

THE STATE
versus
JOHN CHIGAYI
and
JOEL CHIGAYI
and
MATHIAS CHIGAYI
and
BLESSING CHIGAYI

HIGH COURT OF ZIMBABWE
HUNGWE J
MUTARE, 22-24 February, 2017 & 1 March 2017

Assessors: 1. Mr Magorokosho
2. Mr Chagonda

Criminal Trial

W Musarurwa, for the State
S Mupindu, for the 1st accused
J Chikamhi, for the 2nd accused
S Dhlomo, for the 3rd accused
B Mubata, for the 4th accused

HUNGWE J: The four accused pleaded not guilty to the murder of their own father.

The events leading to the charge of murder can be set out as follows.

There were trials and tribulations in the Chigayi family. That family in issue being the nuclear family headed by the now late Sam Chigayi.

He had three wives. Each wife had a number of children. Apparently there were deaths in each of the three households which led the children, specifically the four accused sons, to seek divine intervention as to the source of the perceived misfortunes in each home. This mission was spearheaded by the four accused. In the early hours of 11 December 2015, the four sons asked their father to accompany them to a faith healer. It is not in dispute that the faith healer, upon being consulted, pointed to the deceased, their father as the source of their tribulations as a family. In short he was a wizard.

Unfortunately, as is usual in these matters, each of these the four was satisfied that this was the truth.

Upon returning home the four accused grabbed the deceased and took him inside his bedroom and demanded that he produced his charms. His response did not meet the expectations of the four accused. It was decided and agreed that the father be subjected to a form of torture to elicit from him the expected co-operation. The form of torture settled upon involved the use of molten plastic being administered on the bare skin of the victim.

In order to achieve this they bound their father, by both his hands and legs. A fire was then lit next to the bedroom so that the burning plastic does not go cold before its molten form is administered on the father privately inside the bedroom.

They found a brown plastic container usually used to contain opaque beer going by the nomenclature "Scud" was then put to the fire. As it burned, it melted. A stick was used to convey the molten plastic through the window into the bedroom, where accused one and accused two ensured that the process produced the desired results. Accused four stoked up the fire to ensure that it would burn the plastic to melting point. Accused three carted the wooden rod with dropping hot molten plastic from the fire into the bedroom.

This process led to the deceased being burnt all over including his face, chest, back and lower limbs. At some point the deceased offered to show the charms. He produced a bow, three arrows and a white bottle. It was then decided to burn these. According to the accused's story, the deceased suggested that these be bunt rather than be taken to the faith healer as directed by him.

They took their helpless father to a disused housing structure. Police say that all the accused indicated that this was the place where they tied their father to an ox-drawn harrow

using a metal chain. A fire to burn the charms was lit up. The harrow upon which he was tied then put over the fire. They burned the charms underneath the ox-drawn harrow as he got roasted on the back.

The four deny that they tied their father to the ox-drawn harrow and lit a fire under him. They however agree that the charms consisting of the three arrows, a bow and a white bottle were burnt inside this housing structure at the deceased's behest. After this ritual, they released him. They say he went back to rest inside his bedroom whilst they dispersed to different destinations.

His wives returned and found him helplessly prostrate on his bed. He related his ordeal to his senior wife. In that report the deceased implicated all the four accused. The following day he died at home. This much is not disputed.

The accused chose to adopt as evidence their defence outlines. They gave evidence in court but on that score they all chose to adopt what the eldest among them told the court in his evidence-in-chief.

It is critical first to consider the evidence adduced by the State in proof of the charge.

The evidence of certain witnesses was admitted on the record in terms of s 314 of the Criminal Procedure and Evidence Act [*Chapter 9:07*]. The witnesses include all the police officers, from the arresting detail to the officers who recorded the accused's warned and cautioned statements. An array of weapons from a stick, remains of the type of plastic that was used, to an ox-drawn harrow and a cow-chain were also produced as exhibits by consent.

The remains of the burnt "charms" which "harms" were "produced" during the torture of the deceased, in the form of three arrow-heads, were produced by consent.

Two witnesses gave oral evidence for the State. The first was Janet Chigayi, who is the senior wife to the deceased and accused one's mother. The second one was Doctor Nyafesa who compiled the post mortem report after a visual examination of the deceased.

