HB 26-17
HC (CRB) 90-14
XREF GOKWE CR 163-06-08

THE STATE
versus
DOUBT MATHE

HIGH COURT OF ZIMBABWE
MATHONSI J
GWERU 24 AND 25 JANUARY 2017

Criminal Trial

T Mupariwa for the state
A Chihiya for the accused

MATHONSI J: The deceased was employed as a security guard by Grafax Cotton Company, a Gokwe North cotton buying entity operating at Mutengate buying point, charged with the responsibility of guarding premises housing employees of the company and its property. At the young age of 24 he must have died a lonely and painful death at the hands of a gang of robbers that attacked him as he stood sentinel over his employer's property on the night of 14 June 2008. Using a hoe handle the gang bludgeoned him directing the blows to the head and rendering him unconscious. He later died of severe brain haemorrhage and skull fracture due to the assault.

The state alleges that the accused who was then aged 21 years and residing at Zunguziva village under Chief Chireya in Gokwe North was one of the gang of three robbers who attacked and killed the deceased. He is charged with murder in contravention of s47 (1) of the Penal Code [Chapter 9:23].

The state case is that the accused teamed up with two accomplices one of whom is at large and the other is deceased. They confronted the deceased at his guarding post. They attacked him with a hoe handle several times of the head inflicting injuries from which he later died. After rendering the deceased unconscious they proceeded to the house where Winnie Sigwala, a cotton buyer, was sleeping.

They forced their way in before threatening to kill her like they had done to the deceased while demanding money. When they were directed to the kitchen they broke the kitchen unit door with a metal bar and took Z$50 billion. They also took two solar inverters and a generator which they stuffed into a bag belonging to Sigwala before making good their escape. The accused was arrested later that day with one of his accomplices by a track team of villagers that had been constituted for that purpose. The stolen property was all recovered at the scene of their arrest.

The accused has pleaded not guilty to the charge and stated in his defence outline that he was in fact a victim of circumstances as he happened to be at the wrong place and very wrong time resulting in his arrest for something he knew nothing about. He states that at the time that the deceased was attacked he was about 120 km away from the scene of crime at Chitekete Area under Chief Chireya in Gokwe North.

What led to him being caught in cross fire is that his mother sent him to buy peanuts which were in abundance in Chief Sayi's area in Gokwe South. Boarding a lorry in the early hours of 15 June 2008 in pursuit of the much needed peanuts he arrived in Chief Sayi area at around 1100 hours. At Gokwe Centre he enquired from an unknown woman as to where he could buy peanuts. The woman gave her advice to go around the nearby village looking for them.

It was while he was conversing with two men on the outskirts of the village asking after the peanuts that the track team caught up with them. They were assaulted and asked about the stolen property resulting in one of the two men, Attend Tanyanyiwa leading them to a place where the stolen property was recovered. One of the two men escaped but Tanyanyiwa later died as a result of the assault. The accused maintains that he knows nothing about the offence. Indeed he was once charged with robbery in connection with the same matter but was acquitted by the Regional Court in Gokwe.

The state produced the post mortem report compiled by Dr I Jekenya of Mpilo Hospital in Bulawayo who conducted the examination of the deceased's body. The doctor observed a swollen left side of the head, multiple fragmented fractures of the left temporal and parietal bones around the left ear. He also observed massive left parietal and temporal brain

haemorrhages. He noted that severe forces were used to inflict those injuries before concluding that the cause of death was:

"(a) severe brain haemorrhage
(b) skull fractures
(c) assault."

The state also produced the weapon allegedly used to assault the deceased, a vicious hoe handle robust enough to weigh 0,750 kg with a length of 83cm. Its handle has a circumference of 12cm while its head 19cm. In addition three witnesses testified on behalf of the state.

It was the evidence of Winnie Sigwala that she has been employed by Grafax Cotton company as a cotton buyer at Mutengate buying point for 15 years. On the night of 14 June 2008 herself and other employees of that company who included the deceased and one Tonisi Sachingoma had earlier on whiled up time at the house where they resided located at the buying point after a day's work before retiring to bed later that night. They left the deceased outside standing guard over the house and cotton bales. She had with her three small children one of whom was a breastfeeding baby.

She was awakened by the shouts of a voice which sounded familiar although in the heat of the moment she could not figure out whose voice it was. The person who was shouting had already broken into the house and found his way in. It turned out that two men had already entered the house, one was standing by her bedroom while the other was in the dining room.

