

THE STATE
versus
BERNARD MAKUCHETE
and
RABSON MAKUCHETE

HIGH COURT OF ZIMBABWE
MAFUSIRE J
MASVINGO: 2, 14, 20 & 30 November 2017; 22 & 30 January 2018

Criminal trial

Assessors: Messrs Mushuku & Dhauramanzi

Mr *T. Chikwati*, for the State
Mr *O. Mafa*, for the first accused, *Pro Deo*
Mr *F.R.T. Chakabuda*, for the second accused, *Pro Deo*

MAFUSIRE J:

- [1] The two accused were blood brothers. Together with their third brother, Richard Makuchete [**“Richard”**], they were arrested and charged with the murder of their cousin, Zvinowanda Zvinowanda [**“the deceased”**]. Richard has since been convicted and sentenced under judgment HMA 7-16. The State explained that there had been a separation of trials because the two accused herein had been unavailable by the time the case was ready for trial, and that in the interests of justice it had been decided to have Richard tried on his own.
- [2] The allegations were that on 10 May 2014, in rural Masvingo, under Chief Chikwanda, and following a beer drink at a certain homestead, the two accused and Richard, or one or other of them, unlawfully caused the death of the deceased by striking him with knobkerries and a slasher all over the body, intending to kill him or, despite realising the real risk or possibility that their conduct might cause death, nonetheless continued with it.

- [3] Both accused pleaded not guilty. The State called three witnesses, namely Edward Zvinowanda, the deceased's younger brother [**“Edward”**]; Vimbai Sithole, Edward's wife [**“Vimbai”**] and Munyori Zvinowanda, a cousin to both the Zvinowandas and the Makuchetes [**“Munyori”**]. These people; i.e. the accused; the deceased; Edward, and Munyori, were all closely related, being first cousins in the sense that their fathers had been brothers.
- [4] The synopses of the evidence of three further witnesses for the State were admitted without objection. They were Rashweth Mutaki, the police investigating officer [**“the IO”**]; Last Ziyambi, another police officer [**“Last”**], and Doctor T Nyasha, the medical practitioner who conducted a post mortem examination on the remains of the deceased and compiled a report [**“Dr Nyasha”**].
- [5] Edward's evidence, in summary, was this. On the day in question he and his brother, the deceased, were drinking traditional beer at a certain homestead. The two accused and their brother, Richard, were also drinking there, but not together with him and the deceased. At some stage, the first accused [**“Bernard”**], aged 25 years, the oldest of the three brothers [in HMA 7-16 it was incorrectly stated that he was 21 years old and that he was the youngest], stood up from their drinking place, approached Edward and provoked a fight. Bernard accused Edward that he had once assaulted him on some previous occasion. In court Edward admitted that he had once fought with Bernard but said that the incident had happened a very long time ago when they were youngsters and still growing up.
- [6] Edward said Bernard slapped him twice. He retaliated. The two started fighting. Richard and the second accused herein, Rabson Makuchete [**“Rabson”**], the third brother, joined the fight on Bernard's side. The deceased, who at 44 years old was the oldest of the lot, intervened and quelled the fight. Bernard turned on him. He accused the deceased of marital infidelity with his wife leading to the collapse of his first marriage.
- [7] The brawl eventually died. But the accused and Richard continued to shout at Edward and the deceased. The two of them decided to leave. The time was around 15:00 hours.

The accused and Richard followed later. At the deceased's homestead the three milled around the edge of the fields shouting. The deceased invited them inside the homestead in order to discuss the issue amicably.

