

THE STATE

Versus

PISO MOYO

IN THE HIGH COURT OF ZIMBABWE
MAKONESE J with Assessors Mr E Shumba and Mr A B Mpofu
GWERU 1 FEBRUARY AND 3 FEBRUARY 2023

Criminal Trial

S. Pedzisai, for the state
D. Mujaya, for the accused

MAKONESE J: The deceased, Benjamin Munoitei Murambiwa (the deceased) resided at Zimbabwe Republic Police, Mtapa, Gweru during his lifetime. He was employed as a police

officer. He was 32 years old at the time he met his death. The accused was aged 22 years at the material time. During his off days, deceased would pirate between Gweru, Zvishavane and Masvingo in his blue Honda Fit motor vehicle.

The accused appears in this court facing one count of murder in contravention of section 47 (1) (a) of the Criminal Law Codification and Reform Act (Chapter 9:23). It being alleged that on the 12th of December 2020 at or near number 2 Buffalo Drive, Zvishavane, the accused caused the death of the deceased by stabbing him once on the neck and strangling him

with a rope, intending to kill him or realising that there was a real risk or possibility that his conduct may cause his death.

The accused pleads not guilty to the charge and states that he has been wrongly implicated.

The state tendered a state outline summarising the events leading to the death of the deceased. The state alleges that sometime in December 2020 the accused met the deceased. A friendship developed between the two. On the 12th of December 2020 the deceased visited his girlfriend one Zaina Zembeleya at house number 563 Mkoba 13, Gweru. The deceased was in the company of the accused whom he introduced as a nephew. Food was prepared by Zaina and the two left for Zvishavane after having their meal. On the same day, the deceased visited Linna Gwende at Masvingo. Linna was deceased's other girlfriend. Deceased was in the company of the accused whom he introduced as a nephew. Deceased was driving a blue Honda Fit, bearing registration number AFH 4102. After spending some time at Linna's house the deceased and the accused departed. On the 16th of December 2020 Linna was advised that deceased was missing from his home and work place.

Before he went missing, the deceased and accused visited Tracy Hove at Zvishavane on 13th December 2020. Deceased was driving the blue Honda Fit motor vehicle. Tracy Hove was deceased's other girlfriend based in Zvishavane. Accused was introduced as a nephew of the deceased. Deceased spent some time with Tracy. At one point they made love in the motor vehicle, whilst accused stood outside, smoking a cigarette. Tracy left the deceased and the accused seated in the car and went to sleep. It was late in the night. The following morning, she went to check for the vehicle where it was parked but it was no longer there. Efforts to locate the deceased on his mobile phone were fruitless as the phone was no longer reachable.

On the 20th of December 2020 Tracy was informed that a dead body had been discovered near the place where she had left the deceased and the accused. Later that same day, police officers attended the scene as it was confirmed that the deceased's body had been found in a bush in Advelorem, Zvishavane.

The accused tendered a lengthy and detailed defence outline in his defence. Accused narrates that he had been friends with the deceased since 2016. On the 12th of December deceased invited accused to meet him in the central business district of Zvishavane. They travelled to Gweru where they met deceased's girlfriend Zaina Zembeleya who resided at Mtapa. The deceased travelled to Masvingo in the company of the accused on 13th December 2020 where they met Linna Gwende. The deceased then drove to Zvishavane in the company of the deceased. They met Tracy Hove, deceased's girlfriend. Accused states that he asked the deceased to lend him his car as he wanted to go to Mwenezi for the unveiling of his mother's tombstone. Accused states that when they arrived at Tracy Hove's residence, they disembarked from the deceased's vehicle. Accused bade farewell to the deceased. He left the deceased at Tracy's residence. He drove away. The deceased had indicated that he would put up at Tracy's residence and travel to Harare the following day, where his family was staying. Accused states that the last time he saw the deceased alive is at the gate to Tracy Hove's place of residence. Accused avers that the fact that he was found in possession of the deceased's motor vehicle does not mean that he is the one who murdered the deceased.

