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Judgment No. SC 63/07
Crim Appeal No. 119/06

MBEMBE PORUSINGAZI v THE STATE

SUPREME COURT OF ZIMBABWE
CHEDA JA, MALABA JA & GARWE JA
HARARE, NOVEMBER 5, 2007 & JUNE 9, 2008

M S Sadomba, for the appellant

C Mutangadura, for the respondent

GARWE JA: The appellant appeared before the High Court at Masvingo charged with the crime of murder. At the conclusion of the trial the court found the appellant guilty of murder with actual intent and, finding that no circumstances of extenuation existed, sentenced the appellant to death. It is against that conviction and sentence that the appellant has appealed to this Court.

The facts giving rise to the charge of murder before the court *a quo* were to a large extent common cause. The appellant was part of a group of four poachers who went to hunt game at Mkwasine Range Chiredzi on 4 October 2001. The poachers were armed and accompanied by dogs. The appellant in particular was armed with a bow and arrow. Shortly after their arrival at Arda Mkwasine Range they killed a warthog and shared the meat. They continued with their hunting until they killed two more warthogs. The noise made by their dogs must have attracted the attention of three Mkwasine Range

game scouts, who included the deceased. The scouts came upon the poachers as they shared the spoils. On seeing the game scouts the poachers fled, dropping the meat in the process. The game scouts gave chase. The deceased who was armed with a rifle led the chase. As he closed in on one of the poachers by the name Davison Mangena ("Davison") Davison called out to the other poachers for help. At that juncture the other poachers, including the appellant (who was Davison's uncle) stopped running and turned back to rescue their colleague. They advanced towards the game scouts. The appellant who was still armed with a bow and arrow ordered the deceased to drop his rifle. The deceased did not do so but instead suggested that they discuss the matter. The appellant continued to advance towards the deceased. At that stage Davison shouted to the appellant urging him to shoot. The appellant again ordered the deceased to drop his rifle. The rifle at that stage was lowered. The deceased did not drop his rifle but continued to urge that the two sides discuss the matter. The appellant then pulled his bow and shot the deceased with an arrow hitting the latter on the left side of the rib cage. The deceased and his colleagues ran away. The accused followed the deceased and ordered him to remove the arrow. The deceased did so and the appellant picked it up. The deceased died shortly thereafter. According to the post mortem report, death was due to cardiac arrest due to traumatic haemothorax on the left side of the chest.

It was common cause during the trial that at no stage had the deceased threatened the appellant or the other poachers and that he never pointed the rifle at the appellant at any stage.

The appellant has attacked the conviction on the basis that he ought not to have been convicted of murder with actual intent but rather with constructive intent. On the question of sentence he has submitted that if it is accepted that the murder was committed with constructive as opposed to actual intent then this constitutes an extenuating circumstance which would warrant a sentence other than death. The issue before this court therefore is whether the High Court was correct in finding firstly that the murder was committed with actual intent and secondly that there were no extenuating circumstances in this case.

I will deal firstly with the question whether or not the killing was perpetrated with actual intent. In his heads of argument the appellant submits that his intention was not to kill the deceased but rather to scare him off. He believed he was shooting to the side of the deceased but accidentally shot him on the chest. He also submitted that the deceased was struck by the arrow as he attempted to duck but instead ducked into the direction of its travel. In other words the appellant is saying he did not actually aim the arrow at the deceased but to the side and that the deceased was struck as he tried to evade the arrow.

In dealing with this aspect of the evidence the trial court remarked -

> "Stuart gave his evidence well and is worth to be believed although his evidence varies from that of the other state witness and the accused who told the court that the accused was about 20 to 25 metres away. He said the distance between the accused and the deceased was about 3 metres. Whatever the distance was it was close enough to allow the arrow to penetrate 10 centimetres into the chest cavity and penetrate into the lower lobe of left lung.

