HB 297/17
HC (CRB) 56/17

**THE STATE**

**Versus**

**GEORGE MAGAMBUTSU**

**And**

**LEARNMORE MUZONDIWA**

**And**

**TICHAONA MAREVEGWA**

IN THE HIGH COURT OF ZIMBABWE
BERE J with Assessors Mr W.T. Matemba & Mrs C.J. Baye
GWERU CIRCUIT COURT 25, 26 & 29 SEPTEMBER 2017

**Criminal Trial**

*T. Mupariwa* for the state
*S.R. Mafa & W.T. Davira* for 1st accused
*A. Sibanda* for 2nd accused
*Z. Tapera* for 3rd accused

**BERE J:** If I may borrow McNALLY JA's phrase, the facts in this case are "simple and brutal". The three accused persons together with some of their co-perpetrators who are yet to be accounted for are alleged by the state to have hatched a plan to go and rob pregnant gold carbons from Chipochangu Mine which is officially referred to as Darkhorse 24 Mine, Marivale, Kwekwe under cover of darkness on the night of 20 June 2015.

In a well planned assignment in which every participant appeared to have had a well defined and precise role in the operation, the plan was well executed. Unfortunately, the deceased, one Handson Moyo who was the owner of this lucrative mine lost his life through gun shot during the robbery. The deceased was shot on the forehead and died on the spot. The post mortem report (exhibit 1) concluded that the death of the deceased was: (1) severe brain damage; (2) multiple skull fracture; and (3) severe head trauma due to bullet injury. The CID Forensic ballistic report (exhibit 2) identified the murder weapon as a 303 4MK1 rifle manufactured after

the year 1900. The three accused persons stand accused of causing the death of the deceased and they have been brought together by the doctrine of common purpose. In other words, the state alleged that they were acting in concert when they caused the untimely death of the deceased.

There is absolutely no complication in the respective defences of the three accused persons in this matter. Their defences are easy to follow and I can briefly summarise them as follows:

The first accused stated that on the day in question he was assigned as a gunner and his principle role was to keep his eye on surveillance. His task was to monitor the movement of those that came to the carbon house and that "once" they were captured, he was assigned to ensure that their activities or movements were restricted. All the miners including the deceased were ordered to lie down in the carbon room and remain still as per strict instructions. He said in an unexpected turn of events the deceased sprung up from his position where he had been tied up and jumped for the murder weapon which the accused was firmly holding. The two started wrestling for the rifle with the result that in the process the rifle which was loaded with one live ammunition accidentally discharged and the bullet landed on the deceased's forehead claiming his life on the spot. In short the accused number 1's defence was that he lacked the necessary *mens rea* to kill the deceased. The deceased died due to this accidental discharge.

The accused number 2 and 3 are brothers and their defence outlines had a common denominator. The second accused denied any knowledge of the planned robbery and said that on the day in question he had just arrived from his rural home in Gokwe and that his brother, the 3rd accused person invited him to go for a mining activity at one of the mines. Whilst participating in the robbery as alleged by the state the second accused maintained that he thought he was involved in a legitimate mining activity as indicated to him by the 3rd accused person. The 2nd accused denied acting in common purpose with the co-accused as he did not know that he was involved in a robbery exercise. He thus pleaded innocent participation in the robbery.

The 3rd accused person, like his brother the 2nd accused person gave an extremely simple defence outline. Whilst admitting to the bulk of the chronological sequence of events that took

place at the mine, he said he too was innocently participating in whatever happened at the mine during that dreaded night. The accused denied acting in common purpose with his co-accused persons and he crowned his defence outline by alleging that at the time the deceased was shot, he had long left the scene and therefore could not have been said to have acted in common purpose with his co-accused persons.

