HB 55-19
HC (CRB) 15/19
XREF W/C CR 37/11/17

THE STATE
versus
MOSES NCUBE
and
WALTER MOYO

HIGH COURT OF ZIMBABWE
MABHIKWA J with Assessors Mr M Ndlovu and Mr P Damba
BULAWAYO 19, 20, 21 MARCH 2019 AND 9 & 10 APRIL 2019

Criminal Trial

N Ndlovu for the state
I R Mafirakureva for the 1st accused
Miss T Mazendame and *Miss N Sandi* for the 2nd accused

MABHIKWA J: The two accused persons are charged with the crime of murder in contravention of section 47 of the Criminal Law (Codification and Reform) Act, [Chapter 9:23] in circumstances that would like be best described as "murder in the course of a robbery."

The deceased was 39 at the time he met his death. He was a tenant at Block 80/2443 Mpopoma, Bulawayo. The first accused was 27 and resided at Block 24/809 Mpopoma, Bulawayo. Second accused was 29 years at the time of the murder. He resided at Block 80/2446 Mpopoma, Bulawayo.

During the early hours of 15 November 2017, the accused persons, in the company of their accomplices who are still at large, broke into Marian Kajewe's residence and robbed her. The deceased left his own room responding to Kajewe's screams for help. It was alleged that as he went to assist his fellow tenant, the deceased bumped into the accused persons leaving Kajewe's room, and one or more of them struck him with a machete once on the neck and once on the back of his head leading to his death.

The facts of this matter, in terms of evidence, are largely common cause and the court will not take too long repeating and analyzing the evidence as most of it is admitted. In fact, and in effect the accused persons ultimately pleaded guilty under cross-examination when the law

relating to the doctrine of common purpose was laid bare to them together with the circumstances under which the deceased was killed.

Accused 1 averred that it was the two suspects still at large, one Blessing Moyo and Mandlenkosi Moyo who went into Kajewe's room whilst he remained in the yard up to the point that he heard someone screaming, at which point he ran away. He stated further that harming anyone let alone murder was not part of the plan. He averred that he only got to know of the deceased's death the following day. He however admitted being indeed part of the team that hatched a plan to rob Marian Kajewe.

The 1st accused averred that his actions clearly showed that he had dissociated with whatever happened at Kajewe's room by staying away from it and also by fleeing the scene when he heard the screams of a lady.

The 2nd accused in his defence outline stated that on the fateful day, he and his co-accused, together with Mandlenkosi Moyo and Blessing Mudyandigere Moyo, went to Marian Kajewe's residence at 80/2443 Mpopoma intending to rob her as they had been advised that she had some foreign currency. He averred that he never intended to hurt the deceased. He further averred that when they got to the gate, he had a change of heart and decided against the robbery plan. He claimed he advised his colleagues of his change of heart and tried to convince them to abandon the plan but they insisted. At that stage, he allegedly parted ways with them. He said he then returned to his own residence, apparently a family house, shortly sat outside the yard before going in and retiring to bed. Before long he was alerted by his sister Sithandekile Moyo and Sisasenkosi Moyo that something bad had happened during the robbery and that police were coming with sniffer dogs. Having been in the vicinity of Kajewe's house, he feared he may be implicated and left his residence and went to Lobengula extension.

Accused 2 therefore denied being at Kajewe's residence at the time of the attack and also denied causing the deceased's death as alleged by the state.

The following facts were proved to be common cause;

1) That at Block 80/2443 is where Sisasenkosi Moyo, robbery victim Marian Kajewe and the deceased lived.
2) That accused 2 and Sithandekile Moyo (brother and sister) lived a stone throw away as close neighbours at Block 80/2446 Mpopoma.

3) That Sisasenkosi was a close friend of Sithandekile Moyo and a girlfriend to her brother Walter Moyo who is accused 2.

4) That first accused was a distant neighbour at Block 24/809 Mpopoma.

5) That Sisasenkosi was a daughter to the landlord or lady at Block 80/2443. She gathered information when eavesdropping, that Marian Kajewe her mother's tenant had USD 2000 to USD3000 in her room.

6) That the four of them, Sisasenkosi Moyo, Sithandekile Moyo, accused 1 and 2 then sat at Block 80/2446, connived and planned to rob Kajewe.

7) That the four later co-opted Blessing and Mandlenkosi Moyo into the robbery plan.

8) That there were at least two separate days of the planning of the robbery.

9) That ultimately and depending on the circumstances, it was agreed that certain specific individuals would play specific roles in the robbery, that is to say.

a) Sisasenkosi got a cellphone so that she would communicate to the other team members especially when it was safe to pounce.

b) Moses (accused 1), Blessing and Mandlenkosi were to enter into the yard.

c) Walter (accused 2) was to remain outside standing guard as a sentinel and also waiting for those who would have gone inside to come out so that he would receive the money, or proceeds of the robbery.

d) Though her role was not clearly spelt out, it appears Sithandekile's role was general intelligence and surveillance from the vicinity.

