

THE STATE
versus
TAPIWA CHIKANGA

HIGH COURT OF ZIMBABWE
BERE J
MASVINGO CIRCUIT COURT 11, 12 & 13 June 2015

ASSESSORS: 1. MR MUSHUKU
2. MR DHAURAMANZI

Criminal Trial

E. Chaarika, for the State
F. Chirairo, for the Accused

BERE J: When the Government of Zimbabwe decided to pay relocation allowances to individuals who had been relocated to pave way for the construction of the Tokwe-Mukosi dam, no one had ever envisaged that people like the deceased would fall victim to the evil intent of people like the accused person.

On 4 October 2013 the deceased, his wife Jostina Mapfumo, the accused and other villagers left Jere village, under Chief Gororo, in Chivi and headed to the Provincial Administrator's office here in Masvingo to get their relocation allowances as their compensation for their relocation to pave way for the construction of the Tokwe-Mukosi dam. Little did the villagers know that the accused and his accomplice had hatched a plan to rob them of their relocation allowances. But conscious of the need to always exercise caution, when the deceased arrived at his home he felt his money was not safe in his house. He proceeded to bury his allowance in a plastic tin wrapped in a plastic paper in a goat pen a few metres away from his two-roomed house.

Around mid-night of the same day the accused and his accomplice forced open the deceased's house using a pick head and indiscriminately started assaulting the deceased and his wife demanding the money that the two knew the couple had as they appeared to have kept an eagle's eye on the movements of the couple and other villagers on the day in

question. The victims of this violent attack were well chosen, their vulnerability having been properly assessed.

In the melee that followed the violence at the deceased's place orchestrated by the accused and his accomplice Jostina Mapfumo was attacked on three distinct parts of her body, viz, on the back part of the body around the spine, in the palm and below the armpit. A knife was used to attack her. The victim was almost rendered unconscious. Her husband was not so lucky. When the door was violently opened by the two intruders, one of them attacked him on the head with a pick handle and at the same time demanding money from him. As the deceased offered some resistance one of the attackers used a knife to rip open his abdomen thereby exposing his bowels and intestines. As the deceased screamed in agony and at the same time remarking that his attackers had killed him, one of the attackers rolled a piece of cloth around the exposed bowels and threatened more injury to him unless he disclosed where the money was. The deceased eventually gave in and showed the accused and his accomplice a spot in the goat pen where he had secured the money. Once the accused and his accomplice got what they wanted they swiftly left the scene and got to some place where they shared the loot.

The main thrust of the accused's defence was that he did not deliver the fatal blow that took the deceased life. The accused stated that that was done by his accomplice whom he did not know was armed at the time. This position was adopted by the accused despite him having firmly placed himself at the scene of crime and having actively participated in the advancement or realisation of the two's objective of having to rob the deceased and his wife.

THE LEGAL POSITION

I propose to start by laying the legal position as perceived in this case as informed by the nature of the accused's defence outline. This case brings into analysis the principle of law that is referred to as the doctrine of common purpose. This concept is lucidly explained by Professor G. Felton in the following:

"If X is an accomplice to Y in a criminal enterprise, X will be liable for crimes committed by Y which fall within their common design. The liability of X is not dependent on Y's giving a mandate to commit the crime in question. X is liable because he participated in Y's crime with the necessary mental state, that is he participated knowing or foreseeing that Y would commit the crime in question. If X and Y actually agree upon what crime will be committed, X will be guilty when Y commits the crime because he will have actual intention; if X and Y have not actually agreed in advance that the crime in question will be committed during the criminal enterprise, but X foresees the real possibility that the crime will be committed, X will be guilty of the crime committed by Y on the basis of legal intention. Thus if Y murders D during the course of a robbery, the accomplice, X, will be guilty of murder if X and Y agreed that the person being robbed would be killed if he put up resistance. On the other hand, X

will be guilty of murder on the basis of legal intention in this situation if X and Y had not agreed in advance that D would be killed if he resisted, but X knew that Y was armed when they went to commit the robbery and that Y was likely to use his weapon to kill D if D resisted¹”.