**The legal position**

I propose to deal first with the position of the law on the doctrine of common purpose. The doctrine of common purpose is a time honoured principle of our criminal law which imputes liability to co-perpetrators for offences which fall within their common design. This doctrine is lucidly explained by G. Feltoe in the following manner:

> "If X is an accomplice to Y in a criminal enterprise, X will be liable for crimes committed by Y which fall within their common design. …X is liable because he participated in Y's crime with the necessary mental state, that is, he participated knowing or foreseeing that Y could commit the crime in question. … If X and Y have not actually agreed in advance that the crime in question will be committed during the criminal enterprise, but X foresees the real possibility that the crime will be committed, X will be guilty of the crime committed by Y on the basis of legal intention. Thus if Y murders D during the course of robbery, the accomplice, X, will be guilty of murder if X and Y agreed that the person being robbed would be killed if he put up resistance. On the other hand, X will be guilty of murder on the basis of legal intention if X and Y had not agreed in advance that D would be guilty if he resisted, but X knew that Y was armed when they went to commit robbery and that Y was likely to use his weapon to kill D if D resisted."[1]

Section 196A of our Code[2] clearly spells out the liability of co-perpetrators in the following way:

> "Liability of co-perpetrators

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[1] *A Guide to the Criminal Law of Zimbabwe*, by G. Feltoe, published by the Legal Resources Foundation in 1989, pp 50-51

[2] Criminal Law (Codification and Reform) Act [Chapter 9:23]

(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 realization 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 or 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."

In *Ndebu and Another*[3]; McNALLY JA puts it this way:

"In our law a man who is involved in the planning of and preparation for a crime is regarded as a *socius criminis*. If the crime is later committed, even if he is not present, he is guilty of the substantive offence. He may be what in English law is called a co-principal offender, or he may be an aider and abettor or accessory before the fact. In either event he may be convicted as a principal offender."

In *Enock Ncube and George Moyo* v *The State*[4], HLATSHWAYO JA leaning on an earlier decision by GARWE JA, quoted GARWE JA in the *State* v *Charles Sumani and Akudele* HH-75-2000 thus:

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[3] 1996 (2) SA 133 (ZS) at p 136

[4] Judgment No. SC-58-14

> "… In *Chaeruka & Anor* v *S* SC-40-93 two accused acting in concert had a firearm in their possession. The second accused was found guilty of murder with constructive intent. In *Ngulube and Another* v *S* SC-112-93 the Supreme Court held that the first appellant should have been found guilty of murder with constructive intent on the basis that being aware that his accomplice was armed with a lethal weapon he must have appreciated and foreseen the possibility of his colleague resorting to kill in furtherance of their common objective to effect the robbery."[5]

Having firmly laid the legal position I must now proceed to analyse the facts led in this case, which facts I must point out are largely not in dispute.

The state case was built around the *viva voce* evidence of Jaspher Shabhani, Tatenda Dzapasi and Officer Cornellius Dale of Kwekwe Criminal Investigations Department. The state case was also supported by the evidence of Richard Lunga, Tryphine Zimende, Peter Mafukidze, Assistant Inspector Dube and Dr Robert Trecu whose evidence was accepted without question and as recorded in the state summary and in terms of section 314 of the Criminal Procedure and Evidence Act Chapter 9:07.

All the three accused persons relied on their individual evidence in court.

Jaspher and Tatenda gave graphic details of how they were captured and detained in typical military style by the accused persons whom they described as having been wearing hooded jackets. According to these witnesses all those accused who appeared at the carbon room the main centre of the robbery were wearing jackets which are referred to as hooded jackets which were obviously designed to conceal their identity. I did not hear any of the accused persons challenging his critical aspect of the witnesses' testimony.

In our view the failure to challenge this which by implication must mean its total acceptance put paid to the cheap claims by the accused numbers 2 and 3 to their innocent association with accused 1. An innocent association could not possibly have required that the

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[5] *(supra)* at p 8 of the cyclostyled judgment

two strove to hide their faces. It was quite apparent that they were fully aware that they were involved in a criminal enterprise.

The typical military approach to the scene of crime, which led the accused to strive to get camouflage from the tree shades against the mine lights must have sent strong signals to accused 2 and 3 that their mission to this mine was heavily tainted with criminal conduct. One does not use an undesignated entrance to enter his own mine in the middle of the night and armed with a lethal weapon as accused 1 was. The accused 1, despite his sad chosen criminal life which he unsolicitedly revealed to the court must be accepted as having told the truth when he stated that accused 3 was fully aware of the criminal nature of the gang's mission to the mine. The accused 3's position cannot possibly be believed when he tried to project innocent association with his co-accused persons.

