STATE
versus
1. KUDAKWASHE TAONANGWERE:
2. TAFADZWA MUSAMBA

HIGH COURT OF ZIMBABWE
BHUNU J,
Assessors: 1. Ms Shava
2. Mr Tutani
HARARE, 5 May 2004, 25 April, 2005,10 and 20 May 2005 and 4 July 2005 and 8 July 2005

Mr *Butau-Mocho,* for the state
Mr *Maganga,* for the 1st accused
Mrs *Sosa,* for the 2nd accused

BHUNU J: In this case most of the material facts are to a large extent common cause. The undisputed facts are that on the 7th of January 2003 the 1st accused Kudakwashe Taonangwere teamed up with his girlfriend Memory Madhaka and his friend the 2nd accused Tafadzwa Musamba. They proceeded to the Town House Taxi Rank in the city centre.

At the taxi rank they found the deceased Lloyd Nyandoro a taxi driver parked in one of the parking bays. It is common cause that he was hired to ferry the three companions to Chitungwiza but there is a dispute as to who actually hired Lloyd to ferry the trio to Chitungwiza.

Memory and the second accused testified that it was the first accused who hired the taxi to Chitungwiza. It is not necessary to resolve that dispute at this juncture, suffice it to say the three boarded the taxi and the taxi driver was subsequently instructed to stop outside a certain house in Zengeza 4 around 8p. m. on that fateful day.

It is common cause that while parked outside the house the taxi driver was shot dead. His body was ferried by the two accused persons in the taxi and dumped at a rubbish dump site in the suburb, after being robbed of cash and a cellphone.

The circumstances surrounding the shooting and off loading of the deceased's body at the dump site are hotly contested. The two accused persons blame each other for the shooting and robbery.

What happened at the scene of the crime can best be described in the words of Memory an eye witness who testified before this court. This is what she had to say:

> "First accused told the taxi driver to stop when we got to a certain residence. The taxi driver stopped. First accused alighted, proceeded

towards the gate of the house.
He did not reach the gate. He came back and asked me to go and knock on the gate. He didn't explain why I had to knock on the gate. The second accused was in the motor vehicle on the front passenger seat and the driver in his seat.

I proceeded towards the gate but I did not reach the gate. I heard some sound or noise and I decided to go back and investigate. I went back to the motor vehicle. I asked first accused what had happened because I had heard some sound or noise.

He told me not to worry about that. He ordered me or asked me to get into the motor vehicle.

The first accused was by the driver's door. He was by its side. He was standing holding a gun with his right hand. This was around 7p.m and 8pm. Visibility was bad.

He was by the driver's door and I was by the rear passenger's door about ½ m from him.

I only saw that this was a firearm. I had seen a firearm on T.V. before. I was far from him. I did not have a close look. I saw the barrel of the gun.

The second accused was standing by the front passenger seat when I got back to the motor vehicle- He was just standing. Tafadzwa (accused 2) did not say anything to me. He said to the fist accused, "What do we do with this person?" referring to the taxi driver. First accused said the second accused should lift the driver from the driver's seat to the passenger's seat.

The two assisted each other to lift the driver from the driver's seat to the passenger's seat with the second accused on the right side of the motor vehicle and the first on the left side.

The taxi driver did not make any movement he was bleeding from the head. It must have been from the right side near the right ear. I was seated in the motor vehicle while they assisted each other to lift the taxi driver. I was seated at the back near the middle of the seat.

I could see what was happening it was not very dark. Visibility was good to some extent."

This witness went on to describe how the two accused assisted each other to push start the motor vehicle with the first accused in the driver's seat.

They then drove to the dump site after robing the deceased of his cellphone and handing it to her to play games after replacing the deceased's sim card with her own. She appears to have obliged without any protest.

On their way to the dump site they stopped by the tuck shop to buy some cigarettes. At the dump site the two accused assisted each other to offload the deceased's body

After dumping the deceased's body the second accused searched the dead body and robbed it of a wallet and cash.

The trio then drove to Zengeza 2 where the taxi was locked and abandoned. On the way the 2nd accused divested his blood stained clothes and remained in a short trousers and shirt. They hitch hiked to town. In town the first accused threatened the witness with death if she dared reveal what she had witnessed. He then handed over the gun to the second accused who tucked it somewhere under his waist.

Memory proceeded home but did not tell anyone about the murder. Although she says she told her aunt the following morning, no report was made to the police. That morning she instead accompanied the first accused to town where he bought her clothes and a pair of shoes. It is clear that the goods were bought from the proceeds of the previous day's robbery and she was aware of the fact and yet she happily obliged to partake of the proceeds of the robbery. Later on she was happy to let the first accused use part of his illgotten gains to pay lobola for her.

