

THE STATE
Versus
JOROMIAH MUTOTI

HIGH COURT OF ZIMBABWE
MUZOFA J
CHNHOYI 25 October, 3, 17 November 2022 & 24 January, 27 February & 3 March 2023
Date of written judgment 25 August 2023

Criminal Trial

Assessors, *Mr Chivanda*
 Mr Manyangadze

T.H. Maromo, for the State
F. Murisi, for the Accused

MUZOFA J: The accused was charged together with three other co - accused persons of one count of murder in contravention of s47 (1) of the Criminal Code. The State alleged that on the 2nd of November 2020 the accused acting in common purpose with his three co accused persons assaulted one Charles Cherachera with knobkerries, logs and clenched fists leading to his death. The accused denied the offence.

At the close of the State case, an application for the discharge of the three co- accused persons was made in terms of s198(3) of the Criminal Code. The application was granted in a separate judgment. The trial then proceeded in respect of the accused person before the court.

The background to the case is as follows. The murder took place at Old Citrus Farm Chinhoyi ‘the Farm’. The accused together with hundreds of other people occupied the Farm prior to its acquisition by Government under the land reform programme. The Farm was subsequently offered to one Philip Chiyangwa ‘Phillip’. In terms of s3 (2) (a) of the Gazetted Land (Consequential Provisions) Act (Chapter 20:28) ‘the Act’ these occupiers or settlers were required to vacate the Farm within 45 days. They did not leave the farm. Although they did not hold any valid claim of right in the form of an offer letter, permit or land settlement lease they had their excuses. There were running battles including litigation between the Phillip and the settlers. Eventually Phillip resorted to legal process. He obtained a writ of execution for the eviction of the settlers after a successful prosecution under the Act.

The Messenger of Court, Chinhoyi evicted some of the settlers in terms of the writ. It appears the eviction was not a walk in the park. There was a lot of resistance, houses and fields were burnt in the process. The already tense relationship between Philip and the settlers became worse. A security company known as National Eye Security was engaged to keep order and peace at the Farm.

The deceased was one of the security guards employed by National Eye Security. He was the man in charge of the guards on the 2nd of November 2020. They conducted some patrols checking for some illegal settlers. They met the accused and many other people. What transpired thereafter is heavily disputed.

The State Case.

To prove its case, the State produced a number of exhibits by consent. A post mortem report prepared by Dr Bwanamwale who examined the remains of the deceased was produced. The post mortem report showed that death was due to acute kidney injury. A ballistics report, a firearm certificate a 12 bore Stephens shot gun, .38 amadeo revolver a sketch plan and the accused's warned cautioned statements were also produced. The evidence of three witnesses Tapiwa Chikura, Stephen Pofa, Trust Magwaza, Arimon Mirimbo, Robson Mbudzi and Jackson Bwanamwale was formally admitted as summarized in the outline of the State case. Generally, their evidence did not implicate any of the accused persons.

Four witnesses gave oral evidence. The first witness was Tafadzwa Mapanda. He was part of the security guards who patrolled the Farm on the day. He said they were about 19 security guards patrolling the Farm. Along the way they saw stones blocking the road. They then saw a group of people approaching them. The deceased being the man in charge, ordered them to sit down some distance from this group of people. Some of them had machetes, catapults and hoe handles. The deceased, Tafadzwa and Opon advanced towards the group of people. He heard some gunshots. He, together with other security guards ran away and tried to call the police. He could not identify any of the assailants. He confirmed that the deceased and Opon were injured.

Opon's evidence was highly contested. He said they received information that the Farm owner was to visit the Farm. They were directed by the foreman to do some checks if the settlers were still in the Farm. While they walked around, they saw a group of people descending from a mountain. Nearby there was a hut. There was a child in the hut. We were not told the age of the child. The deceased asked the other guards to sit some distance away. He together with the deceased advanced towards this group. The deceased was armed with a revolver and he had a shotgun. These people were armed with machetes, catapults, stones and hoe handles. They tried to engage the settlers but the engagement soon deteriorated into a chaotic situation.

A mob had gathered around the deceased and they were assaulting him. He heard a gunshot. He did not know who fired the gun. When he saw the deceased under attack, he fired into the air to calm the situation. Instead of calming the situation, the assailants turned to him. Before he could fire a second shot, he was manhandled and thoroughly beaten by the assailants. He identified the accused as one of the assailants. He was taken to Harare. Thereafter investigations took place culminating in the case before the court

Charles Machingambi's evidence did not add value to the State case. The accused called him seeking transport to Harare. They wanted to take the accused before to hospital as he was injured. He was not at the scene of crime. He did not know what transpired. Detective Assistant Inspector Marwa was the last State witness. He was the investigation officer. He

drew up the sketch plan on the accused and witnesses' indications. He recorded a warned cautioned statement from the accused who denied the offence.

