STATE
versus
ZVIONESO CHAIRA
and
ANDREW GUDUZA
and
GREGORY GUDUZA

HIGH COURT OF ZIMBABWE
TSANGA J
HARARE, 6, 7, 8, 9, 10 March 20, 21 2017 & 27 November & 14 December 2018[1]

**Criminal Trial**

**Assessors:** 1. Mr Barwa
2. Mr Shenje

*Mr E Mubaiwa*, for the 1st accused
*Mr B Hungwe*, for the 2nd accused
*Mr S Mubvuma*, for the 3rd Accused

**TSANGA J**: There are three accused person in this murder trial. Two of the three accused are brothers, namely Andrew Guduza and Gregory Guduza. They are the 2nd and 3rd accused respectively. The 1st accused, Zvioneso Chaira is their uncle, in that he is their mother's brother. The central issue is whether the three relatives connived in common purpose when, as the state alleges , on the 5th of March 2016, one or more of them unlawfully and with intent to kill shot Josiah Kusemwa with a luger grand power pistol serial number MRS 0243. He was shot once in the face causing injuries from which he died. The shooting was in the course of what was supposed to be a gold purchase by the deceased from the three accused.

[1] The delay in the handing down of this judgment was because the 2nd accused person could not be brought to court as he had contracted a contagious form of tuberculosis.

Certain facts are common cause. The person who fired the fatal shot is Andrew Guduza using a gun that he had gotten from his uncle Zvioneso Chaira who is the 1st accused. His uncle also had one gun. These guns were illegally in Chaira's possession at the time having failed to surrender them at his work place where he worked as a security guard. The 1st accused had in fact reported the guns as stolen when in fact they had not been stolen. He has since been convicted for the offence relating to illegal possession of fire arms. Both guns had live ammunition at the time.

Regarding the murder, the State's version is that on the 5th of March 2016, acting in connivance and common purpose, the accused proceeded along Mukaradzi River, Mutate farm in Mt Darwin, in furtherance of their objective to rob gold buyers. They were in possession of two fire arms, namely the pistol as described above with ten live rounds as well as a .38 Special Taurus revolver serial number 1237493. The 1st accused was armed with the .38 special Taurus revolver whilst the second accused was armed with the Luger Grand Power pistol. The third accused was not armed.

The deceased who was in the company of his girlfriend Ketai Nyauyanga had been approached by one of them on the pretext that they intended to sell gold. The 3rd accused had been the chief negotiator in the purported sale. A disagreement had ensued over the purchase price. The deceased had been threatened with arrest. Two of the accused with weapons had brandished their weapons with the 2nd accused ultimately firing his weapon and murdering the deceased. The accused were said to have searched the deceased person and taken a scale, 5.5 grams of gold and US$300.00 from his right trouser pocket of the deceased. They had then fled from the scene. The matter had been reported to the police. The post mortem report had shown that the deceased had died from brain damage secondary to deep penetration following the gunshot wound.

All three accused pleaded not guilty in their defence outlines. Each had a confirmed warned and cautioned statement which was admitted in court as evidence. The first and second accused gave oral evidence whilst the third accused opted to remain silent. He was, however, cross examined by the State. For the avoidance of repetition the thrust of each of their defence is dealt with after the totality of the State's evidence.

The following were tendered as exhibits:

1. The first accused Zvioneso Chaira statement was admitted as exhibit 1.
2. The second accused Andrew Guduza's warned and cautioned statement was admitted as exhibit 2.

3. The third accused Gregory Guduza's warned and cautioned statement was admitted as exhibit 3.
4. The .38 special Taurus revolver serial no. 1237493 was admitted as exhibit 4.
5. The Luger grand pistol serial no MRS 0243 was admitted as exhibit 5.
6. 6 live rounds 9x9 x 19mm were admitted as exhibit 6.
7. 7 x .38 special live rounds admitted as exhibit 7.
8. The gold scale inscribed *Kusema* was admitted as exhibit 8.
9. The Ballistic report in two parts admitted as exhibit 9 (a) and 9 (b). The first report related to a spent cartridge picked up at the scene.
10. The post mortem report was admitted as exhibit 10.

The evidence of the following eight witness was admitted by consent in terms of s 314 of the Criminal Procedure and Evidence Act. This included the evidence of Paradzayi Makoto who had heard a gunshot on the day in question and had proceeded to the scene and had discovered the body of the deceased lying in a pool of blood. It also included the evidence of six police officers who played various roles in relation to the taking of warned and cautioned statement from the accused persons as well as the carrying out of indications with the accused and the carrying out of ballistic tests on the spent cartridges recovered.