The illustrations given by Professor Feltoe clearly show that the liability of an accomplice can never be based upon ratification by the accomplice of the offence committed by the principal offender.

As observed by Manyara JA² it is a long held position of the law that where a court finds it impossible to apportion guilty unevenly between accused persons on the evidence before it, the court should treat both in the same way. See *S v Frashishiko and Ors*³, *R.W Nemashakwe and Ors*⁴ and *S v Mhalanga*⁵.

In *S v Nsele & Anor*,⁶ the accused took part in a robbery knowing that his co-accused was armed with a loaded weapon. As it turned out, the loaded weapon was used during the robbery leading to the death of the deceased. The court found the accused guilty on the basis that he foresaw that the gun could be used with fatal consequences during the robbery.

As noted by Ebrahim JA in the case referred to us by the State Counsel during submissions:

“It is now settled that where murder is committed in furtherance of a robbery, particularly by the use of a weapon, it does not matter which colleague uses the weapon. The part not using the weapon cannot escape liability”.⁷

THE EVIDENCE AND ANALYSIS

It is with this legal position that I must now proceed to deal with the evidence. Essentially the facts in this case are common caused. Both the State and the defence appeared to have devoted quite a substantial part of their time trying to establish the roles actually played by the accused and his accomplice in this case.

The evidence by Jostina appeared to suggest that it was the accused who delivered the fatal stabbing on the deceased. The accused in his indications and confirmed warned and cautioned statement appeared to push the blame to his accomplice.

¹ A Guide to the Criminal Law of Zimbabwe 1989 edition, by G.Feltoe, published by The Legal Resources Foundation, Zimbabwe

² *S v Muleya and Ors* 1988(1) ZLR 359 (SC)

³ 1977 (2) RLR 37

⁴ 1967 RLR 127; 1967 (3) SA 520

⁵ AD-27/81 (unreported)

⁶ 1955 (2) SA 145 (A)

⁷ (1) Brian Chareka (2) Noah Mbewe v The State Judgment No. SC 40/99

It will be noted that Jostina is fairly advanced in age and that she together with her husband were unexpectedly and violently awoken in the middle of the night by the accused and his accomplice who torched them with cellphone lights and started seriously and indiscriminately assaulting them with a pick handle and knives demanding money. It is very unlikely in our view that given the very mobile situation and its suddenness that Josphine would have been able to properly identify her assailants and be able to apportion blame.

In this regard, the court prefers the evidence of officer Shepherd Gurure from the Criminal Investigative Department who was tasked to head the investigation of this murder case. The officer in my view gave a very credible account of what happened. It was refreshing to have such an officer in the dock whose evidence was brief, clear and well given. He was able to unravel the mystery of the three counts with easy and remarkable efficiency and professionalism. We were impressed by his handling of these cases.

His evidence was that at the time Jostina was interviewed by his colleague officer Nkomo she was very clear that she was unable to identify the masked assailants. Even under cross-examination Jostina indicated that she was seriously injured and torched by the assailants to the extent that she was unable to identify them. It was only when word had spread within the village that the accused had been part of the assailants that Jostina got to know that the accused had been part of the robbers.

The accused, in his indications and confirmed warned and cautioned statement as well as in his evidence in chief maintained associating with his accomplice in the three counts as well as in this murder but chose to minimise the role he played in the whole enterprise. He stated that his main duty was to provide a torch light to illuminate the deceased's place to enable his accomplice to effectively carry out the robbery as planned by the two. He admitted that he and his accomplice had planned to rob the targeted villagers because the two knew they had money.

But despite the criticism and or reservations that we have in wholesomely accepting the evidence of Jostina, there were aspects of her testimony which had a silver lining. She stated that both the accused and his accomplice had knives in their possession. The witness could not have been off the mark in this regard because her evidence in this regard found support from a very unlikely source, the accused himself.

The accused is very clear in his indications and confirmed warned and cautioned statement that both he and his accomplice were armed with knives when they went to the deceased's place. Not only that but he went on to give graphic details of how those knives

were used against both Jostina and the deceased. The accused probably for convenience explained that it was him who stabbed Jostina and that he saw his accomplice striking the deceased with a pick handle on the head and following that attack with the vicious stabbing of the deceased on his abdomen which exposed his bowels and intestines.

