

THE STATE
versus
ANDREW SIBANDA
and
TAWANDA SHUMBA
and
PARDON NDLOVU
and
NOEL ZHOU
and
INNOCENT MALUNGA
and
REASON NDLOVU

HIGH COURT OF ZIMBABWE
MOYO J
GWERU 31 JANUARY 2018, 1 FEBRUARY AND 6 FEBRUARY 2018

Criminal Trial

T Mupariwa for the state
J Mahamba for the 1st accused
K Manika for 2nd accused
Ms C Dube for the 3rd accused
Miss L Duve for the 4th accused
Miss A Chinyanga for the 5th accused
T Zishiri for the 6th accused

MOYO J: The six accused persons face a charge of murder, it being alleged that on 23 July 2016, they, together in association assaulted the deceased Edmore Maposa resulting in his death later from the injuries he sustained in that assault. All the accused persons pleaded not guilty to the charge. Accused one and two offered limited pleas to the charge of culpable homicide. The state counsel, did not accept those pleas resulting in all the accused persons facing a full trial.

Documentary exhibits were tendered namely, the state summary, the six accused persons' defence outlines, the six accused persons' confirmed warned and cautioned statements, and the post mortem report.

An axe, an okapi knife and a machete were also tendered. All these exhibits were duly marked.

The state applied to have the evidence of the following witnesses admitted into the court record as it appears in the state summary;

- Timothy Sithole
- Manyembesi Shava
- Enia Shoko
- Tsitsi Dube
- Mwenyendanya Chinyenetere
- Julia Sibanda
- Detective Sergeant Mapako
- Detective Sergeant Chiwawa
- Detective Sergeant V Sibanda
- Dr S Pesanai.

The state called three witnesses to give *viva voce* evidence, that is Melody Shumba, Present Mataba and Jabulani Aaron. The essence of these three witnesses' testimony is that accused two attempted to rob Melody Sibanda. Present Mataba and Timothy Sithole intervened after Melody Sibanda had screamed, chased after accused two, caught up with him and assaulted him severely. The other five accused persons heard about the assault on the second accused person and they teamed up to go and intervene, they rescued accused two, rendered assistance to him by pouring cold water on him at Comoil garage. They later decided to go back and retaliate. One of the accused persons who is at large, one Collins Tembo, said he knew where the people who had assaulted accused two resided, they then went there to retaliate.

They found people seated outside around a fire and they beat up Jabulani Aaron. Jabulani Aaron was allegedly present at the scene where accused two was assaulted as per the version of the defence, although the state's version is that he had nothing to do with the assault

on accused two. Jabulani Aaron then fled and ran into deceased's house, with the accused persons in hot pursuit. In deceased's house, a coffee table was broken during the melee. Deceased later followed Jabulani Aaron in a bid to have the two of them go to the police as his property had been damaged. He was then attacked by the accused persons as he was near the Kadoma miners residence and they mistook him for one of the Kadoma Miners.

In their defences the six accused persons do not dispute being present or being part of the group that assaulted the deceased, they however, throw roles at each other as to who was armed and with what or as to who exactly did what in the mission to revenge on accused two's assailants. They also throw blame at each other with regard to who did what, armed with what, or was where, when the deceased was assaulted. They do not however dispute that they were present at the material time having been part of the whole transaction from its inception albeit with varying roles and degrees of participation.

The factual issues that this court has to resolve are the following:

- 1) The reason for the altercation between the accused persons and the state witnesses. Melody Shumba's testimony was that accused two attempted to rob her. Her version is supported by that of Timothy Sithole and Present Mataba.

Accused two says the reason for his assault was a prior gold ore issue between the two groups which were rival gold mining syndicates. Accused one says when he got to the scene he heard the people who were assaulting accused two, demanding their gold ore. With these two versions before the court, the court is inclined to accept the version by the accused persons for the following reasons;

- Accused two says he resided at 424 and the three state witnesses Melody Shumba, Present Mataba and Timothy Sithole (whom accused two says was Melody Shumba's boyfriend) lived in number 426. The state witnesses Melody Shumba and Present Mataba admitted that they knew accused two by sight. Could a neighbour who lives next door attempt to rob another neighbour in the manner as alleged? This court believes not. This court holds the view that if the altercation described by Melody Shumba did occur as alleged, then the parties were known to each as alleged by accused two and the attempted robbery must have been more of a harassment rather than an outright robbery for the simple reason that the two were known to each other.

Secondly, the accused persons' version that the state witnesses and themselves were engaged in gold mining and had rival camps which had disputes over gold ore, cannot be found to be unreasonable, impossible and untrue.

