THE STATE
versus
JEALOUS TOMASI

HIGH COURT OF ZIMBABWE
KUDYA J
HARARE 16, 17, 18 May and 15 and 22 June and 6 July 2011 and 22 March 2016

Assessors: 1. MR S. TUTANI
2. MR. M. MUTAMBIRA

Criminal Trial

M. Manhamo, for the State
E. Chatambudza, for the accused

KUDYA J: The accused person was charged with murder. It was alleged that on 9 August 2008 at Chagadama Village, Chief Dandawa, Magunje, Karoi he unlawfully and intentionally killed Wellington Beremauro by stabbing him with a spear in the stomach and striking him with an iron bar on the head. He pleaded not guilty to the charge.

The State called the oral evidence of four witnesses. These were Neverson Chishato, a member of the Neighbourhood Watch Committee, Victor Edson Tomasi, the accused's father, Sergeant George Wachenuka, the investigating officer and Dr Manyanga, a pathologist. In addition, it produced four exhibits. Exhibit 1 was a spear with a wooden handle measuring 136 cm and weighing 1 kilogram. Exhibit 2 was the spear with a metal handle and exhibit 3 was an iron bar 66 centimeters long with a weight of 1, 160 kilograms. Exhibit 4 was the post mortem report compiled by Dr Kudzai Zimudzi. The accused person was the sole witness in his defence. In addition the evidence of Daniel Beremauro, a local resident and Sergeant Azania Bakuri of the Zimbabwe Republic Police were admitted into evidence by consent in terms of s 314 of the Criminal Procedure and Evidence Act [*Chapter 9:07*].

Neverson Chishato was a fellow villager, a brother-in-law and a fellow member of the Neighbourhood Watch Committee of the deceased. At 4 pm on 9 August 2008 he

proceeded to accused's residence. He was in the company of the deceased, the accused's father and Pascal Zvikonyauswa. The accused, who was playing cards at a nearby homestead with eight others, was the only one who ran away as the four approached. The four were accompanied by accused's wife and elder brother to a nearby bush. They spent 3 hours scouring the accused's 15 bee hives in which they recovered 4 cups, 2 enamel cups, 6 plastic plates, a drip pipe and a 3 watt radio speaker. They took the property to the homestead of accused's father, 400m away from that of accused, recorded it, packed it and left it there. At dusk, around 7pm, they walked off the homestead in a single file. In the lead was the accused's father, followed by the deceased, the witness and Pascal and Pascal's brother who were beside him and accused's brother. To their left was a kitchen hut and to their right a rock. As the deceased went past the kitchen hut, the accused emerged from behind it, some 1 ½ meters away from the witness and threw a spear at the deceased striking him in the stomach. The deceased fell on his back. The witness and his other companions fled from the scene into the night in fear and panic. He later returned to the scene of crime with Pascal and others at 9 pm.

He was cross examined. He denied storming the accused's homestead with 9 other ZANU (PF) militias to assault him for belonging to the MDC. He knew the nine as fellow villagers. Some of them were the accused's brothers and their wives. He denied burning accused's homestead. He denied that the incident was a politically motivated one. He saw the accused emerge and throw the spear. The accused was arrested 7 days later. He implicated his elder brother Edward Tomasi and mother who were then arrested.

In his closing submissions Mr *Chatambudza,* for the accused, correctly conceded that Neverson Chishato was a credible witness.

The evidence of Neverson Chishato was confirmed to the hilt by the accused's father. He agreed with Chishato that the accused ran away from a gambling school at a neighbour's homestead when he saw them. He confirmed that his son threw the spear at the deceased. He was the only witness who alleged that in addition to the two spears, the accused was armed with an axe. The witness hid in the mountains from where he saw his huts ablaze. He did not know who set them alight. He spent the night in the mountains. He was arrested in order to smoke the accused out of hiding. The accused was arrested

six days after the incident. The only discrepancy that we discerned was the order in which the search party left his homestead when the accused threw the spear. Unlike Chishato he identified his son Edward Tomasi as trailing behind the deceased. It will be recalled that Chishato did not place Edward in the single file. We agree with both counsel that despite this discrepancy with Chishato, the father was a truthful witness. His testimony was unaffected by his filial love for his son. Again, he avoided the natural assumption that the accused was the one who burnt down his huts. We are satisfied that he was an honest and truthful witness.