It is common cause that the accused and his accomplice sat down to plan to rob the villagers who included the deceased. The accused knew at the time that they embarked on this criminal enterprise that his accomplice was armed with a pick handle and a knife.

We do accept that the evidence tendered did not quite show that the accused and his accomplice had made a prior agreement that if there was resistance they would kill their victims. We also accept as a finding of this court that when the accused's accomplice realised that the deceased had been seriously injured he used a piece cloth to tie his stomach as stated by the accused in his statement and as confirmed by Jostina.

We are not satisfied that positive intention to kill the deceased can be accepted as a safe verdict. The evidence adduced and accepted by the court does not seem to sustain this verdict in the court's view.

We accept that the accused and his accomplice's primary objective was to rob the deceased. We also accept that in their attempt to further their collective objective they were acting in common purpose and both of them were armed with dangerous weapons in the form of two knives one for each and a pick handle. The accused himself was fully aware that his accomplice had a knife and that it was subjectively foreseeable that such knives would be used with fatal consequences against their victims. The accused fully appreciated the possibility of death occurring as a consequence of their conduct and was reckless as to whether or not death would occur.

For the a foregoing reasons the accused must therefore be found to have committed murder with constructive intention or *dolus eventualis*.

Verdict – Guilty of murder with Constructive intention.

EXTENUATION

We have already made a specific finding in this case that when the accused and his accomplice realised that the deceased had been seriously injured, they demonstrated their compassion for life by attempting to tie the deceased's abdomen to avoid further exposure of the bowels and intestines. That unusual gesture looked at in the light of our finding that the accused be found guilty of murder with constructive intent makes this case a peculiar one for purposes of finding extenuation.

- We find that indeed there were extenuating circumstances which must signal a departure from the tradition that murder committed in the cause of a robbery closes the door for extenuation.

SENTENCE

We propose to deal separately with counts 1 and 2 for purposes of sentence.

We accept that for purposes of sentence the accused will be treated as a first offender. He has a wife and a minor child to look after.

As a court and in aggravation we are concerned that the accused decided to embark on a criminal enterprise on the night of the 4th of October 2013. The accused and his accomplice carefully chose their victims.

There was pre-meditation in this matter and the accused and his accomplice appeared to have thoroughly prepared for the commission of these offences.

Though Tracy did not sustain serious injuries, it was merely fortuitous because a pick head was used to attack her head on several times. She was probably spared from punishment by having identified the accused as having been one of the assailants

In count 2 and 3 the accused and his accomplice chose Jostina and her husband the deceased because they had assessed these two would offer no resistance at all because of their being elderly persons. The deceased was aged 83 years and we estimate the deceased's wife Jostina to be close to this age as well.

Our legitimate expectation is that at village level the young and energetic must occupy the frontline of security in protecting the elderly and the most vulnerable. In this case the accused and his accomplice decided to abandon their natural obligation and turned the prime violators of the peace and tranquillity in Jere Village.

We agree with the State Counsel that the injuries on Jostina were extremely serious and could have easily cost her life in the same as her husband. We also agree that given the deceased and Jostina's advanced ages, the accused and his accomplice could have easily realised their objective without using excessive violence.

The attack on the deceased was purposeful. The deceased lost his life in the most brutal and callous manner. As a court we have a concomitant duty to always speak to the sanctity of human life.

It is inevitable in this case that the accused having missed death penalty by a whisker must be kept out of society for a long long time.

We will also make an order that forces the accused to disgorge what he was found in possession of for the benefit of the deceased's widow.

SENTENCE

Count 1 – 5 years imprisonment

Count 2 – 15 years imprisonment

It is ordered that the two sentences run concurrently.

In addition it is ordered that the amount recovered from the accused person to the tune of \$3 940-00 be released to the deceased's widow Jostina Mapfumo.

Count 3 – Accused is sentenced to life imprisonment.

National Prosecution Authority, State's legal practitioners
Saratoga Makausi Law Chambers, accused's legal practitioners