They shouted that they were robbers who had already killed the guard outside, they wanted money which they would collect from her. After getting the money they would kill her too the way they had killed her colleague outside the house. Trembling she says she carried her baby and led the robbers to the kitchen unit where the money was kept. They broke it down and beheld $50 billion in Zimbabwean currency which they took. They also took two inverters which were there before demanding a bag in which to put their loot. She pointed to the baby bag which had baby clothes which they emptied before stuffing the money in it.

Sigwala testified that the place was illuminated by a paraffin lamp which was almost dying. One of the robbers snatched that lamp from the bed room and carried it to the kitchen. When they were looting he put it on the floor. It was then that she observed that one of the

robbers who had been shouting the most and later turned out to be Attend Tanyanyiwa, a well known local person who was known to be in prison for the murder of his own child, had been putting on white trainers.

His companion, who later turned out to be the accused person herein, was putting on blue push ons. That observation proved useful later upon the arrest of the accused and Attend Tanyanyiwa because when they were brought back to the scene she was able to identify them by the feet apparel they had on.

After they had looted the robbers shouted that she should also be killed. One of them ordered her to put the child down as he feigned three blows with a knife but she clutched onto the child. This must have discouraged the attacker who eventually ordered her to lie on the floor facing down. She complied and the robbers left the house.

Later after the robbers had left they investigated the issue and found the deceased badly injured and lying by the cotton bales. The hoe handle had been thrown away somewhere at the verandah. They also realized that the generator which had been outside the house was stolen as well. Together with the other employees they reported the matter to the village head and later to the police.

Meanwhile using a torch they had observed footprints next to where the deceased was lying, by then he had not died but his head had been battered. It was swollen together with the face. They spotted three different sets of footprints which were visible even by the windows of the house. As the area is of sandy soils the footprints were distinct even as they left the scene. Accordingly they were able to use big dishes to cover them up to be used later to track the suspects as well as to make comparisons after two had been apprehended.

In the morning villagers gathered at the scene before commissioning a track team which followed the spoor of the suspects. Later that day they returned with the accused and Tanyanyiwa. They had been arrested by the track team which recovered all the property that had been stolen at the scene of arrest.

Rennias Chakafa also gave evidence on behalf of the state. The essence of his evidence is that he was part of the track team of 12 men that followed the tracks of the suspects from the scene of the crime. Along the way they would observe that the suspects would put the generator

down. This was clear from the impressions that it made as well as the fuel drops that would be left behind where it had rested. They followed the spoor up to a point where it left the road going into the bush.

About 10km away from the scene the tracks led them to a gulley which was quite deep. It is there that they caught up with the suspects who could be seen sitting inside the gulley by him and his group who were standing over them on the surface. They overhead the three suspects discussing their adventure and arguing over the sharing of the loot. Although he could not make out what each of them was saying they could hear one of them saying he would get the generator, the other saying he would get the money and so on. They were also discussing the killing of the deceased.

Chakafa went on to say that the team split into three groups as they plotted how to apprehend the three suspects. He was in the group that closed in from down stream waiting for anyone who would attempt to flee in that direction. When the first group advanced towards the suspects Tanyanyiwa could not flee. He was caught right where the three had been seated deep in conversation. The other suspect ran upstream and made good his escape. The accused ran straight into a trap made by the witness and his third group. He was easily apprehended and taken to where Tanyanyiwa had been caught.

At that point all the stolen property was recovered. The bag full of money was there where they had been sitting together with the two inverters. The generator had been buried about 5metres from where they were sitting and covered with soil and leaves. They only discovered it due to the smell of fuel which led them to the spot. The witness and his group then tied the accused and Tanyanyiwa and took them back to the scene together with the recovered property.

He stated that on the way back they decided to search the two because they had been told by the victims that the robbers were armed. Nothing was found in the accused person's possession. He certainly did not have any money which could have been used to buy peanuts as alleged by the accused. The witness strongly disputed that the accused could have been caught in cross fire because where he was apprehended it was in a bush and he together with his accomplices were in a gulley discussing their loot. There was nowhere he could have been

buying peanuts. In addition upon being confronted he attempted to flee before running into an ambush.

According to Chakafa, upon arrival at the scene of crime they caused the accused to step besides the footprints suspected to have been his. That demonstration was a perfect match meaning that he had indeed been at the scene of the crime and was indeed one of the robbers who fatally assaulted the deceased. The property that they recovered from the accused and his colleagues was identified by Sigwala as being the company property that had been stolen at the time of the fatal assault of the deceased. Thereafter his group handed the accused and Tanyanyiwa to members of the neighbourhood watch committee whose responsibility it is to liaise with the police.