Janet Chigayi confirmed that on the fateful day the four accused and their father had gone to consult a faith healer. Upon their return, she and the other junior wives left for a rally leaving the father and sons, who had just returned, seated in the verandah.

Upon their return in the afternoon they noticed from a distance the four accused walking up and down the yard. From premonition, she suspected that something was not well at their

homestead. By the time they got into the premises, all the four accused had left. She found her husband lying on the bed. He had been badly burnt all over the body. Upon enquiring she learnt that all the four accused had tortured him by burning him with molten plastic.

When the accused came back they all took responsibility for the state of their father and assured her that they will take care of him. They warned their mothers against rendering assistance to their father pointing out that they were strangers in the crime. Only the sons will deal with the situation. This explains why the deceased died the following day without anyone rendering assistance.

Doctor Nyafesa's evidence was that when he examined the deceased's body, decomposition had set in. In spite of all the decomposition he was able, by usual examination, to tell that the deceased had been subjected to severe burns all over the body. He compiled the post mortem report.

The reason why he was called was that there was a discrepancy in the date of deposition and the date of commission of the report in affidavit form. His explanation was that the Commissioner of Oaths omitted to change the date from the previous day.

The State also put into evidence the confirmed cautioned and warned statements given by each accused four days after the event. The events were still fresh in their memories.

In the statements each admitted what the state alleges occurred. They made indications and gave statements accompanying their indications which confirmed that they knew exactly what happened.

The odd feature on these statements is that only accused one mentions how exh 9, the cow-chain was used to hold the deceased down to the fire as they roasted him in the roofless structure. He does not mention the ox-drawn harrow. None of the other three accused mention the cow-chain or ox-drawn harrow in their statements. This omission appears to have been cured by reference to it in the indication in exh 7. All in all therefore the four accused admitted to their mothers, to their neighbour and to the police that they killed the deceased.

The cold facts established in this case are that the four accused, acting on some belief in their father's involvement, embarked upon an assault on their father using burning or molten plastic. The first and second accused held their victim captive and subdued inside his bed-room. Accused four made sure the fire kept burning in order to be able to burn and melt the plastic.

Accused three kept the first and second accused constantly supplied with their weapon of choice between the fire-place outside and the torture chamber-cum- bed-room. The deceased was denied medical attention at all four accused's behest. They did not allow their mothers to help him. We reject their version that the deceased died as they tried to secure transport. Had this been so, their mother surely would not have told this court that the four prevented the rendering of assistance on the basis that they were not to interfere with their issue.

The subsequent denials by each accused of the roles they played is clearly an after-thought. We do not take it as an honest expression of their respective states of mind when each of them, on these facts, says that he had no intention to kill. The accused agreed on how they would force the deceased to produce the alleged charms. They would burn him, with plastic and with fire.

It was absurd for anyone who does this kind of thing to then come around and claim that they had no intention to kill.

One of the issues raised in the course of trial and in closing argument was that the degree of participation by the second, third and fourth accused was such that they could not at law be treated as co-perpetrators of the crime of murder as they did not directly apply the burning plastic. Only accused one did so and therefore he alone should be held liable for the death of the deceased.

This argument does not take a holistic view of the facts of the case. The facts are that the four accused agreed on a course of criminal conduct which involved different but complimentary roles whose objective was to produce a certain result. That agreed course of conduct involved a real risk or possibility of death occurring as a direct result of their conduct. That conduct involved the risk of death of their victim as a result of burns. They embraced it as each of them religiously played their roles up to the point where they prevented those who wished to help him get medical assistance from so doing.

More importantly the submission failed to address the law on this point which is s 196 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. That section provides:-

“196 Liability of co-perpetrators

(1) Subject to this section, where:-

(a) two or more persons knowingly associate with each other with the intention that each or any of them shall commit or be prepared to commit any crime; and

(b) any one of the persons referred to in paragraph (a) (“the actual perpetrator”) commits the crime; and

(c) any one of the persons referred to in paragraph (a) other than the actual perpetrator (“the copерpetrator”) is present with the actual perpetrator during the commission of the crime;

the conduct of the actual perpetrator shall be deemed also to be the conduct of every co-perpetrator, whether or not the conduct of the co-perpetrator contributed directly in any way to the commission of the crime by the actual perpetrator.