The accused's confirmed warned and cautioned statement was provisionally produced. The defence challenged the production of the statement on the grounds that it was not obtained freely and voluntarily. The accused alleged that he was subjected to physical torture and threatened by the arresting details. The warned and cautioned statement is in the following terms:

“I admit to the allegations of murdering Benjamin Munoitei Murambiwa. On 13 December 2020 and at around 2300 hours, I was in the company of the now deceased in Zvishavane town. We agreed that the now deceased was to accompany me to my rural home in Vurasha Mberengwa using his vehicle, and he said he wanted US\$70 worth of fuel and I bought. The now deceased stated that he wanted to collect his girlfriend first, Tracy Hove in Advelorem, Zvishavane. We went there and collected her and came back to town where we had a braai and drank beer. We then went back so that we drop her at her residence. Upon arrival the now deceased stopped his vehicle and I disembarked leaving him in the company of his girlfriend. After a while, the now deceased called me as he was parking with his girlfriend and I boarded the car. The now deceased told me that he was no longer accompanying me to my rural home since he was left with little fuel in the car. I disagreed since the distance we had travelled was not commensurate with the fuel I had bought. The now deceased took a small axe which was in the car and tried to axe me and I avoided. I drew my black knife and stabbed him once on the neck and he fell down. I then took a rope in the vehicle boot and tied him in the neck and dragged him in the nearby bush and left him there whilst he was still breathing. I then took his car, US\$130 and two cell phones namely a G-Tel XPRO and a small I-Tel and I went to my rural home.”

The warned and cautioned statement was recorded at Zvishavane on the 8th of January 2021. It was confirmed by a Magistrate on the 20th January 2021. Accused indicated that he signed the statement freely and voluntarily without having been influenced thereto.

The G-Tel recovered after the arrest of the accused at Mwenezi was produced as an Exhibit by the state. The phone was tracked and identified as belonging to the deceased by its serial number and IMEI number. A Fiscal Tax Invoice obtained from a shop where the phone

was purchased by deceased on 6th January 2020 was produced by the state. The invoice confirms that the serial number is the same as the one on the device recovered by the police at Mwenezi. The weapon used in the alleged murder a black hunting knife was tendered into evidence. The knife weighs 0.16 kg, it has a handle 11 cm in length, with a blade 9 cm in width. The knife is inscribed “Razorpio.” The rope used to strangle the deceased was also tendered into evidence.

The photographs of the Blue Honda Fit motor vehicle, Registration Number AFH 4102 belonging to the deceased were also produced by the state as part of the evidence.

The evidence of the underlisted witnesses as it appears in the outline of the state case was admitted by consent in terms of section 314 of the Criminal Procedure & Evidence Act (Chapter 9:07) by way of formal admissions; namely:-

- (a) Zaina Zembeleya
- (b) Linna Gwende
- (c) Prince Muhle
- (d) Tabeth Muhle
- (e) Tafadzwa Masundire
- (f) Samantha Maphosa
- (g) Yvonne Chihya
- (h) Tedious Chirindira
- (i) Tavonga Tarupiwa
- (j) Buhlebenkosi Ncube
- (k) John Mapako

The State Case

The state opened its case by leading evidence from **TRACY HOVE**. This witness resides at J2 Maglas Village, Zvishavane. She knew the deceased as her boyfriend. She knew the accused as a friend to the deceased. She was introduced to him as a nephew. She met the deceased who was in the company of the accused sometime mid-December 2020. The two came to her sister's residence at Advelorem Suburb. The witness got inside deceased's motor vehicle. At some stage the witness had sexual intercourse with the deceased whilst the accused was standing outside the motor vehicle. The witness retired to bed leaving the deceased and accused seated in the car close to her residence. Deceased had indicated that they would sleep in the motor vehicle. This is the last time she saw the deceased alive. Around 5 am and before 6 am the next morning witness had gone out to check for the deceased's motor vehicle. The vehicle was not there. She tried to contact the deceased on his mobile but he was unreachable. The witness was subjective to extensive cross-examination. She stuck to her version. She denied that she had a hand in the murder of the deceased. She confirmed that she first learnt of the discovery of the remains of the deceased on the 20th of December 2020. She denied that the deceased had lent his motor vehicle to the accused. The witness was a truthful witness. She was not contradicted in material respects under cross examination. The suggestion by defence counsel that there was a discrepancy in that the outline of the state case alleges that the sexual encounter occurred in the house and not in the motor vehicle is not material and does not alter the colour of the evidence of this witness. We found her to be credible and reliable. We have no hesitation in accepting her evidence as an accurate reflection of events as she recalled them.

JANE MADZITIRE was the second witness for the state. She resided in Mwenezi at the relevant time. Her evidence was straightforward. She testified that sometime in December 2020 the accused arrived at her homestead. He handed her a G-Tel mobile phone. Accused

indicated that he had fallen out with a certain lady and had re-taken the phone. The witness subsequently passed on the phone to her young brother. The witness positively identified the phone as the one given to her by the accused. The witness crucially told the court that accused's mother was her aunt. She died when she was still a young girl. Accused's mother resides less than 50 metres from her residence. During December 2020 there was no tombstone unveiling ceremony involving accused's mother. In any event, the witness pointed out that the accused's late mother's grave has no tombstone up to this day. The witness indicated that if such an unveiling ceremony had been conducted she would have known about it. We found the witness to be truthful and credible. Her evidence is worthy of belief.