The six included officers Collen Saini, Happiness Kabozo, Terence Machaya, Tasiiwa Richard Mutata, Detective Constable Muzawazi and Assistant Inspector Gundumure. From their admitted evidence it was not in dispute that the indications giving rise to the sketch plan and that the warned and cautioned statements made by the accused had been freely and voluntarily made. The evidence also included that of Doctor George Mapiye who is employed as a governmental medical officer stationed at Mt Darwin hospital. He had conducted an autopsy on the remains of the deceased and had concluded that the death was due to "brain injury secondary to deep penetration force following a gun shot. He had compiled the post mortem report.

**THE ORAL EVIDENCE LED BY THE STATE**

**Ketai M Nyauyanga** was the deceased's girlfriend. On the day in question she and the deceased had gone to the river to take a bath at about midday. There they had come across a man who had asked the deceased if he was a gold buyer. He was wearing a short and no shirt and with a torch on his forehead. The deceased had answered in the affirmative. The man whom the witness said was the second accused, had enquired on price and had been told

that it was $25.00 per gram but had disputed the price on account of having plenty of gold to sell. The deceased had gone back to the tent to fetch a scale to weigh the gold and also to fetch his nephew one Langton Bvukumbwe.

When the deceased returned, the 2nd accused had suggested that they go aside to discuss and had gone to the side of the river where the other two accused were. The 1st and 2nd accused started haggling with the deceased asking him to increase the price from $25.00 to $27.00 per gram. They had not come to an agreement. The second accused had moved back to the river bed. The other two accused had remained with the deceased and his nephew, with the first accused in particular continuing to haggle about the price for the sale. The deceased's nephew, Langton had then suggested to the deceased that they settle for the $27.00 and at that time he had produced the scale to weigh the gold. A $20.00 note had also been produced by Langton to test the scale. No gold had been produced by the accused persons.

Instead, at that point the 2nd accused had ordered the witness who was seated by the river bank to go where the others were standing as they were all under arrest for buying gold. She had started moving to where the others were when she noticed that the 1st accused had a fire arm which he was holding and which he had lifted up pointing to the sky. She had run away back to the tent where they were staying leaving the deceased in the company all three accused. The deceased's nephew, Langton, had followed at her heels. As they were running away they had heard a fire arm go off. Once at the tent, they had alerted one Gambazhure as to what had happened. He had rushed to the scene and had come back weeping and announced that the deceased was dead. The deceased had been in possession of the scale and 5.5 grams of gold and had some money on him which he intended to use to purchase the gold. When ordered by the 2nd accused to join the others, the second accused had also taken a white plastic bag from her which contained a red dress a red jersey and a khaki trousers and 5.5 grams of gold.

She was adamant in cross examination that no gold had ever been produced by the accused persons. She was equally steadfast that all three accused had acted in common purpose at the material time and when they said they had plenty of gold to sell. Furthermore, she maintained that all three had been involved in the negotiations when the deceased had come back with Langton. She had also not heard the deceased at any time state that they were trying to sell him fake gold. She disputed vehemently the assertion in cross examination that the first accused had been asleep and had not participated in the negotiations.

Counsel for second accused put forward the self defence argument in cross examination. The witness refuted the assertion that the deceased was confrontational at any stage towards the accused or that he had picked a stone. If violence had taken place, she said it would have been after she had fled. She also dismissed the assertion that the second accused fired in self-defence as she said that the accused were three of them and the deceased was alone after she and Langton fled.

In cross examination the third accused's counsel put forward that the witness's assertion that the third accused had acted in common purpose with the others was false. That the third accused had participated in the negotiations was not in dispute and whilst she conceded that she had not heard him say anything from where she was, she maintained that whatever they were doing they were at all times doing together. She stood by her evidence that the third accused had been present when the gun was produced by the first accused and that she had not seen any action of disassociation from him. In sum, her evidence was that no gold was ever produced and that the first and second accused persons had produced guns whilst the third accused was present acting jointly with them.