Jaspher and Tatenda described in detail how upon arrival at the carbon room they were captured, shepherded into the room and had some of them stripped naked and ordered to stay in lying positions.

From the accused two's confirmed, warned and cautioned statement coupled with his evidence in court, we now know that he played a frontline role in stripping naked some of the mine workers as well as the actual apprehension of the targeted mine workers as ordered by the first accused who used his gun to instill fear in these victims of robbery.

It is quite significant in my view, that if the second accused was merely an innocent participator as he would want this court to believe, he could have sunk his boots so dip in this criminal enterprise. The conduct of the accused 2 on the day in question had nothing to do with digging gold but had everything to do with someone who was fully aware of his role in the robbery exercise as testified by accused 1 when he stated that each of the accused persons had been given a specific task to perform to ensure that the mission was accomplished without difficulty. Indeed the robbery was performed to perfection because of the unmistakable complimentary roles played by each and every actor in this crime movie.

The accused number two must not be believed when he attempts to shamelessly mislead the court by suggesting that he mistook stealing gold carbons with digging for gold ore which he was invited to come to town for by his brother accused 3. Any novice in the field of mining would appreciate that the two are worlds apart.

We find it quite revealing in this case that even the parking of the Mark II Toyota motor vehicle at a well chosen spot, about 150 or so metres from the mine complex and in a bushy area could not have triggered the suspicions of accused 2 and 3 that they were up to a criminal activity. This does not make sense, if anything it lends credence to accused 1's honest position that all the accused had been briefed and that they were conscious of what they were up to – a criminal enterprise.

We regard it as a completely idle appreciation of the events for any one of the accused persons to try and project some inclination towards innocent participation. It simply does not make sense.

When all what took place at Darkhorse 24 Mine on 20 June 2015, is put into its proper perspective, one sees through it a neatly written story of a well planned and carefully executed act of robbery and the only reasonable inference one can draw is that every one of the accused persons was fully aware of the criminal nature of the whole exercise.

Even if one were to accept (which we are not doing in this judgment) the story told by the second and 3rd accused persons that were probably not given the details of their mission to the mine before getting to the mine, the actual events at the mine were such that even the most passive person could not have failed to appreciate the objective of the mission – robbery. In our view robbery was written all over the show in very large and visible flashing print.

Accused 3 has been involved in mining for quite some time. According to his evidence he erks a living out of mining. Despite this he pretends not to be able to distinguish between gold ore and gold carbons. He pretends that he did not even know what he carried on the day of

the murder. We can only say that this accused was taking the court for a fool. He is an accomplished liar. We do not accept his position.

Having rejected to be detained by the stories of the 2nd and 3rd accused's purported innocence I now move to consider the accused's liability. I will start with the alleged accidental discharge of the firearm.

The first accused, having planned this robbery for some time with his colleagues decided to go and retrieve the murder weapon from his underground "gun cabinet" behind Sebakwe – his secret area where he would bury guns after use and retrieve them when needed. The first accused did not only arm himself with such a lethal weapon but he also loaded it with live ammunition.

Anyone who embarks on a mission to rob must appreciate that resistance can be offered and that once such a thing happens the firearm can be used in all sorts of circumstances.

We accept that the witnesses formed the opinion that the first accused and the deceased appeared to have been involved in some struggle over the gun. The accused who is the only person privy to the actual discharge of the firearm said, indeed there was a wrestling for the firearm. We will give the 1st accused the benefit of doubt and accept his explanation as to what the deceased did when the firearm discharged in the circumstances given by the accused.

The liability of accused 1 stems from the fact that, having deliberately armed himself with a loaded gun going for robbery, he must have appreciated the risk that anyone at the mine premises might have been engaged in an attempt to get the gun and that in the process the firearm might end up injuring someone, and that the accused was reckless as to whether or not such a thing would happen. The accidental discharge must therefore be accepted as falling within reasonable expectations. In such situations the accused cannot escape liability. He is accordingly found guilty of murder with constructive intent.

I come now to deal with the liability of the 2nd accused person and the third accused. Evidence abounds that at the scene of the murder both accused knew that the first accused was armed. They saw him use the firearm to induce fear in the victims of robbery. They saw accused pointing this firearm at the mine workers ordering them to either lie down or induce compliance with his instructions.