10) It was known that of the team of robbers at least accused 1, Blessing and Mandlenkosi were armed with knives, a machete and a garden metal bar.

11) It was common cause also that in the early hours of the morning of the fateful day, the robbery plan was brought into action. Kajewe was stabbed twice and robbed of $60-00. She survived but the deceased met his death as a direct result of the planned and executed robbery as he responded to Kajewe's screams. He was axed on the neck and suffered injuries as detailed in the post-mortem report (Exhibit 6).

12) Blessing Moyo and Mandlenkosi are the same people commonly and continuously referred to in evidence as "Ble" and "Fana" respectively. The two carried out their role, disappeared and are still at large.

The facts and evidence, which mostly the accused themselves narrated were that Sisasenkosi Moyo, a close neighbour and girlfriend of accused two, overheard her mother and a tenant at their house talking about some US$2000-00, in the evening. The following morning she went to see the 2nd state's witness (Sithandekile Moyo). She found her in the company of 1st accused and told them about the money. According to Sithandekile, 1st accused remarked and questioned if there were people who still kept such kind of money in their houses. He then suggested that the money should be taken. It was Sithandekile's evidence that thereafter, they all set down and planned how the money was to be taken. At that stage, it was accused one and the two ladies. They were later joined by 2nd accused (Walter).

It was Sithandekile's evidence that the planning that had already started, intensified after the arrival of accused 2. The group agreed, according to Sithandekile, that since she and her brother lived just two houses away, their roles should involve not getting into the premises of house number 2443 Mpopoma since they were known there and could therefore be identified. Sisasenkosi lived at the house itself and therefore her role was to communicate with no one noticing. It was agreed, according to Sithandazile that accused 1 (Moses) who lived further away would go into Kajewe's room and rob her. Moses in fact volunteered to go into the room. He went on to suggest that he may ramp in his friend, one Blessing Moyo commonly known as "Bee"

The following morning, accused 1 brought in "Bee" who, after introductions asked that Sisasenkosi be called. Sithandekile went to call her. Blessing then asked Sisasenkosi about the finer details and house arrangements at her place. He literally sought to know what goes on in the house. The plan thus went a gear up, now with five (5) protagonists. "Bee" suggested that the team meets in the evening again. In the evening the parties met again. Sisasenkosi was then given Walter's phone for communication proposes on the goings on at her home. She would also communicate and advise when all was clear and safe for the team to pounce.

One Mandlenkosi Moyo, commonly known as "Fana" entered the planning venue running. Apparently he was Blessing's friend and had been advised of the robbery plan. He too was romped in. There were now six (6) members in total. Sisasenkosi then returned to her house at around 1900 hours leaving the others to finalise the plan and pounce. Before leaving, she showed them the back part of the family durawall which they would use to enter the yard.

Ultimately, three men, Blessing, Mandlenkosi, and accused 1 armed themselves with two knives, a garden metal digging bar and a machete. They were also putting on disguised clothing such as long coats and balaclavas. The robbery weapons were produced by the state, admitted in evidence and marked Exhibits 8 to 11. Around midnight, the robbery plan was put in motion and the team pounced on the defenceless poor woman-Marian Kajewe.

Marian herself was *mero motu* called to testify by the court to clarify certain issues in the evidence of the two state witnesses who were in any case accomplices to the crime themselves. The evidence, especially of Sisasenkosi, who was in the yard during the robbery and murder was deficient. Marian Kajewe being the robbery victim herself, infact clarified that three (3) (not two) men forcibly entered her room as she screamed incessantly. They attacked her, stabbed her twice and robbed her of a total of $60-00.

Of importance was her evidence that as she was being attacked, she could see through the window Sisasenkosi Moyo (first witness) milling around outside. When she finally got out after being attacked, she found her (Sisasenkosi) talking to her attackers outside before they disappeared. At the time, the deceased was lying motionless there infront of them at her doorsteps. Following the evidence of both Sithandazile and Marian Kajewe, this court rejects the 1st accused's claim that he did not enter Marian's room as she was being attacked. The plan was that he would go in. Marian was attacked by three men and in any case, he was well disguised in his dressing. It is our finding that his claim that he did not go into Kajewe's room and that he had left when the deceased was killed was an attempt to woodwink the court, albeit in a laymen's belief that this was sufficient defence to the crime. The court also will reject Sisasenkosi's evidence that she and accused 1 did not see how the deceased met his death. We agree with Ms Kajewe that the two saw how the deceased met his death. In any event, the attempt would not save accused 1 considering the doctrine of common purpose and the planning of the robbery leading to the deceased's death.

