

STATE
versus
PHENEAS JIM SIGAUKE

HIGH COURT OF ZIMBABWE
CHIGUMBA J
HARARE, 3 October 2017

Criminal Trial

**ASSESSORS: 1. Mhandu
2. Barwa**

A Masamba, for the appellant
R Mutasa, for the respondent

CHIGUMBA J: The accused appeared in court on 21 September 2017 on two charges, the first one of murder as defined in s 47 (1) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] (the code) and the second one being attempted murder as defined in s 189 (1) as read with s 47 (1) of the Code. It was alleged that, on 5 March 2015 at Zim-China Wansin ARDA 5151 farm Mutorashonga, the accused unlawfully caused the death of Robert Gwewera either intending to kill him on despite realising that there was a real risk or possibility that this conduct might cause death continued to engage in that conduct by shooting Robert Gwewera (the deceased) once in the right armpit with a 12 Borebaikal shotgun killing him instantly. It was alleged further that, on the same day, and at the same place, the accused unlawfully attempted to kill Last Muzhange, or, that, despite realising that there was a real risk on possibility that his conduct might cause death continued to engage in that conduct by shooting Last Muzhange on the left shoulder

with a 12 Bore batal shotgun. The state and the defence cosigned a statement of agreed facts which forms part of the record of proceedings. In addition to the statement of agreed facts the evidence of several witnesses was admitted in terms of s 314 of the Criminal Procedure and Evidence Act [*Chapter 9:07*] (the CPEA).

These witnesses were

1. Mind Kadyarusanga
2. Marks Makoto
3. Simbarashe Kasvinge
4. Rodger Rice
5. Lincoln Mahende
6. Sergeant Mukondiona
7. Doctor Madondo
8. Assistant Inspector Machingura

The accused person pleaded not guilty to both charges. Further to the admission of the statement of agreed facts, there aforementioned witnesses evidence in terms of s 314. Of the CPEA, the following exh were produced by consent.

Exh 1. Post Motem Report of Dr Mudanwa

2. 12 bore shotgun live round
3. 1 x 12 bore shotgun live round
4. 3 x 12 bore shotgun cartridges
5. Ballistics Report
6. Baton stick
7. sketch plan

It is common cause that the issue which arose for determination before the court is that of whether the accused person intended to shoot and kill the deceased and his friend, that is, his state of mind when he shot both of them. The state called 4 witnesses. The first of whom Christine Makore who told the court that when she hired the motor vehicle belonging to Last Muzhange he was in the company of his friend the now deceased. She said they wanted to go to ARDA Sisi Estate in Refingora and that they got lost and tried to ask directions from a young boy who ran away. The vehicle got stuck and she panted with the trio sometime after 7 pm.

The second state witness Last Muzhange told the court that after Christine Mahere left her and the deceased tried to find the way out of ARDA Sisi Estates but got hopelessly lost. They saw someone flagging down their vehicle and just as he stopped the accused demanded to know who he was from the opposite side of the road. He identified himself and offered to show his identification particulars, but as he tried to open the door he was shot, he felt paralyzed and weak. He staggered and fell. He told the deceased to leave the vehicle. The deceased came round to the driver's side of the vehicle where he was with his hands raised in surrender. He was shot by the accused in the armpit and fell near the rear wheel. When the accused had initially shot out one of the tyres he had thought the tyre had burst – he did not realise it had been deflated by a gunshot.

He told the court that it was dark and that he could see the accused because his colleagues had torches. He was shot on the shoulder, injured, and hospitalised for four months. After he was shot the accused started questioning him and accusing him of stealing from the farm. He witnessed one of accused's colleagues try to stop him from shooting the deceased and heard the accused threaten that colleague and accuse him of working in cahoots with him. He told the court that the accused assaulted him with a baton stick and forced him to carry the body of the deceased and place it in their vehicle where he was locked in. He was taken to the guardroom and put in a tank of water. He told the court that the accused intended to kill them because he refused to look at the identification particulars to take the car keys offered from before anyone was shot.