The State then closed its case. It is then that an application for discharge already alluded to was made.

The defence case.

In his defence outline which he adopted in his evidence in chief. The accused had a different narration of what transpired on the day. He was one of the settlers at the Farm. On the fateful day he left his homestead in the morning around 0800 hours to herd his cattle. While he was in the pastures, he saw a group of security guards from National Eye Security Company. He approached them. As he drew closer to them two of them pointed guns at him. They ordered him to sit down. He refused and drew backwards. The two shot him thrice on his left hand and he fell down. A group of people gathered and chased the guards. A certain woman approached him as he lay down. He requested her to call his brother Lazarus Zhou. Lazarus dutifully arrived. He saw some people standing with Opon and the guards' firearms on the ground.

The law

For the accused to be convicted on a charge of murder, the State must prove beyond a reasonable doubt that the accused was both the factual and legal cause of the death. The factual cause is the *actus reus* where the State must establish some conduct on the part of the accused leading to the death of the deceased. The legal cause is the intention. The intention can be inferred from the circumstances of the case like the weapon used, the part of the body the blows were directed and the number of blows. The circumstances surrounding the commission of the offence can also point to the intention.

In this case the accused's liability is based on both direct and circumstantial evidence. In its closing submissions the state relied on the doctrine of common purpose to pin liability on the accused. The doctrine of common purpose is now codified under s196A on co-perpetrators and s 197 on accomplices.

The defence in its closing submission raised a salient point that the accused cannot be convicted on the doctrine of common purpose when his co accused persons were acquitted. Put differently, the issue is whether the doctrine is applicable where one person is before the court.

Section 197 (2) (b) of the Criminal Code deals with the liability of accomplices. In terms of that section, it is competent to charge and convict an accomplice even if it has not been possible to bring the actual perpetrator to trial. The liability of a co perpetrator does not depend on a conviction of the actual perpetrator or the other accomplices. The State must establish that the deceased was attacked by a group of people and liability will only attach to those positively identified to have taken part in the attack. It would be absurd to excuse an accused who has been positively identified within a group of assailants to have committed the offence simply because the rest of the group members are not before the court. On the other

hand, it would be legally incompetent to prefer a charge of murder as if the said accused committed the offence alone. The issues on causation would defeat the charge.

As properly submitted by the State, under the doctrine of common purpose where two or more people agree to commit or commit an offence each will be responsible for specific criminal conduct committed by one or other of them which falls under their common design. See JONATHAN BURCHELL, *Principles of Criminal Law*, 5th ed at page 477. To establish common purpose the accused must be at the scene of crime, he must have knowledge of the crime, an act of commission or omission to associate himself with the conduct and must have the requisite *mens rea*. See s196A. In *S v Mubaiwa* 1992 (2) 362 (S) the court elaborated that each accused person in a common purpose case is to be judged on his own *mens rea* and the *actus reus* for the murder ‘consists, not necessarily in an act which is causally linked with the death of the deceased, but solely in an act by which he associates himself with the common purpose to kill’. Thus, the submission by the defence that there was no evidence on who administered the fatal blow is irrelevant. The accused’s liability is based on his conduct that exhibits his intention to associate with the conduct under trial. See also the celebrated case of *S v Safatsa* 1988 (1) SA 868 (A). Any slight act of association suffices. In *S v Mgedezi* 1989 (1) SA 687 (A) at 705-6 the court had this to say,

“Where only one (or a few) of the participants inflict the fatal injury, even a slight degree of assistance by an associate in a common purpose is sufficient to lead to a finding that he was also criminally liable”.

Proof of a prior agreement to commit the offence is not necessary. It can arise at the spur of the moment and this can be inferred from the facts of the case that show an active association to perpetuate the common design. Whether an accused has associated himself in a common purpose is a question of fact. As of necessity a careful examination of the accused’s role in the commission of the offence is required. It is from this analysis that the accused’s liability can be inferred.

Legal and Factual Analysis

The court must first make a determination on what transpired on the day the deceased met his death. The state case and the defence case are divergent. The issue has to be determined based on the circumstantial evidence and the credibility of the witnesses.

Opon was the key witness for the State. Opon’s evidence was punctuated by some omissions, he said the assault on him resulted in some memory loss but he had recovered to some great extent.

Opon said they passed a hut in which there was a child and there were some stone barricades along the road that they removed. This evidence about the barricades was not disputed. This setting confirms the very bad relationship between the Farm owner and the settlers. Barricading the road meant the settlers anticipated another visit either from the Messenger of Court or anyone sympathetic to the owner. Opon also said along the way the huts had no occupants. This means then that the people had organized themselves and grouped. They even armed themselves.