In the same vein, accused 2's initial spirited claim that he be absolved because the plan was that he would remain outside the gate and then receive the money from those who had gone in to carry out the actual robbery would not save him either. In any event, the court does not buy the story that accused 2 had to remain outside the gate simply to wait for the money. A more reasonable explanation is that he was to remain there as a sentinel, in order to advise should

anything happen like approaching police, as stated by accused 1. The second witness also mentions this point.

It seems to me that in cases such as murder in the course of a robbery, the defence that one dissociated himself from the crime is not one that is easy to rely on. Taking a less vital role or merely withdrawing one's agreed services during the commission of the offence is not dissociation.

Further, it appears to me that the common purpose doctrine is premised, also, on the understanding that when people set out to commit a crime, moreso a crime of violence such as robbery, kidnapping, housebreaking, carjacking and so on, everyone of them must consider that the victim's reaction to the attack is unknown. Anything may surprise them and force the team or any member thereof to react in a murderous manner. In those circumstances, the victim's reaction is lawful and he/she cannot blamed. The team members should therefore, together take the blame and be prepared for the consequences of all that may occur during the commission of the crime, including the victim's reaction.

In *State* v *Ndebu and Another* 1985 (2) LRR 45, the facts of the case were simple but brutal. The two appellants, acting in common purpose and in pursuance of a clearly pre-planned operation, went by night to a suburban house in Gweru, intent on housebreaking. The first appellant, to the knowledge of the second appellant, had a gun, tyre lever and a torch. During the course of the house breaking at the house, which they knew would be occupied at the time, they were surprised by the house owner. The second appellant, not in possession of a gun immediately fled and had already run some distance when he heard gunshots fired by the first appellant killing the deceased.

It was held per McNALLY JA (as he then was) that in order to afford himself a defence to the crime with which the principal offender is charged, a *socius criminus* who is present, abetting in the commission of the crime, must do more than merely withdraw from the scene of crime. It was held that in particular, he must do something positive to avert the danger which his reckleness has brought about. The withdrawal of services by the second respondent was held to be only extenuation. The death penalty in respect of him was set aside and substituted with 15 years imprisonment.

See also HLATSHWAYO JA in *Enock Ncube and Another* v *The State* –S-58-14 particular at page 11 where he states with emphatic detail that

> "I will content myself in this case by saying that on the facts I am not at all satisfied that the second appellant dissociated himself from the murder. He had gone along with a common intention to commit housebreaking and theft, and if necessary armed robbery. He had taken part actively in the break-in, and had himself then cut the telephone wires. He knew and appreciated the risk that if someone in the house woke up the firearm might have to be used to subdue the residents or to effect an escape. He was there participating when precisely that situation arose. As it happened he was so placed that he could run away. But by that stage what he did was no longer material. The reason for that is clear. The risk which he deliberately took was not related to what he himself might do but what his armed companion might do if challenged or cut off. He had linked his fate and his guilt with that of his armed companion. The mind that needed changing was not his but his companion's. His constructive intention to kill depended on a decision by his companion." P 50 (E-H)

The same rational was followed by McNALLY JA again in *Owen Michael Nyathi and 2 others* v *The State* SC52/95. See also *Mariko Ngulube and Another* –v- *The State* SC 112/93.

Apart from the authorities cited from decided cases, a defence in common purpose cases, particularly dissociation from the crime is made the more difficult to claim or prove by the requirements of Part 1 of Chapter XIII of the Criminal Law (Codification and Reform) Act, [Chapter 9:23] an accused wishing to rely on such a defence must in his outline, and in evidence meet the requirements of that part of the code, particularly sections 196, 196A, 196B and 200. Needless to say, meeting the requirements, especially in the circumstances of the current case, would be an uphill task.

Both counsel for the two accused and in fact the two accused themselves, must be commended for having eventually admitted towards the end of the trial and in closing submissions that they cannot escape conviction. The two accused admitted that they now realized they had done wrong and had not done much to undo the damage caused by their deadly intentions and reckless conduct.

In the circumstances, both accused are found guilty of murder with constructive intent.

NOTE: The court wishes to state at this stage however, that whilst it was satisfied and benefited from the evidence of the second state witness Sithandazile Moyo who did not even try to shield her own brother Walter Moyo (accused 2), this was not the case with the first witness Sisasenkosi Moyo, who infact was the initiator of the whole plan to attack tenants at her own mother's house.

In her testimony, Sisasenkosi sought to downplay her role even claiming that she did not communicate with the rest of the team when the time to pounce was nigh. She lied about accused 1's participation in the crime chosing to go along with that he would say in his defence. She shielded accused 2 in her evidence completely concealing to the court the fact he is in fact her boyfriend, only for the court to discover this fact when other witness including Walter himself, testified to it.