She only made a report to the police about 2 weeks later after relations between her and the first accused had soured because the first accused had double crossed her.

The second accused person corroborated Memory's evidence to the effect that it was the first accused who shot the deceased. The evidence clearly establishes as a matter of fact that although the first accused pulled the trigger the two accused were acting in concert and common purpose.

Investigations carried out by detective inspector Jambwa revealed that the two accused persons had jointly acquired the murder weapon after breaking into a certain house in Kuwadzana. Both accused made indications to the police which led to the recovery of the murder weapon.

The pistol was properly identified as the murder weapon through scientific ballistic evidence.

It is common cause that the first accused sold the the cellphone robbed from the deceased and shared the proceeds of the sale with the second accused. The cellphone was positively identified by the deceased's wife through its colour, serial number and make.

In his confirmed warned and cautioned statement which was not challenged the first accused confirmed that prior to the fatal shooting the two accused persons had discussed and planned to make money by robbing taxis using the stolen gun.

In our unanimous view we are convinced beyond question that this was a premeditated callous brutal murder committed in the course of a robbery.

The two accused persons were associates in the commission of this henoious crime. They aided and abetted each other in every material respect such that it does not matter who actually shot and killed the deceased. Because they were acting in common purpose and concert we find that they both shot and killed the deceased for he who does a thing through another does it himself. The case of *Dube and others v The State* 1967 RLR (A) is authority for the proposition that in every case where an accused person is a *socius criminis* or a partner in the commission of a crime, he can only be convicted of the same offence as the actual perpetrator.

We therefore find as a fact proved that the two accused persons were accomplices in the commission of the crime. The first accused person was the principal offender whereas the second accused was the co-principal offender.

At no time did either of them attempt to dissociate himself from the commission of the crime. In the same breath we are also constrained to say that the main state witness Memory does not appear to be as saintly as she has held herself to be and made to appear by the state. The evidence in our view clearly establishes that she was an active and willing participant who happily benefited from the proceeds of this wicked crime. She only relented and became a turncoat after the first accused had double crossed her. Her report to the police in our view was not a result of any change of heart but a concerted effort to get even with the first accused and punish him for double crossing her. We find that Memory was a *socius criminis* in that she was an active associate in the commission of the crime. Professor Feltoe in his *Guide to Zimbabwean Law* defines a *a socius criminis* as:

> "a person who with the necessary Mental state aids, abets, counsels or assists in a crime either before or during its commission."

Memory's conduct before, during and after the commission of the crime squarely fits that of a *socius criminis.* She must therefore consider herself extremely fortunate not to have been jointly prosecuted with her two accomplices.

Having said that we are constrained to treat Memory Madhaka as a suspect witness. We must therefore place ourselves on guard against accepting her evidence without corroboration for fear of being misled.

Undoubtedly Memory struck us as being a dubious character of questionable integrity. She teamed up with the two accused persons, actively participated in the commission of the murder and willingly benefited from the proceeds of this dispicable. crime.

Despite that finding we are unanimous in our view that Memory was an honest and credible witness. Her evidence was amply corroborated by the two accused persons to a large extent. It was further corroborated by independent imperical scientific evidence which linked the murder weapon to the deceased's death.

There is no substance in the first accused's protest that Memory was deliberately framing him up because he had double crossed her.

The fact of the matter is that Memory decided to betray the first accused and his friend the second accused by telling the truth because the first accused had double crossed her.

Contrary to what the first accused said at no time did she attempt to absolve the second accused, her evidence clearly establishes that the 2nd accused was a willing and active participant to the murder and robbery.

The two accused persons were not honest and credible witnesses. When the cat was out of the bag they both lied, desparately trying to shift the blame to each other yet they connived and committed the crime together. Their evidence can therefore safely be rejected wherever it contradicts that of Memory Madaka.

In their defence the two accused persons aluded to having taken some beer before embarking on their criminal trail. They both however testified that although they had taken some beer they knew very well what they were doing. For that reason we come to the conclusion that the two accused persons drunk the beer in contemplation of the crime to gather Dutch Courage. We therefore find as a fact proved beyond question that both accused persons acting in concert and common purpose wilfully and deliberately killed the deceased in the course of a robbery.

On the basis of the foregoing summation of evidence, we are unanimously satisfied that the state has proved its case against both accused beyond any reasonable doubt, both accused persons are accordingly found guilty of murder with actual intent.

Having found both accused guilty of murder with actual intent it is now incumbent upon us to consider the question of the existence or otherwise of extenuating circumstances.

