

STATE
And
CHINAMANO DALULA

HIGH COURT OF ZIMBABWE
MUZENDA J
MUTARE, 22 and 23 June 2021

ASSESSORS 1. MRS MAWONEKE
2. MR MUDZINGE

Murder Trial

Mrs J Matsikidze, for the State
E Matsanura, for the Accused

MUZENDA J: On 15 May 2019 at Zimbabwe Consolidated Diamond Company, Marange Manicaland accused shot Terence Masendeke with an FN Browning rifle on the chest and thigh which resulted in his death. He is charged with Murder as defined in s 47 (1) (a) or (b) of the Criminal Law (Codification and Reform) Act, [*Chapter 9:23*].

He pleaded not guilty to the charge. In his defence outline, Annexure B accused states as follows: he was employed as a security guard by the diamond Company and on that date he was a gunner. Deceased and his group were illegal panners. On that fateful day around 300 diamond panners encroached into the mine and encountered the security guards. They were ordered to sit down but refused and retreated for a short distance and became aggressive and attacked accused and his crew, they were armed with wrenches and shovels. Accused sensing danger fired three warning shots in the air to scare them but the panners did not stop advancing towards the guards. Accused fired a shot towards them and fatally wounded deceased. He further states that he acted in defence of self and company property and avers that the means he used did not exceed what lawfully had to be used in the circumstances. To the accused illegal miners are known for shedding blood and being violent. He was not expected to run away and let the panners steal the diamonds or ore since diamonds are a national resource contributing to the fiscus. The scenario at the mine on 15 May 2019 was a case of “kill or be killed” since the miners were threatening and armed. He prayed for his acquittal.

At the close of the state case the defence counsel tendered a limited plea of Culpable Homicide conceding that the accused exceeded the means of defence of self and property, the state could not accept it and counter proposed that the accused give evidence. Accused then gave oral evidence under oath. In principle he repeated facts outlined in his defence. Under cross examination by the prosecution the accused could not explain why deceased sustained injuries on more than one position if he fired one shot at deceased. To the accused the gun he had could produce 44 pellets at one release and a pellet can only be stuck in the flesh and injure the victim. He also insisted that it was the fourth shot that caused the injuries on the deceased, a fact strongly disputed by the second state witness Mr Makuyana.

Accused made a number of concessions under cross examination that just as his colleagues had done, he could have escaped from the attack, he was not cornered to such an extent that the only available option was to shoot at the attackers. He further conceded that by indiscriminately firing at a supposedly approaching mob he was reckless in his conduct. He palpably foresaw the possibility of the people being fatally wounded but proceeded to fire at them using a fairly dangerous weapon like a shotgun. At the time he fired at the deceased there was no imminent danger which matched the type of weapon he used since the illegal panners did not have a gun but wrenches and shovels. He could not simply take his defence of self to such a level that he had portrayed in his defence outline.

Most facts in this matter are basically common cause.

- (1) Deceased was shot by the accused on the chest and thigh and died.
- (2) The post mortem report confirms that there were six wounds, two composed of two entries and three exits wounds, then the sixth one is an entry wound.
- (3) Accused admits shooting the deceased with a gun leading to his death.

What is in dispute is as follows:

- (a) Whether the deceased was panning in a protected zone of the Zimbabwe Consolidated Diamond Company where accused was employed to protect?
- (b) Whether accused shot the now deceased in defence of self and property?
- (c) Whether the accused should be found guilty of murder or lesser offence of culpable homicide?

The state led evidence from two witnesses Cosio Kalambwe and Lisbon Makuyana, deceased's cousin. Cosio Kalambwe was a dog handler and accused's workmate. He stated

that on the day in question they formed a reactionary team and conducted patrols walking around the perimeter fence of the mine. They got to Chikwarukwaru area Portal A and confronted a group of illegal panners. The panners fled towards the mountain, they made a follow up. They reached a point where there was a multitude of them, 300 in number. The reactionary team formed a “C” formation to apprehend the illegal panners, all the guards ordered the panners to sit down but the panners refused. They ran away for a distance then came back to the guards aggressively after uttering a war cry “gweja hoo”. The panners were holding wrenches and shovels. They charged at the guards, some of the guards fled from the scene and then the witness heard four warning shots. After the gun shots the panners fled from the scene. The witness unleashed the dog and chased after the panners. He later came upon now deceased lying down injured. Accused informed his superiors about the deceased.