- [8] The three brothers refused to enter the deceased's home. They later left for their own homes. The deceased; Edward; and their wives had supper together with Munyori, who had called on them. After supper the deceased and Edward walked Munyori to his own home. The time was now around 19:00 hours. There was plenty of moonlight. The three used a footpath that passed through the accused persons' homestead. On their way back, the three brothers confronted the deceased and Edward. The three were all armed with wooden knobkerries. In addition, Richard was armed with a metal slasher.
- [9] With no prior ado Richard struck Edward on the top of his head with the knobkerrie. Edward fell down. Bernard and Rabson joined in and started beating Edward with knobkerries as he lay on the ground. Bernard soon turned on the deceased whom he struck with a knobkerrie. Richard and Rabson both joined the assault on the deceased. Richard was using a slasher and Rabson a knobkerrie. The three of them randomly assaulted the deceased with their weapons all over his body. He had fallen down. He was wailing asking why they were killing him. The three continued to assault the deceased until he went limp. Edward said all the while he lay bleeding very close by and that he could see everything that was taking place. There was a lot of shouting and lots of noise.
- [10] At some stage Vimbai and Tecla Matema, the deceased's wife [**"Tecla"**], approached the scene. Bernard and Richard chased them away. Richard came back and ordered Edward to carry the deceased home. The deceased was lying face down, lifeless. Edward was himself in no state to lift the deceased on account of the assault on his own person. He staggered to the deceased's homestead and found both Tecla and Vimbai waiting. He told them that the deceased had died. Tecla wailed. Eventually Edward was ferried to hospital where he was admitted for two days. A report was made to the police. They came immediately. But all the accused persons had fled. However, they were all apprehended four days later at the homestead of one of their uncles, Winston Zvinowanda [**"Winston"**] which was in another chiefdom.

- [11] Edward said all the three accused persons were subsequently tried in the magistrate's court for the attempted murder of himself. He said he gave similar evidence. But he did not know the exact outcome of that case, save to say that Richard had been sent back to custody and his two brothers released.
- [12] The next State witness was Vimbai. The material portions of her testimony were that she witnessed the assault on both Edward and the deceased. Together with Tecla they had crawled to the edge of the maize field near the accused's homestead. They had been attracted by the noise of the struggle. Richard chased them away.
- [13] The next State witness was Munyori. He had been at the beer drink on the day of the fight. He witnessed the first brawl between Edward and Bernard at the traditional beer drink earlier in the day. Munyori's evidence on this aspect was contradictory. According to his evidence-in-chief, it was Bernard who provoked the brawl. He said Bernard shouted at Edward that he [Edward] had once beaten him up. Bernard had stood up from the place where he had been seated and had approached Edward. He slapped Edward twice. It was then that Edward had retaliated and the two had fought. The deceased had quelled the fight. However, under cross-examination, Munyori maintained it was Edward who had provoked the fight; that it was Edward that had slapped Bernard first; and that Edward had lied if he told the court that it was Bernard who had hit him first. Munyori was emphatic that it was Edward's tomfoolery on the day in question that had ultimately led to the death of the deceased.
- [14] Munyori did not witness the fatal assault on the deceased later on that night. He confirmed his having had supper at the deceased's homestead and the deceased and Edward having walked him home. He said when the three of them had passed through the accused's homesteads none of them had appeared.
- [15] The gist of Rashweth's summary of evidence that was admitted without objection was that he had arrested all the accused persons from their hiding place in a village under another chief. He had brought them back to the scene of the crime. None of them had any injuries. After properly warning and cautioning them he had taken them for

indications, and had recorded their statements which they had made freely and voluntarily. They had admitted that the murder weapons belonged to them.

[16] Last's summary largely corroborated that of Rashweth. He accompanied Rashweth on the arrest mission. He witnessed the recording of the accused's warned and cautioned statements.

[17] The last summary was that of Dr Nyasha. From his post mortem examination of the body of the deceased, he observed deep cuts on the deceased's head and forehead. He observed bruises on the chest. From such observations he concluded that the cause of death had been head injury.

[18] That was the State's case. None of the murder weapons was produced. Mr *Chikwati*, for the State, said all three accused had once been tried in the Regional Magistrate's court for attempted murder in respect of the assault on Edward. They had been the same weapons produced in that trial. Apparently after the conclusion of the trial, all those weapons had been destroyed on the orders of the court.

[19] The accused's warned and cautioned statements were also not produced. None of the parties said anything about them.

[20] Both accused persons gave evidence. It was very similar, almost identical in some respects. The material aspects of their evidence were these. They confirmed the brawl at the traditional beer drinking place. They said Edward had provoked it. Bernard said Edward accused him that he had once beaten him up sometime in 2004. It was Edward who had struck Bernard first. Bernard had retaliated. The two had fought. Bernard had overpowered Edward. The deceased had got up and restrained them. Edward had produced a knife wanting to stab Bernard. But he had been restrained by other people. The owner of the homestead then asked that everyone answering to the name Makuchete should leave the place because they had fought at a traditional beer drink. Edward and the deceased had been the first to leave. The three brothers had followed later.

