

THE STATE
Versus
MISHECK BETSERE
AND
HARDLIFE MUZONDO
AND
KUDAKASHE MOYANA

HIGH COURT OF ZIMBABWE
MUTEVEDZI J with Assessors Mrs Baye & Mr Guruva
GWERU, 18 SEPTEMBER 2024

Criminal Trial

J. Uladi, for the state
T. Kamwemba, for first accused
F. Murewa, for second accused
A. Mugari, for third accused

MUTEVEDZI J: The ages of the three accused persons belie their cruelty. The state alleged that on 24 March 2024, at Shop No. 6, Mazvikanda Centre in Munyati the accused persons Misheck Betsere (first accused), Hardlife Muzondo (second accused) and Kudakwashe Moyana (third accused) or one or more of them unlawfully and with intent to kill or realising that there was a real risk or possibility that their conduct could cause death but persisting with that conduct despite the realisation of the risk or possibility stabbed the deceased with a knife twice in the chest. The deceased died shortly after she was stabbed.

[1] The circumstances under which the murder occurred were pitiful. The accused persons who are close to each other in that the first and the third accused persons are actually brothers stormed the deceased's shop after an elaborate plan to rob her. The first and second accused stood guard at the entrance whilst the third accused stabbed the deceased and tried to steal cash from the shop. They ran off after the dastardly act. The deceased screamed as she came out of the shop. Her colleagues assisted her and ferried her to the hospital. She died before anything could be done.

[2] All three accused persons appeared apathetic in their defences. We suppose and as will be illustrated later, that they were all aware that they did not have any chance out of this. The first accused said that on the fateful day, he was in the company of the second and the third accused persons when they decided to proceed to Munyati shops outside

Kwekwe. On their way, the third accused had advised the other two that they were going to steal money from whoever was going to be unfortunate that day. On arrival at Munyati, they proceeded to a shop that had been identified by the third accused. The third accused bought a packet of a processed corn snack popularly called “Hello chips”. The first accused added that the second accused and he then stood outside the shop just by the entrance. Whilst they stood there, they heard screams from inside the shop as the third accused stabbed the deceased. The first accused said it shocked him that the third accused had stabbed the deceased. He said in their plans he had not foreseen that the third accused would stab and kill someone. He added that the third accused had deviated from their plan.

- [3] The second accused went along the same path as the first accused. His defence outline and narration of what took place were similar to that of the first accused. The significant addition that he made was that when they heard screams from inside the shop, they saw the third accused come out of the shop running holding a knife in one hand and a cahs-box in the other. He equally denied causing the death of the deceased. He added that he also did not realize the risk or possibility that their actions could cause the death of the deceased.
- [4] The third accused in turn, denied the allegations that he and his co-accused had caused the deceased’s death. He said on the day in question he had been invited by his uncle Lawrence Hove to come to Munyati Mining area for gold panning. He in turn had invited the first and then second accused persons. That was their purpose when they went to Munyati shops. When they arrived, he said he tried to call his uncle but his number was unreachable. They decided to wait. They all decided to drink alcohol as they waited. They also bought some food in different shops during that wait. Later in the day, he said he then heard some noise from one of the shops. Upon inquiry he learnt that someone had been stabbed. He could not find the first and second accused because there were a lot of people. He left without them and went home. He was shocked when he was arrested some weeks later on allegations of having stabbed and killed the deceased. He was advised that he had been implicated by the first and second accused persons.
- [5] At the commencement of its case, the state applied to produce the exhibits which buttressed its case. The first was the postmortem report which detailed the cause of the deceased’s death. It was uncontentious. The pathologist stated that death had occurred

as a result of hypovolemic shock, heart and lung laceration, or hemothorax, and stab wounds on the chest. Next was the murder weapon, a flick knife, and its certificate of measurements. The length of its blade was 28 cm, the widest part of the blade was 3 cm and it weighed 0.206 kg. When it was produced in court, it looked like a lethal weapon and one that would certainly kill if targeted at a vulnerable part of the human body like in this case. The prosecutor also produced the first and second accused persons' confirmed, warned and cautioned statements which were recorded at CID Kwekwe on 25/3/24 and later confirmed by a magistrate at Kwekwe Court on 27/3/24. To conclude the preliminaries, the state sought the admission into evidence of the testimonies of several witnesses in terms of s 314 of the Criminal Procedure and Evidence Act [Chapter 9:07]⁹ (The CPEA). The affected witnesses were Fajr Takabeli, Mike Matare, Benjamin Zephania, Veronica Sithole, Mugove Tavashure, Augustus Kundai Mabota, Caroline Mutingwende, and Dr G. Acosta. The production of all the exhibits and the s314 admissions were done with the consent of counsels for all the three accused persons.

