

THE STATE

Versus

THEMBELANI SIBANDA

And

SIKHUMBUZO MAHLANGU

IN THE HIGH COURT OF ZIMBABWE

MOYO J with Assessors Mr E. Mashingayidze & Mr M. Ndlovu

BULAWAYO 17, 18 & 30 JANUARY 2023

Criminal Trial

Ms N. Ngwenya for the state

M. T. Mahlangu for 1st accused

N. Mpofu for 2nd accused

MOYO J: The 2 accused persons face a charge of murder. In that it is alleged that on the 12th of January 2017 and at a railway crossing fly over along Masiyephambili Drive in Bulawayo, in the said province, the accused persons stabbed the deceased Njabulo Dube on the back, right side of the neck, right shoulder and right cheek with an Okapi knife and thereby causing his death.

The facts relating to the robbery and the attack on the deceased are largely common cause, the deceased was cycling on his way home on the fateful night and he was attacked and robbed of his belongings that included 2 simple phones a Samsung and a Nokia, a loaf of bread and US\$30. The cellphones were subsequently sold by the 2 accused persons in Makokoba. The 2 accused persons were arrested after the police investigated and tracked the cellphones via data collection from the network service providers. The State produced the following;

1. The state summary, as amended
2. The post mortem report
3. The DNA affidavit
4. The Nokia cellphone
5. The Samsung cellphone

6. The Okapi knife, the torn blue work-suit jacket with blood stains
7. The green stamped T-shirt
8. The blue work suit trousers
9. Accused 1's defence counsel tendered his defence outline
10. Accused 2's defence counsel tendered his defence outline

All the exhibits were duly marked.

The evidence of –

- (a) Edson Denhe
- (b) Mhlomuli Mathobela
- (c) Vitalis Gunhe
- (d) Jacob Manda
- (e) Bigboy Makombe
- (f) Simbarashe Rusike
- (g) Dr S. Pesanai was admitted into the court record as it appears in the state summary.

The evidence of Nkosiyalinda Gumede, Thulani Mlilo, Richard Chanengeta and a portion of Patriot Shiku's testimony not related to this case was expunged from the court record. Givemore Nyandoro, Archiford Madzinga, Patriot Shiku and Zephaniah Dlamini gave *viva voce* evidence for the state.

The 2 accused persons gave *viva voce* evidence in their respective defence cases. The State alleges that it is the 2 accused persons gave *viva voce* evidence in their respective defence cases.

The State alleges that it is the 2 accused persons who acted together in assaulting, robbing and fatally injuring the deceased. The basis of such allegations is that accused number 1 admits to hatching the plan with accused 2, going to the scene and attacking the deceased in a bid to rob him and then sharing the spoils.

Accused 2 denies ever participating in the robbery but that he was engaged by accused 1 to assist him sell the cellphones being the loot from the robbery and that he did not know anything to do with the robbery as he was not present.

What this court must determine is the respective roles played by each accused person in the robbery and attack on the deceased leading to his demise if any.

Accused number 1

Accused number 1 admits to hatching the robbery and attacking the deceased. His evidence is that accused 2 and himself hatched a plan to go and rob passersby at the Masiyephambili fly-over on the fateful night. Deceased came on a bicycle, he grabbed deceased by the collar, deceased fought back and punched him causing him to fall and lose consciousness, he says, he had an Okapi knife that fell off his pockets. Accused 2 then picked the knife and later stabbed the deceased while accused 1 was unconscious. He later awoke to find deceased injured and they searched the deceased and shared the loot which included 2 cell phones that they later sold in Makokoba to the 2 state witnesses that gave *viva voce* evidence. He said that after they left the scene, accused 2 threw away his work suit jacket which was blood stained at some field. The work suit was recovered by the police after the accused persons made indications.

