THE STATE

versus

MACHEKA SHANGWA

and

WELLINGTON SHANGWA

HIGH COURT OF ZIMBABWE

BERE J

MASVINGO, 7 AND 8 June 2011

**Criminal Trial**

**Assessors**

Mr Dauramanzi

Mr Mushuku

*C Chavarika*, for the State

*T Bhunu*, for the 1st accused

*S Mutendi*, for the 2nd accused

BERE J: The two accused persons Machekwa Shangwa and Wellington Shangwa are blood brothers and the deceased Trust Chidhume was a cousin brother to them.

The following factors are common cause:

Having had a misunderstanding with the deceased on 25 December 2009, the second accused went and reported the deceased’s conduct to the first accused. The first accused armed himself with a screw driver which he subsequently used to stab the deceased leading to the death of the deceased.

The post mortem examination showed the deceased sustained “stab wounds on the anterior and lateral sides of the chest as well as at the back. In addition there was frothing from the deceased’s mouth and chest. The doctor concluded the deceased had died as a result of what he termed bilateral pneumothorax.”

The warned and cautioned statements of both the accused persons and the screw driver were produced by consent. The screw driver weighted 8 grams, the length of its bled was 10 cm and the handle was 8 cm.

The evidence of Fungai Takaidza, Innocent Takaidza, Aleck Zambuko, Tinosi Munengwa and Dr T Murambiwa was accepted by way of admissions in terms of s 314 of the Code. The only evidence which was given *viva voce* and subjected to cross examination by the defence was that of Mufaro Chidhume and Sanangurai Chidhume.

The two accused persons gave evidence and they two were subjected to cross-examination by the State Counsel.

The first accused person pleaded guilty to culpable homicide, a plea which was rejected by the prosecution in preference of a verdict of murder *per se*. The second accused pleaded not guilty but as the trial progressed his counsel reluctantly conceded that perhaps the appropriate verdict against him was one for assault. His initial position was to advocate for his outright acquittal.

In summation of its case the State argued that accused 1 be found guilty of murder with actual intent and that the second accused be found guilty of culpable homicide as the State counsel reasoned there was no evidence the second accused had actually participated in the actual murder of the deceased.

**The Evidence**

The evidence of Mufaro Chidhume was to the effect that when the second accused was chastised by the deceased together with Sanangurai Chidhume for fighting, this did not go down well with the second accused who did not hide his displeasure. The second accused is said to have said he was going home to call accused one for revenge.

Indeed, both accused came back and on meeting the deceased, Mufaro, Jacob and Sanangurai, the witness was slapped and took to his hills. He did not get a chance to see what happened at the scene. He was honest enough to tell the court that the assault on him and his subsequent fleeing from the scene did not allow him to see how the deceased was stabbed. The witness was certainly not a useful witness in as far as assisting the court in appreciating how the deceased met his fate. In our view, the only significant aspect of his evidence was his hearing of the promise made by the second accused to go and seek accused one’s help promising to come back for revenge.

We are satisfied that Mufaro gave a brief and credible evidence. We accept that he was not at the scene when the deceased was stabbed.

The second State witness Sanangurai advised the court that when they were accosted by the accused persons he was hit on the head and before he fell down he heard the first accused remarking “I have killed one.” The head assault rendered him unconscious only to fully recover two weeks later when he found himself at Masvingo General Hospital.

From his own testimony the witness appeared to have been terribly drunk on the day in question as evidenced by his sleeping along the way before getting to his homestead. This witness was also unable to take the court through the scene of the murder itself as he had become unconscious after the assault.

The only helpful piece of evidence was his hearing of the words to the effect “I have killed one” which utterances he attributed to the accused one. He said he could not possibly have mistaken these utterances for anyone else except accused one because he knew him from childhood as they had grown up together.

If true, this evidence would tend to demonstrate the belligerent attitude exhibited by the accused number one. It would appear the conduct of the accused one was consistent with the evidence of the accused number two that on meeting the deceased and his other colleagues the accused one went straight for a fully fledged attack on them. Evidence abounds from accused two which suggest the accused person had prepared himself for nothing else but a fight.