SHIRIYAPENGA TAWEDZERWA is a Sergeant in the Zimbabwe Republic Police. He was based at Zvishavane in 2020. He has since been transferred and is now based at Criminal Investigations Department, Gwanda. He has been in the police service for the past 18 years. He was part of the team of detectives who were assigned to track and arrest the accused who had been seen driving deceased's vehicle in the Mwenezi area. The witness testified that before the arrest of the accused they had followed various leads after obtaining call records from network service providers. The witness interviewed Tracy Hove who had been last seen in the company of the deceased. Tracy confirmed that when she last saw the deceased he was in the company of the accused. She had left the deceased and the accused preparing to sleep in a Honda Fit motor vehicle near her house. The witness narrated how the body of the deceased was discovered. The deceased's body was positively identified by the deceased's relatives. The witness indicated that when they confronted the accused at Mwenezi he initially denied any involvement in the murder. The accused told detectives that he had purchased the Honda Fit motor vehicle from a certain man in Mberengwa. A search was conducted in the vehicle. The witness recovered the vehicle number plates which had been

removed from the vehicle and hidden under the driver's seat. A knife was also recovered in the glove compartment. Accused later confessed having committed the murder. He told the detectives that he had taken deceased's two cell phones. He had given one to his niece and had sold the other to a man in Mberengwa. The accused led the police to a place in Gwamatenga in the Mwenezi area. This led to the recovery of one G-Tel cellphone which had been handed to Jane Madzitire. The accused was arrested at Mwenezi and later transferred to Zvishavane for initial remand. Deceased's wife identified the G-Tel cell phone, wallet and motor vehicle belonging to the deceased. A warned and cautioned statement was recorded from the accused. It was confirmed by a Magistrate at Zvishavane on 20th January 2021. This witness denied that he assaulted the accused or threatened him in any manner. The witness testified that the accused freely and voluntarily made indications at the scene of the crime.

The witness was subjected to lengthy cross-examination. The witness was not shaken under cross-examination. There were no material contradictions in the evidence of this witness. He gave a truthful and credible explanation regarding the case up to the time the accused was taken to court for remand. We have no hesitation in accepting the evidence of this witness as an accurate reflection of the events as he perceived them.

The state closed its case. I shall comment later as regards the confirmed warned and cautioned statement which was provisionally entered into the record by consent.

The Defence Case

Accused elected to give oral testimony under oath. He adopted and adhered to his defence outline. The accused testified that he was known to the deceased since about 2016 or 2017. They were friends. On 8th December 2020 he was phoned by the deceased. He was asked to come to Zvishavane. Accused and the deceased later met. They went to the Caravan

Park where they consumed some beer. Later that day accused and deceased drove to Gweru in a Honda Fit motor vehicle. The following day accused accompanied the deceased to Mkoba 13 where they met accused's girlfriend, Zaina Zembeleya. That same day accused and deceased drove to Masvingo. They met deceased's other girlfriend who resides there. The accused and deceased slept at Croco motors in Masvingo. The following day accused and deceased drove to Zvishavane and then back to Gweru. Accused and deceased made another trip to Zvishavane where they met one of deceased's girlfriends, Tracy Hove. They spent some time with Tracy in Zvishavane. Accused narrates that he had asked the deceased to lend him his motor vehicle as he intended to travel to Mwenezi to attend a tombstone unveiling ceremony for his late mother. Accused states that he left deceased and Tracy Hove at a home in Advelorome in Zvishavane. He bade farewell to the two and left with deceased's motor vehicle. Accused stated that he had undertaken he return deceased's motor vehicle on or about the 8th of January 2021. Accused denies murdering the deceased and stated that the last time he saw the deceased he was at Advelorome in Zvishavane with Tracy Hove. Accused denied that upon his arrest at Mwenezi a mobile phone was recovered from Jane Madzitire. Accused's version is that he took the police detectives to that village so that he could show them his mother's tombstone. Accused denies that the knife that was produced in court was found in the motor vehicle. Accused's version is that the knife was shown to him by the detectives at Zvishavane police station. Accused denies that deceased's wallet was recovered from the Honda Fit. He suggested that the wallet in question belonged to him. Accused denied that he had ever admitted to the offence of murder. He contended that he had nothing to do with the deceased's death. Accused stated that Jane Madzitire was lying when she testified that he gave her a G-Tel mobile phone sometime in December 2020. Accused dissociated himself from the G-Tel phone which was recovered from Mwenezi. Accused failed to proffer any reasonable

explanation why the deceased's phone was recovered at Mwenezi if he had not given it to Jane Madzitire. Accused stated that Jane was not being truthful when she told the court that no tombstone unveiling ceremony ever took place in December 2020 or at any other time. The accused could not explain why Jane would lie on the aspect of the tombstone unveiling ceremony. Accused did accept that Jane's homestead and his late mother's homesteads are not more than 500 metres apart. It is highly unlikely that Jane would not have known about the ceremony if one had indeed been held. Accused was a dishonest and unreliable witness.

