THE STATE
versus
PHILIMON MUCHAPARARA
and
SAMUEL MUKOTAMI MUUNGANIRWA

IN THE HIGH COURT OF HARARE
NDOU J
HARARE, 20 APRIL 2004

ASSESSORS : Mr J. Mangwendeza
Mr Vela

Criminal Judgement

Mr *Musonah*, for the State
Mrs *T. Muvingi*, for the first accused
Mr *C. Mautsedo*, for the second accused

NDOU J : The two accused persons are jointly charged with one count of theft of a Dustan Pulsar motor vehicle registration number 342-405D and two counts of murder for killing two on duty police details, namely, Kasimiro Mapako and Esau Porotazio by shooting them. Both accused persons deny all the three charges.

Count 1

Most facts are common cause or least beyond any material dispute. In the circumstances, it is necessary to state the material facts. In count 1 the complainant Ethel Iris Lillian parked her Datsun automobile, supra, on 4 March 2001 at Number 6 Willows Court, Corner 13th Avenue and Josiah Tongogara, Bulawayo. She closed all its windows and locked its doors. At about 1800 hours she discovered the theft and reported the loss to the police. It is beyond dispute that the two accused persons, in their own admissions, were in joint possession of the said stolen vehicle within hours of its theft. They shared the driving of the said vehicle route to Harare. Both are not holders of valid drivers' licences. Whilst it is trite that the burden is on the state to prove that the two accused persons stole the motor vehicle, however, because the recently stolen vehicle was in possession and jointly driven by the two accused persons, they are reasonably expected to give explanations for their possession

of the stolen vehicle. The doctrine of recent possession applies to the facts of this case - *R v Jeremani* 1968(2) RLR 236, *R v Sitoli* 1967 RLR 302 and *S v Chitsinde* 1982(2) ZLR 91.

At time of the killing of the police details … subject matter of counts 2 and 3 the accused persons were using the said vehicle. The vehicle had been fitted with false registration number plates 324-502T. They only abandoned the vehicle after the offences in counts 2 and 3.

The first accused's explanation is that he was given the vehicle by a person known as Gidza, Gilbert Chitembedza in full. He says he took the vehicle on behalf of Gidza as a steward. The second accused's explanation is that he was merely assisting the first accused with the driving as he was more familiar with Harare. From the credible evidence of it is evident that this is not what they informed the late Constable Porotazio sat the roadblock. The name of Mike Mpofu was proffered. This coupled with the fact that the vehicle had been fitted with false registration plates, does not point in the direction of innocent possession of the recently stolen vehicle. They were using the vehicle around Harare and had not delivered to he said Gidza.

After the fatal shooting of the police details they simply abandoned it. They did not bother to take it to the address of the said Gidza. They did not take steps to inform him about its whereabouts. In our view the explanations by the accused persons are void of truth. From the evidence led by the state and the application of the doctrine of recent possession, the guilt of the accused persons have been established beyond a reasonable doubt and they are both found guilty of the theft of the motor vehicle in Count 1.

Counts 2 and 3

In these counts most facts are equally common cause. The two deceased were serving members of the Zimbabwe Republic police. On 7 March 2001 at about 2100 hours both deceased together with three other police details were on duty manning a roadblock along Stanstead Road near its junction with Fourth Avenue in Mabelreign, Harare. The two accused arrived in the stolen vehicle subject matter of Count 1. The second accused was behind the wheels. In the vehicle were two young women, namely Monica Mahongwa and Portia

Rhoda Nyirenda. The late Constable Porotazio attended to the accused persons' vehicle. He was not armed. He requested the first accused who knew about the vehicle, to disembark after checking its registration numbers, licence disc and communicating (via radio) with Harare Central Police Control Room to verify if it was reported stolen. The first accused disembarked from the vehicle. At that stage the late Constable Mapako, who was armed with an F.N. rifle was attending to another vehicle directly behind that of the accused persons. The late Constable Mapako was apparently at driver's side talking to the driver. He had nothing to do with the vehicle that the late Constable Porotazio was attending to. The first accused pulled out a pistol and shot the late Constable Mapako seven times and the latter died instantly. Although he himself was armed the late Constable Mapako did not fire any shot from the F.N rifle. After shooting the latter, first accused then shot the late Constable Porotazio thrice and the latter fell to the ground and was later conveyed to Parirenyatwa Hospital where he later died. The first accused then jumped into their vehicle and they drove off with the second accused still driving. They dropped the obviously shocked and shaken Monica and Portia in Mabelreign. They later abandoned the vehicle and caught lifts to Marondera. The following morning they saw the news of the murder in the newspapers.