The court therefore registers its displeasure and believes that Sisasenkosi Moyo is not worthy of the protection and discharge from all liability to prosecution for the same offence as afforded by section 267 (2) of the Code. The state is at liberty to prosecute her if it so wishes.

Reasons for sentence

The sentencing aspect of any case is a judicial officer's nightmare when he feels very alone.

In court, the accused persons had literally nothing meaning by way of mitigation, save to say that they were not married but they had each a minor child to look after. They also have no assets of value or savings. As my brother TAKUVA J stated in *State* v *Everton Moyo* HB 169/17, in order to sentence rationally, the court must have that information of the offender as a person, his character behaviour patterns, his family background, socio-economic development, where he grew up and lived, circle of friends, the list is endless. The objective is to ensure that the dual goals of protection of the community and the rehabilitation of the offender are fulfilled.

What is aggravating in the current case is the elaborate planning of the crime leading to the death of a defenceless innocent man. The accused could have stopped the planning that took place over two days, it being against their own and close neighbour. Instead, they persisted with it even to the extent of recruiting more members and finally executed it.

Both counsel for the accused admit that having committed the murder in aggravating circumstances, the accused are liable to the death penalty. They concede also that from recent

authorities, the death penalty is more often the appropriate sentence in a case of murder during the course of a robbery. The reason is perhaps clear. Robbery cases, more often leading to death, are on the increase in our country at alarming rates. Our young people, including women, go to South Africa, copy what they see there and come back home exhibiting some macho conduct that is so reckless towards life, similarly so, with the makorokoza societies.

In *casu*, the evidence reveals that all the eventual six participants, including the two now women, had at some stage lived in South Africa as they repeatedly made reference to it in evidence.

These courts will however not tire in their duty to protect society from such like-minded criminals who, with fanciful thinking sit down for two days planning to rob and ultimately take a precious human life only to get a paltry $60-00 out of it with most of them eventually getting nothing after the robbery. In any event, even if the proceeds had been shared, $10-00 for each member, it is not worth the deceased's life.

This court however has looked closely at the recently decided cases. I take note of the fact that taking a non-combat role in a crime is different from dissociation from a crime, and therefore does not entitle the non-combat role player necessarily to claim any favours when it comes to conviction and sentence. Nonetheless playing a subsidiary role, is in appropriate cases rewarded by reduced sentences. This was the case in *State* v *Ndebu and Another*- 1985 (2) ZLR 45 (SC), when the death penalty was substituted with 15 years imprisonment for the second appellant who had played a subsidiary role even though found guilty of constructive intent in a murder during the course of a robbery.

The court notes also that in *casu*, no witness really explained exactly how, and by who the deceased was murdered. That does not of course absolve the accused. Further, it is understood that any murder victim dies a painful death. The post mortem report, even in this case reveals terrible wounds. However, that detail from an eye witness is still missing.

In *State* v *Kufakwemba and others* –HH 795-16. The robbery and murder was so brutal and scary, followed by a literal looting of an assortment of deceased's firearms and other goods from the premises. The facts were narrated by an eye witness, a 71 year old one Pfungwadzapera, employee who himself had endured extreme torture at the hands of the

accused. The actual killer was part of those in the dock, hence in my view the death penalty was inescapade.

In *State* v *Kadzinga*- 2012 (1) ZLR 48 again the murder was quite horrific and narrated by eyewitnesses among them deceased's wife and an employee. Again the killer was the accused, his accomplice having managed to escape, surprisingly in shock at the horrific conduct of his own colleague, the appellant.

In *State* v *Everton and Another (supra)* TAKUVA J sentenced the accused to 35 years imprisonment inspite of the fact that it was a case of murder in the course of robbery and having found the accused guilty of murder with actual intent. In *S* v *Siluli* (2005- (2) ZLR 141 (S) though not a case of murder in the course a robbery, the court considered that though he had been found guilty of murder with constructive intent, there was really no eye witness who saw exactly how he murdered the deceased save for his own explanation.

In *casu*, the nearest witness (Kajewe), testified as to her own ordeal during the robbery. She did not see exactly how the deceased was killed and by who.

For the above reasons, the court will consider that the accused, though the initiators of the planned robbery, may have played subsidiary roles. Further that no one really saw what happened as far as the actual killing is concerned. The court will further consider that the accused are already serving 8 year jail terms for the robbery part.

For the above reasons the accused will be spared the death penalty and be sentenced each to 30 years imprisonment.

National Prosecuting Authority, state's legal practitioners
Messrs Moyo and Nyoni, 1st accused's legal practitioners
GN Mlothswa and Company, 2nd accused's legal practitioners