**Langton Bvukumbwe** was the second witness who was also at the scene that day. His evidence was that when the deceased had gone to bath he had left him with the scale, $300.00 and 5.5 grams of gold so that he could continue to buy gold whilst he was away. He confirmed that the deceased had come back shortly on account of having met some people who wanted to sell gold. He had given him back the $300.00 and the 5.5 grams of gold which he had put in his pocket. He corroborated Ketai's evidence on the negotiations and lack of consensus on the price. He further confirmed Ketai's evidence that all three the accused had participated in the negotiations for the price of the gold, and materially that no gold was produced even though the accused persons had alleged they had plenty of it. His evidence was it was the second accused who had said they were under arrest and had drawn out his fire arm. He had also noticed that the 1st accused was holding a gun. He equally confirmed hearing a gun shot as he ran away and had also seen a firearm pointed at the deceased as he was running away.

Regarding the 3rd accused's assertion that he had not participated at all when the fire arm was produced, he told the court that the third accused's actions had been to move towards the deceased to encircle him, which to him showed that all this had been planned. In cross examination he stated that he had not observed the first accused asleep at any one point

thereby corroborating the first witness's evidence that all three were participating in negotiations at the material time.

He also told the court that neither of the parties had been aggressive during the negotiations as they were each simply negotiating their position. Like the first witness, he said the parties had simply had a different price for the gold and that if any aggression had occurred it had been after he had fled. He had not heard anything about fake gold. He had identified the gold scale as that belonging to the deceased on the 5th of April when called by the police.

While there were minor discrepancies in what each of the two witnesses who were at the scene saw that day these in the court's view were not material. For example, the fact that Langton said a woman had come selling clothes when it was in fact a man was not material. He had not even engaged the person and therefore he was clearly peripheral to his view and main focus on that day. As regards the different roles by the accused persons, it must also be remembered that both witnesses had only seen the accused persons on that day. Discrepancies in a case must be of such magnitude as to go to the root of the matter for them to matter. See *S v Lawrence & Ors* 1989 ZLR 29(S) as discussed in *S* v *Mudyanadzo* HB 92-15

**The evidence of the investigation officers**

**Trymore Mukunya** was the third State witness. A member of the ZRP stationed at Mt Darwin, he had been assigned to the scene after the shooting. He had recovered a used Econet recharge card which was ultimately traced to the 1st accused leading to his arrest with the other accused persons in Arcturus. At the time of the arrest, 2 pistols had been recovered from a Peugeot 504 which belonged to the second accused. One of them had been used in the commission of the offence. The third accused in particular had indicated to the police, the deceased's scale which had been secured under a passenger seat. He had also established that cash had also been stolen from the deceased at the time the offence was committed. He had further established that the fire arms had been stolen from Safeguard Security by the 1st accused.

The accused persons had told him that the deceased had been shot after they had told him they were police officers. The deceased had demanded to see their identity cards and had argued too much with the accused at the scene hence the shooting. He said there had been no mention by the accused persons that the deceased had tried to strike one of them with a stone.

In terms of roles, he had established that the 1st accused had secured the firearms of which he had one and the 2nd accused had the other. At the scene his role had been to assist

the 2nd and 3rd accused. He had also established that the 2nd accused who shot the accused was also not a gold panner. He used his car as a pirate taxi. The third accused had been central to pretending that he wanted to have a gold transaction with the deceased and that he had gold to sell to the deceased. His investigations had revealed that the third accused was not a gold-panner but a welder. It had been established in interviewing him that he had no gold at the time and had just pretended to have some.

When all three accused had been interviewed they had stated that they wanted to raise money to go into gold panning.

**Clemence Mutyambizi** a member of the Criminal Investigation Unit Mt Darwin attended the scene after the shooting. He had found the deceased lying face downwards at the scene. He had an injury at the back of his head. His trouser pockets had also been searched and were upturned. The deceased also had another wound on the nose which had been the entry point of the bullet. He corroborated the evidence regarding the discovery of the Econet card, the arrest of the accused persons, and, the recovery of the weapons. The accused persons had also signed warned and cautioned statements which had been confirmed by a magistrate at Mt Darwin court. The 2nd accused who had shot the deceased had initially told him that he had shot him intentionally. However, in recording the statement he said he had shot him mistakenly. The 3rd accused had told him he had been in agreement that they had planned to commit the offence in Mukaradzi to get money. After the deceased had been shot he had panicked and picked up the bag with the gold scale.

He had also established through his investigations that the deceased had US$300.00 on him, 5.5 grams of gold, the weighing scale as a well as a bag which had a towel and clothes he had intended to wear after he had bathed. The scale had been recovered but not the clothes. Whilst all the accused had been cooperative in the initial instance, he told the court that they had changed their statements when it came to recording them.