They proceeded to Bulawayo but decided against going back to their respective homes. They feared that the police might trace them at their homes. On the first accused's suggestion, they sought refugee at his girlfriend's residence in Bulawayo. After some time police visited their hiding resort in their absence. They absconded from Bulawayo and came to live in Harare at a lodge at Number 37 Frank Johnson Avenue, Eastlea. They successfully evaded the police for a period of around ten weeks. They were eventually arrested at this lodge.

The seven shots on the late Constable Mapako were as follows -

- one on the right cheek
- one on the back of the right arm
- one on the right lower part of the stomach
- one on the left thigh

- one on the left shin
- one on the left buttock, and
- one on the lower right side of the back.

Dr Mapunda, the pathologist described the cause of death as multiple gunshot wounds, right haemolhoral shock.

As far as the late Constable Porozatio is concerned, Dr Mapunda observed antemortem face to face gunshot wounds. The first one on to the right collar bone region. The second one on to the right pelvic region and, the third one from the back into the trunk. He also opined that the cause of death was gunshot wounds.

With this background it is proposed that the case of each accused person be considered in detail separately.

For the sake of convenience the case of the second accused person will be considered first. The credible evidence clearly shows that he did not take part in the firing of the fatal shots. There is no evidence to show that he was aware prior the shooting that the first accused was armed. Generally, in such circumstances the second accused will be criminally liable on the basis of the doctrine of common purpose ... accessory after the fact. From Mr *Musonah's* submissions the State is only relying on the latter, i.e. accessory-after-the-fact liability. The State is right in not persuing the common purpose liability as there is no evidence to show that, prior the fatal consequences, of the first accused's conduct, the second accused was aware that the former was armed with the pistol. Mr *Musonah* placed reliance in the case of *R v Nkau Majara* [1954] AC 235 (PC). It should be pointed that in that case the accused had a statutory duty to arrest the murderers. The position of second accused is, therefore, slightly different.

It is trite that the accessory after the fact is not an accomplice, but someone who associates or participates after the completion of the crime.

Mr *Mantsebo* raises the question of whether there is a need to have the offence of accessory-after-the-fact at all in our jurisdiction. An accessory after the fact is not a participant, for he neither causes her furthers it - *R v Mlooi*

1925 AD 131 and *S v Mavhungu* 1981(1) SA 56(A) and "Criminal Law" by CR Synnon (2nd Ed) at 273-7.

In other words, Mr *Mantsebo* questions the reason for its existence. I agree with Mr *Mantsebo* that if one accepts the narrower definition of the crime of an accessory-after-the-fact, it is completely overlapped by the crime of defeating or obstructing the course of justice. I agree with the named author in "Criminal Law" *supra*, at 277 that "our criminal law will not be poor if the crime of being an accessory after the fact, disappears." The accused persons in the position of the second accused person should be charged with defeating or obstructing the course of justice. His criminal conduct is precisely that and not killing. With this finding the second accused is therefore found not guilty of the murder charges in counts 2 and 3.