In contradistinction, the accused said he had left his child at home. He went to herd his cattle. He did not tell us how old the child was. In his defence outline he said Opon shot him thrice on his left hand. In his warned and cautioned statement he said the two men who were armed shot him thrice and he fell. His evidence on who actually shot him was inconsistent. From his own version the accused was not clear who shot him. This seeming variance was not reconciled in his evidence in chief.

We deal with the shooting incident first. The court requested the accused to show us the hand that was shot. He lifted his hand and pointed to a spot on his left palm. A scar was visible. He explained that the bullet entered through the palm of his hand and exited on the other side. He obviously had forgotten that he told the court that he was shot thrice. It was unbelievable that a person could be shot thrice on the palm of his hand, yet the palm remained intact. One wonders if he kept his hand up as he was shot. The natural response would be to try and avoid the second shot. He did not tell us that. He said he was shot and he fell. A medical affidavit was produced by the defence to show the injuries that the accused sustained. The report did much harm to the accused's case than intended. The Doctor who examined the accused noted the following among other things,

1. swollen left forearm
2. small wound on palm

The medical report clearly demonstrates that the accused's version was not credible. Factually and medically his evidence was not borne out of the medical report. The palm had a small wound. Surely it cannot be a wound from three shots. He had a swollen forearm and other injuries. So going by the accused's version he was shot and left nursing his wounds. No further violence was perpetrated on him. He did not explain how he sustained the other injuries. Those injuries are evidence of some further violence on the accused.

A further fact that dispels the accused' version of events is the CID Forensic Ballistics Report. The following were sent for examination (a) 12 Bore Shotgun serial number CQL35, (b) a .38 special amadeo revolver serial number AA241737, (c) 5 x .38 special spent cartridge cases, (d) 1 x 12 Bore spent cartridge case and (e) 1x 12 Bore live cartridge case (without top paper seal) was sent examination. The results were set out as follows;-

1. exhibits (a) and (b) showed that they were both functional.
2. Examination of the chamber /cylinder and bore /barrel of exhibits (a) and (b) showed some deposits of gunshot residue an indication that weapons (a) and (b) were fired but cannot ascertain when they were fired.
3. Test cases fired from exhibits (a) and (b) matched characteristics on exhibits (d) and (c) respectively but did not match any outstanding scenes in the laboratory.
4. Examination of exhibit (e) showed that it is a 12 bore live cartridge which can be discharged by a firearm that chambers 12 bore live ammunition.
5.

The accused said he was shot thrice by Opon. We now know that Opon was armed with the shotgun. The Ballistics report showed that the shotgun was shot once and one spent

cartridge was recovered from the scene. This confirms Opon's version and disproves the accused's version.

Secondly 5 spent cartridges of the .38 revolver that the deceased was in possession of were recovered from the scene. The accused did not even allude or relate to the use of the revolver by the deceased. It is impossible that the deceased could have fired five shots and the accused would not hear them. He did not tell us if he had hearing problems. Obviously, the accused concealed some information from the court.

The results confirm what Opon said. That he heard some gun shots which we accept were shots by the deceased. On his part he said he shot once when he saw the deceased under attack. At the scene one spent cartridge from the shotgun that he was in possession of was recovered. He also said when he tried to cork his gun to shotgun the second time he was manhandled by the accused and his accomplices. Indeed, the shotgun was found with one live cartridge.

It is now trite that credibility of a witness must not be assessed from the demeanor of the witness alone. The main focus must be an assessment of the witness' evidence in relation to the rest of the evidence placed before the court. See *Chabalala 2003 (1) SACR 134 (SCA)* where the court succinctly set out the approach in the evaluation of evidence. Heher AJA (as he then was) at 139 (i) -140(b) had this to say,

"The correct approach is to weigh up all the elements which point towards the guilt of the accused against all those which are indicative of his innocence taking proper account of inherent strengths and weakness, probabilities and improbabilities on both sides and, having done so, to decide whether the balance weighs so heavily in favour of the state as to exclude any reasonable doubt of the accused's guilt. The result may prove that one scrap of evidence or one defect in the case for either party (such as the failure to call a material witness concerning an identity parade) was decisive but that can only be on an ex post facto determination and a trial court (and counsel) should avoid the temptation to latch to one (apparently) obvious aspect without assessing it in the context of the full picture of the evidence".

Where there is real evidence the witness' evidence must be cast against the real evidence. In this case the real evidence are the two firearms, the spent cartridges and the gun wound sustained by the accused. They speak part of the story of what transpired. The story confirms Opon's version and dispels the accused's version. If the accused was not candid with the court on how he sustained his injuries, we are left with no option but to draw an inference that even his explanation that he was herding cattle is false.

