

THE STATE
versus
TOBIAS MASAUSO
and
TEMBO DIMINGO
and
LEORNARD MAKODZA

HIGH COURT OF ZIMBABWE
TSANGA J
HARARE, 12, 13, 14, 16 February 2018

Assessors: 1. Mr Chakvinga
2. Mr Mhandu

Criminal Trial

SW Munyoro, for the State
M Ndlovu, for the first accused person
T Mpofu, for 2nd and 3rd accused persons

TSANGA J: In this case, three accused persons all security guards in a company call Ex-Cop were charged with murder of one Edson Girazi, which occurred on 15 October 2014. The offence occurred in the course of their duties at a mine where the deceased, along with others, had been illegally mining gold. Upon filing of the defence outlines, the charges were withdrawn against the second and third accused persons whereas the first accused proffered a limited plea of guilty to culpable homicide. The state was amenable to the plea and a detailed statement of agreed facts was prepared. For the record the statement of agreed facts reads as follows:

- “1.1 The parties agree that the facts set out hereunder, taken together with those filed by the accused persons on the 12th of February 2018, are agreed:
- a. On the 14th of October 2014, the deceased and colleagues arrived at Treasure 4 Mine Marimari near Kadoma Muzvezve. Their mission was to conduct illegal gold mining operations. They did not have the consent and permission of the mine owner to conduct those activities.

- b. Once on the mine, the deceased and his colleagues were allowed by a fellow illegal gold panner who was in charge of the operations to get into the mine. The illegal gold panner has been referred to in the summary of the State case as the “Boss.” The parties wish to record for the avoidance of doubt, that the “boss” is not the owner of the mine and is simply a leader of the vigilante group.
- c. The deceased and his colleagues did not last for more than 7 minutes underground. A more powerful vigilante group led by one Chikwiture arrived at the same mine. Chikwiture is also an illegal gold panner with no connection and or relationship with the legitimate owner of the mine. The Chikwiture group ordered everyone out of the mine.
- d. It was when the deceased and his colleagues, together with the multitude of illegal gold panners had gone out of the mine that the accused persons arrived. This was around 01:00 hrs. The accused persons who are Security Guards had been hired by the legitimate and undisputed owner of the mine to secure it from illegal gold panners.
- e. Once the security details had arrived, violence erupted with the illegal gold miners joining forces in pelting the security details with stones. This was in the dead of the night. The security details fired several warning shots into the air but the illegal gold panners were not easily deterred.
- f. The deceased somehow managed to sneak through the security details during this melee and went past them. He then switched on the engine of the Nissan Serena vehicle which he had used as a form of transport to the mine. He was ordered by the security guards to stop but he refused. Warning shots fired at the car did not yield any result.
- g. The security details deflected the tyres of the vehicle but that did not deter the deceased. He kept driving up until he could do so no longer. At that time two security details got to the vehicle and ordered him to alight.
- h. As the stones were raining down from the top of the hill where the illegal gold panners were and as the *melee* continued, the deceased attacked the two security details with an eye irritant called Pepper Spray. The two details screamed in pain.
- i. Once he had thus attacked the security details, the deceased ran out of the car using the passenger’s side. He ran down the hill into the dark night. The first accused person did not see him running down the hill.
- j. The first accused person sensing danger and having heard the screams of his colleagues decided to fire a shot some distance from where the screaming came but in that general direction. As the deceased was running down the hill, he was caught in the back by the shot thus fired. He screamed in pain that he was dying. The parties agreed that he screamed once.
- k. The only blemish in the first accused person’s conduct was that he fired the warning shot lower than he should have. The fact that the deceased was running down a slope also did not help matters. He however, did not know that he deceased had run down the slope. He thought he was still in or around the car. He was also under pressure from what he believed to be an imminent attack.

- 1.2 It is the shot fired low that has convinced the parties that the first accused was less careful than he could have been although he operated within the context of a very tense atmosphere in which there was looming danger to his person and that of his colleagues.
- 1.3 The parties were agreed that the court may take the following into account.
- a. The undisputed violence won't to be shown by illegal gold panners and their well-documented resistance to authority.
 - b. That on the night in question, the gold panners attacked the security personnel without provocation hence creating very dangerous conditions.
 - c. That apart from pelting the security details with stones, the deceased showed even more violence to the first accused person's two colleagues and that his actions gave the first accused person to think that the level of danger had increased.
 - d. That the violence was actually perpetrated against armed security details.
 - e. The topography of the place in question and in particular the fact that the deceased person was running down the slope when he was shot.
 - e. The fact that it was at night.
 - g. The fact that the deceased managed to breach the line of defence of the security personnel which meant that at that stage, they were sandwiched between what they believed to be two gangs of illegal gold panners, one throwing stones and the other making armed guards wailing in pain.
- 1.4. Having considered the above, both the state and first accused believe that a limited plea to the offence of culpable homicide as set out in s 49 of the Code is appropriate. On the basis of these agreed facts, the parties submit that the court is at large to accept the limited plea.”