For all its criticism and the need to exercise caution given the close relationship between the accused persons on one hand and the deceased and his fellow brothers on the other hand, we are satisfied that Sanangurai’s testimony was accurate and so was the evidence of Mufaro. In fact, in this regard both counsels despite owing a concomitant duty to their clients and to the court had difficulties in negatively criticising the witness’s testimony.

Having accepted the evidence of Mufaro and Sanangurai as being credible and that the two were not at the scene of crime when the deceased was fatally injured. It naturally follows that both accused must not be believed when they state in their respective warned and cautioned statements that the two witnesses were at the scene and participated in a fight.

However, the court cannot discount with the degree of certainty the confrontation which the accused alleged he had with the deceased although the probabilities seem to suggest that if at all the deceased attempted to fight the accused one he must have done so in self-defence to the attack initiated by accused one against Mufaro. This finding would be consistent with the evidence of Mufaro himself, Sanangurai and the second accused person.

The accused one admitted to have used the screw driver in stabbing the deceased in the manner outlined in the post mortem report. The accused one’s defence outline in so far as it suggests that as a prelude to the assault the accused exchanged words concerning the earlier assault on accused two does not find favour with the court because it was not even supported by accused two. He was very clear that if accused one were to suggest that he would be lying. We are indeed comfortable in making a finding that indeed the accused one lied in this regard. He did not get a chance to talk to the deceased before the assault. He introduced himself at the scene by attacking Mufaro, then Sanangurai and finally the deceased.

The defence of self-defence which he attempted to raise in his defence outline would be untenable because it would be contradicting his own unsolicited limited plea to the crime of culpable homicide.

Secondly, both the accused persons’s testimonies as well as that of the two State witnesses clearly show that the scene of the murder was very mobile and the accused one could not possibly have seen the deceased appearing to be ready to attack accused one in in the manner demonstrated by the accused himself.

There can be no question of accused one being found guilty of murder *per se* as urged by the State because other than the testimony of the accused one himself there was no other evidence which could be relied upon to counter the accused’s evidence as regards what happened at the scene of crime. Whilst we are not obliged to religiously accept everything the accused said we are enjoined to give him the benefit of doubt.

We are satisfied that a reasonable person placed in the position of the accused one, having armed himself with a screw driver and using it against the deceased in the manner he did would have appreciated the consequences of his conduct. He was negligent in causing the death of the deceased.

**Accused Two**

The position adopted by the prosecution was that the accused be found guilty of culpable homicide on the basis of the doctrine of common purpose.

Whilst conceding there was no evidence that the accused two participated in the actual assault of the deceased the prosecution argued that it was the second accused who played a substantial role in creating the events leading to the fatal assault of the deceased.

The accused two’s counsel, after referring the court to a line of authorities from this jurisdiction initially urged the court to acquit the accused two but subsequently and with reluctance conceded the accused may have committed the crime of assault.

For the record, where the doctrine of common purpose is evoked the second accused can only be convicted if the evidence suggest the accused two did something to associate himself with the actions of the first accused.

It is clear from the evidence accepted by the court that when the accused one went home his main purpose was to go and get his brother, accused one so that the two would seek revenge primarily against the deceased as it was the conduct of the deceased which accused two had disapproved. We do not accept the motive was to go back and seek clarification or to try and recover the accused two shirt’S and bag as alleged. This is not borne out by what actually transpired at the scene of crime.

The fact that the two brothers had planned for revenge is demonstrated by the conduct of the first accused when he went straight to assault the victims one after the other. There is no evidence that accused two knew the accused one was armed with the screw driver which turned out to be the murder weapon but the enquiry does not end there.

There is overwhelming evidence that revenge was the common objective.

Whilst the accused two would want the court to believe that he was just a passive or innocent bystander whilst the first accused meted out punishment on his enemies, this suggestion did not impress us as a court.

