- g) Prior to the incident in which the accused was a part to, the deceased had no other physical confrontation with anyone.
- h) The accused person was seen at the crime scene by the witness.

On analysis, from the facts and evidence led so far, no one actually perceived the accused holding a knife and stabbing the deceased. In that case, we have undisputed direct evidence of his presence and involvement but we only have indirect evidence of his stabbing the deceased.

It is uncommon that not every murder case needs an eye witness who actually saw the commission of the crime from A to Z. It is sufficient to draw inferences from the totality of proved facts. See, the case of *State v Mada HCC30/22*, *State v Shonhiwa 1987 (1) ZLR 215 (S)* & *Muyanga v State HH-79/13* & *R v Blom 1939 AD*.

Looking at the evidence holistically a reasonable inference can be drawn that the proved facts all point to accused's guilty rather than his innocence. He provoked the fight. He ushered the first blow. He claims to have been the wronged party with his wife having been stolen by the deceased. His bitterness effervesced to his friends. His friends were fighting his cause and his battle. Bosha provoked the situation on accused's behalf. The whole fight was as a result of the accused. He thus, cannot distance himself from the consequences of his and his friends concerted efforts of vengeance.

We find that the accused fits the definition of an accomplice as defined in s 196/7 of the Criminal Law Code. He cannot absolve or extricate himself from the doctrine of common purpose either. He knowingly associated himself with Bosha and Integrity. They were armed with lethal weapons. Any reasonable person would have subjectively foresaw that teaming up on a single person and assaulting him with lethal weapons all over his body, death would reasonably be an inevitable consequence.

In *Madzokere v The State SC71/21*, three conditions have to be met in order to conclude that the doctrine of common purpose applies. This case paraphrased and summarised the provisions of s 196 A. *Madzokere v The State* highlighted as follows:

The honourable judge highlighted that, principally, the State has to lead evidence tending to prove,

- i. Firstly, that the appellants knowingly associated with the person who killed the deceased,
- ii. . secondly that such association was with the intention that each or any of 11 them would kill or be prepared to kill the deceased and,
- iii. thirdly, that the appellants were present with the actual perpetrator when the fatal blow was delivered.

Section 196A reads: 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 or the knowledge that it would be committed, or the realization 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 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 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.”

In *casu*, the accused person and his co-accused on the run accosted the deceased with an axe on the issue of the accused person’s wife who had been allegedly stolen by the deceased. They attacked the deceased by ordering him to sit and then fighting him. In rendition, the deceased then died of stab wounds as described by autopsy report. The accused’s friends were fighting for his cause. They joined the accused to fight his war. The reasonable inference to be drawn is that they were in association and that a common goal and purpose to teach the deceased an unforgettable lesson not to snatch other people’s wives. The evidence that the accused was seen during the course of the fight up to the end has not been rebutted. The witnesses saw them fleeing the scene after the deceased had already been fatally wounded.

The accused wanted to hide behind Integrity partial confession of his involvement in the murder. That confession places the accused at the scene. We are cognisant of the fact that such evidence cannot be used to incriminate a co-accused. See s259 of the Criminal Procedure & Evidence Act [*Chapter 9:07*]. Nonetheless, since Ms Magavude alluded to the confession in her re-examination, she invited a confirmation from the accused of the fact that indeed he was at the scene of the crime at the relevant time, as well as his involvement in the fight.

The court cannot turn a blind eye to the accused's own confirmation of that part of his co-accused written and admitted testimony. In that regard, the State has proved beyond a reasonable doubt that the accused person acted in his individual capacity and in concert with his two accomplices at large to fatally assault the deceased as alleged thereby bringing about his death.

What remains is to consider whether the accused murdered the deceased with actual intention or constructive intent. There is a fine line between the two, particularly in this case. More so with the background that the accused and his friends way laid the deceased and then confronted him. One can easily be swayed to draw an inference reasonably so, that this was a well strategized and executed murder. Needless to say, given that even the weapons used, the gang attack and the savage murder, actual intention can be easily inferred.

Intention can be deduced from, the weapon used, the number of blows, where it was directed, the part of the body that was targeted and the intensity of the force exerted. See *Wairosi HH 57/2021*.

Disposition

In this case, the autopsy report needs no further elaboration. The preamble to this judgment says it all. Some of the knife wounds were 20cm deep. The heart and the lungs were lacerated, to mention but a few injuries. In addition, three people teamed up and assaulted a single youth, not only with their fists and boots but through the use of dangerous weapons. However, we are of the view that the State has not laid down evidence that the accused persons ultimate purpose and goal was a premeditated killing. Why? Because they first interrogated the deceased and then fought him. Had they planned to murder him they would not have, in our view engaged him into a discourse. They are thus guilty of murder with constructive intent rather than with actual intent. Accused person acted in common purpose with Integrity and Bosha to stab the deceased as has already been found.

A reasonable inference can be drawn that through the weapons used and the nature and extent of the injuries the accused persons, all jointly had the intention to kill and bring about the death of their victim. The accused did not disassociate himself until the deceased was fatally injured. He is just as guilty as the rest of the gang. He did not stop the fight. In teaming up to assault the deceased with lethal weapons the accused took the risk that death would occasion. There was reasonable foreseeability that death would ensue after assaulting the deceased in the manner alleged.

We find the accused guilty of murder with constructive intention. The murder was done in aggravating circumstances given the callous and heinous frenzied knife attack.

In sentencing the accused we have weighed the submissions made in mitigation against the victim impact statement and the pre-sentencing enquiry. The accused person is a youthful first offender who is not married. He spent less than two months in pre-trial incarceration. He is an artisanal miner belonging to a notorious gang. In aggravation, the accused person is at the heart of the whole criminal saga. He did not hide his anger and annoyance with the fact that his so-called wife had been taken by the deceased. Though, this was never supported nor confirmed by the first witness or any evidence. He and his two colleagues attacked a single youthful guy with lethal weapons. When they had subdued him and he was down, pleading with them they continuously fatally assaulted him with dangerous weapons. The deceased left a young family. Though, he belonged to another faction of artisanal miners, he was a responsible family man. His minor children have been left orphaned with no bread winner.

A clear message should be sent to all those in illegal mining enterprises who take the law into their hands through the possession and use of prohibited knives. It should be made loud and clear that no one is allowed to take law into their hands, assault and kill any other human being. See, *Sibanda 2006 (20 ZLR 22/14)*. Law enforcement agents and courts are there, respectively to arrest, maintain peace and order and legally settle disputes. A deterrent sentence is called for. Precious life is lost over very minor resolvable issues. Gangsterism must be nubbed in the bud guided by the case of *State v Makuchete HMT 7/2016*, where the court upon convicting the accused person of murder with legal intent and after making a finding on aggravating circumstances convicted him for 25 years. In light of the sentencing principles there is need for deterrence rather than reformation. The law in s 197 (2) allows for an accomplice to receive the same punishment as the principal or co-perpetrator. Had

Integrity been arrested and convicted. Judging from his confession, he would have suffered the same fate. The accused person is sentenced to 25 years imprisonment effective.

National Prosecuting Authority for the State.

Emmanuel Samundombe & Partners, for the accused.