The investigating officer and the two witnesses whose evidence was admitted by consent confirmed that the father's huts were burnt down. It was the uncontroverted version of the investigating officer that none of the accused's huts were burnt down. The investigating officer received a report from the deceased's brother Daniel Beremauro on the night of the incident and walked the 10 kilometer distance to the scene of crime where he arrived at 2 am. The corpse lay in front of the kitchen hut covered with a blanket under the protection of the deceased's relatives and some of the villagers. He took the corpse to Chidamoyo Clinic and then to Chinhoyi hospital for post mortem. The accused was arrested seven days later. Sergeant Bakuri recorded the warned and cautioned statement from the accused that was confirmed by a magistrate. He then took the accused for indications where the two spears and an iron rod were recovered in a grassy area some 300 meters from his homestead. The head of the spear with the wooden handle, exhibit 1, was caked in dry blood.

He described the injuries he saw in the same terms as the two witnesses whose evidence was admitted by consent. The post mortem report, exhibit 4, by Dr Kudzai Zimudzi described them in greater detail. The deceased sustained a huge laceration of approximately six to seven centimeters long on the forehead. Bone fragments were visible on the left side of the head. There was another laceration on the left parietoccipital area that was approximately seven centimeters long. Dr Phibeon Manyanga who was called to explain the post mortem report after the maker could not be located explained that the parietoccipital laceration stretched from the left side to the back of the head. The post mortem showed that the right eye was bruised and the right jaw was swollen. It

further noted the abdominal injury characterized by an entry wound on the right upper quadrant with an exit wound on the back of the left flank. Dr Zimudzi concluded that death was caused by intracranial hemorrhage secondary to the head injury and the damage to internal abdominal organs. Dr Manyanga explained that the head injuries on their own and the abdominal injury on its own could have independently caused the death of the deceased.

The investigating officer disputed that the accused was a victim of politically motivated violence. He explained that the accused's father, step-mother and elder brother were arrested after and not before the accused had been arrested after they were all implicated by the accused person. The accused confirmed that these three were arrested after he had made indications.

In his defence, the accused admitted to throwing the all metal spear, exhibit 2. He, however, averred that he was acting in self defence. He stated that he is a member of the Movement for Democratic Change. On the day in question he was attacked by ten ZANU (PF) members led by the deceased and his two neighbourhood watch committee colleagues Neverson Chishato and Pascal Zvikonyauswa, Luckson Nyachuma, Edward Tomasi (accused's elder brother) and his wife Evelyn Manzungu, Sibongile Hove, accused's step mother Sineri Tomasi and Taurai Mudzongachisvo and Luckson Mudzongachisvo. He hid in his bedroom hut. They burnt his kitchen hut to smoke him out of his hiding place. He armed himself with a spear and ran out of the hut. In one vein he averred that when they saw him armed, they dispersed. In another vein he averred that he was felled to the ground by a knob-kerrie as he emerged from the hut, picked himself up and ran away to seek refuge at his father's homestead. When he realized the folly of his averment that his father was also amongst the ZANU (PF) militia who attacked him he changed his story and averred that he did not run to his father's homestead but simply ran along the main road that passed close to his father's homestead in a bid to escape his attackers.

He stated that when he saw his attackers gaining on him, he threw the spear at them in order to scare them off. It was that spear that stabbed the deceased. He, however, did not intend to kill any of his pursuers.

He was cross examined. He was a poor witness. His counsel conceded as much. His evidence in chief contradicted his confirmed warned and cautioned statement on the number of people who attacked him. In the warned and cautioned statement he identified his attackers as the three members of the neighbourhood watch committee only. In his evidence in chief he identified them as ten members of ZANU (PF). His allegations against ZANU (PF) were false. We did not accept his story that he was a victim of political violence. We arrived at this conclusion from the fact that none of his huts was burnt down. We found it inconceivable that if his father, step mother and brother were part of the political militia that attacked him, their homestead would have been burnt to the ground; and that they would have been arrested as his accomplices. In fact, his step mother and brother remained in custody on these charges for 2 ½ years. In his evidence-in-chief the accused sought to foist an axe, the iron bar exhibit 3 and the spear with the wooden handle, exhibit 1 on his brother Edward.

We were satisfied that he was an incredible witness. We did not believe his story wherever it differed with that of the state witnesses. He was not a victim of political machinations but was wanted for theft of utensils that were eventually recovered from his bee hives where he had hidden them. Our view was that he deliberately attacked the deceased for leading the search for and recovery of the stolen items.

We agreed with Mr *Manhamo,* for the State, that in the absence of direct evidence on how the head injuries were sustained we could only rely on circumstantial evidence. He referred us to *R* v *Edwards* 1949 SR 30. We prefer the treatment of the subject in *S* v *Nyamayaro* 1987 (2) ZLR 222 (S) at 225G-226A wherein KORSAH JA cited with approval the sentiments of Watermeyer JA in *R* v *Blom* 1939 AD 188 at 202-203 that:

> "In reasoning by inference there are two cardinal rules of logic which cannot be ignored:
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> (1) The inference sought to be drawn must be consistent with all the proved facts. If it is not the inference cannot be drawn.
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> (2) The proved facts should be such that they exclude every reasonable inference from them save the one sought to be drawn. If they do not exclude other reasonable inferences, then there must be a doubt whether the inference sought to be drawn is correct."

