

THE STATE
versus
PHILLIMON CHIGWADA

HIGH COURT OF ZIMBABWE
CHIGUMBA J
HARARE 3, 4, 13 April 2017

ASSESSORS 1. Mr. Mhandu
2. Mr. Chivanda

D. H Chesa, for the state
Ms. Ngarava, for the accused

Criminal Trial

CHIGUMBA J: What does it mean to say that for purposes of determining intention, a person's motive is immaterial to criminal liability unless the CODE expressly states otherwise? In my view, this means that where the person whose conduct is in issue intended or meant to engage in the action or produce the result which he did, then in those circumstances, the person may properly be held to have intended to commit the crime, and the actual reasons why the person engaged in such conduct are irrelevant to the element of the crime that requires proof of actual intention. The reasons why the person engaged in the impugned conduct may go towards extenuation, not to a finding of criminal liability, or guilt.

Accused is facing two charges, one of murder, as defined in s 47 of the *Criminal Law (Codification and Reform Act) (the CODE)* [Chapter 9:23], and attempted murder, as defined in s 189 as read with s 147 of the CODE, it being alleged in count one, that, on 23 April 2016, at house number 92 Rhodesville Avenue, Harare, he unlawfully, and with intent to kill, shot Chiedza Nera Rambanapasi (the Deceased) once on the back of the head, thereby causing injuries from which she died, and that, in count two, on 23 April 2016, at the same address, he

attempted to kill Memory Mahari, by shooting her on her right jaw, with a 303 rifle, intending to cause her death or realizing that there was a real risk or possibility that his conduct may cause death, but continuing to engage in that conduct despite the possibility. According to the state summary the accused was employed by Guardian Security, and was deployed to number 92 Rhodesville Avenue to provide security services at that residence. On 23 April 2016, the accused, the deceased, the complainant, and one Brian Matsika were all in the lounge watching movies when a misunderstanding ensued between the accused and the deceased over an allegation that the accused was gossiping about the deceased. The misunderstanding was quelled. Accused subsequently shot the deceased with a 303 rifle after closing the door to the lounge on the back of the head once. The other two occupants tried to run. The complainant was shot on the jaw once using the same rifle. She suffered some injuries to her face. The autopsy report shows that the deceased died due to “hypovolemic shock”.

In his defence outline, accused, in denying the charge of murder, denied that he had any intention to kill the deceased and proffered two defences, one of provocation, and one of confusion, shock, or mental dissociative state, otherwise known as ‘a fugue state’, where he was not cognizant of his actions after seeing four men dressed in black who ordered him to kill everyone in the room. He stated that he was enraged by the deceased who had told him that she had deliberately infected him with the H.I.V. virus. In his rage, he began to hear voices and to see visions which controlled him and told him to kill. The accused stated that he does not remember how he shot the complainant, or how he got to number 94 Rhodesville Avenue. He remembers handing over his rifle and a spent cartridge to Clive Ncube after being informed that he was responsible for the complainant’s injuries. He carried complainant on his back to where the ambulance was parked. He remembers asking for a phone to call his employer, the police, and the ambulance.

The evidence of the following state witnesses, was admitted into evidence by the consent of the parties, as it appeared in the outline of the state case:

- (a) Loyce Godobi-She is a member of the Zimbabwe Republic Police (ZRP) stationed at Rhodesville Police Station who summoned an ambulance and attended the scene of the

crime on the day in question. She arrested the accused person, recovered the rifle, and the spent cartridges from the yard and the house. She ferried the remains of the deceased to Parirenyatwa hospital. She attended a photo shoot at the scene of the crime on 24 May 2016. She ferried the remains of the deceased for a post mortem. She was present when the accused made indications at the scene of the crime on 27 May 2016.