Accused 2 denies any links whatsoever with accused 1 in the commission of the offence. He denies making any indications and denies that the work suit tendered before this court is his. He told the court that his only involvement relates to the sale of the phones wherein he met accused 1 saying he needed to sell phones and thus needed accused 2's assistance to do so. He offered to assist accused 1 on the understanding that accused 1 should first give him one phone. Accused 1 then gave him one of the phones and they proceeded to the selling place where he then sold one phone and accused 1 sold the other phone to the 2 state witnesses.

This court needs to resolve the respective roles, if any, played by the accused persons in the robbery and murder of the deceased in order to ascertain who is culpable *vis-à-vis* the murder of the deceased.

Accused 1's role

Accused 1 gave his evidence well, he did not strike the court as being misleading on most aspects of his evidence. The court accepts accused 1's version in its entirety. In relation

to this accused, the court just needs to assess the impact of his loss of consciousness during the attack on the deceased with an intention to rob him. The court makes the following observations with regard thereto.

1. Accused 1 and 2 hatched a plan to rob people.
2. They went to the Masiyephambili fly-over
3. They saw the deceased and planned to attack him
4. They did attack him with accused 1 grabbing him by the neck
5. After accused 1 had been punched by the deceased and lost consciousness accused 2 proceeded to take accused 1's Okapi knife and stabbed the deceased fatally injuring him
6. Accused 1 regained consciousness and then the 2 proceeded to search the deceased and share the loot

Accused 1's conduct is governed by section 196 of the Code which provides for the liability of co-perpetrators section 196 (2) (a), (b), (c), (d) (ii) of which reads as follows:

“If the state has established that 2 or more accused persons;

- (a) Were associated together in any conduct that is preparation to the conduct which resulted in the crime for which they are charged.
- (b) Engaged in any criminal behavior as a team or group prior to the conduct which resulted in the crime for which they are engaged,, and that they were present at or in the immediate vicinity of the scene of crime in circumstances which implicate them directly or indirectly in the commission of the crime, then it shall be presumed, unless the contrary is shown that;
- (c) They knowingly associated with each other for a criminal purpose or was if not the specific crime for which they associated with each other, a crime whose commission they realized was a real risk or possibility.

Section 196 (6) provides that;

“It shall not be necessary to prove that there was a prior conspiracy to commit the crime for the commission of which a person is associated with another person in order for the court to find any person liable as a co-perpetrator of the crime.”

We then proceed to apply the quoted provisions to the fate of accused 1.

Accused 1's circumstances are as follows:

In terms of section 196 (2) (a) accused 1 associated with accused 2 in hatching a plan to go and rob innocent passersby of their belongings. They boarded a taxi and went to

Masiyephambii fly-over, whilst they did not plan to go and commit murder, the criminal enterprises they planned on involve violence and injuries can follow from violence and they may be fatal. Section 196 2 (b) is the direct one to accused 1's conduct as it provides for 2 more accused persons who are engaged in any circumstantial behavior as a team or group prior to the conduct which resulted in the crime with which they are charged. Accused 1 and 2 engaged in the criminal conduct of robbery prior to the murder charges that they are now facing and that they were present at or in the immediate vicinity of the scene of crime in circumstances that directly or indirectly implicate them. Accused 1 was present at the scene of crime in circumstances that directly implicate him as he is the one who actually grabbed the deceased even after he woke up, he proceeded to participate in the searching of the already injured deceased. Not only did he stop there, he participated in sharing and selling the deceased's items. So he is definitely implicated by these factors in the resultant crime. Section 196 (c) and (d) (ii) allows the court after making the findings above, to then presume that accused knowingly associated with each other for a criminal purpose or was, if not for the specific crime for the commission of which they associated with each other (which is the robbery in this instance), a crime whose commission they realised was a real risk or possibility.

Accused 1 then becomes liable by virtue of this section in that even if he did not set upon to commit murder as he says, he associated with accused 2 to go and commit the crime of robbery of which murder is a real risk or possibility. Robbery is by its nature a violent crime and its commission involves violence that can range from simple assaults to serious injuries that can be fatal so if one sets upon a mission to commit robbery, he exposes himself to liability for a murder committed by his co-perpetrator because commission of a murder is a real risk and possibility in the commission of a robbery. Not only did the matter end there, accused 1 regained his consciousness, found deceased injured, did not resign himself from the criminal enterprise but instead proceeded to search the dying man and took his property and even went further to share and sell the loot. Section 196 therefore clearly renders accused 1 culpable in the death of the deceased.