[6] Oral evidence was led by various witnesses. The first one was **Ruvarashe Pardon Dube**. She was friends with the deceased. She said she knew the three accused persons in connection with the offence. On the day in question, she had just returned from Church and got to the shopping center around 1215 hours. She opened the family shop. Shortly after she said she proceeded to the deceased's shop to ask for change. Although she couldn't remember which one particularly, because he was wearing a cap that was pulled forward to cover his eyes one of the accused came into the shop and asked to buy a beer. She told him that she did not sell beer. He proceeded to the deceased's shop where he made the same request and got the same answer. He went out and sat under a tree where his colleagues were. He then went back to the deceased's shop, this time pretending to ask for change. The deceased said she didn't have. He came to the witness and asked the same. Later, the witness proceeded to the barbershop. At that time the three all went to the deceased's shop. When she returned from the barber's she saw the three of them running away from the deceased's shop. The deceased came out from her shop screaming. The witness went to her. Another woman called Catherine arrived and asked what was happening. The deceased indicated that she had been stabbed. She was holding her chest. They later took her to a clinic where she died. She stood her ground from the feeble cross-examination from all counsel.

[7] **Catherine Mafendu** came and corroborated the important aspects of Ruvarashe's evidence. She was also at the shops when the stabbing occurred. She said when she arrived, she asked the deceased whether the accused persons were genuine customers. She had suspected them because their eyes were always roving. The deceased indicated that she was also afraid of them. The witness then also opened her shop. The deceased came and lay on some carpet on the floor and they started chatting. Someone called the witness outside. When she was still there, she heard the deceased screaming. The three accused suddenly came out of the shop running. The deceased was crying whilst holding her chest. She said she had been stabbed. She removed her hands from the chest. Blood spurted from her wound. She confirmed that they later took her to a clinic where she died. Once again, nothing material came out of the cross-examination by various counsel

[8] **Philip Dube** also stated that he saw the three accused persons get into the deceased's shop. Shortly after he saw them come out running. The deceased followed screaming holding her chest indicating that she had been stabbed with a knife. The witness said he, Mike Matare, and Fajr Takabeli pursued the accused. He called his dogs which came. The accused tried to escape using the side road used by vehicles that transport sand. They went in the direction of Munyati River. At the river they unfortunately found it in flood. They were forced to turn left into the forest. A while later Fajr called out that he had apprehended one of them. Mike was already there and the witness said he became the third person. The accused whom they apprehended said his name was Misheck Betsere. They took him back to the shops and later handed him over to the police.

[9] In their defence cases, both the first and the second accused persons maintained that they had planned to steal money that day at the instigation of the third accused. Quizzed under cross-examination, they both agreed that indeed when they arrived at the shops the third accused had advised that he had seen money in the deceased's shop and that they would steal it. It was then that they went to the shop. They stood outside enjoying the hello chips that the third accused had purchased for them whilst he remained in the shop to execute the theft. A while later they heard the deceased screaming and saw the third accused taking off from the shop holding a knife and a box. They also took to their heels.

[10] Although the third accused tried to stand by his story at first, he was so cornered under cross-examination that he threw in the towel. He admitted that he was the one who stabbed the deceased in the shop. To us, the third accused has no defence at all. He deliberately stabbed the deceased in a bid to rob her. He knew exactly what he was doing. He stabbed the deceased in the chest. He cannot therefore even start saying he did not intend to kill her like his counsel wanted to imply when he led him in examination in chief. We have already described the knife which the third accused used in the execution of his plan. The postmortem report betrays a vicious attack on the deceased. The doctor noted several wounds on the deceased's body. She had a 1.5 cm long perforating wound on the chest below the right collar bone; and a 2 cm long perforating wound on the chest at the midline of the sternum at the level of the fifth rib. The position was from top to bottom and from right to left. It was 8 cm deep.