During cross-examination, Last Muzhange told the court that he refunded Christine Mahere her money when his vehicle could no longer continue due to the poor state of the road. He denied that he had been headed towards Hunyani Bridge when he was flagged down before the shooting. He said that he was confused about the distance between him and the accused when he was shot. He said the vehicle lights were on and that he had clearly seen the deceased with his hands up in surrender.

He disputed accuseds on version of events that he shot deceased to stop him from running away. The third state witness was Samson Green, who told the court that he worked together with the accused as a security guard but that accused was his superior officer. He told the court that it was 7 pm when Samson Kadyamasanga came to report at the guardroom that he had been chased by 2 men in a motor vehicle. He was worried about his father's safety.

Efforts to raise his father on the radio proved fruitless because he was on field patrol. Four guards Simbarashe Kasvinge, Rodgar Rice, Effort Tindirike together with accused went in search of the motor vehicle. After 30 minutes three gunshot sounds came from the direction of the patrol. Kasvinge and Nyandare came to reprint to the guardhouse that accused led stunt the two boys who had been in the motor vehicle. They were frightened and shaken and ran away.

At 9.30 pm accused came to the guardhouse together with Last Mazhange who had been shot and wounded on his left shoulder. He was placed in the water tank on accused's instructions. During cross examination, the witness confirmed that the accused had put a policy in place, that anyone found on the estate after 6 pm would be assumed to be a thief. He confirmed that accused and his patrol had agreed to shoot first and ask questions later.

He told the court that he did not believe that the accused intended to kill anyone. The next state witness was Effort Tindirike who was one of the four members of the patrol that went out to investigate the trespassing motor vehicle. He was tasked with flagging the vehicle down whilst the other two guards and accused remained out of sight. He said accused shot out the tyres just as the vehicle was about to stop. He saw the driver (Last Muzhange) open the door and inquire as to what wrong he had done. He said accused did not respond he simply shot the driver on the right shoulder and instructed him to get out and lie flat on the ground. He said the passenger (deceased) got out of the vehicle and came round its rear to get to where Muzhange the driver was. He saw the deceased being shot, Muzhange being assaulted with a baton and heard the accused sing Chimurenga Liberator war songs. He testified that the two passengers did not resist or dispute any of accused's instructions. He said he tried to stop the accused from shooting the deceased but was threatened by the accused. After Muzhange was assaulted with the baton stick and deceased secured in the motor vehicle, they deflated its tyres and took Muzhange to the guardhouse where he was placed in the water tank at accused's instructions. This witness did not know anything about the no visitor's after 6 pm policy. He confirmed that when the patrol went out they believed that the trespassing motor vehicle carried murderers who were possibly armed.

He corroborated Last Muzhange's testimony that the motor vehicle was facing away from Hunyani bridge, meaning that the suspects were on their way out of the estate. Simon Nyandare testified and told the court that he was there when the accused shot the deceased, he was part of the ambush led by the accused. He corroborated the sequence of events which appear in the statement of agreed

facts. He was frightened by the actions of the accused of singing Chimurenga Liberation war songs and by the shooting. He ran away. He also had no knowledge of the no visitors after 6 pm policy which had allegedly been implemented by the accused. During cross examination this witness told the court that the deceased did not try to run away or escape. He reiterated that he became frightened and uneasy at his actions.

The state closed its case. Accused testified on his own behalf. He started off by adopting his defence outline. He told the court that after hearing the report that two intruders were roaming the estate in a motor vehicle, and after efforts to locate one of the guards on patrol had failed, he came to believe that the intruders might be armed and dangerous, and that they had come to steal from the Estate. He laid an ambush to prevent the suspects from escaping. He shot out one tyre on the motor vehicle was about to come to a stop. He intended to question the suspects. He used force because it was after 9 pm and no one was allowed at the estate after 6 pm. He shot at Last Muzhange from a distance of 10 metres whilst standing. His intention was to disable him before he disembarked in case he was armed and dangerous. He attacked before he could be attacked. The deceased came round the back of the vehicle where it was dark. Accused believed he wanted to run away and shot him. He aimed at the legs to disable him and missed because he was not familiar with the type of gun he was using. As a trained commando in the ZNA he was used to the AK47 and the Bazooka.