The first state witness’ evidence is almost that of the defence. The witness did not fare well under cross examination and also contradicted himself when questions were put to him by the court. The witness did not take the state case further. He could have been better called by the accused. This is understood given the fact that the witness is accused’s workmate and almost an accomplice or accessory to the charge.

Lisbon Makuyana’s evidence is that he was with the deceased panning in a mountain four to five kilometres from the protected area of the diamond company. At the time deceased was shot he was sieving the ore and at that time he did not see the shooter arriving at the scene. He heard a gunshot and he and deceased fled. Indeed there were about 200 to 300 panners scattered around the site. He disputed that the guards initially ordered all panners to sit down. He told the court that such an order was heard well after the gunshot. He denied that the panners attacked the security guards before the gunshot. He heard now deceased telling him that he had been shot and was walking with a limp and he left deceased behind only to look for him later. He retraced him and found him dead. He had two gun wounds on the chest and three wounds on the thigh.

To us the witness impressed us as an honest witness. He remained unshaken under cross examination and we do not hesitate to declare him credible. We accept his evidence as truthful and not exaggerated. His observation of wounds sustained by deceased tally and correlate with wounds detected by the pathologist when he examined deceased’s body.

The evidence of the accused is not supported by the evidence on the post-mortem report. His colleagues Cosio Kalambwe’s evidence also conflicts largely with that of the

accused. Cosio Kalambwe told the court that the reactionary team was composed of four security guards, accused says there were five guards. Accused says he fired once at the group of panners and that single bullet caused the death of deceased, the post-mortem shows at least three entry gunshots. It appears to us that accused is not being forthcoming with the truth on the number of times he directly fired at the deceased.

The facts established by the state are to the effect that deceased was shot at more than once, more than twice but at least three times. In our view accused did not fire warning shots at all. He directly shot at deceased and the first shot hit him. The illegal diamond panners including deceased reacted to the shot instantly by fleeing in all directions creating a total pandemonium. Had accused fired warning shots deceased could have immediately reacted by running away but because he was shot at first he was injured and he informed his cousin about it. We are contended that s 253 of the Criminal Law (Codification and Reform) Act, [Chapter 9:23] requirements of both the circumstances of the matter and action taken by the accused do not lay a defence of self on the part of the accused. Accused is a fully trained and retired police detail who is well acquainted with the nature of the gun he was using, the rules applicable to the use of it, moreso that he should use a firearm in extremely exceptional scenarios open to him in dire situations. He was at a distance of plus or minus 20 to 25 metres and aimed at a target close to him and according to his defence outline he had set upon to kill else he would be killed, and he chose to kill and inappropriately opted to rely on defence of self and property. No diamonds were found attributable to the deceased and second state witness stated the place where deceased was shot was 4 to 5 km outside the protected zone. We accept that evidence. In our view it will be absurd, for a group 300 illegal panners invade a protected and guarded area where security personnel guards day and night. We conclude therefore that the area was a distance from the diamond field and panners took advantage of that location. We also come to a conclusion that the accused armed with a gun spotted deceased and his colleagues and fired at them resulting in the first bullet injuring the deceased. The state had established and proved beyond reasonable doubt murder with constructive intent in contravention of s 47 (1)(b) of the Criminal law (Codification and Reform) Act, [Chapter 9:23].

Accused is found guilty of Murder with constructive intent.

Sentence

In assessing an appropriate sentence the court will factor in both mitigatory and aggravatory features submitted by both parties.

Accused is a first offender and was on a tour of duty as a security guard. Deceased was an illegal diamond panner. Accused exceeded the means of protecting his employer's property and acted unreasonably by firing at a defenceless person resulting in the loss of life. In as much as the law does not condone behaviour of illegal panners, security guards have a duty to respect constitutionally enshrined right to life and use appropriate methods of bringing offenders to book than terminating lives, that is the prerogative of God. Given the national importance of diamond to the national fiscus the moral blameworthiness of the accused is slightly ameliorated by this aspect.

Accused has been found guilty of Murder with constructive intent and that *per se* is a mitigatory factor. However the offence he is convicted of remains a serious offence.

Accordingly accused is sentenced as follows:

10 years imprisonment.

National Prosecuting Authority, state's legal practitioners
Caleb Muccheche and Partners, accused' legal practitioners