[11] The above wounds besides showing that the third accused used brutal force also show that he was not bent on simply disabling the deceased to allow him to steal but to kill her instantly. We are not sure how but the knife appeared to have been used with a measure of expertise and the accused must have known the critical parts to stab. Witness Cathreine Mafendu said when the deceased came out screaming blood spurted from her chest like water out of a hosepipe. The damage was massive.

[12] Against the above background, it is clear that the third accused intended to kill the deceased. His argument that he had no intention to do so is lame and unacceptable.

[13] The second and third accused persons argue that they did not stab the deceased. Our view is that they did not need to do that to attract liability. S 196 A of the Criminal Law Code deals with the liability of co-perpetrators. It provides as follows:

196A Liability of co-perpetrators

(1) 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 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 realisation 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 that 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.

(3) A person charged with being a co-perpetrator of crime may be found guilty of assisting the actual perpetrator of the crime as an accomplice or accessory if such are the facts proved.

[14] The factors outlined under subsection (2) above are used to illustrate the existence of the requisite *mens rea* in the mind of an accused who acted as a co-perpetrator. The first and second accused in this case seem to fit into most of the factors. They were present not in the vicinity of the place where the crime was committed but at the actual place where the stabbing took place. They were there in circumstances where the evidence shows that if they were at the entrance they were taking guard to ensure that nothing went wrong with their plans. They admit so in their warned and cautioned statements which were confirmed by a magistrate and therefore receivable in evidence upon their mere production by the prosecutor in terms of s 256 of the CPEA.

[15] Further, both accused admit that they were associated together with the third accused in conduct that was preparatory to the conduct which resulted in the murder. They confessed that together with the third accused, they planned to steal. At first their targets were indeterminate. When they arrived at Munyati shops, the third accused identified their specific target and advised the two of them. They agreed that they would hit that target. They therefore put themselves firmly within the confines of s 196 A (2) (b). It is from the above considerations that we said the two needed not to be the ones who brandished the flick knife that killed the deceased. Their roles were enough to make them killers in as much as the third accused was.¹

[16] What shows that they were not innocent is their behaviour after the deceased was stabbed. They both fled from the scene with the third accused. It was through the bravery and quick reaction of the members of the public that the first accused was apprehended a long way from the crime scene. The second accused was only arrested many days later. If they had been innocent and the third accused had deviated from their original plan, they ought to have shown it by going to the police or taking some other measure to dissociate themselves from the conduct of the third accused person.² They

¹ See the Supreme Court case of *Madzokere and Others v The state* SC71/21 for a fuller discussion of the principle of common purpose and how it was enacted, reenacted and modified by the Code.

² Refer to the case of *S v Ncube* SC 58/14 which explains that for a withdrawal or dissociation from an criminal enterprise to be effective, a co-perpetrator is required to take positive action to prevent the commission of the crime before it is committed. Such action necessarily includes approaching a police officer or any other person with authority or capacity to stop the commission of the crime.

did not. We therefore do not see any way through which they can extricate themselves from the murder. They equally have no defence.

[17] It is from the above, that we were satisfied that the state managed to prove beyond reasonable doubt that all the accused persons are guilty of murder. **Against that background, it is ordered that each of the accused persons be and is hereby found guilty of murder as charged.**

SENTENCING JUDGMENT

[18] In the main judgment we expressed shock at the heartlessness of these young men. The eldest of the three offenders in this case is barely 23 years whilst the youngest is 17 Years old. We said those tender ages belied the offenders' cruelty. They planned and pulled out a robbery during which there was no hesitation to kill. They had discussed and convinced each other of the need to do it. In their own words they had agreed that they were going to steal money from whoever would be unfortunate. The deceased, on a blissful Sunday afternoon was not aware that she had been randomly targeted by lucifer himself and would soon die. The offenders stormed her shop, fatally stabbed her and made off with a cash-box. Members of the public and other shop owners gave chase. The first offender was the weakest of the three. He was soon caught. His apprehension triggered a chain of events which led to the arrest of the other two. At their trial, their defences were pathetic. We threw them out and convicted all of them.