- The court is obliged to accept an accused's version in so far as it is reasonably possibly true, an accused's version cannot, and should not be thrown out simply because it comes from an accused person. An accused's version should succeed at all times where it is reasonable or probable and has not been proven to be manifestly false. An accused person also has no burden to prove the truthfulness of his version, all that he must do, is to come up with a version which either balances the scales between his case and that of the state, or a version which tilts the scales in his favour. Refer to the case of *S v Makanyanga* 1996 (2) ZLR 231.

Thirdly, whilst it is the state case that the accused persons went on a rampage on this day, beating everyone in Zvishavane, the state failed to adduce such evidence, I say so for the assault on Jabulani Aaron was explained by the accused persons. There was something peculiar about him, he was one of the Kadoma miners and he belonged to the rival gold mining syndicate. He was also present when accused two was assaulted. Although he strenuously denies this, this court is inclined to believe the version of the accused persons in this regard in, that, the accused persons left Comoil, they did not assault anyone else, they did not go into any other house in Mandava but they went straight to the house wherein Jabulani Aaron lived, and they say this is because Collins Tembo had said that is where the Kadoma gold miners lived. This is consistent with their explanation on the rivalry fighting involving two gold mining syndicates.

Even Jabulani Aaron confirms that people were walking in the streets when the accused persons budged into his house where he stayed warming himself around a fire together with others. We are not told that the accused persons also beat up the people in the street, but they went into this specific house where they believed the people they were fighting were in.

Fourthly, the accused persons also explain how deceased was caught up in the cross fire, they explain that after chasing Jabulani Aaron who ran into deceased's house, they then went to Mare bottle store, and on their way back, they met deceased near Jabulani Aaron's place and they mistook him for one of their rivalries. The state did not bring any other person other than Jabulani Aaron who was assaulted in this rampage.

Even Present Mataba, says they chased after accused two in a bid to apprehend him and take him to the police. They managed to overpower accused two and beat him up severely but still did not apprehend him as per their mission. This is consistent with the accuseds' versions that the intention of Present Mataba was just to assault the accused person due to previous scores.

It is this court's finding therefore that the bone of contention on the day in question was the issue of the gold ore dispute and nothing else, and that the deceased who was innocent was caught up in the cross fire when he attempted to follow up on Jabulani Aaron's assault since it had occurred at his house, and his property had also been damaged.

The next issue for determination is the assault on the deceased, that is, what exactly transpired?

We have already found that the deceased was mistakenly taken for one of the gold mining syndicates' members because of his following upon Jabulani Aaron. It is not clear exactly as to what transpired when deceased was assaulted, I mean the actual assault itself. Accused one says everyone amongst them beat up deceased indiscriminately and kicked him all over the body with booted feet. Accused one says;

“Accused two Tawanda Shumba, hit the deceased with a log on the shoulder, while he (accused 1) tripped the deceased to the ground. The deceased fell to the ground. Accused five, Innocent Malunga then struck deceased with an axe on the head. All the accused persons kicked the deceased.”

Accused two says; he struck deceased once on the shoulder with the log thinking that deceased was the one who had assaulted him. That accused one struck deceased with an axe. The other co-accused joined in and assaulted deceased with an assortment of weapons.

Accused three, although, he denies participation in the deceased's assault, he confirms his presence in the whole transaction from its inception where the accused persons planned to retaliate, to its culmination where deceased was mistakenly assaulted. Accused four also confirms his participation in the mission of the day together with his co-accused, but denies specifically assaulting deceased, he however, confirms his presence in the vicinity when deceased was mistakenly assaulted.

Accused six confirms his participation in the mission of the day in question, but denies assaulting deceased. He was however also present at the scene where deceased was assaulted.

We now move on to assess who is guilty and of what?

Clearly all the accused persons, by their own admission were part of this revenge mission on the day in question. They were present at the scene or within the vicinity of the deceased's assault although it is not clear as to what exactly transpired when deceased was assaulted, that is, the nature of the assault itself.

The post mortem report however, exhibit 14, shows that the deceased had a sutured laceration on the left parietal region which was 5cm, an extensive scalp haematoma covering the right and left frontal parietal temporal and occipital region, depressed skull, more depressed on the occipital region, lineal fracture extending to the pariete occipital region,

- lineal fracture right postenor fossae

These marks of violence depict a depressed skull and two lineal skull fractures. There is also a sutured laceration on the left parietal region and an extensive scalp haematoma on the right frontal parietal region.

This means that the deceased had more than two injuries on the head and this is consistent with numerous blows to the head, three or four blows in our view. The brain also suffered extensive subarchanoid haemorrhage, this is consistent with a severe assault on one's head.

The deceased obviously died from the assault as concluded in the post mortem report. All the accused persons actively participated on the events of the day in question that culminated in the assault on the deceased and his resultant death.