Coming to the first accused, he fired the fatal shots. The only issue is whether he had the requisite *mens rea* in light of the alcohol that he consumed. We accept, that the first accused had consumed some alcohol. But the question is whether he knew what he was doing. This is a case of voluntary intoxication. It is trite that in our law the policy is to ensure that persons who commit offences under such voluntary intoxication are punished. Such intoxication amounts to a partial defence. In our view, the first accused knew what he was doing. We base our findings on a number of factors from credible evidence at our disposal. First, he had presence of mind to get out of the vehicle armed with a pistol. Second he appreciated that the police detail was questioning the false vehicle particulars. Third and quite materially he appreciated that he had to fire at the armed police detail first even though the latter was not attending to them. Further the shots hit their target in such a way that prevented the armed police detail from reacting. Further he then fired three "face to face" shots at the unarmed detail next to him. He immediately jumped into the vehicle and they drove off. Further , when they dropped Portia and Monica he warned them that "they never met, they never knew each other and nothing happened". He appreciated the effect of such threats on these shocked girls.

Further, he decided that they abandon the vehicle and prevent the police from tracing them. Further, when they left the vehicle he kept firearm with him. We are satisfied that he acted rationally throughout notwithstanding the alcohol that he had consumed.

Mr *Muvingi* placed reliance on the case *S v Kamusewu* 1988(1) ZLR 182 (SC) and argued that the first accused should be found guilty of culpable homicide. In the said case the Supreme Court confirmed the ….. of guilty of murder notwithstanding the fact that the accused was drunk. Intoxication was considered as a factor in finding the existence of extenuation. She also referred to the case of *S v Tshuma* 1991(1) ZLR 166 (SC). Even in this case the Supreme Court confirmed the findings of murder but regarded intoxication as a factor in showing the existence of extenuation.

In our view, the first accused behaved rationally. He aimed the shots at vulnerable parts of the body. The inescapable conclusion is that he shot with the requisite intention to kill.

Accordingly, first accused is found guilty as charged in Count a and guilty of murder with actual intent in counts 2 and 3. Second accused is found guilty as charged in count 1 and not guilty on the charge of murder in counts 2 and 3 and he is acquitted and discharged. (After mitigation, the second accused was sentenced to 3 years imprisonment)

RULING OF EXTENUATION - FIRST ACCUSED

The only substantive issue raised on the question of extenuation is that of intoxication. Reliance was placed on *S v Kamusewu*, *supra* and *S v Tshuma, supra.* The test for extenuating circumstances is moral one - *S v Lesolo* 1970(3) SA 476 (A). The court has a discretion in this regard to be exercised judicially upon a consideration of the facts of each case or in essence weigh the traitier of the individual with the evil of his deed - *S v Ndhlovu* (2) 1965(4) SA 692 (A). I do not understand the learned Judges of Appeal in *S v Kamusewu, supra* and *S v Tshuma, supra* - to be saying that in cases where the accused person is intoxicated automatically there has to be a finding of extenuating circumstances. The circumstances of each case have to be taken into account. It is for this reason that EBRAHIM JA in the Tshuma case, *supra*, at 170 E -

> "This is a borderline case but, weighing all the factors, the scale must come down in favour of a finding of extenuating circumstances."

And earlier on the learned Judge of Appeal stated at 169 E-F -

> "The relevant question which was required to be determined was what effect had the consumption of alcohol been on the appellant. ... The consumption of alcohol is normally considered as a factor to be taken into account when consideration is given to whether extenuating circumstances exist or not unless an offender partakes of alcohol to boost his courage."

See also *S v Chiradza* AD 44-81, *S v Chamunorwa and Ors* S 137-86 and *S v Mangwende* AD 170-78.

Where, in my view intoxication results in mindless conduct or irrational behaviour this may be an indication that the accused person's behaviour at the time of the offence was at a time when his normal inhibitions had been clouded by consumption of alcohol. In our view, this is not the case here.

Here we have an accused who arrives at a police roadblock with a stolen vehicle. When the police start asking question about the vehicle he disembarks armed with a pistol. Strategically he shoots and kills an armed policeman who was not attending to him. He only shot the unarmed policeman attending to him after killing the armed one. This was a tactful move. He did rationalise. He was trying to evade arrest. His subsequent conduct thereafter that evening did not display any irrational behaviour. In the circumstances, the murder was committed without extenuation.

Accordingly, there are no extenuating circumstances. (The accused was sentenced to death)