

THE STATE
versus
EMMANUEL DOLOSI
and
KUDZAI MADZIRO
and
LEEROY MUTEYERA
and
RONALD ROORAI SAMBO

HIGH COURT OF ZIMBABWE
MWAYERA J
HARARE, 2, 5, 10, 11, 12, 13 September 2013 and 26 & 30 June 2014

Assessors: 1. Mr Kunaka
2. Mr Shenje

D H Chesa, for the State
Ms M. Jera, for the 1st accused
Ms R Gasa, for the 2nd accused
P Kumbawa, for the 3rd accused
B Mtombeni, for the 4th accused

MWAYERA J: The four accused were arraigned before the courts on charges of murder. It is alleged that on 2 July 2010 and at Gletwin Farm Chishawasha Highlands Harare, the four accused or one or more of them unlawfully and with intention to kill caused the death of Edson Manhembe by shooting him three times once on his chest, cheek and stomach with a firearm thereby causing injuries from which the said Edson Manhembe died. All the four accused pleaded not guilty to the charge.

The trial commenced on 3 September 2012 and is only being concluded in 2014. We give a sigh of relief for the matter has finally come to an end. It is prudent that we briefly mention that the delay was occasioned in the matter mainly by the state and then defence and to a lesser extent counsel for the 4th accused. The prosecutor who started the ball rolling Mr Chimbari was in the middle of trial and towards the end of state case was posted for foreign duty in Sudan. It took

time for another prosecutor to be assigned to the matter and he of necessity requested to have the record transcribed for him to make meaningful representation on behalf of the state. He also required to make representations in a trial within trial which had been occasioned by the accused dispute of indications which the state sought to rely on.

After a finding on the trial within a trial where the court ruled that the tape or disc was admissible as evidence, the trial progressed. This time trial had to proceed again with another prosecutor because Mr Manhiri who had been assigned the matter after departure of Mr Chimbari was promoted as a Chief Law Officer and was working in a different policy department.

Mr *Chesa* took over prosecution till the stage that we have reached that is judgment stage. After adducement of evidence and close of the defence cases the matter was deferred for written submissions to be filed within specified dates. All counsels, state and defence filed their written submissions on or just after the specified dates with the exception of counsel for the 4th accused Mr Mtombeni. Such failure by counsel for the 4th accused to file submissions was explained to the court and fellow counsel by Mr Mtombeni. It was because of other commitments and not dereliction of duty. When he undertook to file submission and submissions took long to be filed the court was in a dilemma to request the Registrar to appoint another *pro-deo* counsel for the 4th accused and have the rest of the record transcribed or having given the transcribed record to allow the new counsel to take instructions and make meaningful representations on behalf of the accused. This would not be an easy option given the stage at which the matter had reached. Mr Mtombeni came to the rescue and offered to file the written submissions on specified dates. He with apology filed submissions the last two weeks of March 2014 and, thus has enabled us to come to the conclusion of the matter. We must however comment that on the part of the court, the convening of this session was difficult given the nature of duties being in another department and duties of the assessors.

We must at this stage express our gratitude for the closing submissions which were filed by the state counsel and defence counsels which we viewed as highly valuable and which were well informed. Such submissions have assisted us in coming up with the disposition in the matter. This is the reason why we did not accept an argument which would have been presented that we could have proceeded to come up with judgment without the written submissions or

closing submissions by all counsels. The submissions are there for a purpose and they are important, hence their inclusion.

The brief summary of the state case is that sometime in June 2010, accused 2, 3 and 4th all police officers connived with accused 1 and others to rob building materials which were at Gletwin Farm a police farm in Chishawasha Harare. Accused 2, 3, 4 and one Clever Ndlovu a policeman now deceased agreed to provide their service pistols to facilitate the armed robbery mission while Emmanuel Dolosi (accused one) and another civilian Ocean Mujeri at large at the time of trial were to provide getaway vehicles. On 2 July 2010, the accused proceeded as planned to Gletwin Farm Chishawasha to rob building materials which they knew were under guard by some security guards. Upon arrival at the premises the accused produced their service pistol caused the security guards to lay down and tied their hands to the back. Accused one then remained guarding the two security guards while the co-accused and others proceeded to the storeroom.

While on the their way to the storeroom, the accused or the group met one Peter Muzerengwa who was in the chicken run and the later screamed for help arousing the attention of Edson Manhembe the now deceased who was manning the storeroom. As the now deceased went out to investigate he was shot three times, in the chest, cheek and stomach. It was as a result of these injuries that the deceased died on admission at Parerenyatwa Hospital.

All the accused denied the allegations. The 1st accused denied committing the offence. He pointed out that when he was taken for indications he showed they entered through a gate, but was forced to indicate a hole in the fence. He told the court that he was not well when he was taken for indications.

The 2nd accused's defence outline was basically that he did not commit the offence and that he did not implicate any of his co-accused. He was known to accused three and four as workmates, but he did not know the 1st accused. In the defence outline which he later adopted as evidence in chief, he pointed out that the warned and cautioned statement and indications which he made were given under compulsion by the police details.

The 3rd accused's defence outline which was also later adopted as evidence in chief was a denial of participation in the commission of the offence. He told the court that he was tasked by his superiors and the police internal security section to investigate or track down accused two

who was a wanted person and that the police linked him to the offence because he telephoned the 2nd accused for purposes of an investigation. He denied participating in the murder of Edson Manhembe.

The 4th accused's gist of defence outline was that he was a victim of circumstances in the offence he never committed. He was invited by accused Madziro Kudzai to accompany the latter to assist a friend Ndlovu carrying his goods. He pointed out that he was not aware of the plan and of the goods that were to be ferried. When they got to Gletwin Farm he became suspicious of what the group was doing and he indicated his intentions to go back home. He however could not retreat because one Ndlovu threatened him with a firearm. He was compelled to remain at the scene and did not connive or agree to commit the offence. The 4th accused also pointed out that the indications and warned and cautioned statement was not freely and voluntarily made as he was subjected to threats and assaults by the police.