We found the proved facts to be that the accused was armed with two spears and an iron bar before he felled the deceased with the spear with the wooden handle, exh 1. The deceased's companions ran away from the scene. The accused went to where the deceased lay. He removed the spear he had plunged into the deceased. The deceased was found dead on the spot in front of the kitchen hut with the head injuries that were described in the post mortem report. One of the head injuries had visible bone fragments. The head injuries, like the abdominal injuries, were fatal.

In our view the only inference to be drawn from these facts was that the head injuries were caused by the accused person. There was no other reasonable inference that could be drawn from those facts on the identity of the perpetrator other than that it was the accused. It appeared to us that he was the only person who had a motive to kill the deceased. He was angry at the deceased's primary role in the recovery of the stolen goods. He was also the only person who had a motive to destroy the evidence of the recovered goods by burning his father's homestead. We were satisfied from the nature, extent and position of the head injuries that they were deliberately and consciously inflicted.

In *S* v *Mugwanda* 2002 (1) ZLR 574 (S) at 580 H-581F Chidyausiku CJ set out the test for determining the *mens rea* of an accused in murder cases. At 581 D-F he stated that:

> "On the basis of the above authorities, it follows that for a trial court to return a verdict of *murder with actual intent* it must be satisfied beyond reasonable doubt that:
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> (a) either the accused desired to bring about the death of his victim and succeeded in completing his purpose; or
> (b) while pursuing another objective foresees the death of his victim as a *substantially certain* result of that activity and proceeds regardless.
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> On the other hand, a verdict of murder with constructive intent requires the foreseeability to be *possible* (as opposed to being substantially certain, making this a question of degree more than anything else). In the case of culpable homicide, the test is: he ought to, as a reasonable man, have foreseen the death of the deceased."

We were satisfied from the position on the human anatomy of the head injuries and their extent and the weapon used that the accused desired the death of the deceased. The abdominal injury was the first injury that he deliberately inflicted on the deceased.

He way laid and specifically targeted the deceased after he allowed his father passage. He threw the 1, 36 m long spear with a 45 centimeter iron head from a distance of three meters. He directed it at the right upper quadrant and its head protruded through the back damaging internal organs in the process. The death from the spear would fall under constructive intent in the above formulation set out by the learned Chief Justice. We were, however, satisfied that the accused was also the author of the head injuries. We accordingly returned a verdict of guilty of murder with actual intent.

After returning the verdict of guilty of murder with actual intent, Mr. *Chatambudza* in his address in extenuation applied for the accused to be examined by a psychiatrist to establish whether or not he suffered from diminished responsibility at the time he committed the offence. He suggested that the odd reaction of the accused of fleeing from the gambling school on the approach of the quartet of the deceased and three others and the apparently unprovoked and motiveless nature of the crime pointed to the possible presence of diminished responsibility on his part. Mr. *Manhamo* opposed the application on the ground that the accused had the presence of mind to arm himself with a spear and an iron rod, patiently wait for three hours for an opportune time to strike and kill the deceased and thereafter burn his father's hut to erase any trace of the stolen utensils. We were satisfied that the very behavior enumerated by Mr. *Manhamo* was inexplicable and bizzare. In addition, in hindsight we realized that there might be more to his failure to answer simple questions levelled against him during both his examination in chief and cross examination than mere obduracy and evasiveness. We were satisfied, on the authority of *Gordin Moyo* v *S* SC 148/1987 that the factors pointed by Mr. *Chatambudza* required that such an examination be made.

Accordingly, we ordered that:

1. The accused be mentally examined by a Government psychiatrist as soon as was practically possible;
2. The psychiatrist should conduct an EEG to determine his mental condition at the time of the commission of the offence and

3. The psychiatrist should have regard to collateral history and if necessary the court record including the judgment delivered on 6 July 2011 in arriving at his or her opinion.

Regrettably, as lamented by Gubbay CJ in *S* v *Moyo* (the sequel to SC 148/1987, above) 1992 (1) ZLR 228 (S) at 230 E, there was an inordinate delay of 4 ¾ years before the order was complied with. The accused was examined by Dr Mhaka on 4 March 2016. He *inter alia* stated in his affidavit that:

> "My examination revealed the following: Jealous Thomas has a history of mental illness. He used to have convulsions (fits) starting on early age. Evidenced the time of the offence he appeared to have been psychotic (sign of mental disorder). He was having hallucinations (hearing voices in his head and also had visual hallucinations seeing any things which are not true. He is on trifluoprazine medication for mental disorder. In my opinion at the time of the alleged crime the accused was mentally disordered."