Accused 2's role

Accused 2 divorces himself completely from the criminal enterprise and places himself only at the sale of the cellphones.

For an accused's version to be accepted by the court, it must be reasonably, possibly true in the circumstances. There is one problem with accused 2's version. In his defence outline he says he met the 1st accused who carried 2 cellphones and an amplifier looking for a buyer. He then went to show accused 1 the state witness who buys and sells second hand goods in Makokoba. In paragraphs 4 and 5 of his defence outline he says they charged Givemore Nyandoro US\$8 for the Samsung phone and he gave them US\$5 and promised to pay the remaining US\$3 which they agreed to collect in the late afternoon. In paragraph 5 of the defence outline he says "he will also state that they sold the Nokia to one Archiford Madzinge on credit."

In his evidence-in-chief, he told the court that accused 1 asked for assistance with the sale of the phones and then "paid" him with one of the phones to enable him (accused 2) to show accused 1 cellphone buyers. The problem with this averment is that it is unreasonable that accused 1 would commit a robbery and a murder alone, ask accused 2 to show him buyers and give him a whole phone for such a small task. It also defies logic that accused 2 in his evidence in court further said that the phone that he was given by accused 1, fetched cash and more money yet the one that accused 1 sold fetched less and was sold on credit. He told the court that accused 2's phone was sold for US\$8 with US\$5 being paid and US\$3 remaining. He told the court that his own phone fetched US\$12 and in cash how come accused 1 gave accused 2 a better phone that sold for more and for cash when himself the perpetrator of an offence gets less and on terms? The accused person is clearly lying in this respect. The court is supported in this finding by that in his defence outline he gives the impression that they sold the phone together, but in his evidence –in-chief, he wants to distance himself from the phone that had an outstanding sum. Not only do his lies end there, he further contradicts his defence outline where he stated that the 2nd phone was sold on credit to Archiford Madzinga by saying in his oral evidence it was sold for cash in USD which was paid in full. He clearly cannot be relied upon as his version falls apart on its own as it is being told at different times. The is the consequence of concocted stories they always fall apart, you almost always find something that either does not make sense or does not add up in them..

The 2nd accused's version on his involvement only when it was the time to sell cellphones is thus unreliable and in fact it is false and this court will not accept it.

Evidence that the state has against accused 2

1. The 1st part of the state's evidence is that accused 2 was a co-seller of the cellphones to the state witness. This may not have any weight standing alone but has a foundation whereupon if after facts that cumulatively build onto it are present, it stands as the foundational basis for the involvement of accused 2 in the criminal enterprise.

Do we have any after facts to cumulatively buttress that point?

Yes in the following manner:-

2. Accused 2 made indications at a field where the work suit that had deceased's blood was recovered and he said it was his. Did the state prove that the work suit belonged to accused 2? Yes it did in the following respect.
3. Accused number 1's testimony. Accused number 1's statement to the police or his defence outline cannot be used as evidence against accused 2, but his *viva voce* evidence in court can be used as he gave it as a witness and it is subjected to the usual rules of evidence including cross-examination.

The Judge's Handbook in criminal cases provides as follows at page 106.

"Co-accused implicating each other

Where 2 or more accused persons are jointly charged with an offence and each gives evidence blaming the other for the offence, the evidence of each is admissible against the other, but the court must approach the evidence with care since there is a risk that either or both of them may be seeking to protect himself by telling lies (this is as per the case of *Sambo vs S* SC-22-90")

It is also emphasized therein that the statement made by an accused in reply to police questions is only evidence against the maker of the statement and is not evidence against any other person in terms of section 259 of the Criminal Procedure and Evidence Act Chapter 9:07 and that this is because there is no opportunity to cross-examine the person making such a statement to the police where he or she makes the statement but that if the maker of the statement goes on to the witness box and repeats on oath what he or she said is the statement, he or she renders himself liable to cross-examine by an accused jointly charged with him or her and thus renders such evidence on oath admissible against the co-accused.