- [21] The accused admitted the fight with knobkerries at the edge of their homesteads. But their version was at variance with that of the State witnesses. They maintained that Edward and the deceased had provoked the fight. Bernard said he had already retired to bed with his wife when Rabson had come knocking at the door. He was shouting that Edward and the deceased were fighting Richard at his home. When he went to find out Edward stabbed him with a knife on the top of his head. He bled profusely.
- [22] Both accused denied that they had fought with either Edward or the deceased, let alone joined Richard in assaulting the deceased. They maintained that only Richard had fought with the deceased. They maintained that both Edward and the deceased had been armed with knobkerries which they used to fight Richard.
- [23] Bernard said that after Edward had stabbed him with a knife, he fell down. Edward left him to join the deceased in fighting Richard. He [Bernard] woke up and went home. He washed off the blood from his head. Later he went to make a report to the village constable, one Cephass Tebwe [**Cephass**], about Edward having stabbed him with a knife. At that time he was not aware of the deceased's death. From Cephass' place Bernard said he came back home. But a number of people were now gathered. That is when he learnt that the deceased had died. One of their cousins, Ishmael Zvinowanda, was threatening revenge. He was shouting that nobody was going to sleep at that homestead that night. Fearing for their lives all the three of them had run away and sought refuge at Winston's house.
- [24] The accused said they arrived at Winston's place very late in the night. They informed him of the fracas and sought his mediation and counsel as the surviving patriarch of the entire extended household. Winston immediately left for the scene. He did not come back until about two or three days later when they were arrested by the police.
- [25] The accused said they had once been charged for the attempted murder of Edward but had both been acquitted.
- [26] Rabson called two witnesses: Cephass and Winston. Cephass confirmed that that three brothers had knocked on him late in the night of the fateful day. They reported that the

deceased and Edward had come to their place and that there had been a fight. They said that Edward had stabbed Bernard with a knife on the head. Cephas said he had seen Bernard bleeding. Quizzed on this by the State, Cephas conceded he had seen no wound on Bernard but merely blood on his person.

[27] Cephas also said that he advised the three that he would call on them only on the following day. He said on the following day he had gone to the accused persons' residence with the intention of arresting both Edward and the deceased. However, he aborted the mission when he learnt that the deceased had died the previous night. He also observed that the regular police details were already in attendance. The accused had fled.

[28] Winston's evidence confirmed that the three accused had indeed taken refuge at his homestead after the fracas. However, there was a material discrepancy in the narrative. The accused said when they called at Winston's house it was them that informed him of what had taken place. It was only after their report to him that he had left for the accused persons' homesteads. However, Winston said he never saw them on the day. He heard of the news of the fracas from his sister-in-law, Esther, the accused persons' own mother. She had travelled all the way from her village to inform him of the incident as the patriarch. Together with Esther, Winston had departed that very night. He stayed at the accused persons' homesteads throughout the duration of the mourning period. He said it was about one and half [1 ½] weeks. It was on the second or third day after the incident that the accused, Bernard in particular, had contacted him on the mobile telephone to inform him that they had taken refuge at his homestead. The accused wanted him to resolve the matter. Winston said he immediately informed the police about the telephone call. The police then went and arrested the accused.

[29] That was the defence case. In his closing submissions, Mr *Mafa*, for Bernard, the first accused, seeks an outright acquittal from the charge of murder, or any other offence. He argues that Bernard had not at all been involved in the assault on the deceased and that none of the State witnesses could be believed. Mr *Chakabuda*, for Rabson, the second accused, tacitly admits that Rabson was armed with a knobkerrie; that a knobkerrie could not have inflicted such fatal injuries; that the State had failed to prove the element

of common purpose; but nonetheless that Rabson's actions could be regarded as having been negligent, and that therefore Rabson might be found guilty of culpable homicide in respect of the death of the deceased.

[30] The accused persons' version of events was manifestly contrived. It did not add up. It is unworthy of belief. Each of them was at pains to down play their own roles in the whole violent incident. They denied any assault on either Edward or the deceased. In respect of the deceased, they alleged it was Richard who single-handedly fought him with knobkerries and a slasher. Ironically, at his own trial, Richard distanced himself from any altercation with the deceased. He blamed it all on Bernard and Rabson, the two herein.