Sigwala and Chakafa gave their evidence very well and were not discredited during lengthy bouts of cross-examination which did not upset the gist of their presentation. Their testimonies were very clear and could not be faulted at all. Together they placed the accused at the scene of the crime. They also linked him to the stolen property because he was arrested while in possession of it and it was recovered from his custody.

The importance of the evidence of Samson Chidembo is to expose the fallacy of what may have passed as an *alibi* presented by the accused in his defence outline. He claimed that he had been in Gokwe North at the time of the commission of the offence from where he was sent by his mother to travel a distance of 120km in search of peanuts. Of course, as is usual with fabrication, the accused forgot the dates when he testified. In his evidence he was to tell the court that he received the instruction from his mother on 13 June 2008 and set off for Chief Sayi area on the morning of 14 June 2008 arriving there in the morning after boarding a bus to Gokwe centre and then a lorry to the scene of his arrest.

If that is the case that is no *alibi* at all because the deceased was fatally attacked on the night of 14 June 2008 after he had reported for duty at about 1800 hours that evening. Whatever the case the presentation of an *alibi* could only put a dent on the state case, had it been raised with the police upon his arrest. If that had been done the police would have been obligated to investigate the veracity of that *alibi*. As it turns out, according to Chidembo, the accused did not raise an *alibi* at all. It was only after he had disowned his warned and cautioned statement at

confirmation stage that he started talking about peanuts, which he said he wanted to buy for himself and not in terms of instructions given by his mother. In fact the accused unwittingly corroborated Chidembo's testimony. He was adamant that the officer only heard the story about peanuts for the first time during his trial for robbery at Gokwe Regional Court. With that the *pseudo alibi* went up in smoke.

Try as the accused did, he could not during his evidence discredit the state evidence. While he vehemently disputed ever having been at the scene of the crime insisting that he was in Gokwe North, he confirmed the evidence of Sigwala that on the day in question he was putting on the blue push ons which were seen by Sigwala during the robbery. We therefore would have no reason to disbelieve Sigwala. The accused's claim that the witness related to that footwear because she saw him putting it on after his apprehension is just self serving. It does not explain why the prints made by that footwear were a perfect match as stated by both Sigwala and Chakafa.

In accepting the state evidence relating to footprints we are mindful of the fact that reliance on shoeprints is obviously fraught with danger. This is particularly so when the shoe print is from a type of footwear which is in wide spread use. See *S* v *Mavunga* 1982 (1) ZLR 63 (S). We also appreciate that in a case where the identity of the suspects footprint forms a vital part of the evidence upon which the state relies for conviction the police are ordinarily required where possible to take a cast or other impression of the footprint at the scene of the crime for comparison with that of the accused. See *S* v *Menzou* HH 90-93

Having said that our fears have been allayed in this case by the fact that the state case is not dependent on the evidence of footprints. In fact footprints in this case were used to track the suspects who were then arrested while in possession of stolen property. They were also used to corroborate the identification of the accused by a witness who observed the footwear he was putting on during the robbery.

Of course what the witnesses did in making a comparison with the accused's prints after his arrest was just a bonus to put the point beyond doubt, that indeed he had set foot at the scene despite his protestations to the contrary.

The striking feature of the accused's defence is that all the people that could assist his case are either dead or cannot be found. He claims that his mother sent him to buy peanuts at the material time. Unfortunately she is deceased. He claims that Tanyanyiwa vouched for him that he knew nothing about the crime and that Tanyanyiwa confessed that he had committed the crime with his nephew Tonde or Tonderai. Again it so happens that Tanyanyiwa is deceased and Tonde cannot be located. He says the one Tonde that was located is not the one. In the end we are left with only the accused's word, word which is not worth much coming from a witness who performed badly on the witness stand. He dodged questions and could not sustain his strange story of peanuts. He appeared to make up his case as the trial progressed which is why so much of what he relied upon was not put to the state witnesses, was not contained in his outline and he did not challenge the crucial state evidence pointing to him as being one of the robbers. For instance the evidence of Chakafa that he was found discussing the loot and that he ran into an ambush was unchallenged. We have no hesitation in rejecting the accused's defence as it is apparent he deliberately mentioned witnesses who are non-existence to create doubt where it is not there. It is true that the state relies on circumstantial evidence as submitted by Mr *Mupariwa*. However ever such evidence points to the guilt of the accused and nothing else.

Looking at the manner in which the deceased was attacked, the lethal weapon used and the severe force which was used there can be no doubt that the intention was to kill him. All the blows were directed to the head and after the attack the assailants were bragging to Sigwila that they had killed him. The idea was to eliminate the security guard in order to pave way for a smooth robbery.