When the police had visited the scene after the shooting there was also nothing to show that the accused had implements for gold panning. Furthermore, he said the witnesses Ketai and Langton had also told the police that the accused had nothing whereas in Arcturus they now had implements to pan for gold. He reiterated the point that the accused themselves had said they had gone to Mukaradzi to look for money and not to pan for gold.

In summary the evidence by the state witnesses established the following:

- No gold was ever produced at the scene according to the state witnesses
- No gold planning implements were ever recovered at the scene.

- Whilst two of the accused had produced pistols, at all times the three had acted together on that day.

**THE EVIDENCE OF THE ACCUSED PERSONS**

**First accused's evidence: Zvioneso Chaira**

In his evidence to the court the 2nd accused gave a lengthy background explanation regarding his possession of the weapons from his previous workplace. Regarding his presence in Mt Darwin that facilitated the chain of events leading to the fateful encounter, he told the court he had gone to Mt Darwin to tell his sister about his sick wife and had taken the firearms with him. He had told the 2nd accused only, about the fire arms because he was visiting him at his home and thought it prudent to advise him that he had firearms.

Regarding the fatal events of the day in question, whilst he confirmed that there had indeed been a disagreement been the third accused and the deceased about the purchasing price, he denied encircling the deceased and producing a fire arm. His explanation to the court was that the 2nd accused had come to be in actual possession of the firearm because it could not fit in the bag that they had. He explained to the court that the 3rd accused had not witnessed him give the firearm to the 2nd accused because he was walking ahead of them with the mining implements. Regarding the shooting he said he had not actually seen how the deceased had been shot as he had run away from the scene on hearing a shot.

His oral evidence differed materially from his warned and cautioned statement. The core elements of the 1st accused's warned and a cautioned statement, made freely and voluntarily and admitted into evidence, largely corroborated the evidence of the two state witnesses Ketai and Langton as to what happened at the material point in time. The statement established that the 1st accused had given the 2nd accused a loaded revolver. It was the 2nd accused, Andrew Guduza, who had told the deceased that he was under arrest. It was also then that he had produced a firearm that he had given him. It was on the instructions of Andrew Guduza that Langton and Ketai had come towards where he was at the material time. At that point the 1st accused himself had produced his own revolver which he had in his pocket and had also told them to go where directed. The fact that the 1st accused person had produced a fire arm as stated in his warned and cautioned statement emerged distinctly from the evidence of Langton Bvukumbwe. Ketai and Langton had runway. According to the statement, the deceased upon realising what was happening had warned the accused persons that they would end up killing him. The deceased had then picked up a stone and thrown it at

the 2nd accused. What the warned and cautioned statement established was that this was after the revolvers had been produced and after Ketai and Langton had run away.

In court, unlike in the warned and cautioned statement, the 1st accused denied producing a gun. Accused tried to distance himself from the statement on the basis that the contents of what he signed had not been fully explained to him. The admitted evidence of the officers who took the statement confirmed that the statement had been made freely and voluntarily. His claim that he was only hearing the contents of the statement in court cannot be true.

The 1st accused was not a credible witness. The State established in its cross examination that the 1st accused having worked for a security company, the guns which the accused had in his possession, had been reported missing two weeks before his trip to Mt Darwin. They were therefore illegally in his possession. That he had ill motives from the start regarding their retention emerged from this failure to return the weapons and his whole charade that they had been stolen when he knew very well that was not the case. The State also established in cross examination that although he said he had travelled to Mr Darwin primarily to seek help for his pregnant wife, he had not visited his wife up until his arrest. Despite the 1st accused's assertion that a panning dish, a mattock and an iron bar were in their possession on the day of the incident, no implements had been found at the scene. There was no evidence to support the claim that they were indeed genuinely panning for gold at Mukaradzi that day.

**Second accused's evidence: Andrew Guduza**

The gist of his defence was that he acted in **self-defence** after a persistent physical threat to himself by the deceased. His assertion was that the incident had happened in an intense moment of rage. In his evidence he told the court that the deceased had been given the gold for weighing, and had declared that it was fake gold. According to him, the deceased had said they assault people who sell fake gold and had turned and faced the accused and picked two stones. It was at that point that the 2nd accused had told the deceased to return their gold. He denied searching the deceased person or taking gold from his pocket. In essence he denied intending to rob. He denied intending to kill. He denied conniving with the other two accused.