In support of the allegations the state adduced evidence from witnesses, oral evidence and also sought to have evidence of the other witnesses admitted formally in terms of s 314 of Criminal Procedure and Evidence Act (*Chapter 9:07*) and produce documentary evidence. The guards who were on duty at Gletwin Farm on the night in question testified. Both guards namely Joseph Matunhuke and Godfrey Chirwanemhuka testified that the peace at the farm was disturbed when some intruders came. Both guards could not identify the accused. Their evidence was basically that two armed men approached them at the guardroom. The witnesses stated that they were ordered to look down and their hands were then tied to their backs. One of the intruders according to the witnesses remained guarding them at the guardroom. After a short while they heard some screams which were followed by gunshots.

It was apparent from both witnesses' testimony that they did not get the chance to visualize the intruders for them to recognize them. They assumed the people were holding firearms going by the way they were holding and wielding threats of being shot if they lifted their heads. They could not identify the intruders and stated that they saw a vehicle which was described as a black vehicle. The witnesses were not certain as regards the identity of the intruders. Their evidence did not shade much light as regards who and how many intruders had come in. Their evidence however establishes that there were some intruders who indeed went to Gletwin Farm on the night in question and that following some screaming there was sound of

some gunshots. It was after these gunshots that the intruders dispersed. After the dispersing of the intruders the witnesses then sought for assistance.

The court viewed the witnesses, the guards' evidence in the light of the circumstances that they were bound and it was at night, the witnesses were candid in so far as they mentioned that they could not identify the intruders. They did not seek to exaggerate their observations to give descriptions which they had not observed.

Peter Munzverengu another security guard on duty on the night in question also recounted how in the early hours of the morning in question he was checking the chicken run and was confronted by some intruders holding pistols. He told the court that he was handcuffed and assaulted and he screamed for help. It was after the screams that he heard gunshots. After the gunshots he made a report to Senior Assistant Commissioner Munzverengu. We found nothing to criticize about the manner in which the witness testified.

The witness's evidence of making a report to Senior Assistant Commissioner Munzverengu was confirmed by the Commissioner. Senior Assistant Commissioner Munzverengu's evidence was formally admitted in terms of s 314 of the Criminal Procedure and Evidence Act. Her admitted evidence showed that she reacted to the report by going to the scene together with Levison Munzverengu and that she observed Peter Munzverengu was handcuffed. She observed Edson Munhembe who was laying on the ground bleeding and crying for help.

The witness also confirmed that the 1st and 2nd witnesses, the guards Joseph Matunhike and Godfrey Chirwanemhuka were bound on their hands. She caused the deceased to be driven to hospital and later that morning learnt that he had passed on.

Also admitted formally was the evidence of Radias Majojo, a member of the Support Unit. His evidence was basically that on 10 September 2010 he was directed to accompany one Sergeant and Detective Inspector Utahwashe and other details to go and apprehend police detail Clever Ndlovu. He recounted how the latter Clever Ndlovu opened fire in resistance and witness as well as Inspector Utahwashe sustained injuries because of being shot by Clever Ndlovu.

Benard Rongai confirmed receiving a report from Senior Assistant Munzverengu about the burglary and shooting at Gletwin Farm on 2 July 2010 at 0400 hours which prompted him to attend the scene where he recovered 3x7.62mm spent cartridge, 1x7.62mm live rounds

ammunition. The witness's recoveries were confirmed by the Investigating Officer's evidence. The investigating officer Inspector Masenda took the exhibits for forensic examination, the spent and live round ammunitions were tendered in court as exhibits.

The state produced as exhibit 4a and 4 the CID forensic ballistic reports detailing the items received and examined. The recovered as part of exh 4a and ammunition measured 7.62x25mm exhibit 4. The state also sought to rely on evidence of Superintendent Muchengwa which was fairly straight forwards as it was pertaining to the arrest of accused 3, 4 and also he testified on the shooting of Clever Ndlovu whom the police held was in company of the intruders who went to Gletwin Farm on the night in question.

The Superintendent's evidence about recovery of the tokarev pistols serial numbers ZRP015 with eight live rounds and the arrest of accused three and four was confirmed by Inspector Utahwashe. Also confirming that is Detective Inspector Tachiwa and Constable Majojo.

The state further sought to rely on indications made by the accused persons to give evidence. To give evidence pertaining to the indications was the indications team, the leader, Alfred Mhakayakora, Assistant Inspector Mhasvi the interpreter, Sergeant Makanyesa, the driver, Constable Mangena the escort and Constable Makanheni the video camera operator. We must of necessity in passing comment on the evidence of the indications because the video and recording and indications were ruled admissible evidence after going through a trial within a trial wherein the accused disputed giving indications freely and voluntarily. The evidence revealed otherwise when it was presented before the court that there was no compulsion in terms of making indications.

It is important at this stage that the evidence of Owen Chari be put into perspective. Owen Chari a civilian witness testified that on 1 July 2010 at around 1500 hours he lent his car a Vauxhall, red in colour registration number AAL1577 to accused two Kudzai Madziro his friend. This was not the first time that he gave his friend access to use his motor vehicle. According to the witness, Kudzai, on that day wanted to use the vehicle to ferry his wife to the hospital. The witness was not amused by failure to return the vehicle, for accused two did not return the vehicle as agreed. The vehicle was handed back to him the following morning.

Owen Chari recounted how he was apprehended over allegations of armed robbery and murder at Gletwin Farm and that his vehicle was used during the commission of the offence. He denied participation in the offence or even knowing that his vehicle had been used for purposes of that errand. He confirmed being together with the accused persons under police arrest and that when time for indications came he was warned and he refused to make the indications pointing out that he had not participated or gone to the scene of crime at all. Owen Chari told the court that upon refusing to make indications he was not in any manner subjected to torture or force for him to be compelled to make the indications. He told the court that each of the accused who participated had equally been warned and asked if they wished to make indications to which they agreed.