For purposes of conviction it is not necessary to establish who among the three robbers struck the fatal blow or what roll the accused played. He is caught in the web of s196 A of the Criminal Law (Codification and Reform) Act [Chapter 9:23] providing for the liability of co-perpetrators. In terms of subsection (2) of s196A;

> "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 immediate 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."

The accused was present when the deceased was clobbered under circumstances which implicate him directly in the killing of the deceased. He and his accomplices obviously associated with each other in planning a raid on the cotton buying depot. Ultimately the three of them engaged in criminal behaviour as a team. In terms of subsection (1) of s196 A it is unnecessary to identify the actual perpetrator.

In the result, the accused is hereby found guilty of murder with actual intent.

Reasons for sentence

In considering an appropriate sentence we have examined the following mitigating circumstances referred to by counsel, namely that the accused is a first offender. He is married with two minor children who attend school. His parents are both deceased. That is all that counsel could advance in consideration of sentence.

In aggravation Mr *Mupariwa* for the state submitted that the accused stands convicted of a very serious offence, that is, murder committed in aggravating circumstances of robbery. He submitted further the only motivation the accused had was greed and an evil intent. We agree. In fact if the accused was motivated by agreed alone considering that they were three, they clearly outnumbered the deceased. They could have simply tied him up and proceeded with their mission but that was certainly not enough for them. They wanted to end the life of the deceased in the most brutal of ways.

Mr *Chihiya* for the accused person has conceded that the exceptions set out in s196B of the Criminal Law Code [Chapter 9:23] do not apply to the accused person. In our view the concession has been properly made because the accused was born on 3 February 1987. This

means that he celebrated his 21st birthday on 3 February 2008. He was therefore not less than 21 years at the time of the commission of the offence on 14 June 2008.

What is critical to note is that the law governing the sentencing of persons convicted of murder has drastically changed in recent history. Where the court would be required to inquire into the existence or otherwise of extenuating circumstances in order to determine whether the capital punishment should be imposed, the situation is now governed by s47 (2) and (3) of the Criminal Law (Codification and Reform) Act [Chapter 9:23]. In terms of subsection (2) (a) of s47.

> "In determining an appropriate sentence to be imposed upon a person convicted of murder, and without limitation on any other factors or circumstances which a court may take into account, a court shall regard it as an aggravating circumstance if—
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> (a) the murder was committed by the accused in the course of, or in connection with, or as a result of, the commission of any one or more of the following crimes, or of any act constituting an essential element of any such crime (whether or not the accused was also charged with or convicted of such crime)—
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> (i) an act of insurgency, banditry, sabotage or terrorism; or
> (ii) the rape or other sexual assault of the victim; or
> (iii) kidnapping or illegal detention, robbery; hijacking, piracy or escaping from lawful custody; or
> (iv) unlawful entry into a dwelling house, or malicious damage to property if the property in question was a dwelling house and the damage was effected by the use of fire or explosives;"

Subsection (4) of s47 provides that a person convicted of murder shall be liable, subject to section s337 and 338 of the Criminal Procedure and Evidence Act [Chapter (9:07] to death, life imprisonment or to imprisonment for not less than 20 years if the murder was committed in aggravating circumstances, which in terms of subsection (2)(a) thereof includes murder committed in the course of a robbery or unlawful entry into a dwelling house. The exceptions in sections 337 and 338 do not arise in this case.

In the present case we have examined the mitigating circumstances against the aggravation. In our view nothing can mitigate the callous killing of a security guard standing sentinel over a dwelling house occupied by a well-known female cotton buyer who was fast asleep in the middle of the night. The security guard stood in the way of a ruthless gang intent

on laying their hands on cotton buying money and other valuables. He therefore had to be clobbered to death using a hoe handle, itself a grotesque weapon when directed to the head.

Once the security guard had been accounted for the gang was not to be deterred as they went on to break the barriers using a metal object, in order to gain entry into the dwelling house thereby exposing the hapless female cotton buyer. Still determined to achieve their intended mission they threatened to kill the woman if she did not point to where the money was before they again broke the kitchen unit where the money was.

In short this was murder committed in the aggravating circumstances of robbery and unlawful entry into a dwelling house. As a result of the murder the robbery and unlawful entry were achieved. Considering that there is really no mitigation to talk about, our hands are really tied.

We have no option but to impose the ultimate penalty. The sentence of the court is that the accused be returned to custody and the sentence of death be executed upon him according to law.

National Prosecuting Authority, state's legal practitioners
Makonese Chambati & Mataka Attorneys, accused's legal practitioners