> Muridzo Nyadzeni also told the court that the accused deliberately aimed at the deceased. Mangena whose evidence was formerly (*sic*) admitted as it appears in the state outline said the accused shot the arrow from the bow and it hit the accused.
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> Further, the accused's story that he aimed at about a metre and half away from the deceased is difficult to follow and it is highly improbable. Firstly, the accused himself had difficult in trying to demonstrate to this court how the deceased went into the path of the travelling arrow which was about 1½ metres away. The accused was simply being untruthful. His assertion that the deceased went into the path of the arrow as he tried to dodge it must be rejected since it is false.
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> Similarly, his suggestion that he aimed at about 1½ metres away from the deceased is also improbable as it is untrue. Here is why. The accused stopped running and returned when he heard Davison Mangena calling out that he was about to be apprehended. So the accused and his colleagues decided to go and rescue Mangena. Quite likely the accused and his colleagues relied on their numerical superiority and the fact that he and all his colleagues had weapons while the game scouts had only one of them armed with a rifle.
>
> Quite clearly, the accused and his colleagues were going to fight in order to rescue Mangena. That is why the accused described the encounter here in court as a "contact". It is highly improbable that the accused would aim a metre away from the deceased in such circumstances. Moreso when the deceased defied the accused's order to drop his rifle. Further, unless the accused had more than one arrow he would not have aimed a metre away from the deceased as that would have left him with only a bow without an arrow in the circumstances of a "contact".
>
> The court therefore, rejects the assertion that the accused aimed away from the deceased. The court finds that the accused indeed in fact aim (*sic*) at the deceased. The court has found that the accused and his colleagues resolved to go and rescue Davison Mangena. The accused ordered the deceased twice to drop his rifle but because the deceased did not do so, the accused decided to shoot at him with an arrow thereby killing him."

I find no basis upon which the trial court could be said to have misdirected itself in coming to the above conclusion. The trial court was impressed with the demeanour of the two witnesses and behaved their evidence. Indeed the evidence reads well. There is no suggestion that either would have had any reason to lie.

However there is one aspect of the evidence to which little or no regard has been paid. The aspect relates to the suggestion that at the time the deceased was struck by the arrow, he had turned in order to run away.

The two witnesses who were called by the State were Muridzo Nyadzeni one of the game scouts and Stuart Gungubo who was one of the four poachers. In describing the events surrounding the killing of the deceased Muridzo Nyadzeni gave the impression that the deceased was struck as he turned to run away. The following exchange took place between the prosecutor and the witness during evidence in chief:

"Q. Mr Nyadzeni I just want you to explain to the court before you heard the accused saying remove that arrow what had happened …

A. The deceased suggested to the accused person they should talk. That is when the deceased was shot and that is also was the time when the deceased turned as he was running away and at that time the accused person called him to remove the arrow and he removed it and ran away … ."

Later the following exchange took place:

"Q. Yes.

A. At the time the accused person was telling the deceased to put his gun down he had his arrow drawn.

Q. Yes.

A. And the deceased was turning that is when he was shot on the rib side (witness indicates) the left side of the rib side."

Thereafter the following exchange took place between the witness and the trial Judge:

"Q. So the deceased was shot when he was turning to run away.

A. Yes my lord.

Q. Why were you people running away. You have got a gun. These are armed with arrows. Why were you running.

A. We had one gun."

In answer to a further question by the court he stated as follows:

"Yes that is when he was telling the poachers that we should discuss as he was turning as the accused person and his colleagues had their bows drawn."

Immediately thereafter the witness made the following statement under cross examination:

"… (inaudible) that at the time the deceased surrounded by the accused and his colleagues … (inaudible) their arrows to us. As the deceased was turning he was shot."

Mr Stuart Gungubohowever seemed to have a somewhat different version. The following exchange took place when he was cross examined

"Q. So when all this was happening you could also view the other game scouts whom you say were a distance away.
A. Yes I could see the two of them. What happened is that the deceased is the one who left his other colleagues and pursued us and when his colleagues noticed that he had been surrounded they were then afraid to draw close.