The accused is the one who initiated the whole idea of seeking revenge. As rightly observed by his counsel Mr *Mutendi*, there is no suggestion that the accused desired to cause the deceased’s death but to mete out some form of revenge on the deceased and his colleagues.

In accordance with the finding of the court, the accused two could not have witnessed or been involved in a fight with the people who had fled from the scene of crime.

It is inconceivable in our view that having taken the trouble to run home to bring more reinforcement to enable him to seek revenge the accused could have come back to the scene, seen his adversaries and folded his hands whilst the accused one did the dirty work for him. We do not accept this posture created by the accused. He was the prime mover of the disturbances that took the deceased’s life that evening. He must have participated in exacting some form of punishment against the deceased and his colleagues.

As a reasonable person, the accused person must have foreseen that in the process of meting out revenge against the deceased, the deceased might be seriously injured in the process.

Whilst we are prepared to grant the accused person the benefit of doubt on the offence of murder itself that cannot be said of the offence of culpable homicide. Our very story view is that in encouraging accused one to exact revenge on the deceased, a *bona paterfamilias* individual should have taken steps to ensure that the punishment did not exceed accepted levels.

It was not out of the ordinary that given the manner in which the revenge was going to be meted the deceased might be seriously injured in the process. To this extent the accused one’s negligence stands high and remains clearly visible.

The accused masterminded and participated in an extremely dangerous adventure. He identified himself with accused one’s conduct and must equally be found guilty of culpable homicide.

**Verdict**

Accused one - not guilty of murder but guilty of culpable homicide

Accused two - not guilty of murder but guilty of culpable homicide.

**Sentence**

It has never been an easy walk on the part of the court when it comes to sentencing. What authorities say is that the sentence imposed must be blended with mercy and must take cognisance of societal expectations.

We accept in this case as mitigatory that both parties had partaken of alcohol and that must have clouded their ability to think rationally.

Both accused persons have family responsibilities which have been outlined by their respective counsels.

Outside these proceedings the accused demonstrated some form of remorse by contribution eleven of the fifteen beasts required traditionally to appease the deceased’s spirit in accordance with their culture. There is some evidence that they or their parents contributed towards funeral expenses at the deceased’s funeral. We will not lose sight of the youthfulness of accused two although against him should be weighed the heavy influence and pressure he must have exerted upon accused one in seeking revenge.

Murder by its very nature is bound to create a permanent stigma on the part of both accused persons. The two will always be remembered as the people who cut short the deceased’s youthful life.

In aggravation we are concerned as courts that wherever cases of murder occur, there is no amount of punishment that can be meted out to adequately recompense the deceased’s death. Once murdered one cannot be replaced. It is that sacred nature of human life that we are obliged to always emphasise. Human life must be respected because it is irreplaceable.

It is aggravating that the two accused ganged up against the deceased, their bother, to punish him for exercising his natural and brotherly authority over the accused two. The deceased lost his life for doing nothing really except to encourage accused two to follow the right path in life.

As courts we have always insisted that conflicts in our society must be resolved in civilised fashion and there should be no place for barbaric behaviour as exhibited by the two accused persons.

Accused two’s blameworthiness in our view despite his age is high in that he set in motion the events leading to the demise of the deceased.

The two decided to gang up and take the law into their hands by meting out revenge. Punishment must be left to be meted out by those who are trained to do so. The accused are not such persons. They ought to have resolved the issue through the intervention of their family elders at a time they would have sobered up and not what they did.

We are satisfied there is no need to differentiate the sentence in this regard.

**In the result it is ordered that:**

Each accused be sentenced to ten years imprisonment of which two years is suspended for five years on condition the accused does not within that time commit any offence involving violence upon the person of another and for which he shall be sentenced to a term of imprisonment, without the option of a fine.

*Muzenda & Partners*, 1st accused’s legal practitioners

*Mutendi & Shumba*, 2nd accused’s legal practitioners

*Attorney General’s Office*, State legal practitioners