[31] Some aspects of the accused persons' version of events that we have rejected include the following:

- That at the beer drink earlier in the day, it was Edward, not Bernard, who had provoked the fight. Munyori, who seemed more favourably disposed towards the accused, said, before his summersault, that it was Bernard who had provoked the fight. To us, that it was Bernard, and not Edward, who had started the fight, was more believable. Bernard had a motive. At least he deemed himself to have an unresolved grudge against Edward, dating back to their childhood tiffs and brawls. Furthermore, although in his evidence he claimed to have been unbothered by the issue of the alleged affair between the deceased and his former wife, whom he called a loose woman, it seemed the wound had never quite healed and had remained a festering sore point.
- It is common cause that the deceased died from the injuries sustained on the night in question. Richard's role in the brawl is beyond question. Among other things he has since been convicted. Both accused confirm he had a slasher and that he used it to assault the deceased. Both confirm knobkerries had also been used, only that they said it was Richard and the deceased using them against each other. But there was no significant challenge to the evidence of Edward and Vimbai on this point. They were direct eye-witnesses. They remained firm in their evidence that the two accused persons fully and actively participated in the assault of the deceased. Furthermore, there is the

admitted evidence of Rashweth. He said the accused had freely and voluntarily admitted the murder weapons as belonging to them.

- That Edward was armed with a knife which he used to stab Bernard with was manifestly a concoction. It is not believed. If Bernard had been stabbed and had been injured to the degree imagined, then the wound would definitely have required proper medical attention. But he sought none. In contrast, Edward, whom they assaulted and left for dead, had to be admitted in hospital for two days. The deceased died. Cephas' evidence takes the accused's case no further. He did not see any wound on Bernard, only blood. But it was evidently his victims' blood. Rashweth's summary of evidence said none of them had any injuries.
- The accused ran away after the offence. If they had been the victims of the assault they should have reported to the regular police. Cephas was just an old man and a villager, albeit a member of the village constabulary.
- The accused openly lied that when they sought refuge at Winston's house they found him there and informed him of the incident. Winston, their own witness, denied this. He said he heard of the incident for the first time from Esther, and that until they were arrested he had not seen the accused.

[32] That Richard might have delivered the fatal blow, as urged upon us by Rabson's Counsel, is completely immaterial, given the circumstances of this case. All three of them had made common purpose with one another since the fight at the traditional beer drinking place earlier in the day. To Bernard's fight with Edward, Richard and Rabson had joined in. They were in one another's company from the beginning to the end. They were in one another's company when they called on the deceased's homestead later in the evening. They were all armed with knobkerries when they assaulted the deceased. Richard just did have the slasher as an additional weapon. All of them were armed for the purpose of assaulting Edward and the deceased. The assault was severe, sustained and brutal. They only abandoned it after their mission had been accomplished. Only when the deceased had become motionless did they leave him.

[33] The doctrine of common purpose says that where two or more people agree to commit a crime, or actively associate in a joint unlawful enterprise, each will be responsible for specific criminal conduct committed by one or other of them which falls within their common design. Liability arises from their ‘common purpose’ to commit the crime: see JONATHAN BURCHELL *Principles of Criminal Law*, 5th ed. at p 477.

[34] In murder cases, the act of one in causing the death of the deceased is imputed, as a matter of law, to the other or others. Prior planning is not significant. A common purpose needs not be derived from an antecedent agreement. It can arise on the spur of the moment and can be inferred from the facts surrounding the active association with the furtherance of the common design: see *S v Safatsa & Ors*¹.

[35] The requirements for common purpose are:

- presence at the scene of crime;
- knowledge of the criminal act;
- intention to make common cause with the actual perpetrator of the crime;
- manifestation of a sharing of a common purpose with the actual perpetrator of the crime by the performance of some own act of association with the conduct of the perpetrator;
- *mens rea*, [either in the form of *dolus directus* or *dolus eventualis*] in respect of the perpetration of the crime;

See *S v Mgedezi & Ors*²

[36] *In casu*, just about every aspect of the accused persons’ conduct on that night classically fits into all the facets of the doctrine of common purpose.