When asked whether the appellant had aimed the arrow to the side of the deceased the witness responded:

"He wanted to shoot. If it was that he intended to shoot on the side he would have aimed away from the deceased but in this instance he aimed at the deceased."

Earlier the witness had made the following statement:

"As they were surrounding that man the accused person then called out game scouts or the deceased to put down his gun. He made that order for the second

> time. Davison then said shoot, shoot, shoot. Deceased said wait let us talk. The accused then pulled his bow and shot the deceased on the rib side."

The witness had then continued:

> "The accused person had then said remove my arrow. The deceased removed the arrow. He was told to throw down the arrow. After throwing the arrow down the deceased made a loud groan and at that point accused person picked his arrow. When the other two game scouts realised that their colleague had been stabbed they started to run away. That is when the deceased turned and he started to run as he was asking his colleagues to wait for him … ."

The trial Judge was impressed with the evidence of the two state witnesses. He believed them. Whilst it is apparent that the portion of the evidence to which reference has just been made was not considered by the trial court, I have no difficulty with the finding by the trial Judge that the witnesses in general gave their evidence well. The trial Judge was correct when he remarked that Muridzo Nyadzeni had told the court that the accused had deliberately aimed at the deceased. However Nyadzeni went further and told the court that the deceased was struck as he turned to run away.

The evidence led before the court *a quo* established the following. The game scouts including the deceased pursued the poachers. The deceased, who was armed with a rifle, outran his colleagues. As he closed in on one of the poachers called Davison the latter called out to the other poachers for assistance. The other poachers then returned and surrounded the deceased, with their bows and arrows ready. The appellant ordered the deceased to put down his rifle. The deceased suggested they talk. In the meantime Davison shouted to the appellant to shoot. The appellant again ordered the deceased to

drop his rifle. The deceased did not do so but instead urged dialogue. It was then the appellant shot at the deceased who then turned and started running away.

It was not in dispute during the trial that the appellant was an experienced hunter. He shot at the deceased or at the very least in his direction. The appellant's story that he aimed to the side was rejected by the trial court. I find no reason for disagreeing with that conclusion.

The appellant must have aimed at the deceased and shot him with the arrow. That he aimed to the side would, even if such a version were to be accepted, not absolve him. As stated in *S v Du Preez* 1972 (4) SA 584, 589 D – E:

> "To shoot with a pistol in the direction of a moving human being leaving so small a margin of safety may indeed fairly be described as reckless conduct."

Whether the appellant was reckless or not does not arise in this case in view of the finding by the trial court, which finding I agree with, that the appellant aimed his arrow at the deceased and then shot him with it.

I am satisfied that the appellant must at the very least have foreseen the possibility of killing the deceased as having been substantially certain. In the circumstances the trial court was, in my view, correct in coming to the conclusion that the appellant was guilty of murder with actual intent.

On the question of extenuating circumstances, it has been argued on behalf of the appellant that the killing was not premeditated and that it occurred on the spur of

the moment. The trial court found that the attack was pre-planned because the appellant and his colleagues returned to confront the deceased and his workmates. On these facts the trial court was wrong in concluding that the offence was premeditated. Premeditation is the:

> "previous deliberation upon or thinking out of something to be done or
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> The action of thinking of or considering something before hand or previously" - The *Oxford English Dictionary* p 1279-80.

Clearly what happened in the present case had not been previously deliberated upon. It happened in the heat of the moment after the game scouts came across the poachers and pursued them in order to apprehend them.

The fact that this was not pre-planned does not, on its own, amount to an extenuating circumstance. The appellant aimed his arrow at the deceased and deliberately shot at him. He must have appreciated the consequences of his action at this stage. There is nothing to reduce his moral blameworthiness on the day in question. The conclusion by the trial court that there were no extenuating circumstances cannot be faulted.

The appeal must therefore fail.

Accordingly the appeal against both conviction and sentence is dismissed.

CHEDA JA: I agree

MALABA JA: I agree

Pro deo