

THE STATE  
versus  
YOMENCE CHAITEZVI  
and  
NOTICE KIDA  
and  
OBERT MUCHEMWA  
and  
ZVIDZAYI MARUFU  
and  
JACOB KAGOGODA

HIGH COURT OF ZIMBABWE  
PATEL J

ASSESSORS: MESSRS. CHIDYAUSIKU & TUTANI

**Criminal Trial**

HARARE, 4-7 December 2006, 2-4 July 2007, 30 March and 1 April 2010

*Mr. Mabeza & Mr. Tokwe*, for the State  
*Mr. Kadyokoto & Mr. Manyurureni*, for the accuseds

PATEL J: The accused persons in this case are charged with three separate counts of murder, assault and arson. These three counts arise from events which took place in 2000 at Nehanda Resettlement Village, Madziwa.

All five accuseds pleaded not guilty to the charges against them when trial commenced in December 2006. At the resumption of the trial in July 2007, the court was advised that the 1<sup>st</sup> accused (Yomence Chaitezvi) had died on the 4<sup>th</sup> of January 2007. This was later confirmed by an affidavit deposed to by his brother. The trial duly proceeded on the same charges as against the remaining four accuseds, who were now represented by different counsel.

The finalisation of this matter has been hampered by several factors. In particular, at the conclusion of the trial, *Mr. Mabeza* moved on to the regional bench without having properly handed over the further conduct of the case. Thereafter, the matter was significantly delayed for his replacement to be identified and duly equipped to file

closing submissions on behalf of the State. These were eventually filed in November 2009.

### State Evidence

At the beginning of its case, the State produced by consent the post-mortem report of Dr. Mutamba, dated the 8<sup>th</sup> of May 2000 [Exhibit 1]. In essence, the report shows that the deceased, Peter Karidza, died as a result of a head injury from the assault perpetrated upon him on the fatal day. At a later stage, the evidence of Vincent Kambanga and that of Dr. Mutamba, as contained in the State Summary of Evidence, was also admitted by consent.

Vennas Chimangemange is the deceased's widow. She testified that on the night of the 23<sup>rd</sup> of April 2000, a group of people gathered outside her homestead chanting political songs. They then began to throw stones at the main house and eventually torched the main house as well as the surrounding structures. At the same time, they called out for the deceased. When she and the deceased went outside they were attacked by some of the men in the group. At that point, the 1<sup>st</sup> accused (Chaitezvi) tried to verbally restrain the assailants and took the witness away to the back of the house. Therefore, she could not say whether any of the other accuseds were present or involved in assaulting the deceased. When she returned to the front of the house after about 30 to 45 minutes, she found that the deceased had been severely beaten. The main four-roomed house and five other structures had been destroyed by stones and fire. All the domestic furniture, utensils and equipment was also destroyed. The deceased passed away at about 5.00 a.m. on the following morning.

Molline Chimangemange is the deceased's daughter. Her testimony was similar to that of her mother as regards the general picture of what transpired on the night in question. However, her evidence was that she actually saw the 1<sup>st</sup> accused (Chaitezvi) and the 2<sup>nd</sup> accused (Kida) each strike the deceased once before the others in the group joined the attack. She was able to see what happened and positively identify the assailants because of the burning huts. She did not see the 3<sup>rd</sup> accused (Muchemwa) or the 4<sup>th</sup> accused (Marufu) at the scene of the attack. However, she did see the 5<sup>th</sup> accused (Kagogoda) running around encouraging the assault, but did not witness him actually

assaulting the deceased or causing any fires. The witness was present throughout the duration of the attack. The group consisted of about 100 men and about 40 of them took part in the assault. The deceased eventually lay on the ground after being assaulted for about 30 minutes. The 1<sup>st</sup> accused then told the others to stop.