Generally the witness gave his evidence well in an unclouded manner as he did not seek to exaggerate or commit himself to happenings during his absence. To a large extent his evidence on there being no compulsion or coercion imposed to make indications tallied with the indications team evidence.

Alfred Mhakayakora's evidence pertaining to how the indications came about was clear and straight forward. There was no global indications but individual specific to each and every suspect after explanation accepted to partake in the indications. The witness was not part of the investigation team, he only came into contact with the accused persons on the 15th of September 2010. As the leader of the indications team he observed that the accused were in their sound and sober senses and that none of them raised any complaints even pertaining to the arresting details. The witness duly warned the accused persons and they freely and voluntarily made indications. All the suspects with the exception of Owen Chari participated freely one after the other and signed indications forms and then made the indications. The witness maintained that none of the accused was subjected by the indications team or indications details to assault or coercion.

The other witness who was part of the indications details Inspector Mhasvi confirmed he was acting as an interpreter during the indications and that all the four accused participated freely and voluntarily in the indications. According to the witness Accused three Leroy Muteyera elected to give his indications in English without the services of the interpreter and he proceeded to give indications. He corroborated Alfred Makayakora's evidence to a greater extent. He also

confirmed that none of the accused persons complained of having been subjected to assaults earlier by arresting details to them at least as indications team.

Taurai Mukanyeni the detail who operated the video camera also confirmed that the four accused made indications freely and voluntarily and that there were no prior recordings or rehearsals or beatings. He recounted that normal course of recording occurred with him signalling when because of terrain he was stopping or technical hiccup and when he was resuming the recordings. The court takes judicial notice of the fact that there is no anomaly in stopping recordings along the way to the alleged scene of crime or when hiccups occur notifying that there are hiccups which would have an effect to the witness testimony and the recordings. There is standard procedure followed in recording of indications which does not necessarily includes recording along the way if there is nothing which is relevant for purposes of the indications.

We must mention at this stage that the evidence of indications by the indication details and by the accused given during trial within a trial where in all the accused had challenged the admissibility of the indications did not reveal any conscience. Having considered all the four accused's defences and evidence which was adduced in the trial within a trial it became apparent that the indications were made freely and voluntarily and that there was nothing to suggest that the indications so recorded were as a result of external impulses or forced admissions improperly brought to bearing upon all the four accused persons. The indication records were therefore ruled admissible.

A close look at accused one's evidence for instance clearly showed that no force was brought to bearing on him by the recording details. The 1st accused admitted making some indications at the guardroom freely and voluntarily and the court was left to wonder then at what stage he was forced to make indications. His indications as observed tallied with his defence outline. He was at the guardroom at Gletwin Farm and that is what is depicted on the video.

The 2nd accused made his indications which he sought to refute on basis of having been rehearsed with one officer Madekuchekwa. Officer Madekuchekwa testified, he was never put to task on having rehearsed the purported indications with the 2nd accused. In any event the indications were in line with the evidence of accused two having been at the scene in the motor vehicle.

The 3rd accused was given as the only one who chose to make indications in English. There is nothing amiss in the manner in which the indications were made and the indications do not reveal any threats which were brought upon him for him to make the indications. If he was subject to assault and torture by the arresting details he did not bring that to the attention of the indications details. This made it then difficult for one to have such alleged assaults have a bearing on the indications without disclosure of same.

The 4th accused recounted how he told the police the truth when he made the indications. It was then difficult to follow his claim of not having made indications freely and voluntarily if he told the police the truth. It was laid bare during the trial within a trial that the recording of indications by the indications team was above board and that the allegations of threats and force during indications by the indications team were without substance and it was apparent that all the four accused agreed, after being warned, to make the indications. For example viewing accused four when he was being warned and requested to go and make indications. He indicated that he could not give directions from the Highlands Police Stations, where they were up to Gletwin. He only knew and would only know upon reaching Gletwin Farm since it was his first day to go to Gletwin Farm on the day that he went upon invitation by accused two. When he said he could not give directions, he was not forced per the video clip. When they were at Gletwin Farm he indicated that he now remembered and he indicated some positions of entry.

His evidence is that he did not go further than the guardroom and the indications depict such as well. Accused four maintained that he was invited by accused two to accompany a friend to collect his property and that he did not go further than the guardroom and that is when he realized it was a suspicious enterprise, he wanted to go back but then he was threatened by Ndlovu. If he was at the guardroom and he indicated that is where he ended, then there is basically no basis or merit in his challenge of the indications.

Clearly all the four accused accepted having gone to the scene as per the indications albeit not for purposes of committing an offence. The aspect which the court is to grapple with in the face of the totality of the evidence adduced is as regards whether the accused went to Gletwin Farm with a motive to commit an offence. It is necessary at this stage that we highlight aspects which from the totality of the evidence in progression of the trial are common cause. It is

common cause that accused 2, 3 and 4 were known to each other prior to the fateful day as fellow policemen. It is also common knowledge that Gletwin Farm is a police force concern.

It is clear and apparent that all the four accused went to Gletwin Farm on the day in question in the company of Ndlovu and others. Entry into the farm was through a hole in the security fence. It is also not in dispute that the guards at Gletwin Farm guardroom were bound and tied up. It is common cause that Clever Ndlovu who was with the accused was armed and that his firearm was discharged causing the mortal injuries on the deceased. It is also not in dispute that the deceased died as a result of the shots occasioned when he sought to investigate and follow the armed robbers. It can also not be disputed that murder occurred during a foiled armed robbery and that the deceased died as a result of hypovolemic shock due to gunshots as per the post mortem report which was tendered as an exhibit.

Given the evidence of the accused persons and the state witnesses the court is to come up with a determination of whether or not on the day in question the accused acting with common purpose and in concert killed the deceased with actual or constructive intentions. The state was tasked with the onus of proving beyond reasonable doubt the cause or connection between Clever Ndlovu's shooting of the deceased and the four accused persons. If there is such a link then the accused ought to be found guilty. In the reverse if there is no link between the shooting by Clever Ndlovu and the accused persons then the accused ought to be acquitted. To come up with a disposition of necessity it is important to pay attention to the accused persons' line of argument as presented in evidence.

