THE STATE
versus
CHARLES CHIWEWE

HIGH COURT OF ZIMBABWE
MUSAKWA J WITH ASSESSORS
HARARE, 23 & 24 MAY, 15, 16, 17 JULY 2013 and 23 May 2014

Criminal Trial

S.W. Munyoro, for the state
T. Gumbo, for accused

MUSAKWA J: The accused pleaded not guilty to a charge of murder. The incident giving rise to the charge occurred on 1 September 2010 at Solar Farm, Nyabira.

It is common cause that the accused shot at the deceased during the night. The accused's defence is that he was guarding a field of potatoes. During the course of the night some people besieged the field and attacked him. In the process the accused backtracked and tripped on a ridge of potatoes. This happened whilst he was in the process of bringing up the gun in order to scare the thieves. The gun discharged and the intruders dispersed. The deceased ran towards a point where he was found on the following day.

The state called Stanley Moses as its first witness. He is the head of security at the farm. He testified that the deceased had previously been arrested on two occasions for stealing potatoes from the farm. This was some two months before the fatal incident.

The accused had been employed at the farm for six years. He had been trained in the use of firearms. The instruction was that when confronted by thieves he would fire into the air. He had used a shotgun for five years.

On a particular morning he was informed by the accused about a body that lay at the field he guarded. The accused reported that some thieves had come to the field and he had discharged the firearm. The witness asked the accused if he had shot at the person who was in the field and he responded that he was not sure. The accused had also told him that when the thieves chased him that is when he fired the gun. Although the witness said the accused appeared confused, in another breadth he stated that the accused looked normal. He went to

the fields with two other guards who had been on duty with the accused during the preceding night.

At the scene of shooting there appeared to have been signs of digging. There were some rods, three of which were some twenty metres into the field whilst the other rods were at the place of the digging. The witness further demonstrated how the accused explained how the shooting occurred. The posture was that of someone falling on his back as he held the firearm pointing into the air at an angle.

When Police Officers attended the scene they gave them a spent cartridge they had recovered. His initial inspection of the deceased did not reveal any injuries, but he later noted a black spot on the body. The side where the deceased died was guarded by Anyway Madziya.

The witness also stated that contrary to his statement, the accused shivered when they went to where the body was.

Canaan Muzembe, the investigating officer also testified. When he attended the scene the accused explained that he had been attacked by thieves and he shot at them. The accused further explained that as he tried to run he fell down and in the process the gun discharged. From the witness's explanation the accused was in a seated position when the gun went off. He had tried to back off from his attackers and in the process, tripped on a ridge of potatoes.

The witness further explained that from his knowledge of shotguns, when it discharges the pellets spread after a distance of about fifty metres. On this aspect he was obviously off the mark, as he is not an expert in ballistics. He also drew a sketch plan from indications made by the accused.

The other witness to testify for the state was Cleopas Wairesi. Whilst doing guard duties about fifty metres away, he heard a gunshot. He stated that the accused was his senior and the gunner (he preferred to call him gunman). The gunner is the one who uses the firearm when the need arises. The gun was to be fired when thieves attacked the gunner. If the intention is to scare the thieves the gun is fired in the air. Where a guard is unarmed, he alerts others by shouting.

On the night in question he heard calls for thief followed by a gunshot. He went to the scene shortly. The accused told him thieves had come and indicated the directions they came from. The witness did not inspect the scene. He did not ask why the gun had been fired although a gun is usually fired in the wake of thieves. The accused had fired the gun on

many occasions in the past. The witness further explained that one could see for a distance of about twenty metres. Where the shooting took place the potatoes were ready for harvesting.

Admire Mutizwa was the last witness to testify. He is a holder of a Bachelor of Science Honours degree in Physics from the University of Zimbabwe. He is attached to Criminal Investigations, Forensics and Ballistics Section. He has seven years experience in the examination of firearms.

He examined the firearm in issue, a twelve bore double barrelled Webley and Scott shotgun. He found it to be in working order. Test cases he fired from the firearm matched the spent cartridge that was recovered from the scene of shooting. The witness explained that when a shotgun is fired the firing pin leaves a mark at the cap of the cartridge case. The mark so made is unique to the particular firearm and they examine such marks using a microscope.

The witness also explained that the type of ammunition used depends with what the firearm can be used against. The spent cartridge from the scene of shooting was a 12 bore, meaning it was meant for shooting animals. The shotgun has an effective range of 50 metres. Contrary to what the investigating officer had stated, this witness told the court that the pellets start to spread at a distance of 30 metres. He also explained that with a gun you do not point it at someone you do not intend to shoot. The safest direction is to always point in the air. That way, in the event of a discharge, the bullets or pellets can always fall back harmlessly. Anything can happen where a gun is pointed at an angle, for example, a ricochet.

The witness, from questions paused by the court, further explained that it is ideal for a ballistics expert to attend an autopsy where a shooting was involved. In the present case this did not happen. Given the nature of the wound that was noted on the deceased, it was his opinion that the charge had not separated when the deceased was struck. This means the deceased was within a range of thirty metres from the accused. Asked further if there would have been an exit wound in the circumstances, he explained that the charge would be stopped and cause damage around the area it struck. In this case, it would have been possible for the projectile to be extracted from the body and submitted to their laboratory for examination together with the spent cartridge case.

