THE STATE
Versus
LAST GONGA
And
ADMIRE GONGA
And
NELAON GONGA
And
OSCAR PFUPAJENA

HIGH COURT OF ZIMBABWE
BACHI MZAWAZI J
CHINHOYI, 30 MAY – 24 JUNE 2024

Assessors: 1. *Mr. Mutombwa*
2. *Dr. Mashavave*

Criminal Trial

G. T. Dhamusi, for the State
D. Chikwangwani and M. James, for the 4 accused

BACHI MZAWAZI J: The four accused persons are brothers. The first three are from the same biological parents, whilst their father and that of the fourth are brothers. The three fraternal brothers stay in the same household, under one roof but different rooms. Accused four resides a small distance away at his own homestead. This criminal offence took place at the three accused persons‟ home and compound.

The common cause and undisputed facts are that, on the 6th of September, 2022 at Gonga homestead, Gazmark, Farm Kadoma, the four accused persons individually, and in concert assaulted the deceased, Mark Taonameso to death. They bombarded the deceased with an avalanche of stone and brick missiles capped with sjambok assaults all over his body. The deceased died on the spot. The autopsy report confirmed the cause of death as due to assaults resulting in extensive brain and head injuries. Severe and multiple wounds were also depicted on the head, face, left rib, legs and at both his back and front torso.

It is not in dispute that, it is the conduct of all the four accused persons that caused the death of the deceased. The *actus reus* is present. What needs to be established and proved by the State through evidence is the *mens rea. Is there dolus directus, dolus eventualis, culpa* or lack of it.? In other words, did the accused persons intend to cause the death of the deceased, were negligent or they have a defence that completely absolve them from any culpability?

Apparently, there is no independent eye witness to the events of this tragic day. The State case is born largely from the accused persons‟ version of what transpired on the day. The State led evidence from four witnesses, all members of the police force. The first witness, from the police support unit, is a very close relative of the accused persons and stays a few kilometres from their house. It was evident from the onset that his evidence was tailored in favour of exonerating the accused persons. As such, his evidence was mainly relevant in that, he was said to be the first to arrive at the scene of the offence after being summoned by two of the accused persons. He found the deceased already dead. To this extent he was found credible. He mentioned receiving a machete from accused two who was holding it as soon as he emerged onto the scene. This was not said in his evidence-in-chief, but after a leading question was asked, in that regard by *Mr Chikwangwani*, defence counsel for the accused. He stated that he handed over the machete to the investigating officer, which was rebutted.

The second State witness‟s evidence was corroborative of the first‟s in that the accused did kill the deceased in the manner alleged on suspected intention to steal their donkeys. This was the investigating officer. He too in his evidence in chief did not state that he saw any machete or torch. Again, the defence counsel pushed him to the wall, to solicit an admission that there was a machete. The witness unconvincingly, admitted being shown by accused one, some home- made knife which looked like some machete of some sort, but did not conclude it to be such. However, he confirmed not collecting or booking any machete as an exhibit in the police exhibit log book.

Though the investigating officer did a pathetic investigative role in this case, his evidence was credible. He fell short of an astute police officer by failing to have the warned and cautioned statements, as well as, the indications and sketch plan confirmed by the Magistrate. He did not make further follow-ups to ensure the confirmation of the documents was done, after his first failed attempt to do so due to his late arrival at court.

As a result, the said two important pieces of evidence did not make part of the evidence produced in court by the State. The State proposed to rest its case after this second witness. The court was of the view that the admitted evidence of the other two police officers in the company of the investigating officer, would assist in the clarification of the machete issue, the presence of any other witnesses, amongst other, hazy aspects of the State case. It proceeded in terms of s232 of the Criminal Procedure and Evidence Act, Chapter 9:07 and recalled the other two police officers. The State though *dominus litus*, for one reason or another failed to conduct a trial within a trial, even at that stage, though it sought reliance on the sketch plan and the indications. It was prudent that it could have taken this route.

The third State witness, attested that he never saw a machete nor a torch at the scene of the crime, in the car or at the police station. This witness was consistent and credible. He was present when the accused persons were interviewed and made indications. It was his testimony that there was never any mention of a defence of any form but an attack on a suspected donkey thief. He was steadfast under cross examination. He did not shake or falter. The last State witness‟s evidence had no probative value as he was restricted to crowd managing, ironically, oblivious of the surrounding happenings.