The 1st accused's position was that he went to the farm at the invitation of accused two whom he was introduced to by his uncle Owen Chari. His business there was to assist to ferry some property from accused two's former workplace. According to the 1st accused his going to Gletwin Farm was not by cohesion. He met accused two and one Clever Ndlovu at Warren Park beer hall after 10.00pm. While at Gletwin Farm he stood guard at the entrance to the farm where the guards had been bound by shoe laces. It was apparent from the 1st accused's evidence that he requested the 4th accused not to tightly secure the guards. This aspect of his evidence is also confirmed by the 4th accused during indications that the 1st accused requested him not to tie the guards tightly. According to the 1st accused when the gunshots were fired, the group dispersed and the 1st accused enquired from Clever Ndlovu if he had not shot someone.

The 1st accused's evidence as given in court especially during cross examination by the state counsel tallied with evidence as observed and given on the indications which was video recorded. The questions that begs of answers when the totality of evidence of the 1st accused is considered is, if this was an innocent escapade to assist ferry a colleague's property, why was it necessary to facilitate the same in the middle of the night, why was it necessary to enter through a hole of the security fence, why was it necessary to bind the guards and keep them under guard. Further, why did accused one remain guarding the security guards if he was acting under instructions of Ndlovu, at the time that Ndlovu ventured to go inside the premise where eventually the shooting incident occurred. Even after the shooting, the 1st accused went back with his companions in the same vehicle.

The answers to questions given above logically smack of some illegal activity ventured into by a group acting in agreement and at the scene there was agreed division of labour as regards roles. The 1st accused generally impressed the court as of shrewd personality who on the face of evidence could not deny having been at Gletwin Farm but sought to underplay his role, by pointing out that he was only in possession of a small sharpened nail cutter. He oscillated from saying accused three was present to saying he did not know accused three. Accused two and four were present with him together with Ndlovu. He unconvincingly sought to underplay his role but a closer view of the witness's evidence, the 2nd accused and 4th accused's evidence, accused one was at Gletwin Farm with accomplices with a common design.

The 2nd accused's evidence was marked with incredible stories. He denied having been at Gletwin Farm on the night or early morning hours of the fateful day. He had insisted by his indications as viewed on the clip and going by the 1st and 4th accused's evidence, accused two was quite central. He was and he played a pivotal role in bringing about the group together for the visit to Gletwin Farm. The court is alive to the need to view with caution accomplice evidence and such has been applied. What sticks out really is why would accused four and one seek to drag in accused two if he never went to the farm?

The 2nd accused was exposed as an untrustworthy man. He would deny even the impossible. He sought to hide behind a finger when he sought to portray that he was not known to accused one and four. His assertion is that he did not know accused one and accused four. When viewed in conjunction with accused one and four and Owen Chari's evidence, his

dishonest personality is exposed as one who was bent on misleading the court hiding factual information. We found no basis why Owen Chari his friend would lie about the vehicle and that accused four was misleading the court that it is accused two who invited him. It was not disputed accused two was given a vehicle by Chari, he requested for the vehicle saying he wanted to ferry his wife to hospital, but that vehicle was not returned till the following day. The coincidence of the same vehicle being at Gletwin Farm and being seen by accused four being driven away after the shots is certainly not explainable.

Accused four stated that he was driven by accused two and that he fell asleep upon entering the motor vehicle and woke up when there was another person presumably accused one. In a bold mischievous manner, the 2nd accused sought to paint that he was not known to Clever Ndlovu a fellow police detail who lived in the same camp with him and yet accused four had indicated that accused two invited him to go and assist his friend Clever Ndlovu.

The indications (which were ruled admissible) by accused two to a greater extent tallied with accused one's evidence who indicated that accused two remained at the getaway car and this also tallied with accused four's evidence that shortly after the shots accused two drove away leaving the rest who had to board a kombi vehicle to go back. The 2nd accused drove off and later returned and met his colleagues at Chisipiti. The 2nd accused's evidence was riddled with contradictions even on the aspect of returning the vehicle, he gave varying explanations. The vehicle had developed a technical fault and he did not notify Chari about that. He also gave another version, his wife was having complications at hospital and yet another version that he had taken his wife to a traditional healer. Despite his imaginations and the contradictions in his testimony, the court could clearly read that accused one, three and four were brought together by accused two and Clever Ndlovu. We viewed accused two as a man who is untrustworthy and not candid.

The 2nd accused's sudden turn about to dissociate himself from co-accused only exposed him as the one playing the pivotal role or core role to the activities of the day in question. The questions that again require answers are why was it necessary to go and ferry property at night, why was it necessary to have the cars parked outside the farm premises instead of driving in through the entrance for purposes of ferrying property if it was a lawful enterprise. Why was it necessary for accused two to drive away in heist leaving his passengers after hearing gunshots

and why on calming down was it necessary for accused two to drive back to collect his colleagues if they were not associates. The logical answers to these questions shows that the 2nd accused was appreciative of the unlawful enterprise and was quite central to the unlawful enterprise, that they had teamed up as a group to achieve the criminal enterprise and he played the role even of driving the getaway car fully well.

The 3rd accused was not only implicated by the 2nd accused but the 1st and 4th accused's indications evidence. His own indications bring him in as part of the group. In his evidence in denial of the allegations, accused three pointed out that he was linked to the offence by his call to accused two because he wanted to investigate accused two. He stated that he was tasked by his superiors in the Peace Section to investigate accused two and he called accused two. The superiors were however not called to support his story.

The 3rd accused's evidence when viewed in conjunction with accused one, two, four and evidence of admitted indications clearly places him as part of the group which proceeded to Gletwin Farm on the fateful day. Accused three interestingly denied some of his indications and accepted others. In fact he was specific on saying he was instructed to point at a collapsed building and cut security fence which clearly is an acquiescence to that the rest of the indications he made freely and voluntarily and that they were correct.