Since he denied threatening the deceased and the other two state witnesses in his oral evidence, the State read his warned and cautioned statement which confirmed that he had done so. The accused's explanation in this regard was that the warned and cautioned

statement was not correct on that aspect. He said he had not realised he had killed the deceased and had only seen pictures when the police arrested him.

In the face of two guns, the deceased could not have been the aggressor.

Materially, it also emerged from the second accused's evidence that he had worked as a security guard before and was familiar with guns.

**The Third accused: Gregory Guduza**

Whilst the third accused submitted a lengthy defence outline, he elected not to testify at the actual trial and therefore did not give evidence. He did, however, answer the prosecution's questions having been sworn in and from the witness stand. His counsel, in his closing submissions says this was wrong and that he should have answered those questions unsworn and from the dock to indicate their lack of evidential value.

No prejudice whatsoever was suffered by the accused in answering his questions under oath. Most jurisdictions have in fact done away with the practice of giving evidence from the dock as anachronistic and unhelpful.[2] Our law in s198 (9) of the Criminal Evidence Act does not accept unreservedly the right to silence in that it allows questions to be asked. The accused was asked explanatory questions and not evidentiary ones. After all even questions which are not evidence are supposed to be truthful. There were no inferences drawn. We will thereof not labour this point.

He also filed a defence outline as required by s 66 of the Criminal Evidence and Procedure Act. This court therefore takes into account what he said in that outline. His defence outline made it clear that his brother was merely visiting from Harare at the time that the 1st accused also came to visit him. It was him who resided at the rural home with his parents, wife and children whilst his older brother worked in town. This therefore makes implausible the claim by the 1st accused in his evidence in court that the reason he had told the 2nd accused only about the guns was because he was at his home. If anyone needed to be told about the guns it was the 3rd accused who resided there day to day with his family. The gist of his defence that he did not know that the two accused were armed or that they would use ammunition against the deceased is simply not true.

[2] See for instance: David Brown, *Silencing in Court: The Abolition of the Dock Statement in New South Wales*, 6 Current Issues Crim. Just. 158, 162 (1994); and
Jeffrey Bellin, *Improving the Reliability of Criminal Trials through Legal Rules that Encourage Defendants to Testify*, 76 U. Cin. L. Rev. 851, 898 (2008)

He also said in his defence outline that what he was admitting to in his warned and cautioned statement was being present when the deceased was shot and not to hatching and conniving a plan to rob gold buyers or that he knew that the other two had guns. The detective who also investigated the matter gave evidence that the accused persons were engaged in a ruse to sell gold which they never had. Their main intent was to rob. The disagreement they engaged in was about the price. The accused confirm as much. There was never any disagreement as claimed about fake gold. The disagreement was about price. At the material when the gold was to be produced for which price had now been agreed, they put their plan into motion.

His warned and cautioned statement established the following: Things had not gone as expected at both Chin and ND in terms of their finding gold. He was central to the negotiation in the purported sale of gold. Since no gold was produced, this establishes that he was aware at all times that he was engaged in a ruse and had no gold to sell. He was there when the shot was fired by his brother Andrew the 2nd accused. He was the one who took the bag from the scene which contained the scale which he said had fallen inside the bag.

**Whether the murder was with actual intent**

As regards the murder we reject the 2nd accused's version that he acted in self-defence. The evidence of the state witness whom we believed was that there had been absolutely no aggression from the deceased when these negotiations were taking place. They had simply haggled over the price. There was never a real intention to sell gold. Both Ketai and Langton whom we found to be credible witnesses were crystal clear that no gold had ever been produced by the accused.

If the deceased picked up a stone, as he alleged by the 2nd accused it could only have been in futile attempt at that point to protect himself against what had clearly become a violent situation against him. Both state witnesses were clear there had been no aggression during the negotiations and that if any violence had taken place it was after they had fled the scene when the guns were produced.

He had been given the gun by the 1st accused precisely because of the two brothers, he was the one who knew how to use the weapon. The fact that they carried loaded weapons indicates that they were prepared to use them to achieve their goals if the need arose.

His claim that he had only seen the pictures of the deceased shot in the fore head when arrested by the police is equally not credible since if he thought he had merely injured

him in self-defence his actions afterwards would have spoken to that reality. He must have known that he had killed the deceased.

The murder by the 2nd accused was with actual intent.

**WHETHER THE ACCUSED ACTED IN COMMON PURPOSE**

Common purpose**,** whereby an accused performs an act in solidarity that gives rise to co-responsibility by association with the other perpetrators is what has been invoked by the state as underlying the murder in this matter. The essence of common purpose is that a**ssociation in the common design makes the act of the principal offender the act of all**.