[37] The court is satisfied that the State has proved its case beyond any reasonable doubt. We find that the accused actually did intend to kill deceased. They desired his death. They willed the result that ensued. Until he stopped moving, the accused continued to

¹ 1988 [1] SA 868 [A]

² 1989 [1] SA 687 [A]

pummel him. Therefore, both accused are hereby found guilty of the murder of the deceased, Zvinowanda Zvinowanda, with actual intent.

[38] Regarding the appropriate penalty, we have taken into account the fact that the murder was not committed in aggravating circumstances as contemplated by s 48[2] of the Constitution; s 47 of the Criminal Law [Codification and Reform] Act, *Cap 9:23*; and s 237 of the Criminal Procedure and Evidence Act, *Cap 9:07*. As such, the death sentence is out of consideration.

[39] In mitigation, Defence Counsel highlighted the personal circumstances of the accused. Both accused are married. They have children. Their wives, children and other members of their extended family depend on them for support. They have no regular or formal employment. Bernard is self-employed as a bricklayer. Rabson assists him. Defence Counsel pressed for a short term of imprisonment to enable the accused to reunite with their families sooner.

[40] Counsel also highlighted the accused persons' ages. Bernard is now thirty three [33] years old, and Rabson twenty six [26] years old. It was argued that, at twenty five [25] and twenty one [21] respectively, the accused were still relatively young at the time of the offence. They had started drinking early in the day and must have been under the influence of alcohol. Counsel also argued that, despite the finding of common purpose, the accused persons' participation in the crime was relatively less involved than Richard's and that therefore, their moral blameworthiness was markedly lower. With Rabson in particular, it was said that he just thoughtlessly made common purpose with his elder brothers.

[41] Mr *Mafa* pressed for a term of imprisonment of between ten [10] to fifteen [15] years. Mr *Chakabuda* said twelve [12] years.

[42] For the State, Mr *Chikwati* stressed the brutal and sustained assault that characterised the offence. He argued that the murder was undoubtedly premeditated. He said the accused harboured a grudge against the deceased whom they held responsible for the collapse of Bernard's first marriage by having an affair with Bernard's first wife.

- [43] Mr *Chikwati* further urged us to consider that none of the accused had been contrite. In Richard's case we pointed out that the deceased had been a very close relative. We said the English word "cousin" kind of puts distance in that sort of relationship. In traditional African culture, the accused and the deceased were practically brothers by blood. Ever since the commission of the offence the accused have strenuously disowned responsibility.
- [44] Mr *Chikwati* called for twenty five [25] years imprisonment for each of the accused. He pointed out that in Richard's case we would have imposed thirty [30] years imprisonment but reduced the period to twenty five [25] on account of the fact that Richard was already serving an additional seven [7] years imprisonment for the attempted murder of Edward.
- [45] We have taken both the aggravating factors and the mitigating circumstances into account. The assault on Edward and the deceased was one single act of criminality. Alcohol must have reduced or diminished self-control. This might have been compounded by the accused persons' youthfulness. Nonetheless, life was needlessly lost.
- [46] Sentencing is a complex exercise. It is all about striking a balance to achieve a certain equilibrium. It is not about mathematical precision or moral exactitude. There is no tariff system. The principle of *stare decisis*, i.e. "to stand by things decided", namely, to follow similar decisions in similar cases, is important, but not overriding. Sentencing is akin to feeding disparate factors into the proverbial judicial computer; letting it process them; blend them; and finally emitting the appropriate globular penalty that suits both the offence and the offender. In the case of two or multiple offenders convicted for the same offence, individual circumstances are definitely taken into account, but not with such a pedantic or doctrinaire adherence as to upset the equilibrium.
- [47] Therefore, taking all the various factors into account, each accused is hereby sentenced to twenty five [25] years imprisonment.

30 January 2018

A handwritten signature in black ink, appearing to read 'M. J. M. M.', is written over a horizontal line.

National Prosecuting Authority, legal practitioners for the State;
Mutendi, Mudisi & Shumba, legal practitioners for the first accused, *Pro Deo*
Chakabuda Foroma Law Chambers, legal practitioners for the second accused, *Pro Deo*