When we resumed the hearing on 22 March 2016, we were confronted with the legal issue of whether in the light of the psychiatric evidence we could revisit our initial verdict of guilty of murder with actual intent.

Mr. *Chatambudza* submitted that we could not ignore the new evidence in the psychiatrist's affidavit that the accused did not suffer from diminished responsibility but was mentally disordered at the time of the commission of the offence. Mr. *Manhamo* did not challenge the accuracy of the psychiatric report and conceded that at the time the accused committed the offence he suffered from statutory mental disorder.

Both counsel were agreed that we were at large to consider the psychiatric evidence and if necessary revisit our verdict. I was unable to find any statutory provision or case law that permits the High Court to alter its verdict in these circumstances. The cases I was able to find were remittals from the Supreme Court consequent to the setting aside of a conviction of murder with actual intent without extenuation. In *S* v *Mukombe* 1991 (1) ZLR 138 (S) at 141B-C McNally JA remarked that:

> "The practice in the past has usually been to refer the matter back. Essentially this is because a full and proper investigation may reveal not merely diminished responsibility but mental disorder or defect justifying a special verdict. The cases in this connection have very carefully been discussed and analysed in two articles by G Feltoe in *Legal Forum* Vol 1 Nos 4 and 5 dated June and September 1989, and entitled "Investigating the Mental Condition of Persons charged with Murder". Accordingly, and in order to leave open the possibility of a special verdict, the conviction and sentence will be set aside, and

> the matter remitted to the High Court for further consideration of the appellant's mental/emotional state."

Remittal follows the quashing of a verdict. This allows the High Court to reconsider verdict afresh and in so doing is at liberty to arrive at the same verdict as before or at a different one. However, Chidyausiku CJ in *A-G* v *Sibanda* 2008 (1) ZLR 187 (S) at 192A stated that:

> "I agree with the learned judge president's conclusion that a murder trial ends with the judge and assessors making a finding on extenuating circumstances."

Section 29 (2) of the Mental Health Act [*Chapter 15:12*] provides that:

> "(2) If a judge or magistrate presiding over a criminal trial is satisfied from evidence, including medical evidence, given at the trial that the accused person did the act constituting the offence charged or any other offence of which he may be convicted on the charge, but that when he did the act he was mentally disordered or intellectually handicapped so as to have a complete defence in terms of section 248 of the Criminal Law Code, the judge or magistrate shall return a special verdict to the effect that the accused person is not guilty because of insanity, and may—[underlining my own for emphasis]"

The trial in a murder case thus ends with a finding on extenuating circumstances. In my view, s 29 (2) of the Mental Health Act permits the High Court constituted by a judge and assessors to make a definitive verdict on the guilty of an accused charged with murder after considering evidence including medical evidence adduced in extenuation. It stands to reason that the initial verdict that we reached before extenuation was merely a provisional verdict subject to revision by evidence including medical evidence led in considering extenuation.

We therefore agree with both counsel that we remain are at large in reconsidering the provisional verdict we reached before we embarked upon the process of extenuation.

The evidence disclosed that the accused killed the deceased using both the iron bar and spear. The uncontroverted medical affidavit of Dr Mhaka demonstrated that at the time he was afflicted by a mental disorder. In hindsight we accept that what we characterised as obduracy, evasiveness, incomprehension and incredulity in his testimony were tell-tale marks of statutory mental disorder corroborative of the psychiatric findings. We agree with both counsel that in these circumstances the only appropriate verdict is one of Not Guilty by reason of insanity.

In addition both counsel were further agreed that s 29 (2) prescribes three possible consequences of such a special verdict. It was common cause that the only suitable result of such a verdict in the present matter is to return the accused to prison for transfer to an institution or a special institution for examination as to his mental state or treatment in terms of para (a) of this sub-section. Chikurubi Hospital Extension was declared a place in lieu of a special institution by General Notice No. 51/2000, published in the Government Gazette of 18 February 2000.

Accordingly, it is ordered that:

1. The accused is not guilty of murder by reason of insanity.
2. The accused shall be returned to prison for transfer to Chikurubi Hospital Extension for examination as to his mental state or treatment as prescribed in s 29 (2) (a) of the Mental Health Act [*Chapter 15:12*].

National Prosecuting Authority, legal practitioners for the State
Rubaya and Chatambudza, legal practitioners for the accused