Counsel for the third accused put forward the argument that the doctrine of common purpose was at that time no longer in applicable in our jurisdiction by virtue of s3 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. It provides as follows:

> **"3 Roman-Dutch criminal law no longer to apply**
> (1) The non-statutory Roman-Dutch criminal law in force in the Colony of the Cape of Good Hope on the 10th June, 1891, as subsequently modified in Zimbabwe, shall no longer apply within Zimbabwe to the extent that this Code expressly or impliedly enacts, re-enacts, amends, modifies or repeals that law."

Whilst s 3 (2) provides as follows:

> "(2) Subsection (1) shall not prevent a court, when interpreting any provision of this Code, from obtaining guidance from judicial decisions and legal writings on relevant aspects of:
> (*a*) the criminal law referred to in subsection (1); or
> (*b*) the criminal law that is or was in force in any country other than Zimbabwe."

He also relied on s 9 of the Criminal Code which in essence requires a person to be a party to a crime as provided for in the Code or any other enactment. The essence of this argument was that common purpose being then not part of the code or any enactment could not be relied on. This is what the court distilled from his lengthy submissions. The argument does not hold.

Indeed the Criminal Code brought together major aspects of the criminal law and to the extent that those areas are covered by the Code then Roman Dutch law is indeed no longer applicable. It is also clear from s 3 (2) that the exclusion of common law is qualified. A reading of s 3(1) in particular indicates that it is only those areas previously dealt with under common law and now provided for in the Code that were being referred to. It is not in dispute that the doctrine of common purpose was not one of those areas that were initially introduced into the Code up until 2016 when part XX of Act No 3 of 2016 brought in s196A on co-perpetrators and s 197 on accomplices.

As such, prior to the amendment, the doctrine of common purpose which was not provided for in the Code continued to be applied as drawn from common law. In other words, up until the amendment in 2016, the common law was applicable in addressing the lacuna in the Code. To the extent that the criminal offence in this matter occurred prior to the coming into effect of the 2016 amendment, then the doctrine of common law applied and the Supreme Court case of *S* v *Ncube & Anor* 2014 (2) ZLR 174 (S) bears testimony to this. There is therefore no merit in the argument about the non-applicability of the common law doctrine of common purpose. What the new provision has done is to in fact incorporate and consolidate those common law aspects that were in force prior to the amendment.

The case of *S* v *Mubaiwa* 1992 (2) 362 (S) makes it clear that the guiding principles on common purpose are that:

> "1. Each individual in a common purpose case is to be judged on his own *mens rea*;
> 2. The *actus reus* of the accused, on which his criminal responsibility for the murder is founded, consists, not necessarily in an act which is causally linked with the death of the deceased, but solely in an act by which he associates himself with the common purpose to kill."

It was also held that each individual to a common purpose is to be judged on his own state of mind. In addition, the conduct on which criminal liability is founded is the act by which the accused associates with the common purpose. See *S* v *Safatsa* 1988 (1) SA 868 (A).

In *S* v *Mitchell and Another* 1992 (1) SACR 17 (A) awareness of the assault, an intention to make common cause with those who were actually perpetrating the assault, a manifestation of his sharing of a common purpose with the perpetrators of the assault by performing 'some act of association with the conduct of the others' are all factors that point to common purpose where there has been no prior agreement.[3] See also *S* v *Mgedezi* 1989 (1) SA 687 (A) at 705-6.

> "Where only one (or a few) of the participants inflict the fatal injury, even a slight degree of assistance by an associate in a common purpose is sufficient to lead to a finding that he was also criminally liable".

While the criticism of common purpose especially in large group contexts is that it can cast the net of criminal liability too widely[4], it is nonetheless critical to note that with common purpose, it matters not that only one person inflicts the fatal injury. Criminal liability can arise

[3] See Neil Bolster *Common Purpose: Association and Mandate* 5 S. Afr. J. Crim. Just. 167 1992 at p

[4] G Felton Guilt by Association: the over extension of the doctrine of common purpose in *Zimbabwe Electronic law Journal Vol 2 2017 (1)*

on the basis of common purpose and can be found where there is a slight degree of assistance by an associate in common purpose. It is also well established that a common purpose need not be derived from an antecedent agreement, but can arise on the spur of the moment and can be inferred from the facts surrounding the active association with the furtherance of the common design.