The state sought into admission the summaries of evidence of Anyway Madziya, Tichaona Karimazondo and Phillip Ganyiwa. The post-mortem report compiled by Doctor Eduardo Estrada, a forensic pathologist was also produced. The report noted an entry wound on the left side of the chest. No dimensions of the wound were noted. There was blood inside the chest cavity, haemorrhage of the left lung and blood inside the pericardium. The

oesophagus was congested. He concluded that the cause of death was hypovolemic shock due to gunshot wound.

With this evidence the state closed its case. Counsel for the accused intimated that he intended to apply for discharge. Since he wanted to factor in the evidence that had just been adduced, he sought leave to file a written application.

For purposes of the present application s 198 (3) of the Criminal Procedure and Evidence Act [*Cap 9:07*] provides that-

> "If at the close of the case for the prosecution the court considers that there is no evidence that the accused committed the offence charged in the indictment, summons or charge, or any other offence of which he might be convicted thereon, it shall return a verdict of not guilty."

There are numerous authorities on the legal requirements for discharge at the close of the state case. Mr Gumbo cited *S* v *Kachipare* 1998 (2) ZLR 271 (SC), *S* v *Kuruneri* HH 59-2007, *Attorney-General* v *Bvuma & Another* 1987 (2) ZLR 976 (S) and *R* v *Herhold & Others* 1956 (2) SA 722 (W). These requirements were succinctly expressed by GUBBAY CJ in *S v Kachipare* (*supra*), at 276 as follows:

> "There is sound basis for ordering the discharge of the accused at the close of the case for the prosecution, where:
> (i) there is no evidence to prove an essential element of the offence: see Attorney-General v Bvuma & Anor 1987 (2) ZLR 96 (S) at 102F-G;
> (ii) there is no evidence on which a reasonable court, acting carefully, might properly convict: see Attorney-General v Mzizi 1991 (2) ZLR 321 (S) at 323B;
> (iii) the evidence adduced on behalf of the State is so manifestly unreliable that no reasonable court could safely act on it: see Attorney-General v Tarwirei 1997 (1) ZLR 575 (S) at 576G."

Mr Gumbo further submitted that no evidence was adduced to prove that the accused intentionally caused the deceased's death. He highlighted that the state witnesses did not witness the shooting. The evidence of these witnesses essentially tallied with what the accused told them. This is the basis of the accused's defence.

In the present case, it is accepted that the accused shot at the deceased during the night. There is no direct evidence on the circumstances surrounding the shooting. However, there is evidence on statements made by the accused person in explaining what led to the shooting. From such evidence, it is uncontroverted that the accused was confronted by

thieves. In the process of running away and trying to scare the thieves, he tripped and discharged the firearm. The incident took place at the potato fields where a crop was ready for harvesting. There was evidence of digging where the confrontation took place. There were metal rods at the scene of shooting and in the potato field.

The medical evidence suggests the deceased was shot within a range of thirty metres. The accused would have been entitled to defend himself against an attack that had commenced. There is evidence that he shouted about the presence of thieves. At this stage the accused's defence is not yet evidence. It is only relevant to the extent it was put to the state witnesses. At least a warning shot would have been necessary. See for example, *S* v *Burdett* 1996 (2) ZLR 658 (SC). On this score counsel for the state submitted that the accused should have first issued a verbal warning, then followed by a warning shot. He cited the case of *S* v *Chikukutu* 1996 (1) ZLR 702 (S). In that case EBRAHIM JA had this to say at 706-

> "A police officer - and presumably any other person entitled to effect an arrest - should resort to using a firearm only if there is no other way at all to capture the suspect. He should, if circumstances permit, give an oral warning to the suspect F ("Stop or I will shoot"). He should then fire a warning shot into the ground or the air. After that, if he still must shoot, he should try to shoot the suspect in the legs: Matlou v Makhubedu 1978 (1) SA 946 (A) at 958A. If the suspect is killed and the killing is found to have been as a result of excessive force, the person attempting the arrest may be prosecuted for G culpable homicide (or even for murder if the excess of force was unreasonable or immoderate): R v Koning 1953 (3) SA 220 (T) at 232-3."

However, the circumstances under which the shooting took place merit critical analysis. This was at night where there was no artificial light. A group of people was attacking the accused. The accused tried to back away and tripped on a ridge of potatoes. It was not explained to the state witnesses whether the accused intended to fire a warning shot when the gun discharged. What is not refuted is that the accused tripped and the gun went off in the process. In the absence of any other evidence, the discharge of the firearm amounted to a purely accidental shooting under a stressful situation.

At this stage it cannot be said what the accused person explained to the state witnesses is not what transpired. The indications made by the accused person to the investigating officer tally with the evidence of the ballistics expert. The sketch plan depicts that the deceased was shot within a range of twenty four metres. Going by the point of impact on the

deceased, he was facing the accused, which accords with the latter's explanation that he was under attack.

Given these circumstances, can one safely argue that the accused person has a case to answer? Or it may asked, has the state made a prima facie case? This does not look like a case from which an inference can be drawn that the accused intended to shoot the deceased or that he discharged the firearm without taking precautions as set out in the authorities that I have cited. This is because the facts of the matter are quite distinguishable from the cited cases. I am satisfied that there is no evidence on which a reasonable court, acting carefully, might properly convict.

In the result, the accused is found not guilty and discharged.

Chinawa Law Chambers, accused's legal practitioners