This court, upon further enquiry on these factual circumstances as outlined, was satisfied that the concession by the State had been properly made. The post-mortem report which showed that the deceased had died of wounds sustained from the gun shots, was produced as exh 1 whilst the ballistic report relating to the gun used was produced as exh 2.

Accordingly, on the basis of the agreed statement of facts the verdicts against the accused persons are as follows:

1. First accused Tobias Masauso is found not guilty of murder as charged but is instead convicted of culpable homicide.
2. The second accused Tembo Domingo is found not guilty of murder and is acquitted.
3. The third accused Leonard Makodza is found not guilty of murder and is acquitted.

Mitigation and aggravation in relation to first accused person

In mitigation, Tobias Masauso who stands convicted of culpable homicide, like many others who come before this court, is a first offender, married, and in this instance has two

children aged 17 and 9 years. He is the sole breadwinner. His responsibilities also include looking after his aged father. He is 42 years old. He also told the court that his wife suffers from a mental ailment which beset her after having their first child. He claimed that she continued to suffer from this condition and that he buys her medication every month. Notably, however, he failed to place any supporting evidence before the court despite being accorded an opportunity to do so. His pre-trial incarceration in custody was for two and half months.

It was submitted that his behaviour was not grossly negligent and that neither was there recklessness. To ascertain the degree of negligence, the court sought clarity on the training that he received as a security guard and in the use of a firearm. He had been previously trained as a security guard for a cumulative period of three weeks by other companies he worked for. His fire arm training had come from his current employer and had been done over a month in which he received training three days a week. He told the court however, that he had never used a fire arm before and that he could not call himself an experienced person in the use of fire arms. Granted the period of training may very well meet the prescribed lengths, but it is of course the duty of the employer to ensure that its staff are adequately trained and more importantly are fit for purpose. This court therefore noted that the convicted person, by his own admission, deemed himself insufficiently trained for the kind of encounter that required the use of a fire arm. An inadequately trained security officer using a gun is one is at risk of inflicting harm others. The negligence in firing in the dark at waist level could have been avoided with a more experienced guard.

In this instance, the State, in aggravation highlighted that the guards should also have identified themselves fully as such. In arriving at what is an appropriate sentence under the circumstances, the court does take cognisance of the circumstances under which the offence took place. The assignment contained definite risk elements as the guards were assigned to a crime area. Also there was indeed a violent encounter with the illegal gold planners who are known to be violent and who had indeed displayed violence towards the convicted person and his colleagues.

What the court considers as aggravating is that the accused himself deemed his training in the use of fire arms to have been insufficient for the task. The criminal culpability of private security guards is no different from that of ordinary citizens in so far as the law is concerned. In *S v Mundisi* HH 645-16, the accused person was also a security guard and had killed a deceased woman whilst on night duty who was stealing maize at a farm he was guarding. He was convicted of culpable homicide and sentenced to an effective sentence of 30 months

imprisonment the reason being that the court found that under the factual circumstances of that case he had acted precipitately and prematurely in using the fire arm.

The specific context under which security guards often find themselves criminally liable has to be understood. In this instance, he was acting in the scope of his duties. A sentence which sends a clear message to employers that they have a responsibility to ensure that their employees are adequately trained for purpose is called for. Community service in the court's view would not send such a message.

Sentence

Accordingly, taking into account the circumstances under which the convicted found himself having to use the gun, but also taking into account that he was inexperienced, he is sentenced as follows.

\$1000.00 or in default of payment 6 months imprisonment. In addition, 2 years imprisonment wholly suspended for 5 years on condition that accused does not during that time commit an offence involving negligence to which he is sentenced to a period of imprisonment without the option of a fine.

*National Prosecuting Authority, State's legal practitioners
The Temple Bar, Accused Persons legal practitioners*