- (b) Sergeant Ruzayi-is a member of the ZRP who was present when the accused made indications at the scene of the crime on 27 May 2016, freely and voluntarily. He warned and cautioned the accused, and was furnished with complainant's medical affidavit, which will be produced.
- (c) Etwell Ngara-is a member of the ZRP stationed in the criminal Investigations Department, and the Investigating Officer in this matter. He received a report on 23 April 2016, and attended the scene of the crime. He observed a gunshot exit wound on the left side of the deceased's neck, and recovered two spent cartridges on the floor of the lounge.
- (d) Assistant Inspector Zvoushe-is a member of the ZRP who saw the accused in his office at Rhodesville Police Station on 25 April 2016. He recorded a statement from the accused after he had been warned and cautioned. The statement was witnessed by Constable Tsodzo. It was made freely and voluntarily.
- (e) Assistant Inspector Dube is a member of the ZRP employed as a Firearms Identification Officer at the Criminal Investigation Department. On 27 April 2016 he received a 303 4MK2 Rifle Serial Number A24966 and a 303 spent cartridges. He examined the rifle and compiled a ballistics report was produced.
- (f) Dr Nyamapfeke is a medical practitioner employed by the Ministry of Health and Child Care attached to Parirenyatwa Hospital. On 24 April 2016 during the course of his duties, at the request of Rhodesville Police, he compiled a report for Memory Mahachi, in which he stated that she sustained a "mandibular fracture, with severe bleeding". His report was produced.
- (g) Dr. Javangwe is a medical practitioner stationed at Parirenyatwa hospital. On the 26th of April 2016, at the request of Rhodesville police, he examined the remains of Chiedza

Nero Rambanapasi. He concluded that the death had been caused by “Hypovolemic shock due to damaged left neck vessel, Cerebella laceration with basal skull fracture secondary to gunshot wound”. His report was produced.

The following exhibits were tendered by the state and by the accused and admitted by consent:

- Exhibit 1 - Accused’s warned and cautioned statement dated 26 April 2016 and confirmed by magistrate Mahwe
- Exhibit 2 - Accused person’s defence outline dated 27 October 2016
- Exhibit 3 - Medical Certificate for Admission to Institution dated 3 November 2016
- Exhibit 4 - Affidavit by Dr. Mhaka dated 25 November 2016 in which he states that the accused does not suffer from mental illness but is a malingerer
- Exhibit 5 - Medical Report dated 15 June 2016 compiled at Parirenyatwa Hospital which shows that the accused is H.I.V. negative
- Exhibit 6 - CID Forensic Ballistics Report dated 27 April 2016 showing that the rifle was fired and that the spent cartridges were fired from that rifle.
- Exhibit 7 - Medical report compiled by Dr. Nyamapfeni dated 22 June 2016 with regards to the complainant Memory Mahari which states that her injuries were severe and that the possibility of permanent injury was likely
- Exhibit 8 - post mortem report which confirms the cause of death Two witnesses Tragedy Muchairi accused and deceased’s sister and Sikhumbuzo Ncube, accused’s neighbour gave *viva voce* evidence for the state. The evidence of Lovemore Mutsakani the police officer who recovered the hoe and that of the pathologist Dr I.

Jekonya was introduced by consent in terms of section 314 of the Criminal Procedure and Evidence Act [*Chapter 9:07*].

Three witnesses testified on behalf of the state via *viva voce*.

Accused gave evidence and closed his case.

What is common cause *in casu* is that:

1. Accused was employed by Guardian Security as a guard and was deployed to number 92 Rhodesville Avenue to provide security services at the residence.
2. On 23 April 2016, accused, deceased, complainant and Brian Matsika were all in the lounge when the accused shot the deceased once on the back of the head with a 303 rifle once on the back of the head. Deceased died immediately.
3. Accused pointed the rifle intermittently between the complainant and Brian. Brian managed to escape. The accused followed the complainant and dragged her back into the yard where he strangled her by the neck, gagged her mouth and, while she was on her knees, he shot her on the right jaw with the rifle and she collapsed. She played possum so that the accused wouldn't finish her off.
4. Complainant managed to escape and run to number 94 Rhodesville Avenue where she sought help. Accused followed her and found her in the company of Clive Ncube, the third state witness. Accused handed over the rifle, a live round of ammunition to the witness, and asked for a phone so that he could call his superiors.
5. Guardian Rapid Response attended the scene where Clive Ncube handed over the firearm and the live cartridge. Accused carried the complainant on his back to the ambulance which was parked at the gate at number 94.
6. The cause of death was hypovolemic shock due to damaged left neck vessel; cerebella laceration with basal skull fracture secondary to gunshot wound. Complainant suffered a mandibular fracture with severe bleeding.
7. The deceased and the complainant were shot from the rifle which was in the accused's possession.