The 3rd accused is the only one who opted to give indications in English confirming there was no cohesion in making the same. Accused three did not challenge accused four's version as observed on indications where accused four specifically refers to accused three by name "*Mutere went to the inside building*". Such is taken as acceptance of his involvement and his being there at Gletwin Farm. The recording audio of the video clip is very clear even though their pictures as regards accused three which were blurred at some instances. He gave out that he assisted in handcuffing Peter Munzverengwa and shortly thereafter the gunshot. This tallies with the state witness Peter Munzverengwa's evidence that after he was handcuffed the gunshots sounded. The sequence of events cannot be said to be coincidence but something real, which occurred. The questions that come to mind would be, why would accused four say accused three was in and he went with Ndlovu further into the interior of Gletwin premises and why would accused one say accused three was present if he was not present. Why would accused three be the only one in the Peace Section to be victimized and be arrested for being requested to investigate accused two.

Generally accused three was very economical with evidence. However such signs of being economical did not cloud the evidence which brought him to the scene and which showed clearly his involvement with the group. We read lack of being candid to the court through the signs of being economical with evidence. We later understood as evidence unfolded that if he is the one who went inside with Ndlovu where after handcuffing Muzerengwa the shooting occurred, then he did not want to talk much, for that would expose his central role. Generally the 3rd accused as a witness did not impress the court as a genuine man. There is nothing in evidence to dissociate him from events of the evening or night in question of the unlawful enterprise at Gletwin Farm.

The 4th accused, the Sergeant in the police force, most senior among the police details who went to Gletwin Farm. To a considerable measure he impressed the court as being genuine and candid. He was known to accused 2 and was surprised at accused two's denial of the obvious. He narrated how he accompanied accused two and Clever Ndlovu to Gletwin Farm. He also pointed out that Clever Ndlovu was accused two's friend and that the visit to Gletwin Farm was to collect Ndlovu's property. The 4th accused stated that he was introduced to Ndlovu by accused two. He sought to portray a picture that although he was neighbours with Ndlovu accused four residing at number 248 and Ndlovu residing at Number 253 Chikurubi Support Unit Camp was not known to Ndlovu. He also stated he was introduced to accused one by Ndlovu. He presumed accused one was the man who was in the vehicle at the time he woke up from sleep. Interestingly accused four stated that when he got into accused two's vehicle he fell asleep. One only wonders what was in it for him to undergo the trip to Gletwin Farm where in upon entering the vehicle he fell asleep. If it was for no benefit then why bothered to be disrupted during sleeping time as opposed to staying in the comfort of his home.

The 4th accused told the court that he knew that Ndlovu had a gun but he did not know that the gun was going to be used. This is another aspect which led the court to comment that the 4th accused was to an extent or a considerable extent candid. He told the court that while at Gletwin Farm when he became suspicious that his accomplices or his companions were engaging in an unlawful enterprise, he indicated his intention to remain behind. This was upon realizing the entry was via a hole in the security fence. According to the 4th accused's indications one of them in the group had used a pliers to cut the fence. When he indicated his intention to remain

there Ndlovu ordered him at gunpoint to move on. Again this is depicted on the indications which explain why we were wondering what he was challenging on the indications. On another breath he stated that the gun was pointed at him while he was seated at the guardroom where he was directed to stand guard by Ndlovu.

In short the 4th accused raised the defence of compulsion. The 4th accused told the court that after tying the guards or binding the guards he remained at the guardroom where he was guarded by accused one. It is worth pointing out at this stage that his evidence here does not tally with accused one's version. The 4th accused stated that he only escaped after the gunshots were fired and observed accused two drive off in the Red Vauxhall. To this end the 4th accused confirmed the presence of 2nd accused at Gletwin Farm and that the latter drove away after the gunshot. The 4th accused boarded a kombi vehicle together with other companions and left the farm. Surprisingly the Sergeant who suspects that a crime was being committed did not report the shooting to any police station. He at some stage in his evidence sought to paint a picture that he was not sure if the sound were gunshots or not again an absurd suggestion given his rank in the police force and that he actually uses firearms.

He painted a picture that he did not report because he required to confirm with accused two first. This rendered his testimony exaggerated or spiced with a view to dissociate himself from the offence given that accused two was mere constable. He sought to portray a picture that he was just a sheep being driven by accused two and Ndlovu. However there was no evidence to support that shipment of sheep.

The 4th accused made indications and these tallied with his version that he went to Gletwin Farm and remained there under compulsion. We repeatedly pointed out that his challenge of indications given his evidence was not understandable because he also sought to rely on those indications in his defence of compulsion where he says he remained at the gate and indicates he remained at the gate at the guardroom.

The 4th accused produced a sky blue t-shirt with a brown stain and warrant of committal as evidence to show that he had been subjected to assault. It however remained unclear if he was assaulted and at what stage he was assaulted as evidence from the indications details clearly showed voluntary participation in making of the indications. When one observes the indications by the 4th accused they are in line with his defence such that one fails to appreciate the basis of

that challenge. If at all accused four was assaulted by the police at any stage he did not notify the indications team and he did not refuse to make indications which clearly from the video clip and evidence were made freely and voluntarily.

Accused four went to Gletwin Farm upon invitation by accused two and he states he remained on compulsion at the farm from Ndlovu. What falls under scrutiny then in respect of accused four in the circumstances of his defence of compulsion is whether that defence is available given the circumstances of this case. Compulsion is given as a complete defence in s 243 of the Criminal Law Codification Reform Act and s 244 outlines further requirements where one is facing a charge of murder. Section 243(1) reads;

“subject to this part the fact that a person accused of a crime was subjected to compulsion when the person did or omitted to do anything that is an essential element of the crime shall be a complete defence to the charge if the compulsion consists of a threat of unlawful killing to him or her or causing of him or her serious bodily injury, or kill or cause seriously bodily injury to someone other than that persons or unlawfully to cause him or her financial or proprietary loss and (b) He or she believed on reasonable grounds that the implementation of the threat had began.”