All the three accused persons were not only at the scene of crime but actively participated in the robbery.

First accused person said both accused 2 and 3 knew from the very beginning that they were going to rob the mine.

Whichever way one looks at the evidence the accused persons were hook, line and sinker in their participation in this robbery. They cannot escape liability. The two accused persons' knowledge of the accused being armed puts them firmly within the armbit of the substantive offence the first accused has been convicted of.

The fact that the two were not there at the point the firearm was discharged is neither here nor there. The discharge occurred in the middle of the furtherance of the accused's robbery. None of the accused persons can be said to have dissociated himself from the robbery before the deceased died. See section 200 of Code, *Enock Ncube and Another* v *The State* and *S* v *Ndebu and Another (supra)*

The accused are accordingly found guilty of murder with constructive intent.

**Sentence**

In our approach to sentence we will seriously consider the unanimous view by the court that this particular murder was committed in aggravating circumstances.

For all the accused persons we accept their personal circumstances as advised by their respective counsels. They have all been in custody for 26 months awaiting the finalization of

this case. For accused 1 we do accept that he has fairly heavy family responsibilities although in a case of this nature these count for very little.

The accused has in a way expressed remorse. We commend the accused for being honest with the court with the bulk of his testimony. By being candid with the court the accused demonstrated his remorse and he must be properly rewarded for that.

The accused was the only one privy to the circumstances of the deceased's death and his version appears to have been candid as evidenced by aspects of the state evidence which tended to corroborate it. The accidental discharge of the firearm although not a defence must be regarded as some form of mitigation.

In aggravation for accused 1 we are extremely concerned that he is the one who actively participated in the planning and execution of this robbery leading to the deceased's heartless murder.

We are shocked by the accused's conduct of continuing with the robbery even after he appreciated that the deceased may have died from the shooting. The accused continued with the robbery and did not attempt to render basic aid let alone to try and ascertain the condition or state of the deceased. It is both brutal and callous for one to act in the manner accused 1 did.

It was the accused person who lured the other two accused persons in the commission of this offence. It is both disturbing and frightening that the accused had the guts to steal and harbour so many firearms and prepare an "arms catch" from which he would retrieve the firearms for use and return them for further use when he felt like. Such conduct is a serious threat to our citizens and the court must send the correct message to persons of the mind of the accused person.

For accused 2 we accept as submitted that he is a fairly young offender whose main mistake was to get involved at the deeper end of this robbery – execution stage.

There is no evidence that he together with accused 3 participated in the planning stage of the offence.

We are however shocked by the frontline role he played in stripping naked the victims. The level of his participation and the excitement he exhibited does not project him in good light.

Even after suspecting that someone might have been shot at the sound of gun discharge he continued with the robbery undeterred. Such young men are a danger to our society.

For accused number 3, we accept as submitted that he is 34 years oldand has a young family to look after. But it is the welfare of one's family that must be uppermost in one's mind before one gets involved in such crimes.

He too appeared quite determined to continue with the robbery exercise despite getting to know that someone had been shot and died. Such brazen determination to continue on a criminal path is frightening.

For all our citizens, those who want to enjoy life must learn to work hard and not to waste valuable time strategizing on how best they can do to interfere with fellow citizens' liberties. We must be a nation that thrives in hard and honest work and not to try and reap and enjoy other people's labour and efforts.

The deceased in this case died for no reason except his hard work. His death has robbed his family of a breadwinner.

It is important that these three accused persons be removed from society for a considerable length of time.

But because accused one is evidently more culpable than the other two, I believe there must be a difference in the sentence.

I must emphasise that the conduct of all the accused persons was very close to inviting the imposition of death penalty. They have missed it by a whisker.

Accused 1 - accused is sentenced to life imprisonment.

Accused 2 and 3 - Each 30 years imprisonment

*National Prosecuting Authority*, state's legal practitioners
*Dzimba, Jaravaza & Associates*, 1st accused's legal practitioners
*Mhaka Attorneys*, 2nd accused's legal practitioners
*J. Magodora & Partners*, 3rd accused's legal practitioners