8. Trial failed to commence on 31st October 2016 after accused exhibited signs of confusion, memory loss and hallucinations in court. The court ordered that he be examined by a psychiatrist. He was examined by a duly registered psychiatrist, Dr Mhaka, on 25 November 2016 who concluded that he suffered from malingering, he was pretending to be mentally ill but was mentally fit to stand trial, and had not been mentally disordered at the time that he committed the offence.
9. On 3 April 2017 accused's concentration appeared impaired. He told the court he had taken some tablets for mental disorders and provided a prescription dated November 2016 as proof that he was on medication. Dr. M. Kajawo compiled a report dated 4 April 2017 in which he confirmed that he was faking mental illness. Accused's medications were subsequently withheld. During the trial the accused was no longer on any illicit medications.

The disputed issues are the accused's *mens rea*, his mental state, whether he intended to commit murder, and whether any of the defences which he proffered, provocation, intoxication and fugue state, were proved. The crimes of murder and attempted murder are defined in the CODE as follows:

“47 Murder

- (1) Any person who causes 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.
- (2) Subject to section 337 of the Criminal Procedure and Evidence Act [*Chapter 9:07*], a person convicted of murder shall be sentenced to death unless
 - (a) the convicted person is under the age of eighteen years at the time of the commission of the crime; or
 - (b) the court is of the opinion that there are extenuating circumstances; in which event the convicted person shall be liable to imprisonment for life or any shorter period.
- (3) A person convicted of attempted murder or of incitement or conspiracy to commit murder shall be liable to be sentenced to death or to imprisonment for life or any shorter period.”

For attempted murder, s 47 should be read in conjunction with s 189, which reads as follows:

“189 Attempt

- (1) Subject to subsection (1), any person who
 - (a) intending to commit a crime, whether in terms of this Code or any other enactment; or

(b) realising that there is a real risk or possibility that a crime, whether in terms of this Code or any other enactment, may be committed; does or omits to do anything that has reached at least the commencement of the execution of the intended crime, shall be guilty of attempting to commit the crime concerned:

(2) A person shall not be guilty of attempting to commit a crime if, before the commencement of the execution of the intended crime, he or she changes his or her mind and voluntarily desists from proceeding further with the crime.”

Intention is defined in s 13 of the CODE as follows:

“13 Intention

(1) Where intention is an element of any crime, the test is subjective and is whether or not the person whose conduct is in issue intended to engage in the conduct or produce the consequence he or she did.

(2) Except as may be expressly provided in this Code or in the enactment concerned, the motive or underlying reason for a person’s doing or omitting to do anything, or forming any intention, is immaterial to that person’s criminal liability in terms of this Code or any other enactment.”

What does it mean to say that for purposes of determining intention, a person’s motive is immaterial to criminal liability unless the CODE expressly states otherwise? In my view, this means that where the person whose conduct is in issue intended or meant to engage in the action or produce the result which he did, then in those circumstances, the person may properly be held to have intended to commit the crime, and the actual reasons why the person engaged in such conduct are irrelevant to the element of the crime that requires proof of actual intention. The reasons why the person engaged in the impugned conduct may go towards extenuation, not to a finding of criminal liability, or guilt.

A subjective state of mind is defined in s 12 of the CODE as follows:

“12 Meaning of subjective state of mind

For the purposes of this Part, a subjective test for a state of mind is a test whereby a court decides whether or not the person concerned actually possessed that state of mind at the relevant time, taking into account all relevant factors that may have influenced that person’s state of mind.”