That being the case, it is the accused persons‟ defence that they acted in defence of the individual, self, each other and their property, therefore they are entitled to an acquittal. In a rehearsed unison, they all said the deceased was armed with a machete which he intended to use on them but never did. Further, that he was also equipped with a torch and would pick bricks whilst holding the said two items and throw randomly at the four of them. Their evidence had in common the fact that the donkeys were near a scotch cart near their crumbled kitchen which separated the two standing structures in their compound.

They all confirmed that the deceased was attacked at the spot where the donkeys were harnessed to the scotch cart from the onset up to the time of his death. They all admit that they catapulted the bricks and stones from four different angles aiming at one target, the deceased. It was their unified version that accused two then took a sjambok from the scotch cart and assaulted the deceased whilst he was already down. They all say the reason of further inflicting more injury to a man who was already down and wounded, was to extract information about his colleague‟s whereabouts, as they suspected his co-thieves may be hidden nearby. This is bizarre, as any would be accomplice would have either joined in

defence or fled the scene. They all affirmed that no response came from the deceased apart from a complaint that his head was very painful.

Noticeably, there were a lot of discrepancies in the four accused persons‟ evidence which also contrasted, that, of the State witnesses. To begin with, the State summary, which is made up mainly from the accused‟s rendition of events, the donkeys where in a pen some distance away from the homestead. This was not supported by the accused persons‟ testimony in court. They all said there was no pen but a crumbled kitchen in the vicinity of the yard. The donkeys were in the same yard sanguaged by and in the proximity of the only two dwelling buildings on this compound.

Sequentially, the first accused said that the presence of the deceased was heralded by the barking of dogs which awakened him alone prompting him to go outside. When he was outside, he saw the deceased already harnessing the donkeys. The deceased saw him and he, the first accused threw the first brick. He later went in to inform the second accused and together they planned to approach the deceased from different angles, one from the back, the other in front. In variance, the second accused stated that he too was awaken by the dogs, soon after they liaised a plan of action with the first accused and left the room together to confront the suspected thief.

The first accused stated that he is the one who retrieved the machete from the deceased after he had laid it down beside him when overwhelmed by the stoning. He said that accused two is the one who gave it to the police. This contradicts both the version of the first and second witness in respect to who handed over the machete to the police. The four accused persons differed in their description of how the deceased held both the torch and the machete whilst pelting them with stones. Some said he held the two objects together in his left hand whilst the others said he held the torch with one hand whilst the machete with the other.

All the accused persons told the court the machete was never used to attack any of them. At one stage, the deceased is said to have been only two metres from the second accused facing him but did not charge, throw or strike him with the said machete. All the four accused persons dismally failed to explain the feasibility of one who was shouting threats‟ continuous cling to a weapon which he does not use whilst under a barrage of stones and brick shower. Further, how he would still be holding to both the torch and machete under such fire? How the deceased could manage to bend and pick bricks in an unfamiliar territory, but not letting go of the two items?

The accused persons wanted the court to believe that the deceased would torch one accused at any given time in order to launch an attack on him whilst turning his back on the three others who were all throwing bricks. This is beyond logic. Common sense says, it is more of a fable than the truth of what happened. Schreiner JA in *R v Nhlapo* (AD 10 November 1952) quoted in *R v Bellingham 1955 (2) SA 566* (A) at 569). It has been said more than once that the exercise of caution must not be allowed to displace the exercise of common sense.

What further complicates the accused persons‟ story is that the deceased would take cover from the donkeys after every time he retaliated. Surprisingly, neither, the donkeys, the scotch court nor any single one of the four accused persons was hit by the bricks allegedly thrown by the deceased. All the accused and their property escaped unscathed in comparison to the wounds sustained by the deceased, as evidenced by the autopsy report.

This leads us to the question, was there self -defence, defence of a third party or property given how the events leading to the death of the deceased unravelled?

On analysis, our factual finding is that, the deceased was an intruder on the accused persons‟ homestead *cum* property is apparent. What will remain unanswered and can only be explained circumstantially is what his mission there was? For all we know, he may have trespassed as a vagabond, lost person, drunkard or mentally challenged person who strayed onto this property guarded by loudly barking dogs. Nevertheless, with the deceased dead with his own version of what transpired and in the absence of evidence of his general mental state at the time, it is the accused‟s word that gets the benefit of the doubt that he intended to steal.

Nonetheless, if we interrogate the accused‟s suspicion that the trespasser was a thief, we find that is not supported by evidence. Firstly, the donkeys never moved an inch. They remained on the spot where the accused persons had left them which is the same place the deceased was attacked and died. There were dogs on this premises which barked alerting the inhabitants of the place of an intruder. They even awakened the fourth accused who lived a considerable distance away. These dogs were not caught in the cross fire or help in apprehending the suspected thief. This is not consistent with an attempted theft or an act of theft at all.