It is against these principles on common purpose that the issue must be decided whether all accused acted in common purpose when the 2nd accused killed the deceased. The 1st accused claimed that he had runaway and yet there was nothing in the evidence that supported that finding. Instead the evidence by the two witnesses was that he had produced a gun and had surrounded the deceased. The denial by the 2nd accused that he had threatened the deceased and the witnesses was simply that – a denial. He was simply not a credible witness. The material aspects of the 2nd accused warned and cautioned statement which was admitted in evidence established that he had indeed threatened the two witnesses and the deceased that they were under arrest. The 1st accused, as already established, also produced a gun. From the evidence of the two state witnesses which we accept as credible, they fled upon being threatened with weapons.

As regards the 1st accused, it is evident that evil had been brewing in his mind from the day he decided not to return the weapons to his workplace and to lie that they had been stolen. We accepted the evidence from the police investigations that the accused's primary motive in going to Mukaradzi was to look for money. In their search for money they had clearly anticipated using the guns if need be. Providing the weapons was the catalyst that put the plan in motion to rob gold dealers for money. In this regard the evidence has been succinct on the role that the 1st accused played at the material time of the attack. He helped surround the deceased and had threatened the witnesses and the deceased with a live firearm. There is no doubt that the accused's death must have foreseen with substantial certainty in the event of any of the guns being fired which the 1st and 2nd accused were brandishing at the time. His story of how the 2nd accused had come into possession of the gun because the weapons could not fit in the bag was clearly concocted and made little sense.

The persons who ran away were the witnesses and not the first accused. In the Supreme Court case of *S* v *Ncube & Anor* cited earlier it was emphasised that where a party argues that they dissociated from a crime, a last-minute withdrawal on its own is insufficient to exculpate a secondary party from the main charge. That party must do more for the defence of "withdrawal" to succeed. He must "countermand" or "repent" the original

instruction or understanding. The withdrawing party must literally "step on the lit fuse" in order to successfully dissociate from a conspiracy. The accused did no such thing. We find convincingly that at all times he acted in full common purpose with the 2nd accused when he committed the murder. He is guilty of murder with actual intent.

As for the third accused it has been said with regard to common purpose that ultimately:

> "Whether an accused has associated himself in a common purpose is a question of fact. This calls for a careful examination of his role with a view to determining whether, from his conduct, an inference can be drawn that his mind and those of the other perpetrators were directed towards achieving a common goal, namely the death of the deceased".[5]

The 3rd accused denies that he acted in common purpose with the first and second accused. We have already dismissed his claim that he was not even aware that the first two accused were carrying weapons let alone loaded ones and that he only became aware after the shooting. We have further established that his negotiations for the sale of the gold where never genuine negotiations as the evidence of the two witnesses who were at the scene was that clear that absolutely no gold was produced at any point. The evidence of the two witnesses on the scene is credible that there was no gold which was produced at the material time when the price was agreed and the scale had been positioned for weighing the gold. Right from the start the whole thing was a ruse as the police investigations confirmed. The argument that at the very most he obstructed justice does not have a basis.

The 2nd accused told the two witnesses that they were policemen and that they were under arrest. When the deceased resisted and demanded proof thereof he was shot. It is important to bear in mind that planning for a murder can be instantaneous. After all one only needs a second to decide they are going to end someone's life. It would be misleading to think of the murder under the circumstances of this case in terms of long term planning. What is crucial in relation to the other two accused persons is that they knew they were carrying live weapons. Two of the three accused were brandishing them at the time. All three were in position. It was obviously foreseeable at all times that there was a real risk of using the live weapons.

The manner in which the third accused played a central negotiating role and helped to surround the deceased was described by the witnesses at the scene. His intention in helping surround was clearly to prevent the deceased's escape. It cannot be said on the basis of the

[5] **SK** Parmanand **and MS** Ramaite *Dissociation From A Common Purpose* 5 Stellenbosch L. Rev. 82 1994

facts as explained by the State witnesses and by the police in their investigations that he was a person who had merely witnessed an act and had not taken steps to prevent it. His role was far more than this. Langton Bvukumbwe's evidence was clear that all three had surrounded the deceased. Ketai Nyauyanga's evidence was also clear that at all times the three were acting together in common purpose. The 3rd accused intended at all times to be part of the commission of an offence. His assertion that the accused's scale accidentally fell into his bag was baloney. There had been no effort to surrender it to the police if it had accidentally fallen into his bag and he had had nothing to do with the crime. He stole it after the commission of the offence. He too like the 1st and 2nd accused is guilty of murder with actual intent as he at all times acted in common purpose.