[19] Like the law requires, we must find if they committed this murder in aggravating circumstances to be informed of the correct route we must take in punishing them.

[20] The prosecutor argued that indeed the murder was in aggravating circumstances. He said it was so because the offenders premeditated the commission of the offence; they committed the murder in the course of a robbery. Further he submitted that a lethal weapon in the form of a flick knife was used; and that the offenders used brutal and excessive force. He said that given that the only mitigating factor is the youthfulness of the offenders there is virtually no argument about the fate of them all.

[21] None of the counsels for all the offenders had any gripe with the contention that the offence was aggravated. The court's own assessment is that indeed there are multiple aggravating factors in this case. We are therefore bound to stick to the three choices that attach to a finding that a murder was aggravated. We must sentence each

of the offenders to either death, imprisonment for life or a determinate term of imprisonment of not less than 20 years.

[22] S 338 of the CPEA however provides for persons on whom the death penalty cannot be imposed. These are an offender who was less than 21 years old when the offence was committed, is more than seventy years old or is a woman. In this case, the first offender is 19 years whilst the second offender is 17 years old. Both of them cannot be sentenced to death. So, in respect of the two the options are whittled down to either life imprisonment or a determinate prison term of not less than twenty years.

[23] Counsel for the third offender painted a sorry picture of the offender's upbringing. He lost his father at a tender age and grew up under the care of his grandmother. He is a young man who therefore didn't have any fatherly guidance when he was growing up. He doesn't have any formal education to talk of. He became a gold panner at twelve years. That from what we hear is a cruel world. We mentioned it elsewhere that most of the young men who kill by stabbing appear to know how to use the okapi and flick knives they always carry. They know the parts to stab. The third offender in this case was no different. He targeted the deceased's vital organs. The pathologist stated that the stabs ruptured the heart and lung vessels. It was the reason why the witnesses who tried to assist the deceased said blood was coming out of her body like water from a hosepipe. The offenders left her with no chance of survival.

[24] The first offender was in the same predicament. He is a half-brother to the third offender because they share the same mother. They grew up in different places.

[25] Counsels also pointed out that the offenders were intoxicated. They had consumed beer possibly to gain Dutch courage to execute the gruesome task which awaited them.

[26] All the three are first offenders. This is their first recorded transgression. We are not sure about the third offender but he appears to be capable of reoffending given that he instigated the commission of this murder. The first and second offenders appeared to have been timid at first but their resolves were galvanised by the assurances of the third offender who knew exactly what he was doing and he was talking about.

[27] We note once more that this is a murder perpetrated by the gold panning gangs. They don't fear to kill. They are death angels. They come in all ages. Why the offenders decided to kill the deceased in this case defies logic. They could have just robbed her without fatally stabbing her. At times we stop to wonder whether they do it for

enjoyment or to initiate themselves into the hard-core cults in that industry. Whatever the reason, the courts must intervene to stop the madness. We can only do so by hitting hard those that are apprehended after murdering innocent citizens.

[28] We have already discounted capital punishment for the first and second offenders. It is outlawed in respect of those two. We equally think it is inappropriate for the third offender who is only twenty-three. The same applies to life imprisonment. It would not serve any purpose for a youthful trio like the offenders in this case. We will therefore impose a determinate prison term of not less than twenty years as prescribed by law.

[29] We are cognisant of the role which the third offender played. He was the dominant offender. He was overbearing on the other two. He deserves punishment which is different from the others. The second offender is only 17 years old. If only the law gave us options we could have chosen an entirely different penalty for him. Unfortunately, it doesn't. We can only impose the minimum required.

[30] In the circumstances the offenders are sentenced as follows:

- a. Each of the first and second offenders (Misheck Betsere and Hardlife Muzondo) is sentenced to **20 years imprisonment**
- b. The third offender Kudakwshe Moyana is sentenced to **23 years imprisonment**

National Prosecuting Authority, State's legal practitioners
Tabenave & Machingauta Legal Practice 1st accused' legal practitioners
Gundu, Dube & Pamacheche Legal Practitioners, 2nd & 3rd respondents' legal practitioners