Savory Hodza was at the relevant time the Chizinga District Chairman of the ZANU-PF youth wing. All five accuseds were office-bearers in the political party in various branches which fell under Hodza's command. He testified that on the night in question he met and drank beer with the deceased at Muzivi Growth Point. He heard that the 2<sup>nd</sup> accused (Kida) had planned a meeting at which the deceased was to be summoned. He warned the deceased who then ran away. On his way home he passed by Nehanda Village and saw a group of about 50 people, including the 2<sup>nd</sup> accused, who had gathered for a "pungwe" about 300 metres from the deceased's homestead. Further along the road he encountered two more groups, of about 50 and 20 people respectively, who were also going to the "pungwe". The first group included the 1<sup>st</sup> accused (Chaitezvi) and the second group included the 4<sup>th</sup> accused (Marufu). When Hodza arrived home, about 2 to 3 kilometres away, he saw fires burning over Nehanda Village. Although he was fairly drunk, he walked towards the village. About 300 metres away from the deceased's homestead he observed that all the groups had dispersed. The witness was arrested as a suspect on the following morning but was later released after recording his statement to the police. According to Hodza, the 2<sup>nd</sup> accused (Kida), 3<sup>rd</sup> accused (Muchemwa) and 4<sup>th</sup> accused (Marufu) wanted his position in the party and therefore resented him. They had arranged the gathering in question without his authority and knowledge. Under cross-examination, he admitted that he had been convicted for public violence and sentenced to 30 months imprisonment in respect of another offence involving political violence in the same area.

Detective Sergeant Nemaïsa is a member of the Zimbabwe Republic Police. He was based in Bindura in April 2000. On the 25<sup>th</sup> of April 2000, he was tasked to record warned and cautioned statements from four suspects, namely, the 1<sup>st</sup> accused (Chaitezvi), 2<sup>nd</sup> accused (Kida), 3<sup>rd</sup> accused (Muchemwa) and Hodza. He met the three accuseds for the first time at that stage. They corroborated Hodza's statement that he was not present at the scene of the attack and that he knew nothing about it. Each of the three accuseds

was then allowed to write his own statement in three separate rooms. At that time, each accused was unguarded and not handcuffed. Nemaisa then confirmed their statements in Shona and translated them into English. Thereafter, the statements were given to the accuseds to read before they were signed and witnessed. In their statements, the three accuseds admitted the charge of having murdered the deceased.

After Nemaisa's evidence-in-chief, the warned and cautioned statements of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> accuseds [Exhibits 2, 3 & 4] were admitted by consent, subject to challenge under cross-examination. When cross-examined, Nemaisa confirmed that the three accuseds had understood and signed their respective statements freely and voluntarily and without any duress whatsoever. Moreover, he did not see any visible signs of the accuseds having been assaulted, nor did they complain of having been assaulted by other police officers.

Inspector Absai Muchemedzi testified that he was involved in attending the scene of the attack on the morning after. He found the body of the deceased covered in bruises and observed that some of the structures at the homestead had been burnt or otherwise damaged. Certain suspects were arrested later that day but he could not recall any of them other than the 1<sup>st</sup> accused (Chaitezvi).

The warned and cautioned statements of the 4<sup>th</sup> and 5<sup>th</sup> accuseds were compiled and signed over 9 months later, in the presence of different police officers who were not called to testify. These statements were therefore not adduced or admitted in evidence.

#### Evidence for the Defence

The 2<sup>nd</sup> accused (Notice Kida) used to reside in Nehanda Village and was a ZANU-PF cell chairman in April 2000. His evidence was that it was Hodza, in his capacity as the District Chairman, who had convened the ZANU-PF members from the surrounding villages to attend the gathering at the deceased's homestead. He disagreed with Hodza's mission as he knew the deceased as a village elder and because there was a strong probability that violence would occur. Therefore, he and the other Nehanda Village members dispersed to go home, having been told to do so by Hodza. On his way home, he observed flames emanating from the deceased's homestead. On the following morning, he and the 3<sup>rd</sup> accused (Muchemwa) were arrested by the police. When cross-

examined, Kida accepted that 2000 was a very politically charged year and that the ZANU-PF youth wing was an important element in strengthening the party's base. At that time, it was unheard of that anyone in the locality should belong to the opposition MDC party.

The 3<sup>rd</sup> accused (Obert Muchemwa) was a senior official of ZANU-PF in the Chizinga District. His testimony was that from the 21<sup>st</sup> and 24<sup>th</sup> of April 2000 he was attending his father-in-law's memorial service at Batsinarayi Village, about 12 kilometres away from Nehanda Village. He only returned to Nehanda Village on the morning of the 24<sup>th</sup> of April, together with his wife and child. He was not aware of Hodza's plan to visit the deceased at his homestead. He was arrested by the police because he was the ZANU-PF political leader in Nehanda Village. He and Kida were taken to the scene of the attack where he was assaulted for arguing with the police. The deceased's wife identified Hodza and Chaitezvi as the perpetrators of the assault upon the deceased. They were both arrested but Hodza was given preferential treatment and was not detained. Under cross-examination, he accepted that he was not assaulted at the police station and that his arrested colleagues did not complain to him of having been assaulted. Again, he was not assaulted at the time that he signed his warned and cautioned statement, but he denied having read his statement before signing it. As this was the first time that he had been arrested he did not appreciate the significance of signing the statement. When questioned by the Court, he stated that he had attained 8 "O" levels in 1990 and a certificate in tobacco culture in 1996 or 1997.