(2) If the State has established that two or more accused persons—

(a) were associated together in any conduct that is preparatory to the conduct which resulted in the crime for which they are charged; or

(b) engaged in any criminal behaviour as a team or group prior to the conduct which resulted in the crime for which they are charged;

and that they were present at or in the immediate vicinity of the scene of the crime in circumstances which implicate them directly or indirectly in the commission of that crime, then it shall be presumed, unless the contrary is shown, that—

(c) they knowingly associated with each other for a criminal purpose; and

(d) the crime actually committed—

(i) was the crime for the commission of which they associated with each other; or

(ii) was, if not the specific crime for the commission of which they associated with each other, a crime whose commission they realised was a real risk or possibility.

(3) If any accused person referred to in subsection (2) who is not the actual perpetrator of the crime—

(a) does not discharge the burden mentioned in subparagraph (i) or (ii) of paragraph (d) of subsection (2), his or her liability as the co-perpetrator of the crime shall not differ in any respect from the liability of the actual perpetrator, unless he or she satisfies the court that there are special circumstances peculiar to him or her or to the case (which circumstances shall be recorded by the court) why the same penalty as that imposed on the actual perpetrator should not be imposed on him or her; or

(b) discharges the burden mentioned in subparagraphs (i) and (ii) of paragraph (d) of subsection (2), he or she shall be found guilty of assisting the actual perpetrator of the crime as an accomplice or accessory.

[Paragraph amended by section 31 of Act 9 of 2006.]

(4)

(5)

(6)

(7)

(8) -----“

Considered in their proper perspective, the actions of each accused were necessary to achieve the common object which is the criminal enterprise.

As such they cannot escape liability for the killing of the deceased by their chosen method. They must have realized as a real risk or possibility that death will follow the roasting alive of their father.

We are therefore satisfied that the State has proved beyond a reasonable doubt the crime of murder as defined in s 47 (1) (b) of the Criminal Law (Codification and Reform) Act, [Chapter 9:07].

Sentence

In assessing sentence I take into account the submissions by counsel regarding what must be found as mitigatory in this case. In respect of the first accused it was submitted that he is a family man with four minor children who depend on him. He has one wife. He is HIV positive and is of ill-disposition. He acted throughout this episode out of his belief in witchcraft. He has spent some sixteen months in custody awaiting trial.

As for the second accused the court was advised that he is similarly a first offender who has spent the same period awaiting his trial. He is married with two minor children who look up to him for their provisions in life. He blames his older brother the first accused for the killing of their father.

The third accused is also married with two minor children. He spent about the same time in custody awaiting trial. He also blames accused one, their elder brother for the killing of their father. It was submitted that the third accused believed genuinely that his father was a wizard and responsible for the problems faced in the family.

Accused four's plea was really one for mercy as he acknowledged the brutal nature of the crime committed by these siblings. Besides the usual personal circumstances of his being a youthful first offender aged twenty-two married with one child, counsel accepted that the only mitigating feature in the case was their strong belief in witchcraft which drove them to act in this dastardly manner against their father.

I am in agreement with counsel's concession that there are more aggravating features here than mitigatory ones in that this is a most heinous type of patricide committed by a gang of four siblings in a most heartless fashion. The sheer brutality of adult sons literally roasting their father over a burning fire induces a sense of shock and outrage. I accept that the primary driver

of the crime is the belief in witchcraft. However, it is clear that the accused had not exhausted the avenues open to them where they were swayed by this belief in witchcraft into holding their father responsible for the family's misfortune. They could, for instance consulted other family relatives like the deceased's brothers, or the village headman or their chief in order to get the issue resolved in a way which would not have resulted in death. Instead they chose to take the law into their own hands and administer instant justice to their own father. In typical group terror tactics, they cowered even their mothers into failing to seek help for their husband. This led to an unnecessary loss of life. The community must have been shell-shocked and traumatized by this event. Had it not been for the belief in witchcraft a lengthier sentence than what I am about to impose would have been truly justified.

In the event you are each sentenced as follows:

Each: 20 years imprisonment.

National Prosecuting Authority, legal practitioners State
Mupindu Legal Practitioners, 1st accused's legal practitioners
Mvere Chikamhi Mareanadzo Legal Practitioners, 2nd accused's legal practitioners
Mutungura & Partners, 3rd accused's legal practitioners
Mubata Chigadza & associates, 4th accused's legal practitioners