Further, the machete was conspicuously absent from the exhibits taken from the scene to the police station and the court room. The torch was not even there. What was brought as exhibits are the bricks and sjambok. Marrying this with the fact that a cornered thief would fail in using a weapon he had brought in the first place and then scrambles for bricks in an

alien homestead is an insult to common sense and logic. It casts a doubt on the presence of any of the alleged objects. To think, a would-be thief would rather die such a miserable death whilst in possession of a lethal weapon and never ever uses it in his defence is absurd.

In addition, in the darkness of the night, it is illogical that an intruder will light a torch to expose himself and become an open target. The torch would be of assistance only to his attackers who will be attracted to their target, like flies and insects to the light. To envisage a situation whereby one turns torches one side and then changes whilst still under constant attack is a fit only capable from characters in science- fiction movies. This inevitably leads us to the factual conclusion that there was no torch and no machete.

All the accused persons sang a song justifying, their rampage in the stoning of the deceased to death, that they wanted him to relinquish his machete grip. The assaults did not stop after the alleged release of the machete, if any. A sjambok was then introduced to further punish the deceased. The court is cognisant of the fact that in terms of sections 253, 254,257,258 and 259, if all the elements set out therein are met the defences of the person, third party and or, property can be a full defence. The court is also mindful that a subjective rather than an objective test should be employed in order to experience the accused"s person interpretation of the situation, their inherent fears and reactions. However, a concerted rampage of throwing bricks weighed to be 71kg at a person, only points to people who were carried away in the excitement of the moment and mob psychology rather than the fear of a trespasser.

In summary, the essential elements common to the triad of statutory defences outlined above are, that firstly there must be an unlawful attack which has commenced or imminent. The perpetrators conduct must have been necessary to avert the unlawful attack. The means used to avert the attack must commensurate with the nature of attack or reasonable. The repelling attack must only be targeted to the invader. Lastly, the injury caused must be proportionate to the likely injury to be caused by the attacker. See, *S v Chirwa 66/23, S v Tengera* HCC27/24, *Sv Kanyawa* HH104/10 *S v Charuma* HH103/10, *S v Pistorius 2016 (1) SACR 431.*

In the case of *S v Chirwa,* above, the court had the following to say regarding the defence of self-defence,

"The provisions show that for the defence to succeed, the accused must prove that he or she was under an unlawful attack. An unlawful attack is unlawful conduct which endangers a person"s life, bodily integrity of freedom see s252 of the said Act. The force to defend himself or herself. The defence is available as a complete defence in cases where the accused used reasonable force to defend himself or herself. If all other requirements are met, but the means used by the accused to avert the

unlawful attack on her by the deceased were not reasonable or disproportionate, the defence will suffice as a partial defence and the accused will be found guilty of Culpable Homicide. see s254 of the Criminal Law Code 17”.

We are of the view from the analysis made above that, there was no self, third party or property defence. Given that, in rendition, not even a single accused person was struck by the deceased and not even the scotch cart donkeys or the houses of the accused were damaged in the alleged brick throwing war zone, the reasonable inference to be drawn is that there was never any unlawful or imminent attack.

Nevertheless, even if it is supposed that indeed there was, an unlawful attack or attempt to steal, which we refute, four persons would have managed to overpower the deceased without the use of lethal force. Further, the severity of the injuries on the deceased, illustrates the magnitude of the attack. In addition, the number of blows recklessly and indiscriminately thrown at a human being, not some dangerous animal or snake speaks to intention. Indeed, intention can reasonably be inferred from such callous conduct. We are not convinced that the accused‟s, „tripartite defence succeeds in the circumstances of this offence.

There is no doubt that the accused acted in common purpose. The requirements s196 A of the Criminal Law Code as amplified in the Supreme Court decision of *S v Madzokere The State* SC 71/21 are met. In *S v Mubaiwa & Anor 1992 (2) ZLR 362 (5)* the court held that if there is no prior purpose to commit the crime charge, an accomplice who did not contribute causally i.e. join can only be held liable if these requirements are met;

i. He must have been present at the scene.
ii. He must have been aware that the crime was being committed.
iii. He must have made this intention of common cause clear by some act.
iv. He must have had the *mensrea*.