It goes on to (c) up to (e).

Sub Section 2 is vital it reads:

“were a person voluntarily associates himself or herself with one or more knowing or realizing there is a real risk or possibility that they will involve him or her in commission of a crime any threat made against him to commit the crime shall be deemed to have been brought about through his own fault. For emphasis I am talking of the proviso Sub Section (2) s 243 were a person voluntarily associates himself or herself with one or more other persons knowing or realizing there is a real risk or possibility that they will involve him or her in commission of crime, any threat made against him or her by one or more of other persons for the purpose of inducing him or her to commit crime shall be deemed for purposes of paragraph C of sub section 1 to have been brought through his own fault”.

Section 244 the whole of it is instructive on additional requirements for compulsion to be a complete defence to murder. It reads:

“(1) Subject to subsection (3), the fact that a person accused of murder was subjected to compulsion when he or she did or omitted to do anything that is an essential element of the crime shall not be a complete defence to the charge unless the following requirements are satisfied in addition to those specified in paragraphs (b), (c) and (d) of subsection (1) of section two hundred and forty-three –

(a) The compulsion took the form of a threat unlawfully to kill the accused or some other person immediately if the accused did not kill or assist in killing the deceased; and

- (b) The accused could not escape from or resist the threat referred to in paragraph (a); and
 - (c) The accused had no warning of the threat referred to in paragraph (a) to enable him or her to forestall it, whether by reporting the matter to the police or by other means.
- (2) if the requirements referred to or specified in subsection (1) are satisfied, the defence of compulsion shall be a complete defence to a charge of murder, whether the accused is charged as an actual perpetrator or as an accomplice”.

Once the requirements as outlined in s 243 and 244 are satisfied then the defence of compulsion can be available as a complete defence to the accused person.

In the circumstances of this case accused four, a sergeant colloquially referred to by his colleagues as “elder” voluntarily associated with the co-accused for purposes of an unlawful enterprise even if one was to accept, he realised it was a criminal enterprise whilst at the Gletwin Farm, he remained in attendance even after Ndlovu had gone further down into the premises of Gletwin Farm. He had walked to the premises, when the fourth accused still remained at the guardroom. There was no threat on him when Clever had gone to be necessitating his remaining at the guardroom even if one was to accept that accused four says a civilian accused one was watching over him. The 1st accused was not armed. If he was not part to the unlawful enterprise and he did not want to be there, the 4th accused would have gone away. When viewed holistically with the happenings of the day in question and the failure to report thereafter, and the evidence points more in the direction of voluntary association in full appreciation of the likelihood or possibility of involvement in commission of the offence by accused four.

In the face of evidence before the court from the accused persons and the state witnesses both direct and indirect evidence the defence of compulsion raised by the 4th accused cannot be sustained in the circumstances more so given its cosmetic nature. The cosmetic nature being applied as regards the threats. The 4th accused’s assertion that he was a victim just drawn in cannot be accepted given the hours that he left the comfort of his home to go with accused two and Ndlovu and the rest. If anything the 4th accused as the most senior policeman, the sergeant who is highly respected “elder”, his conduct prior, during and after the shooting is consistent with one acting in cahoots with these accomplices.

Having looked closely at the totality of the evidence adduced before the court from the state witnesses, the accused persons and further having considered submissions by state and

defence counsels, further having taken note of the common cause aspects alluded to earlier, the following observations are also worth noting. Central to the matter before the court is whether or not the accused were acting with common purpose and in concert. The common law doctrine of common purpose or conspiracy to commit a crime which is now codified in the Criminal Law Codification Reform Act s 188 provides,

“any person who enters into any agreement with one or more or other persons for the commission of a crime whether in terms of this code or any other enactment (a) Intending by the agreement to bring about commission of a crime or

(b) Realizing that there is a real risk or possibility that an agreement may bring about the commission of crime shall be guilty of conspiracy to commit the crime concerned.

Sub section (2) for an agreement to constitute a conspiracy it shall not be necessary for the parties to agree upon the time, manner and circumstances in which the crime which is the subject of the conspiracy is to be committed. Sub paragraph 3, to know the identity of every other party to the conspiracy. It shall be immaterial that the crime which is subject to the conspiracy is to be committed by one, both or all of the parties. One or more of the parties to the conspiracy other than the accused did not know that the subject matter of the agreement was commission of a crime”.

These subsections 1 and 2 under (b) show what is viewed as immaterial for purposes of a conspiracy. Clearly then if two or more people form a common purpose to prosecute an unlawful enterprise and to assist each other then each of them is party to and liable to punishment for every act committed by the others in the performance of the unlawful enterprise which was or must have been known to be a probable consequence of such an enterprise.

The accused together with other accomplices planned to commit an armed robbery at Gletwin Farm. In the process of executing such an unlawful enterprise, one Clever Ndlovu part of the team shot at Edson Munhembe for coming in the way of the foiled plan. Such shooting given that the group conspired to go and rob and that they were armed cannot be said to be an improbable consequence but certainly a foreseeable consequence in an armed robbery enterprise. The murder of Edson Munhembe came about during the course of the conspired foiled unlawful armed robbery enterprise. The fact that it only took one individual to pull the trigger does not exonerate the rest of the conspirators. What is important and what is apparent is that the shooting fell within the common design of the group. The late Edson Munhembe had got into the way of the smooth execution of an unlawful enterprise, hence he was fatally shot by Clever Ndlovu who was part of the group. The group had conspired to prosecute an unlawful enterprise and the team

undertook to prosecute armed robbery and they all ought to have foreseen that the firearm could be used on any attempt to foil the set criminal or unlawful enterprise.