The evidence before us establish quite clearly that this was a premeditated callous, brutal murder carried out with unflinching resolve. Prior to the murder both accused had

stolen the gun with the specific purpose of making money by robbing taxi drivers. It is during the course of such a robbery that the deceased met his death at the hands of both accused. We have already found that the first accused was the principal offender whereas the second was the co- principal offender.

In respect of the 2nd accused the state has made the valid concession that extenuating circumstances do exist due to the accused's youthfulness. In the case of *S v Muchirikwa 1985* (2) ZLR 328 (SC) MCNALLY J A quoted with approval the sentiments of AS RUMFF CJ in the South African Case of *S v Lehnberg and Another 1975* (4) SA 553(AD) in that case the learned judge had this to say:

> "As far as the question of youth is concerned, teenagers should, in my opinion in general be considered immature, and therefore entitled to extenuation, unless the circumstances of a case are such that a court feels itself compelled to impose the sentence of death. There are of course degrees of maturity where teenagers are concerned, but naturally no teenager has the maturity of an adult. Youthfulness is immaturity lack of experience of life thoughtless and especially a mental condition prone to being influenced especially by adults and a person of 18 or 19 years is, in my opinion, immature, whether he is still at school or University or has already worked for a year or longer. To impose the death sentence on youths, without more ado, is to measure the youth with the same yard stick as a mature adult. And I do not think that the administration of justice in a civilised state is anxious, except in exeptional circumstances to send teenagers to the gallows. For this reason the youthfulness of teenagers is often considered as an extenuating circumstance by our courts."

I am in resptctful agreement with the above words of great wisdom. In the *Muchimbikwa case (supra)* the learned judge of Appeal noted that in our law the age at which no person could be sentenced to death was 16 years of age. That position has however since been altered by statute.

Section 338 now provides that;

"The High Court shall not pass sentence of death upon an offender who-

(a) is a pregnant woman; or

(b) is over the age of 18 years; or

(c) at the time of the offence was under the age of eighteen years (my emphasis)

In this case it is common cause that at the time of the commission of the offence the 2nd accused was only 17 years 3 months old. That being the case he falls under the class of persons who cannot be sentenced to death. For that reason it is not necessary to consider the existence or otherwise of extenuating circumstances in relation to the 2nd accused because he is not facing the death sentence.

As regards the 1st accused it is an established fact that he was 21 years of age at the material time. He was the principal offender who master minded and directed operations of this most wicked crime executed with chilling determination and brutality. He is the one who wielded the murder weapon and shot the deceased in cold blood in the course of a robbery for the love of money.

The courts have sounded a warning time without number that those who commit murder in the course of a robbery run the real risk of losing their lives, for he who lives by the sword shall die by the sword.

GUBBAY J A as he than was sounded the same warning in the case of *Enerst Masuku v The State* SC 234/96. In that case an 18 year old teenager had committed murder in the course of robbery. The learned judge of Appeal forewarned that:

> "In the absence of weighty mitigating features murders committed in the course of robberies invariably attract the death sentence-"

It is unfortunate that the accused and other like minded persons continue to fail to take heed at their own peril. His Lordship had also occasion to consider the accused's youthfulness as an extenuating circumstances but concluded that it was outweighed by aggravating circumstances. He therefore commended thus:

> "Youthfulness is an important factor to be considered but the aggravating features are such that I find myself unable to conclude that this was a suitable case for a finding of extenuating circumstances despite appellant's youth."

In this case the 1st accused is undoubtedly a youthful offender. The aggravating circumstances however by far outweigh any semblence of extenuation in his favour . It is therefore not surprising that both the 1st accused and his legal practitioner were unable to make any submissions on the question of extenuating circumstances. That being the case

we come to the unanimous conclusion that no extenuating circumstances exist in respect of the first accused. Having come to that conclusion the ultimate penalty is unavoidable.

It is accordingly ordered that the 1st accused be returned to custody and that the sentence of death be executed upon him according to law.

The 2nd accused is a young first offender who was lured into committing this dispicable offence by a man 4 years older and better educated than him.

He was brought up under a broken family and was exposed to extreme hardships and deviant behaviour at a young tender age.

The anormity and seriousness of the offence which he committed as a co- principal offender however defies description. Despite his youth, and social background there is need to preserve the sanctity of human life by passing stiff and deterrent sentences upon convicted murderers like the accused.

It is the duty of the living to fight the battles of the dead who can nolonger help themselves. That can only be archieved through the courts passing stiff penalties in the form of lengthy prison terms.

Through greed and wickedness innocent precious blood was spilt. Society lost a useful citizen. The deceased's wife was condemnedto premature widowhood and his children to perpetual orphanage. Who shall fend for his family?

In the circumstances the accused must consider himself extremely lucky to have escaped the altimate penalty by a whisker.

The accused is accordingly sentenced to 25 years imprisonment.