The test then becomes, what are the relevant factors that influenced the accused’s state of mind in the circumstances of this case, which caused him to shoot the deceased and the complainant, knowing full well that the parts of the body where he aimed the rifle would most likely cause mortal wounds? It is to be noted that these relevant factors are separate and distinct from the accused’s motive. Motive is defined as something which prompts a person to act in a

certain way.¹ It is common cause that the accused person was a trained security guard who had five years' experience on the job and could handle firearms. Indeed the fact that he handed Clive Ncube a live round of ammunition proves that he could load and unload the rifle in question like an expert. It also shows that he realized that he should not wave around a gun whilst it was loaded with live rounds, because this posed a danger to himself and to others. It was a move calculated to reassure Clive Ncube that he did not intend to discharge the rifle.

It is a reasonable inference therefore, that the act of pointing the loaded rifle at a woman that he professed to be having a long term sexual relationship with, an alleged lover who took care of all his financial needs, could not have been done in jest or in ignorance of the consequences of pulling the trigger. Pointing a loaded rifle to the head, and to the right jaw, exhibits a sign of a desire to obliterate, a serious decision to cause mortal wounds. It has been held that shots directed at a vulnerable part of the body can only suggest intent to kill. See *S v Mpofu*².

In count 1, the victim was lying helplessly on the sofa, unsuspectingly. In count 2, the victim was in a kneeling position, a position of supplication which posed no threat to the accused person. The height and build, and age of the complainant posed no serious threat to the accused. She could not have overpowered him due to her build. As it was she only survived because she played dead. Accused did not discharge two shots into his victims. Two spent cartridges were found in the yard, two in the lounge, one exited the deceased and was recovered. This supports the evidence of the complainant and Brian that the accused pointed the rifle at them intermittently. He fired at least three shots that did not "get" anybody, one in the dining room and two in the yard.

The accused gave two conflicting versions as to why he had shot the deceased. In his warned and cautioned statement he said he was angry because she had told him that she had

¹ Wikipedia

² SC 135-04

deliberately infected him with H.I.V. The medical evidence did not bear this out. The accused tested H.I.V. negative. During evidence in chief he told the court four men dressed in black ordered him to kill everyone. During cross examination he decided the provocation did not cause him to shoot the deceased, the earlier argument did not cause him to shoot the deceased, he opted for the four men dressed in black who told him to shoot everyone. The conflicting statements are a factor to be considered when drawing adverse inferences as to the accused's guilt. See *Inspector Gijima v State* ³. Accused must have realized that none of his other defences accounted for the shooting of the complainant except his 'fugue state' where for men told him to kill everyone and he does not remember what happened because he was not 'compos mentis' at the time that he committed the offences.

Neither the complainant nor Brian the gardener could confirm the alleged sexual relationship between the accused and the deceased. His H. I. V. status belies the allegation that the deceased had deliberately infected him with the H. I. V. Virus. The accused initially alleged that he had been angered hence provoked in an earlier conversation in which the deceased taunted him that she had infected him and his wife and children. None of the witnesses could confirm that this conversation took place. The conversation in which deceased took umbrage at what she perceived as gossip and insubordination resulted in the accused apologizing to the deceased, according to his own evidence in chief. We accept the submission made on behalf of the state, that if the deceased provoked the accused around 7pm, why did he wait for four hours before killing her. If the accused was angry at the deceased why did he threaten everyone in that room with death. The evidence of the complainant and Brian is clear. After shooting the deceased the accused informed them that he intended to kill them to prevent them from testifying against him. That is the only reasonable explanation for his pointing the firearm at the two and pursuing the complainant and shooting her at a part of the body which was calculated to cause

³ SC 9-86 (cyclostyled)

her death. We find that the state discharged the onus on it to refute the defences given by the accused and to prove a case against him beyond reasonable doubt. See *State v Rowayi Chimene*⁴

We find that, when the accused person closed the dining room door, he deliberately cut off any avenue of escape. He had already formed the intention to kill everyone in that room and later claim that four men appeared and told him to shoot everyone. Brian foiled his plan by escaping completely. He thought he had killed the complainant when she played possum. There is no evidence that the alleged provocation preyed on the mind of the accused at the time that he closed the door to the dining room to prevent any of the occupants of the room from escaping. There is no evidence that his mind was under the influence of alcohol.