In the circumstances of this case, the probability of shooting occurring was very high given Gletwin Farm is a police farm which was under guard. In the case of *S v Chauke and Anor* 2000 (3) ZLR 494, the honourable Judge of appeal Sandura as he then was with the concurrence of Ibrahim JA and Muchechetere JA dismissed the appeal by the appellant who among other things argued that the prison officer who was shot during escape was shot by one who fired the firearm and that it might have been another prison officer firing to prevent the escape. The Honourable Judges therein held that the shooting fell within the common design of the group and that the appellants ought to have foreseen that anyone involved in escape could be killed in the cross fire. The Judges quoted with approval the case of *S v Mhlazo and Anor* 1981 (2) SALR wherein it, it was clearly spelt out that armed robbers in that case who attacked security guards in order to steal must have foreseen that the attack might lead to gun battle which would result in the guards or an innocent bystander for that matter or robbers being shot and killed. The fact that one of the team fires a shot therefore does not remove the liability of the others who teamed up for purposes of prosecuting an unlawful enterprise. We subscribe to the same reasoning by the Honourable Judges of the Court of Appeal.

The same reasoning is equally applicable to the case on hand, clearly the team went to Gletwin Farm with two vehicles for purposes of stealing and they were armed. All the accused had an active distinctive role, of either carrying property, guarding, stealing or driving the getaway cars and immobilizing the security guards at the farm. None of them in the team dissociated from the common purpose, prior, during and after the shooting. The team went to Gletwin Farm acting in concert and in pursuance of a pre-planned robbery. The deceased heard screams for help from Peter Munzerengwa who was being handcuffed and went out to investigate. It was then that the deceased was shot three times by Clever Ndlovu.

All the accused were present, not only physically but in mind as evidenced by their spontaneous escape from the scene upon hearing the gunshots with accused two driving leaving the others behind. We must comment on that withdrawal of the 2nd accused after the event. It does not remove him at all from being a co-perpetrator. He drove away after the event, last minute withdrawal so to speak and that did not render the conspired illegal enterprises ineffective

for it had already been accomplished. In fact evidence on record shows, upon hearing the gun shots he drove away out of fear and when he sobered up, he drove back and joined his co-accused at Chisipiti showing, he was still part and parcel of the group. He thereafter proceeded to drop off his colleagues with accused one being the last one to be dropped at his house.

Accused one was in from the pre planning stages and was at the scene when the armed robbery was disturbed by the shooting of the deceased. There is nothing to negative his participation or to show his dissociation. The same observation can be said and made of accused two and three and four, they only escaped from the scene after the fatal blow. They did not dissociate themselves from the team, they escaped as a team. During and after the event, none of them reported the shooting to relevant authorities. This only buttresses the fact that Clever Ndlovu and the accused persons were partners in an unlawful enterprise, the unlawful enterprise of robbing a police farm Gletwin. The fact that it was foiled by the shooting of the deceased which came up as a result of the desire to accomplish that planned unlawful enterprise does not remove liability of the teammates.

Even if one was to stretch the argument of participation or assistance by co-perpetrators and accomplices before and during commission of the crime, all the four accused fall within the ambit in the sense that co-perpetrators are defined in s 196 of the Criminal Law Codification and Reform Act. Clearly one has to be present with the actual perpetrator during the commission of the crime, or one has to be in the immediate vicinity of the crime in circumstances that implicate one directly or indirectly. The commission of the offence and that one knowingly associates with the actual perpetrator with an intention each or one of them or all to commits or perpetrates to commit the crime actually committed. The actions of the actual perpetrator would be deemed to be the conduct of every perpetrator. *In casu* therefore the accused set out with common purpose to go and commit an armed robbery at Gletwin Farm. Accused one was there to give assistance in committing the crime. Accused four was there to bind the guards and keep guard. Accused two provided transport and was there in the vicinity. Accused three was there right inside at the commission of the crime and they cannot be held not liable for the conduct of Clever Ndlovu who pulled the trigger and killed the deceased during the course of commission of the disrupted armed robbery. Each of the accused had agreed to play a role in the unlawful enterprise. There is nothing from the evidence which shows that any of them dissociated themselves from the

significant participation and aid they had rendered for materialisation of the unlawful enterprise. In the case of *State v Woods and Anor* 1993 (2) ZLR 258 it was held that conspirators who had rendered significant assistance to the actual perpetrators of murder are guilty of murder as accomplices even though they were not present at the scene of murder. This is obviously because of the obvious pivotal role played in the unlawful enterprise, as in the present case.

From the foregoing it is apparent that the four accused together with one Clever Ndlovu and Ocean Mujeri hatched a plan to go and rob some building materials from a police farm Gletwin. The accused together with their accomplices associated with a common purpose to prosecute an unlawful enterprise. The fact that it was a police farm and that accused two, three and four are policemen fortifies a clear preplanning in order to execute the conspired unlawful enterprise at a guarded farm. There was a prior agreement to commit the armed robbery and all set out with an intention to commit the armed robbery by virtue of going to Gletwin Farm whilst they were armed with a firearm. The team had actual intention to commit robbery and while in that association Edson Munhembe the deceased came into their way and was shot dead by Clever Ndlovu who was in the process of executing the planned unlawful enterprise.

There was no evidence of dissociation from the unlawful enterprise. The casual link between the shooting by Ndlovu resulting in death of the deceased cannot be viewed in isolation of the common design of the group. They ought to have foreseen that in so engaging with a common purpose and consent to, embark on an armed robbery at a guarded police farm, there was bound to be resistance which would occasion casualties or death especially going in an armed state as they did. In the case of *S v Woods and Anor* 1993 ZLR 258 it was held that were persons participated and rendered significant assistance to the actual perpetrator they are equally guilty. All the accused set out with an aim to execute the unlawful enterprise and that they all had the requisite *mens rea* and *actus reas* to commit the offence. There is no evidence to dissociate the four accused from the pulling of the trigger by Ndlovu. The state has thus discharged the required onus and proved its case beyond reasonable doubt. All the accused are accordingly found guilty of murder with actual intent.

RULING

We have taken note of submissions by all the defence counsels on extenuation and we have also taken note of submissions by the State counsel in aggravation. In general all the

defence counsels submitted the fact that 4 accused persons did not pull the trigger to shoot and kill the deceased. And that that should be taken as extenuation.