He told the court that when Muzhange exited the vehicle he was indeed holding up the car keys, and his identity particulars, and that he said they were not thieves. He denied aiming at the deceased's armpit and stated that the shotgun sprayed pellets when a bullet was discharged. He said deceased was probably hit in the armpit by one of the pellets. He denied threatening any of the guards in his patrol. He denied that he sang revolutionary war songs as he assaulted Muzhange with the baton stick. He denied that one of the guards in her patrol disarmed him. He denied that he disappeared from the guardhouse after ordering Muzhange to be placed in the water tank.

During cross examination the accused admitted that he belonged to an elite group of soldiers in the army with specialist training. He said that he was a sharpshooter, an excellent marksman.

He denied breaching of firearms protocols. He said he did not fire warning shots because he did not aim to kill. He said that he had assumed that the intruders were armed and dangerous

and that his intention had been to disable them first then question them. He was afraid that if they were armed they would kill him first if he did not manage to disable them quickly.

On being questioned about why he missed his mark when he shot deceased's leg, but had shot what he aimed for from the vehicle tyre to Muzhange's shoulder, the accused told the court that the weapon was unfamiliar and it sprayed pellets as it discharged a bullet. He accepted that when he shot Muzhange he aimed at a delicate part of the body which contained vital organs. He admitted that Muzhange was not aggressive or threatening when he stopped.

The accused was at times evasive in answering direct questions during cross examination. He did not make a credible witness when it came to questions of visibility, his distance and position when he shot the victims, and the position of the deceased when he shot him. He was not truthful about why he shot the deceased in the armpit if he aimed at his legs, or about whether the deceased had his hands raised to indicate an intention to surrender. This version is consistent with the post mortem which says deceased was shot in the armpit. He had his hands up. No explanation was given by the accused as to why he shot a defenceless man who had his hands up. Clearly he was unarmed. The accused did not take the court into his confidence as to why he believed the intruders would shoot him first if he did not shoot them.

The accused person kept on asking for forgiveness each time he was asked a question which he did not want to answer. It is trite that the court is required to have regard to all the facts and the probabilities of the matter. It is equally trite that 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. See *R v Blom* 1939 AD 188 at 202-203. The accused's version of the events leading to the accident, must be believed unless the court is satisfied that his explanation is improbable or false. It is trite that:-

“No onus rests on the accused to convince the court of the truth of any explanation which he gives.”

If that explanation is probable, the court is not entitled to convict unless satisfied not only that the explanation is improbable, but that, beyond a reasonable doubt it is false. If there is any reasonable possibility of his explanation being true, then he is entitled to his acquittal see *R v Difford* 1973 AD 37 at 373. This court has said the following:-

“No onus rests on an accused person to convince the court of any explanation he gives. Its sufficient if a court thinks there is a reasonable possibility that it may be true. Even of the explanation given is improbable the court must acquit unless proof beyond a reasonable doubt is adduced.”

See *S v Tsvangirai* HH 159-04; *Edward Chininga v State* SC 21-02; *Mapfunde v S* SC 37-95.

We begin the inquiry by asking ourselves whether the State has discharged the onus on it, to prove all the essential elements of both offences beyond a reasonable doubt.

Section 47 of the Code provides that:

“Any person who caused the death of another person

(a) Intending to kill the other person or

(b) Realising that there is a real risk or possibility that his or her conduct may cause death and continues to engage in that conduct despite the risk or possibility, shall be guilty of murder.”

The state submitted that the accused should be found guilty of murder with actual intent because he discharged a firearm which had live ammunition like a war hungry person. It submitted further that the accused had not been fully re-integrated back into society after his retirement from the army. It was submitted on behalf of the State that accused intended to kill the deceased and the driver Muzhange because he did not fire any warning shots. With all due respect to counsel for the State I disagree.