Analysis of the evidence

There can be no dispute that the deceased was found dead at an area near Tracy Hove's residence in Advelarome in Zvishavane. The cell phone belonging to the deceased was properly identified by its IMEI number and serial numbers. The mobile phone was purchased by the deceased at a shop in Gweru on 6th January 2020. There can be no doubt that the evidence of the phone perfectly links the accused to the death of the deceased. Upon his arrest accused was found driving the deceased's vehicle. Accused's possession of the vehicle is clear proof that accused murdered the deceased and took over the vehicle. He went far from the murder scene and used the car to ferry passengers for a fee in Mwenezi. Accused's luck ran out when police detectives working on various leads located the accused. The accused's defence is a web of lies designed to mislead the court. The murder weapon, the black knife, is a special hunters' knife. It was found in the Honda Fit that was being driven by the accused. We entertain no doubt that the deceased met his demise in the manner described in the confirmed warned and cautioned statement which now forms part of the record. We accept that the warned and cautioned statement was properly accepted into evidence. In *State v Moyo HB 169/2017*, the court reiterated that where an accused in possession of property recently stolen fails to provide a reasonable explanation of his possession, he would be guilty of the theft of

such property. Accused failed to give a reasonable explanation of how he came to be in possession of deceased's motor vehicle. The only plausible conclusion is that accused murdered deceased before robbing him of the vehicle and other valuables. See; *Mangoma v The State SC 36/20*

Disposition

There are various pointers that lead to the conclusion that accused was responsible for the murder of the deceased. Accused cannot explain his recent possession of the Honda Fit motor vehicle belonging to the deceased and the mobile phone. The warned cautioned statement is a confession containing vital details which were only known to the accused. The state has proved its case beyond reasonable doubt. In the result, accused is found guilty of murder in terms of section 47 (1) (a) of the Criminal Law Codification & Reform Act (Chapter 9:23)

Sentence

The accused has been convicted of murder in contravention of section 47 (1) (a) of the Criminal Law Codification and Reform Act. This was a callous murder committed in aggravating circumstances. The accused brutally killed the deceased before robbing him of a Honda Fit motor vehicle and two mobile phones. The murder was committed in the course of a robbery. *Mr Pedzisayi*, appearing for the state submitted that one of the aggravating features of the case is that the murder victim was a police officer. *Mr Mujaya*, appearing for the accused suggested that the provisions of section 47 (3) (b) of the Criminal Code do not apply to the facts of this matter in that the murder victim was not killed in the line of his duty as a police officer. He argued that the intention of the legislative was that the police officer must have been killed during the course of his employment. The golden rule of interpretation is that the

words in a statute must be given their ordinary grammatical meaning. See; *Tapedza and Ors v Zimbabwe Energy Regulatory Authority and Anor SC 150/16*. In the circumstances of this case, the accused who was a friend of the deceased knew that his victim was a police officer. The statute does not specify that the police officer must be uniformed or that he must be on duty. If the Legislature intended to define the scope of the words “police officer”, this should have been done expressly. I am convinced that the second aggravating feature other than the fact that the murder was committed during the course of a robbery is that accused killed his victim with the full knowledge that the victim was a police officer.

In assessing an appropriate sentence this court takes into account the fact that accused is a youthful first offender, who was aged 22 years at the time of the commission of the offence. The accused is a family man with a wife and 3 minor children. In aggravation, the accused has not shown any remorse or contrition. Whilst on the witness stand the accused had an opportunity to express regret on the death of the deceased. Accused, however sought to distance himself from the killing of the deceased and expressed no regret. He pursued a palpably false defence to the better end. Accused’s conduct shows that he is inherently wicked. The manner in which he killed his victim and disposed of the body shows that accused has very little regard for human life.

This court takes into account that due to accused’s youthfulness he acted out of immaturity. His desire to kill the deceased and take over his motor vehicle and then start using it for hire shows how accused acted out of a foolish belief that this offence would somehow just disappear. We do not propose to impose the ultimate sentence of a death penalty. It is our view that accused must be removed from society.

In the result, and accordingly, the accused is sentenced as follows:

“Accused is sentenced to life imprisonment”

National Prosecuting Authority, state’s legal practitioners
Mawadze & Mujaya Legal Practitioners, accused’s legal practitioners