In this case s197A, underscores that the mental element can be established by the mere presence of the accomplice at the scene as well as their participation in some action leading to the death of the deceased. See, *Mbatha & Ors* 1987(2) SA 272(A).

In *Ncube v S*, SC90/90, it was held that for a person to be liable of murder he must have done something causally connected with the deceased‟s death under the doctrine of common purpose. Active association with the common purpose, is also necessary, although the association can be implied.

Section 196A reads: Liability of co-perpetrators,

Section 2 provides:

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 behavior as a team or group prior to the conduct which resulted in the crime for which they are charged."

That the four accused acted in common purpose as deduced from their conduct and the observations made herein, is crystal clear.

Having noted that, the State advocates for a conviction on culpable homicide if the court is satisfied that the other elements of private defence have been fulfilled with the exception of the element of excessive and disproportionate attack. On the other hand, like afore said the defence vies for an acquittal. We are, however, not convinced that there was negligence. There is no culpable homicide to talk about given the injuries, the blows and the indiscriminate attack as observed above.

What then remains is to determine the intention and its nature thereof. The Supreme Court decision in *Dube v The State* SC 83/22, at page 8, outlines four crucial elements which are a summary of what needs to be proved for one to be convicted of murder.

It was noted that,

"It is trite that there are four basic essential elements that must be proved to sustain a conviction of murder. These are: - (i) causing death of (ii) another human being; (iii) unlawfully; and (iv) intentionally."

Apparently, going by the *Dube* case above, the first three elements are not in question. The four accused persons unlawfully caused the death of the deceased. We have already discarded the notion of imputing negligent killing given the manner the offence was committed. We have also alluded that intention can be inferred from various factors emerging from how the offence was executed. Presently, intention can easily be reasonably drawn from the fact that four grown men ganged to attack the deceased with lethal weapons until he lost his life.

Notwithstanding that, *dolus directus* is insustainable, as is apparent, in view of the sequence of events. In this case, the accused persons cannot be said to have set out with an aim to kill the deceased and proceeded to do so. There is no evidence that this was a premeditated

attack with the main objective to end life. This was an offence of the moment. See, **Burchell & Hunt,** *Principles of Criminal Law*, 4th Ed, at 409.

The oft cited case of *Mugwanda v* S-S-19-2002, defines and differentiates actual and legal intent. Additionally, Hungwe J, as he then was, in *S v Kurongera* HH 267/17 extrapolated on the aspect of intention and exclaimed,

> "Where there is no expression of such intent the law can infer such an intention from the accused‟s conduct and circumstances surrounding the commission of the offence and conclude that such an intent existed in accused‟s mind."

That being the case, we are of the considered view that the four accused persons in their continuous pursuit of throwing a litany of bricks at the deceased, a human being, the possibility of death being occasioned, was reasonably foreseeable, yet they persisted recklessly with the attack. They acted in association, reckless as to death will ensue. Not even a single one of them dissociated or restrained others from the continued attack. They even watched the second accused further assaulting an already broken man with yet another dangerous weapon whilst watching in spectacle.

In the South African case of *S v Pistorius 2016 (1) SACR 431 (SCA*), a case of persuasive authority, the Supreme Court of Appeal articulated the concept of *dolus eventualis* in murder cases as follows at paragraph 26:

> „In cases of murder, there are principally two forms of *dolus* which arise: dolus *directus* and *dolus eventualis*. These terms are nothing more than labels used by lawyers to connote a particular form of intention on the part of a person who commits a criminal act. In the case of murder, a person acts with *dolus directus* if he or she committed the offence with the object and purpose of killing the deceased. *Dolus eventualis*, on the other hand, although a relatively straightforward concept, is somewhat different. In contrast to dolus directus, in a case of murder where the object and purpose of the perpetrator is specifically to cause death, a person‟s intention in the form of *dolus eventualis* arises if the perpetrator foresees the risk of death occurring, but nevertheless continues to act appreciating that death might well occur, therefore „gambling‟ as it were with the life of the person against whom the act is directed. It therefore consists of two parts: (1) foresight of the possibility of death occurring, and (2) reconciliation with that foreseen possibility. This second element has been expressed in various ways. For example, it has been said that the person must act „reckless as to the consequences‟ (a phrase that has caused some confusion as some have interpreted it to mean with gross negligence) or must have been „reconciled‟ with the foreseeable outcome. Terminology aside, it is necessary to stress that the wrongdoer does not have to foresee death as a probable consequence of his or her actions. It is sufficient that the possibility of death is foreseen which, coupled with a disregard of that consequence, is sufficient to constitute the necessary criminal intent.‟

The Supreme Court of appeal confirmed that, the foreseeability test to be applied is subjective. The Supreme Court of Appeal says in this regard as follows at paragraph 29:

> „Furthermore, the finding that the accused had not subjectively foreseen that he would kill whoever was behind the door and that if he had he intended to do so he would have aimed higher than he did, conflates the test of what is required to establish *dolus directus* with the assessment of *dolus eventualis*. The issue was not whether the accused had as his direct objective the death of the person behind the door. What was required in considering the presence or otherwise of dolus eventualis was whether he had foreseen the possible death of the person behind the door and reconciled himself with that event.