We find some comfort in rejecting the cattle herding version from the circumstances of the case. As already stated, the security guards were conducting some patrols. There was already a highly charged atmosphere between the Farm owner and the settlers. Others had been evicted. The remaining settlers were unaware of the next move. It is reasonable to conclude that, they were very alert and on the lookout for the next move from the owner of the farm. They were set to resist eviction. It then behooves the court to believe a group of people accosted the security guards. They were the settlers that included the accused person.

We reject the accused's version that some passersby assisted him after he was shot. If the accused was assisted by some passersby as he said in his defence outline, one wonders why the good Samaritans discriminated against the deceased. The deceased was not attended to. In fact, the said good Samaritans wanted to see justice done on Opon for shooting the accused. This brings us to the conclusion that the people who eventually took Opon to Harare were part of the settlers that were sympathetic to the accused. We were not told what happened to the deceased. They had more to settle with Opon than the injured deceased.

We found Opon credible. We accept that Opon could not describe in detail how the accused assaulted the deceased. What is on record is that the deceased's assailants were armed, they were many and they attacked the deceased. The accused was specifically identified by Opon. He did not know the assailants' names. However, the accused was prominent as Opon said the one who said was shot assaulted the deceased together with others. Then when he shot in the air, they left the deceased and attacked Opon. This is the same man who took him to Harare together with the other group members.

From the evidence placed before us, we conclude that the deceased and Opon were attacked by the settlers. There was a reason why the settlers would want to attack these security guards. They were an extension of the Farm owner who was threatening their very life and existence by evicting them from the Farm. We also accept that the accused was shot. It is very difficult to conclude who shot the accused but it must be either the deceased or Opon. Whatever the case we accept that, the only reason the deceased fired his gun was that he was under attack by the settlers. Opon identified the accused as one of the people that assaulted the deceased. The accused and his group members had a confrontation with the deceased and Opon on this day.

The accused and his accomplices were already armed to confront anyone who would challenge their stay at the Farm. They confronted the deceased and Opon. They attacked them. The accused was positively identified by Opon assaulting the deceased. The accused was not just standing there, he was actively involved in the scuffle that could explain how he sustained some of his injuries that he failed to explain to the court.

Given the nature, timing and object of the gathering as well as the number of men involved, they were said to be over 70, the possibility of death was foreseeable. However, what happened on the day cannot justify a finding of murder with actual intention. These settlers wanted to resist eviction. That was their primary intention. However, when they armed themselves, grouped and attacked the deceased, death was foreseeable but they persisted in the conduct resulting in the death of the deceased.

Accordingly, the accused is found guilty of murder with constructive intention in contravention of s 47 (1) (b) of the Criminal Code.

Sentence

In assessing the appropriate sentence, the court will consider the submissions made by both legal practitioners. The accused is a first offender with family responsibilities. During

this melee he also sustained some injuries. He now has a chronic pain on his hip. He has been in custody for 6 months before the finalisation of this case.

In motivating the court to pass a sentence of 6years imprisonment the accused's legal practitioner urged the court to follow the reasoning in the case of *S v Nyamayevhu* HMA 4/19. Having gone through the case, the facts in that case are distinguishable from the facts in this case. In the *Nyamayevhu* case (supra), the accused was convicted of culpable homicide committed in the domestic setting. The deceased was the accused's wife and he was intoxicated. The injuries that the accused sustained had nothing to do with the commission of the offence.

In aggravation the court will consider that the accused, who acted in cahoots with other settlers occupied this piece of land illegally. They were well aware that they were not authorised to remain on the land yet were adamant. Had the accused and his accomplices left the place upon its acquisition this unnecessary loss of life would have been avoided. The accused were in blatant disregard of the law. Their plight that they needed land and had stayed at the farm for the better part of their lives is understandable but that cannot be a reason to disregard the law. Their recourse was in lawful processes only.

It is also aggravating that the assault on the deceased appear to have been premeditated. The group of people that attacked the deceased were armed. They anticipated some conflict with the farm owner. The deceased was simply an employee doing his work. As properly submitted for the State the court must take a serious view were illegal farmers commit murder where they know they have no right to occupy the land. In *S v Chishaka HH 264/17* whose facts are similar to this case the court sentenced the accused to 18 years. In this case the accused and his accomplices cannot even raise the defence of property because they had no right to be on the farm in the first place. The deceased and his colleagues did not threaten their property, they were just patrolling the place. This elevates the accused's moral blameworthiness.

Where a life is lost there can be no replacement. The accused and his accomplices were brutal and defied authority. Despite the mitigatory factors alluded to, the accused deserves a fairly lengthy custodial sentence. An exemplary sentence must be imposed.

Accordingly, the accused is sentenced as follows.

15 years imprisonment.

The National Prosecuting Authority, the State's legal practitioners

Murisi and Associates, accused's legal practitioners