

THE STATE
versus
FRED MUKOKA CHITANGE

HIGH COURT OF ZIMBABWE
HUNGWE J
MUTARE, 24 & 26 February 2016; 3 March 2016

Assessors 1. Mr Magorokosho
 2. Mr Chidawanyika

Criminal Trial

M. Musarurwa, for the State
Ms P. Maganga, for the accused

HUNGWE J: The accused who was 94 years old in April 2015, pleaded not guilty to the charge of murder.

The State alleged that on 13 April 2015 at Village 23 Chief Chikore Mayo the accused unlawfully with intent to kill, shot Sylvester Mutanga once with a 303 rifle on the right thigh thereby causing injuries from which the said Sylvester Matanga died.

His sole defence to the charge of murder is that he did not intended to kill the deceased, in other words he lacked the intention (*mens rea*) to commit the crime charged.

The facts of the matter are common cause and can be summarised as follows.

On 11 April 2015 the accused had approached the deceased who was ploughing his field. The deceased had cleared that portion of the field and had deposited the bushes he had removed from the field across a path leading to the accused's family cemetery. He ordered the now deceased to stop ploughing and, further, to open the path leading to the cemetery. The now deceased then stopped the task he had been engaged in but had argued with the accused stating that there was still access to the cemetery which did not pass through the field.

It is not in dispute that both the accused and the deceased parted ways without the matter having been resolved. The deceased announced that he was going to report the dispute between them to the Police. The now deceased went home where he briefed his mother about the issue and the resultant deadlock with the accused on the matter.

On the following, Monday 13 April 2015, the deceased and his mother got up early to continue ploughing the field. His mother left him once the cattle got the swing of following the furrows without being led. That achieved, the deceased could plough on without any assistance from his mother. At about 08.00 the accused came up to the field and ordered the now deceased to immediately desist from carrying on with his field work. The deceased ignored him. He ordered the now deceased to remove the bushes blocking the path way. Again the deceased ignored him despite the fact that it was clear that the old man was armed with a rifle and was agitated.

The accused then took aim at the now deceased and fired one shot from his 303 rifle. It found its mark on his right thigh. The bullet penetrated both thighs and exited through the left thigh. Deceased screamed for help and fell down. His cattle remained under the yoke as the now deceased bled to death.

The accused left the scene for his residence and locked away his 303 rifle before proceeding to make a report at the local Police Station. When eventually the Police arrived, approximately two hours later, the deceased had already died from the gun-shot wounds. His cattle were still on the same spot.

This much is not in dispute.

What is in dispute is whether or not the accused was the aggressor from the first day encounter going forward. On his part the accused says that he had tried to have the matter resolved amicably by way of dialogue between him and the deceased's family. When it became apparent that they would not accede to his demands that they leave the access path free he had resolved to involve the Police. However before this happened the deceased continued ploughing. When he confronted him the deceased had refused to back down. On this occasion he was carrying his gun or rifle. He then decided to disable or immobilize the deceased so that when he goes to report to police, they will find him still on the scene. He reasoned that he could achieve this by shooting the now deceased in the feet. Once he settled on this course of action, he took aim at close range and fired a single shot.

Unfortunately he missed either foot but hit him on the right thigh. He then left the now deceased to go and fetch the police.

On his way from the scene he met the deceased's friend, one Aleck Mwarusi.

Aleck Mwarusi testified that on meeting the accused, the latter demanded to know where he was going. He told the accused that he was going to see his friend at the fields. Accused told him to go back as he had shot him. He continued on the way but accused would

have none of it and threatened him with his rifle if he persisted in becoming a witness to the matter since he wanted to resolve it his own way. At that point any doubt which he had entertained as to whether accused was joking or not disappeared and he complied. He only visited the scene after the police arrived.

The circumstances surrounding the shooting were not witnessed by anyone besides the accused. As such the court can only rely on such conduct by the accused as can possibly be accepted as consistent with his stated intention in order to decide on the issue of whether or not he had the necessary intention to commit murder as defined s 47 (1) of the Criminal Law (Codification & Reform) Act, [*Chapter 9:23*].

In s 13 the Criminal Law Code provides:

“13 Intention

- (1) Where intention is an element of any crime the test is subjective and is whether or not the person whose conduct is in issue intended to engage in the conduct or produce the consequence he or she did.
- (2) Except as may be expressly provided in this Code, or in the enactment concerned, the motive or underlying reason for a person doing or omitting to do anything, or forming any intention, is immaterial to that person’s criminal liability in terms of this Code or any other enactment”.

The test to be applied for actual or legal intention to cause a consequences, according to Professor G. Feltoe’s *Commentary on the Code*, the accused would have legal intention if he or she engaged in conduct realising that there was a real risk or possibility (not merely a remote risk or possibility) that his conduct might cause the consequence and having realised this, the accused continued to engage in the conduct reckless as to whether or not the consequence ensued.

From the above it is clear that the Code relies on the concept of realisation of a real risk rather than foreseeability as before Codification.

In *casu* the question to ask could be framed thus:

Did the accused realise that the act of shooting at the deceased at close range using a .303 rifle carried with it the real risk or possibility that death might result but, in spite of having so realised this continued to engage in the shooting of the deceased?

If the answer is yes then the accused cannot escape criminal liability.

The accused is a mature person. The dangers inherent in the use of a gun needed not be examined in respect of his life experience. We came to the conclusion that the accused realised that there was a real risk or possibility that death might result. His claim that he did

not intent to kill the deceased is false. He subjectively foresaw death occurring from shooting at the deceased from close range.

That he continued to engage in the conduct despite the realisation is demonstrated by his post-incident conduct. He claimed that he merely wanted to immobilize the now deceased by shooting him in the feet. When he pulled the trigger he saw that the bullet hit the deceased in the thighs and that he was bleeding profusely. Had he not intended to cause the death of the deceased that resulted from his conduct the accused would have helped the deceased one way or the other.

His abandonment of a gun-shot victim belies the intention to achieve the death that resulted. He even prevented Mwarusi who would have assisted the deceased by at least stopping or reducing the resultant loss of blood.

In our view the accused cannot escape conviction and ought to be found guilty of murder as defined in s 47 (1) (a) of the Code.

SENTENCE

In assessing sentence the court takes into account that you are an elderly first offender at 94 years. You co-operated with the police during investigations. You also compensated the deceased's family by payment of US\$1 500, 00 and eleven herd of cattle and bearing of all the funeral expenses according to local custom. This in a way is punishment since the community which was directly affected by your actions accepted your overtures. In a way that community accepts that you have atoned for your wrong-doing. What remains is sentencing at criminal law level. The general public views the crime of murder as a serious one deserving of capital punishment. This is because by its nature it is an attack on society and its values. It attacks directly the right to life and threatens the dignity of the human being.

What I find particularly disconcerting in your case is the casual manner in which you killed the deceased. There could have been this dispute over the field boundary and your family cemetery between you and the deceased. You had sensibly agreed to refer the matter to police for mediation. Before that could be done you decided to take out your rifle and shoot the deceased at point blank range. At your age you could not have failed to appreciate that you were committing murder. Unfortunately you decided to deny the intention to kill. We heard the full evidence in a trial which was uncomplimentary for an old man like you.

Society expects you to be the pillar of rectitude and source of moral uprightness. You have failed not just your family but also society in general which expected better judgment from its senior citizen. I understand that to err is human and therefore will temper the sentence I am going to impose with a measure of mercy in light of your advanced age.

In the circumstances the following sentence will meet the justice of this case.

9 years imprisonment.

National Prosecuting Authority, for the State
Mugadza Chinzamba & Partners, accused's legal practitioners