Juliet Kaingidza resides at Batsinarayi Village and is Muchemwa's sister-in-law. She endeavoured to corroborate Muchemwa's version of his having attended her father's memorial service at her village from the 21<sup>st</sup> to the 24<sup>th</sup> of April 2000. However, she contradicted him in one material respect – by stating with certainty that he left the village on the 24<sup>th</sup> of April on his own and without his wife and child. Moreover, although she could recall exactly the date and time of Muchemwa's departure, she could not remember the month or year when her father had died.

The 4<sup>th</sup> accused (Zvidzayi Marufu) was an official in the Chitepo Branch of ZANU-PF. According to him, it was Hodza who directed him to mobilise the members from Chitepo Village. When they arrived at Nehanda Village he met Chaitezvi, Kida and

Hodza, together with 120 to 150 party members, gathered on a hill approximately 300 to 400 metres away from the deceased's homestead. He deduced that Hodza was drunk and that his plan to confront the deceased as an MDC sympathiser would probably entail violence. Marufu then told the Chitepo members to return to their village and returned home himself soon thereafter. He was surprised the following morning when he heard about the attack on the deceased and his homestead. He was arrested about nine months later. He signed his warned and cautioned statement after being threatened and slapped by the police.

The 5<sup>th</sup> accused (Jacob Kagogoda) was also an official in the Chitepo Branch of ZANU-PF. He testified that at the time of the attack on the deceased he was in bed suffering from malaria. He was under medication and unable to walk. He was arrested much later in January 2001. After his warned and cautioned statement was recorded he was assaulted by three police officers. He then signed the statement without having read it.

#### Warned and Cautioned Statements

Having regard to the testimony of Detective Sergeant Nemaisa, the Court is satisfied that the warned and cautioned statements of the 2<sup>nd</sup> and 3<sup>rd</sup> accuseds were properly recorded and that they were duly sworn and signed by them. Notwithstanding their protestations to the contrary, it is clear that the two accuseds had understood and signed their respective statements freely and voluntarily and without any duress. They are accordingly admitted as reliable evidence.

On the other hand, the warned and cautioned statements of the 4<sup>th</sup> and 5<sup>th</sup> accuseds were not adduced or admitted in evidence and must therefore be disregarded for present purposes.

#### Findings:- Assault and Arson

According to the indictment, one or some or all of the accuseds intentionally assaulted Molline Chimangemange and unlawfully set fire to a hut owned by the deceased and Vennas Chimangemange.

However, no evidence whatsoever was led at the trial relating to the alleged assault. As for the arson charge, such evidence as was presented was not specific as to

what property was destroyed and which accused, if any, was responsible for such destruction. Moreover, the State's closing submissions are utterly silent on both charges.

In the premises, the Court finds that these charges cannot be sustained. Accordingly, all four accuseds are acquitted on the counts of assault and arson.

#### Findings:- Murder

In considering the charge of murder it is necessary to assess the extent to which each accused was or was not present and involved in the events that took place on the night in question. Thereafter, it must be determined whether any or all of them are guilty of murder or some lesser offence.

The evidence against the 2<sup>nd</sup> accused (Kida) stems from various sources. Firstly, there is the evidence of Molline Chimangemange who was adamant that he used a stick to assault the deceased on the head. She indicated that visibility was good because of the burning huts and she positively identified the 2<sup>nd</sup> accused as an assailant. Moreover, she knew him because he was from the same village. Secondly, the 2<sup>nd</sup> accused was also identified by Savory Hodza as having gathered with his group for a "pungwe" about 300 metres from the deceased's homestead. Finally and crucially, there is the 2<sup>nd</sup> accused's warned and cautioned statement in which he made several critical admissions:- that he had circulated the letter that resulted in the gathering of ZANU-PF youth at the deceased's homestead; that, although it might not have been agreed to assault the deceased "to death", it was agreed to assault him in order to "inflict pain"; and that he could not defend the deceased because he was standing outside the homestead.

The 3<sup>rd</sup> accused (Muchemwa) stated that he was attending his father-in-law's memorial service at the relevant time. However, his alibi was not satisfactorily corroborated by his sister-in-law and is wholly rebutted by his warned and cautioned statement. In that statement, he admits the following:- that ZANU-PF youth were recruited from neighbouring villages to deal with the deceased's case; that he was invited by the 2<sup>nd</sup> accused to accompany the group to the deceased's homestead where it was planned to assault him and that the latter was in fact assaulted; and that, although he did not enter the homestead, he "could not go against that [assault] because it is a taboo in our party to go against any planned thing".