Further counsel for the 2nd accused submitted that the degree of participation of each accused should be taken into account and that accused 2 was a mere Constable. We must comment that the degree of participation of accused 2 as shown on the record was very significant as he convened the rounding up of people, looked for the gateway vehicle secured the gateway vehicle and was at the scene during the commission of the offence. Also after the commission of the offence he came in to drive colleagues to their respective homes. The fact that 2nd accused is a Constable is not any factor which can amount to reduction of moral blameworthiness that is his rank as a Police Officer and it does not amount to youthfulness as envisaged by the law.

Further it was submitted by the counsel for the accused number 3 that the accused made a mistake on choice of friends or associates. He in fact sought to submit this in respect of all the accused that they made a mistake by associating with Ndlovu who pulled the trigger and urged the court to view such a mistake as extenuation. In other words he was requesting the court to view the poor choice of association of friends whether in agreement or not as immaterial and amounting to extenuation.

Counsel for accused 4 emphasized the point that accused 4 did not pull the trigger. We must commend the professional approach from the counsel for the 4th accused in his submissions as regards extenuation as it depicted the full understanding of the legal position.

Counsel for the 1st accused submitted, 1st accused did not pull the trigger and that the 1st accused went with a view that they were just going to steal property and not that there was going to be an armed robbery. The finding by the court was that the accused persons were acting with common purpose and with consent when the murder during the robbery occurred.

The State counsel Mr. Chesa argued that there were no extenuating circumstances and urged the court to disregard submissions tendered by all the defence counsels. He presented the facts that only one member of the gang pulled the trigger does..... not reduce the moral blameworthiness of the accused given they conspired with a common design to accomplish an unlawful enterprise.

Even the fact that the accused were acting with common purpose and in consent with Clever Ndlovu who pulled the trigger and other accomplices does not amount to extenuating circumstances. It is with these submissions in mind, in circumstances of the case as given on record that we are to come up with a disposition on whether or not we are extenuating circumstances.

It is necessary at this point to tabulate that extenuating circumstances have been defined time and again by this court and the Supreme and in other jurisdiction as a fact having a bearing upon the commission of the murder, which reduces the moral blameworthiness of the offender as distinct from the legal liability. In deciding whether or not they are extenuating circumstances which allow imposition of a sentence other than death, the court exercise essentially a moral judgment. By the mere fact that one will be looking at the degree or moral blameworthiness the court of necessity makes a moral judgment. There are a plethora of cases on definition of what constitutes extenuating circumstances. The case of *S v Lestolo* 1970 (3) SA 476 and another and the case of the *State v Chauke* cited above are instructive. The fact that all the accused did not pull the trigger does not in any manner relieve their voluntary enthusiastic participation in the unlawful action they premeditated and set out so to accomplish. Logically there is no way a sizeable gang if they are engaging in an unlawful enterprise would pull the trigger at the same time but the pulling would be by agreement and for it to be effective has a person assigned to be playing that role.

The accused set out in quite a sizeable group to rob a guarded police farm. Clearly to subdue any resistance in the event of any having occurred. The firearm which they were aware was in possession of one of them a gang member, which became handy and in this case was used. The murder was during the commission of an armed robbery the fact that the robbery was failed does not denote any extenuation or any extenuating circumstances and does not change the complexion of the matter that murder was committed during the course of an attempted armed robbery.

In casu it was murder with a lethal weapon occasioned by a Policeman who teamed up with fellow Policemen and civilians for purposes of accomplishing an unlawful enterprise. In the case of *Mthandazo Mbodlela Dube & Anor v the State* SC 245/96 it was ruled that where a team carries a firearm on a robbery expedition and someone gets killed then generally speaking

the one who fires the shoot and those of his colleagues who knew he is armed and who do not actively disassociate I emphasize who do not actively dissociate themselves from the killing are guilty and are likely to be sentenced to death.

There are other cases which come to mind and are apposite on determination of whether or not extenuating circumstances exists. The case of *Bigboy Ncube v the State* SC 179/98 and the case of the *State v Wairoso* 2011 (1) ZLR 215 the case of *State v Sibanda* 1992 (2) ZLR 438 are also relevant in respect of what is at stake in determination. *In casu* the submissions on mistaken choice of associates and that there was no simultaneous pulling of a trigger by all the accused does not reduce the moral blameworthiness given the accused were acting with common purpose and in concert. In *S v Sibanda supra* Honourable CJ Gubbay as he then was stated:

“Warnings have frequently been given that, in the absence of weighty extenuating circumstances a murder committed in the course of a robbery will attract the death penalty”.

The murder was during an armed robbery (albeit foiled) with a lethal weapon by Policemen and civilians in circumstances which amount to murder in aggravated circumstances. We have a situation where law enforcement agents ceased to protect the general public and turned villain. The murder in aggravated circumstances is outlined not only in s 337 of the Criminal Procedure and Evidence Act [*Chapter 9.07*]

But also s 47 (2) of the Criminal Law Codification Reform And Reform Act [*Chapter 9.23*] and more importantly s 48 (2) of the constitution, the Supreme law of the country which is a section which deals with the right to life. Section 48 (2) reads:

“A law may permit the death penalty to be imposed only on a person convicted of murder committed in aggravated circumstances”

The aggravated circumstances in this case are shown in it being a murder during the course of an armed robbery. Having ruled that the murder was during the course of a gang armed robbery and as such committed in aggravatory circumstances, and that no submissions have been made to the satisfaction of the court to reduce the moral blameworthiness of the accused persons, we accordingly make a finding that there are no extenuating circumstance in existence in the case.

SENTENCE

The sentence of the court is that you be returned to custody and that sentence of death be executed upon you according to the law.

Attorney General's Office, applicant's legal practitioners
C. Mpame and Associates, accused 1's legal practitioners
Gasa Nyamadzawo & Associates accused 2's legal practitioners
C. Nhemwa & Associates, accused 3's legal practitioners
Venturas and Samukange, accused 4's legal practitioners