The accused is by his own admission sharp shooter, a marksman. He aimed for Muzhange’s right shoulder and hit his mark with perfect precision. He aimed to disable one tyre of the suspect vehicle and he hit it with German precision. If he had intended to kill Muzhange he could have aimed at and shot him in the head while he was seated in the car. The court believed that accused intended to disable Muzhange in case he was armed and dangerous. The law on the definition of actual intention is clear.

It follows that if accused did not intended to kill the suspects, he caused the death of the deceased in terms of s 47 (b) of the Code. He realised that there was a risk or possibility that by shooting at the suspects he could cause their death but continued to shoot at them despite the risk or possibility. He caused the death of the deceased not with actual intent, but with constructive intent. He is guilty of attempted murder of Muzhange. There is no evidence that any of the 2 suspects resisted arrest. Accused was not authorised to use force against them. According to s 42 of the Criminal Procedure

and Evidence Act he ought to have used “such force as may be reasonably justifiable and proportionate in the circumstances to overcome the resistance or prevent the person from fleeing. Muzhange was shot on the shoulder before he disembarked from the vehicle. The evidence of the State outline and of the accused is that he was holding up his identity particulars and the car keys. The deceased had his hands up in surrender. The evidence of the State witnesses which was believed by the court, is that he did not attempt to flee as stated by the accused. If the suspects did not resist arrest (they stopped the vehicle immediately when Tindirike flagged it down, accused shot out one tyre)) then accused was not justified in using force to arrest them. Not only that accused used force when it was not reasonably justifiable, and used too much force (which was disproportionate in the circumstances).

Accused did not comply with s 42 (2) of the Criminal Procedure and Evidence Act. His lethal use of force did not comply with the conditions set out in the Act. He failed to fire warning shots. In *S v Chikukutu* 1996 (1) ZLR 702 SC it was held that:

“A firearm should be used only where there is no other way to catch the suspect. An oral warning should be given first followed by a warning shot into the ground or air. If it is still necessary I shoot the suspect, the person effecting the arrest should try to shot the suspect on the legs.” See also *S v Gumbi* 1994 (2) ZLR 323 SC.

Accused in his evidence in chief said that he had aimed for the deceased’s legs. This shows that, as a trained soldier and a member of the elite commands regiment, he was well aware of the protocols in the Criminal Procedure and Evidence Act regarding the use of force on a suspect who resists arrest. Except that in accused’s case the evidence did not support a finding that any of the suspects resisted arrest. For not only was the use of force unlawful, the use of lethal force was unjustified and disproportionate in the circumstances. Accused’s explanation that the deceased was sprayed with pellets which hit him in the armpit is not believable or probable. What is more probable is that accused aimed for the deceased’s shoulder in order to disable him as he had done to Muzhange. He hit deceased in the armpit because deceased had his hands up.

It is deplorable conduct on that part of a trained soldier to shoot an unarmed man who has surrendered. The court finds that although accused had no actual intention to kill he was reckless as to the consequences of shooting live ammunition from one metre away from the target in a semi dark place. Accused did not need to shoot at the suspects. He ignored all protocols. He appears to

have gone into a trance where he was transported to a war like situation. He recklessly shot at the suspects. He ignored their pleas of innocence. He thought the deceased intended to flee but all those who were present clearly saw that this was not the deceased's intention. His treatment of Muzhange after he shot him of beating him with a baton and putting him in the water tank indicate a fractured state of mind. He must have flipped and temporarily lost control of his power of reasoning. If the accused had been insane or not in his right mind at the time of the commission of the offence the State would have had him medically examined. There is a recent phenomena which has been found to afflict battle combatants who spend time in a war zone. It is known that Post Traumatic Stress Disorder (PTSD). It afflicts long serving soldiers and that it manifests itself by inducing battle or 'siege' mentality in the mind of the combatant and result in them losing control or becoming unable to function normally in society. In some countries such soldiers now undergo mandatory counseling after coming from a battle or war zone. Accused did not proffer this as a defence to his actions. It follows that he is guilty of:

- (a) Murder contravening s 47 (1) (b) of the Code.
- (b) Attempted murder contravening section 189 (1) and s 47 (1) of the Code.

National Prosecuting Authority
Manokore Attorneys, the accused's legal practitioners