The main evidence against the 4<sup>th</sup> accused (Marufu) is that of Savory Hodza to the effect that he encountered the 4<sup>th</sup> accused leading a group of about 20 people going to the “pungwe” near the deceased’s homestead. The 4<sup>th</sup> accused admits that he was present at the “pungwe” but denies having been involved thereafter and claims to have withdrawn from the planned assault.

The 5<sup>th</sup> accused (Kagogoda) was identified by Molline Chimangemange as running around the homestead encouraging the assault. The witness did not know him in person as he was from a different village. In his defence, the 5<sup>th</sup> accused’s testimony is that at the time of the attack he was in bed suffering from malaria and that he was under medication and unable to walk. As is conceded by State counsel, his alibi was not meaningfully challenged or rebutted.

#### Elements of Murder and Conspiracy to Murder

On a charge of murder, it must first be established whether the accused’s action was the factual cause of the end result, viz. if but for his action, the deceased would not have died when he did. It must also be shown that there was legal cause, viz. whether it was objectively foreseeable or within the range of ordinary human experience that the accused’s action would lead to the death of the deceased. Where there has been a supervening event, this will not break the causal link between the accused’s act and the end result if that subsequent event was foreseeable.

As regards *mens rea*, it must be shown that there was actual or legal intention to kill. Legal or constructive intention to kill arises where the accused does not mean to bring about death but continues to engage in an activity after he foresees that there is a real risk or possibility that the activity will result in the death of a person and is reckless as to whether or not death ensues.

Under our law, it is trite that conspiracy is a competent verdict on a charge of having committed the completed crime. It is also trite that a conspirator is liable to the same punishment as the person who has actually committed the principal crime.

A conspiracy to commit a crime is usually defined as an agreement by two or more persons to do an unlawful act or to do a lawful act by using unlawful means. In essence, there must be agreement as to the criminal object. There does not have to be



agreement on the exact ways and means of putting into effect the plan before conspiracy is committed. Provided that the criminals have agreed on their object, they are guilty of conspiracy even if they are still negotiating towards full agreement on the means to be used in the criminal enterprise. See Feltoe: *A Guide to the Criminal Law of Zimbabwe* (2006). Moreover, each conspirator will be responsible for specific criminal conduct committed by any one of the conspirators which falls within their common purpose or design. See *S v Chauke & Another* 2000 (2) ZLR 494 (S) at 497, citing Burchell and Hunt: *South African Criminal Law and Procedure* Vol. 1 (3<sup>rd</sup> ed.) at p. 307. Again, even where a conspirator withdraws at any stage from the common enterprise, he may be entitled to an acquittal on the main charge but remains liable to be convicted of the offence of conspiring to commit the crime in question. See *R v Chimyerere* 1980 ZLR 3 (AD) at 8.

### Verdict

The general picture that emerges from all of the evidence before the Court is that the leaders of various ZANU-PF village groups within the district convened a night time gathering of their respective members, comprising *circa* 100 men, near the deceased's homestead. The purpose of the gathering, which purpose was agreed by the leaders and understood by their followers, was to confront the deceased at his homestead and assault him for his supposed affiliation with the MDC opposition party. Given the nature, timing and object of the gathering as well as the number of men involved, the leaders present must have foreseen the possibility of the gathering turning so violent against the deceased as to culminate in his death.

The 2<sup>nd</sup> accused (Kida) was identified not only as having been present but also as having struck the deceased on his head with a stick that was approximately 2 ft. long. According to the post-mortem report, the cause of death was stated to be "head injury due to assault". Nevertheless, in light of the overall attack on the deceased perpetrated by about 40 men, it cannot be stated with any certainty that it was the 2<sup>nd</sup> accused's particular blow to the deceased's head that was the specific cause of his death. In the event, it is difficult on the evidence available to sustain the charge of murder against the 2<sup>nd</sup> accused on his own.