Section 196 A of the Criminal Law Codification and Reform Act [Chapter 9:23] as amended by the General Laws Amendment Act No. 3 of 2016, provides thus:

“If two or more persons are accused of committing a crime in association with each other, and the state adduces evidence to show that each one of them had the requisite *mens rea* to commit the crime, whether by virtue of having the intention to commit it or the knowledge that it would be committed, or the realization of a real risk or possibility that a crime of the kind in question would be committed, then they may be convicted as co-perpetrators, in which event the conduct of the actual perpetrator (even if none of them is

identified as 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) The following shall be indicative (but not in themselves) necessarily decisive, factors tending to prove that two or more persons accused of committing a crime in association with each other together had the requisite *mens rea* to commit the crime, namely, if they:
- a) 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 crime, or
 - b) were associated together in any conduct that is preparatory to the conduct which resulted in the crime for which they are charged, or
 - c) engaged in any criminal behaviour as a team or group prior to the conduct which resulted in the crime for which they are charged.

The circumstances of the six accused persons fit squarely the provisions of Section 196 A in that;

- Firstly they were all present at the scene or within the vicinity
- Secondly they were engaged in preparatory conduct which they planned to go and revenge against the Kadoma gold miners.
- Thirdly, they worked as a team in their mission to assault the Kadoma gold miners, and each one of them should have realized the real risk or possibility that a life could be lost from the collective actions. All the accused persons therefore acted wrongfully and unlawfully on the day in question.

Verdict

As to the verdict, all counsel were one in submitting that the accused persons should be found guilty of murder with constructive intent. This court is grateful for such a concession by all the defendant counsels. The facts of the matter clearly point towards a verdict of murder with constructive intent as all the accused persons, should have foreseen the possibility of death as they assaulted deceased severely on the head, but they nonetheless continued. It is for these reasons that all the accused persons are found guilty of murder with constructive intent.

Sentence

The accused persons are convicted of murder. Save for accused number two they are all first offenders. Save for accused 1, 2, and 4, the rest are family men and sole bread winners in their families. They were involved in gold panning activities in Zvishavane. The accused person set on a revenge mission on the day in question, to assault the Kadoma miners who were their rivalries in gold panning. It is an unfortunate incident that the deceased was caught up in the mayhem that resulted in his death. He was an innocent man, who had no business whatsoever with the issues the accused persons had with the Kadoma miners. A life was needlessly lost in the most unfortunate of circumstances. These courts have day in and day out, bemoaned the loss of life through violent means, gold mining disputes are now another source of brutal deaths. Violence in these mining ventures seems to be suddenly the norm rather than the exception. Gold panners, admittedly carry lethal weapons due to the nature of their business and certainly this cannot be pardoned. We cannot have a business where one has to wield a lethal weapon around in order to conduct same. Counsel for accused 1 submitted that this court should consider that gold panning by virtue of being an illegal trade encourages youngsters to carry weapons and behave in an unbecoming manner.

Youngsters are flocking into gold mining to earn a living yes, but such endeavours should not result in violence in as much as illegal vending is rampant in this country, it does not mean then that those who conduct it should butcher each other on the slightest of misunderstandings. There are no violent deaths in illegal vending, so why should there be violent deaths in illegal mining? It is just a trend that these artisanal miners are allowing to grow amongst themselves, and that cannot be an excuse. Clearly the source of the dispute was from the fact that accused persons dispossessed the Kadoma miners of their gold ore? But why? That is no longer gold panning it is now bullying and theft. It therefore cannot be an excuse that one's involvement in gold panning manifestly results in violence. It is the greed that results in violence, the greed to forcibly acquire gold belonging to others. And this certainly cannot be pardoned. A message

must be sent out there that those who engage in gold mining and use violence as a means to survive in that enterprise, will not be treated with kid gloves by these courts.

The accused persons are generally young, all of them, and although they have different personal circumstances and acted in different roles on that day, a sentence that befits all of them should be meted out.

Accused 2 – 6 are accordingly sentenced to 18 years imprisonment.

Accused 1 simply due to the reason of his pre-incarceration for a period of 18 months will have such a period knocked off from his sentence as it is a long and significant period that this court cannot ignore. Accused number 1 is accordingly sentenced to 16 years imprisonment.

National Prosecuting Authority, state's legal practitioners

Mahamba Law firm, 1st accused's legal practitioners

Legal Aid Directorate, 2nd accused's legal practitioners

Chitere Chidawanyika & Partners, 3rd accused's legal practitioners

Jumo Mashoko and Partners, 4th accused's legal practitioners

Legal Resources Foundation, 5th accused's legal practitioners

Garikayi & Company, 6th accused's legal practitioners