This court returns the following verdicts:

Accused 1guilty of murder with actual intent

Accused 2 guilty of murder with actual intent

Accused 3 guilty of murder with actual intent.

14th December 2018

**Mitigation, aggravation and sentence**

The three accused in this case are all said to be first offenders, family men as well as bread winners. Whilst accused one has been convicted on a fire arm charge it is emphasised that the charge arose out of the same set of facts. One of his children is said to have been born whilst the accused was in the custody. He is also said to be remorseful but this is not true given his very clear efforts to spin a yarn on his possession the fire arm. He was more concerned with how he could get away with the offence as opposed to being genuinely remorseful. No weight too was placed by this court on his efforts to absolve the third accused as that too was found to be manufactured and contrived in view of the full facts of what happened on that fateful day.

The 2nd accused also a family man and has three children who are all minors. He too was not remorseful despite the claims in mitigation that he was. His self defence argument was rejected by this court and was merely aimed at down playing his role in shooting the deceased. The fact that he contracted TB in prison is neither here nor there as there are doctors in prisons. In fact he has made recovery precisely because he has been accorded medical care.

The 3rd accused at 34 years also has three children and his role is said not to have been central because he did not deliver the fatal blow. This verdict in this case was founded on common purpose where the conduct of each is imputed to the others. The intention of each of the accused having been determined independently and active association having been found in this case, the sentence must be the same.

All three counsel have emphasised case law on the role of sentencing in particular that its aim should as much as possible be rehabilitative. *S* v *Madembo 2003 (1)* ZLR 137*; S* v *Shariwa* 2003 (1) ZLR 314 (H)

The State has emphasised that the attack on the deceased was motivated by the desire to rob him of his gold and cash; that they were not remorseful and did not accept responsibility for their actions. On matters of murder which involve robbery our courts have generally taken a stern approach. In *S* v *Murijo* SC 139/06 an appeal was lodged against a death sentence for a murder committed in the course of a robbery. The case *Dube & Anor* v *S A C 245-96* was cited with approval in so far as it lays out clearly the risks of carrying a fire arm on a robbery expedition if someone is then killed. These risks pertain to the fact that all parties in the know are likely to face the penalty of death. In *S* v *Murijo* the appellant had not pulled the trigger but had acted together with the person who pulled the trigger. In other words they had acted in common purpose.

Relying on the case of *S* v *Mutero* SC 28 /17 the State, as do the accused's counsel recognise the non-applicability of the death penalty in this case as the law clarifying the applicability of the death penalty in terms of the new Constitution was not yet in force at the time the murder was committed. Furthermore s 337 of the Criminal Procedure and Evidence Act which would have been applicable was deemed in the Muter case to be in contravention of the new constitution. The General Laws Amendment Act which clarifies aggravating circumstances for the possible imposition of the death penalty, only came into force on 24 June 2016. The State therefore suggests life imprisonment as appropriate in this case.

The issue is what weight should be placed on fact that they are first offenders. Generally, where the crime is serious then the fact that one is a first offender tends to carry less weight. The question as to whether a life sentence should be imposed hinges on the probability of the accused committing a similar offence if they are not sentenced life imprisonment as suggested by the state. I am also cognisant here of the fact that the amended provisions of the criminal code though not applicable herein, in fact recognise that 20 years is a **minimum** sentence for murder committed in aggravating circumstances where the death

sentence is not deemed appropriate. In other words, an appropriate sentence of imprisonment can be looked at critically even where the murder is committed in aggravating circumstances. It is safe to surmise that the right to life must be protected unless it is probable that the accused are beyond rehabilitation and would in fact commit a similar crime if released after serving their sentence.

From the factual circumstances there are no strong indications that the accused are beyond rehabilitation and that they ought to receive life imprisonment since the death penalty is not applicable here. The accused have been in detention for nearly two years and nine months. This period will be taken into account in sentencing them. A sentence in the region of 40 years would in my view have been appropriate. Having spent nearly three years in detention the accused persons who acted in common purpose are accordingly sentenced as follows:

35 years each imprisonment.

*National Prosecuting Authority: State's Counsel*
*Harare Law Chambers: 1st accused's defence counsel*
*Harare Law Chambers 2nd accused's defence counsel*
*Nyambirai Mtetwa & Associates: 3rd Accused's Legal Practitioners*