Back home, in this jurisdiction, the same observations were made in *Mungwanda v State S/19/2000.* See, S v *Zimondi* HH179/15 and *S v Togara* HH13/17, *S v Phiri* HH581/16 and *S v Mupange* v-S-143-94. *Mungwanda v S-S-19-2002.*

In conclusion, we find the accused persons guilty of murder with legal intention.

Sentencing Judgment

The facts are common cause. The four accused persons have been jointly convicted of murder with constructive intent. They have been found to have acted in common purpose to bring about the death of the deceased. They stoned the deceased to death with stones and bricks. They further watched the second accused finishing the deceased off by assaulting him with a sjambok.

The court has considered and weighed the submissions in mitigation as well as those in aggravation against the victim impact statement and sentencing report. The court has also sought guidance from the principles governing sentence. That is a balance must be struck between the interests of the victim, the accused and society. Over and above all that the court has also taken into account the individual and unique circumstances of this case.

In mitigation, the accused persons‟ ages range from 26 to 36. They are all married with minor children. They lost both parents when growing up. They are not employed. In their favour is the fact that the deceased strayed onto their property for whatever reasons. Their dogs awakened them. They acted impulsively without giving themselves time to reflect. Their actions were more out of unrestrained excitement and mob psychology.

In aggravation however life was needlessly lost. Thief or no thief no one is not a law unto himself or themselves. There are mechanisms in place to deal with criminals. The accused persons‟ degree of blameworthiness is high in that they continuously pelted bricks or attacked a fellow human being with bricks. They did so even after noticing that he was alone and cornered. They went on an uncontrollable rampage inciting and motivating each other with no one prepared to restrain others or dissociate from the criminal enterprise. The use of bricks and acting as a group further exacerbates their degree of blameworthiness and culpability.

The accused persons were not remorseful. They continued to disrespect the dead by referring to the deceased individually and repeatedly as "the thief", yet there was no evidence on record that the deceased stole the donkeys nor wanted to steal them. Because of that stubbornness and adamancy the accused persons refused to confront the reality that they had killed a fellow human being. They did not make efforts to engage the family of the deceased so as to pay traditional reparations or assist in funeral arrangements.

The court would not have hesitated to sentence the accused persons to imprisonment for a considerably longer period, had it not been for the mitigation and sentencing report. This has watered down the ideal prison term envisaged in cases of this nature. Though their story is unbelievable and improbable, an intruder was indeed at their homestead in the late hours of the night. For that reason, a distinction should be made from those cases of drunken brawls and murder committed in the furtherance of a crime. In *S v Karanda HB 74/2017*, weapons were used in the murder in that case. The court found it appropriate to impose a sentence of 15 years.

In *S v Mungoza HMT 1/2018* the honourable court sentenced the accused person ten years for murder with constructive intent. These cases, however operated in a period when the new sentencing guide had not yet been promulgated and introduced. Statutory Instrument SI 146/23 sets that bar for the sentence of murder with constructive intent at 15 years against the backdrop of stated mitigatory factors. Most of these are present in the circumstances of this case. The overriding factors are that justice should be tampered with mercy and each accused‟s case should be treated on its merits. The accused persons are sentenced to, accused number 1, 3 and 4, 6 years imprisonment effective each. Accused number 2, due to his use of

sjambok on an already broken man, is sentenced to 8 years imprisonment. A leaf has been taken from the case of *S v Pistorius* (above) which is of persuasive authority. See *S v Poterai & Ors HMA 1/2027*.

Accordingly, it is ordered;

1. All accused persons are found guilty of murder with constructive intent.
2. Accused 1, 3 and 4 are sentenced to 6 years imprisonment each.
3. Accused 2 is sentenced to 8 years imprisonment.

The National Prosecuting Authority, State legal Representatives.

Chikwangwani, Tapi Attorneys, Accused's Legal Practitioners.