There is no evidence, medical evidence, that the accused's mind became disordered, that he suffered a 'dissociated state' 'a fugue' and did not know what he was doing at the time that he committed these offences. In fact accused's actions show a calculated plan which went awry. He closed the door to the dining room to prevent escape. He knew he wanted to kill the witnesses to prevent them from testifying against him. He discharged three shots in the dining room and two in the yard. He dragged the complainant from the gate back into the yard. He aimed at her head in the same manner that he had aimed at the deceased's head. When he went to number 94, he told Clive Ncube of his concocted defence. His care of the complainant was calculated to tally with his defence that when he shot her he did not know what he was doing. He removed the live round from the chamber and calmly gave it to Clive Ncube. He asked for a phone and called his employer.

These are the cool rational ordered actions of someone who was not in a dissociative state. It is improbable that such a state lasted for thirty minutes or a mere hour, or that this alleged state was brought on by an alleged provocation that had taken place four hours previously. It is simply not believable that the accused could have shot his alleged lover of five years, at point blank range because she had taunted him four hours earlier, when the argument which they had had barely an hour earlier had resulted in him apologizing to her and in the apology being

⁴ HH721-15

accepted. It is hard to believe that the accused had the wherewithal to sit and watch one movie, and to request for the movie to be changed, while in his 'provoked state'. It has been held that an act triggered by provocation has to be a quick and spontaneous one. See *Godfrey Chimwendo v State*⁵.

The accused shot the deceased and the complainant in a movie style 'orgy of violence'. The evidence was inconclusive as to whether the accused and the deceased were long time lovers. What was clear is that the accused was familiar with the movies which were in the deceased's house. Perhaps the deceased was in the habit of inviting her employees to watch movies with her. Perhaps she was lonely after her separation from her husband. What is certain is that she did not deserve to be executed in movie style fashion by a person whom she paid to protect her from the very thing which was perpetrated on her by a person in a position of trust. A seasoned security guard which killed her deliberately and barely thirty minutes later had the presence of mind to attempt to render first aid to the complainant, to activate his employer's security protocols by calling them, and to Nicodemously carry the complainant on his back, to the ambulance. What about his alleged lover, whose head was lying in a pool of congealed blood?

Did the accused intend to kill the deceased and the complainant? Let us have regard to the following factors;-

- the weapon used – a rifle loaded with live ammunition which accused used at point blank range on both the deceased and the complainant, showing no mercy to his alleged lover or to a very young girl who was on her knees when he shot her on the jaw, pleading for her life after he strangled and gagged her. He only left when she played dead. In her evidence it was clear that she believed that had the accused seen any signs of life, he would have finished her off. She was very brave, at sixteen years of age, to play possum then scale a precast wall and run to

⁵ SC 98-01

number 94, with her injuries and the amount of bleeding, and her faint state due to loss of blood.

- the part of the human anatomy the blows were aimed – the head – a very vulnerable and delicate part of the body.
 - the number of blows delivered – two shots one at each victim, three haphazard shots which went wide two in the dining room and one in the yard-five shots in all – shows determination and perseverance
 - the degree of force used as gleaned from the post mortem report exhibit 2 was very severe in view of the nature of the injuries caused.
 - the injuries actually occasioned –the deceased’ skull was fractured as well as the complainant’s jaw. She is now permanently disfigured, something pitiful in such a young girl
- a) wound 3,5cm.

These caused deceased’s death whose cause the pathologist listed as severe brain damage with haemorrhages, skull fractures and callous head injury.

The penultimate question is whether the intention to kill was actual or constructive. It is our considered view that the accused killed the deceased in cold blood, and attempted to murder the complainant in cold blood. There is no rational explanation for the accused’s actions. He did not act in the heat of the moment. He was not drunk. He was not mentally disordered because he could describe in excruciating detail what the four men dressed in black were wearing and what they looked like down to their height and weight. If he was cognizant of these things, he was aware of who he was as opposed to the four men. He understood their instructions. We accept the medical evidence the accused person tried to fake mental illness because he could not face the fact that he had gunned down two people for no apparent reason. We find the accused person guilty of murder with actual intent, and of one count of attempted murder.

In the result accused is found guilty of murder with actual intent.

The Prosecutor General's Office, State's legal practitioners
Messrs Chatsama & Partners, accused's legal practitioners