What the evidence does clearly show is the following. The 2<sup>nd</sup> accused (Kida), 3<sup>rd</sup> accused (Muchemwa) and 4<sup>th</sup> accused (Marufu) were all present at or near the deceased's homestead on the night in question. All three of them held positions of leadership and control over the groups that they had called together at the gathering. As already stated, they were fully aware of the planned assault. Additionally, they must have foreseen, and by unavoidable inference did foresee, the possibility of the attack on the deceased resulting in his death. Subsequently, after their followers were unleashed on the deceased's homestead, they either actively participated or did nothing to defuse the situation and avert the attack on the deceased. Moreover, in the aftermath of the attack, they did nothing to report the matter to the police or any other responsible authority. In short, all three accused conspired in varying degrees in the planned assault on the deceased and all three of them foresaw the real possibility of the attack resulting in his death but were reckless as to whether or not death ensued. In the event, all three accuseds are acquitted on the charge of murder but are found guilty of the offence of conspiring to murder the deceased.

Turning to the 5<sup>th</sup> accused (Kagogoda), there is only the evidence of one witness (Molline Chimangemange) identifying him as having been present at the deceased's homestead. Given the circumstances prevailing at the time and the fact that the 5<sup>th</sup> accused was not previously known to the witness, it is necessary to be very circumspect in assessing this evidence of identification. See *S v Mutsinziri* 1997 (1) ZLR 6 (H); *S v Ndhlovu & Others* 1985 (2) ZLR 261 (SC). On balance, the Court is inclined to credit and accept his alibi of having been physically indisposed at the time and unaware of the planned attack until after it had occurred. The 5<sup>th</sup> accused is accordingly acquitted on the charge of murder

#### Mitigatory Factors and Aggravating Features

All three accuseds are first offenders and breadwinners for their respective families. Their lengthy incarceration would certainly impact very badly on them and their families and may not serve to rehabilitate them. Moreover, after having undergone 3 months of pre-trial incarceration, they attended court regularly for the purpose of their trial and did not interfere with State witnesses.

Ordinarily, the crime of murder with legal or constructive intent attracts a relatively lengthy term of imprisonment. As I have already indicated, the offence of conspiracy to murder is susceptible to the same penalty as applies to the principal offence.

In the instant case, however, the ordinary rules must be weighed against the inordinate and substantial delay in finalising this case. The Court notes that the offence was committed in April 2000, almost 10 years ago, and that trial commenced in 2006 but was only concluded a few days ago because of the reasons outlined at the beginning of this judgment. The intervening delays were not occasioned by the accuseds but were entirely attributable to the State. As was submitted by Defence counsel and conceded by State counsel, the accuseds have over the past 10 years undergone significant anguish. They have obviously agonised over their uncertain fate and the attendant psychological trauma constitutes a form of punishment in itself.

As against these mitigatory factors is the fact that the accuseds have been convicted of a very serious offence. The attack on the deceased and his homestead took place at night and traumatised not only the deceased but also his entire family. Although the accuseds did not kill the deceased with their own hands, they conspired in conduct that entailed his death and did nothing to avert or alleviate that death. Our courts have perennially declared that the sanctity of human life must be protected and preserved. Apart from the violent loss of life, the conduct of the accuseds is aggravated by the fact that it was politically motivated. In this context, it is especially incumbent upon the courts to make it abundantly clear that such conduct will not be favoured with impunity.

### Sentence

In imposing sentence on the accuseds it is necessary to have regard to the respective role and culpability of each accused. Of the three accuseds, the 2<sup>nd</sup> accused (Kida) bears the greatest degree of culpability inasmuch as he not only circulated the letter convening the gathering but also participated directly in assaulting the deceased. The 3<sup>rd</sup> accused (Muchemwa) is less culpable as he was present but did not actively assault the deceased, while the 4<sup>th</sup> accused (Marufu) is the least culpable having withdrawn from the planned attack at the last minute.

In the result, the accuseds are sentenced as follows:

- The 2<sup>nd</sup> accused (Notice Kida) is sentenced to a term of 48 months imprisonment of which a period of 24 months imprisonment is suspended for 5 years on condition that he does not within that period commit any offence involving violence or bodily injury to another person and for which he is convicted and sentenced to a term of imprisonment without the option of a fine.
- The 3<sup>rd</sup> accused (Obert Muchemwa) is sentenced to a term of 24 months imprisonment of which a period of 12 months imprisonment is suspended for 5 years on condition that he does not within that period commit any offence involving violence or bodily injury to another person and for which he is convicted and sentenced to a term of imprisonment without the option of a fine.
- The 4<sup>th</sup> accused (Zvidzayi Marufu) is sentenced to a term of 24 months imprisonment wholly suspended for 5 years on condition that he does not within that period commit any offence involving violence or bodily injury to another person and for which he is convicted and sentenced to a term of imprisonment without the option of a fine.