In essence this means that the *viva voce* evidence of accused number 1 which was subject to cross-examination serves as evidence against accused 2. Nothing much turned on the cross-examination of accused 1 by accused 2. The version by accused 1 remained intact during cross-examination as no crucial issues were canvassed *vis-à-vis* his implication of

accused 2. Accused 1's version thus stands as against accused 2 as no holes were poked at all by accused 2 in cross-examination. In exercising care in the acceptance of accused 1's version, the court notes that he has already proven himself to be a reliable witness, as already found, and that accused 2's version on the other hand is found wanting as already shown herein. Again, accused 1 sold the phones to the 2 state witnesses without implicating them in the robbery, so where he implicates accused 2, he must be believed because he has not shown himself to be on a mission to crucify anyone who was involved in the transaction with no valid cause. Accused 1 could have easily said the 4 of them hatched a plan to rob, robbed and then shared the spoils, instead of just singling out the 2nd accused person as a co-perpetrator. There is also further evidence that I am yet to analyse which the court will use in exercising care as emptying accused 1's version, and that is the evidence of Patriot Shiku and the indications that led to the recovery of a work suit top that allegedly belonged to accused 2.

The evidence of Patriot Shiku

The evidence of Patriot Shiku which neither accused person meaningfully challenged during cross-examination is to the effect that he questioned accused 1. 1st following a link from the buyers of the cellphones who had told him they bought the phones from the accused persons. He then questioned accused 2. The 2 accused persons then made indications at some field where accused 2's blood stained work suit was later picked. It belongs to accused 2 because he indicated so during the time indications were made and accused 1's evidence is also to that effect. Patriot Shiku's evidence stands out, no meaningful challenges were ever made to it during cross-examination. Again, in his defence outline, accused 2 despite knowledge that the work suit was being attributed to him by this witness, he does not mention it at all in his defence outline. It was a material point that accused 2 should have stated in his defence outline that the ownership of the work suit jacket was an issue. He does not challenge the ownership of the work suit at all and this court is allowed in terms of section 189 (2) of the Criminal Procedure and Evidence Act to draw an adverse inference on the failure to mention a crucial point in defence will serve as corroboration of the evidence by the state on that point. The 2nd accused failed to challenge the evidence of the Investigating Officer in respect of the work suit ownership and he had failed to maintain this challenge in his defence outline as well. Again, the evidence in chief of accused number 1 was not meaningfully challenged yet his testimony is also that the work suit belongs to accused 2. There is therefore overwhelming evidence on

the aspect of who the work suit jacket belongs to in our view. Accused's silence in his defence outline corroborates the evidence of Patriot Shiku and that of accused 1. In any event, even if the confessions made by the accused persons were not admissible by reason of duress and assaults as claimed by accused 2, the indications and what was unearthed during indications remain admissible. This is by virtue of section 258 (2) of the Criminal Procedure and Evidence Act (*supra*) which provides that:

“It shall be lawful to admit evidence that anything was pointed out by the person under trial or that any fact or thing was discovered in consequence of information given by such a person notwithstanding that such pointing out or information forms part of a confession or statement which by law is not admissibility him on such that.”

The evidence of the discovery of the work suit by Patriot Shiku at the point of the accused person's admissible against them in terms of this section. We accordingly make a factual finding that the state proved beyond a reasonable doubt that the work suit jacket belongs to accused 2. This seals accused 2's fate in this matter. Having made such a finding, we conversely find accused number 2 has not told the truth before this court on this aspect. Our finding that the work suit belongs to accused 2 in effect means that accused 2 participated in the events as narrated by accused 1 who we have already found to be credible and reliable. The evidence of Zephaniah Dlamini is to the effect that the work suit which was blood stained contained deceased's DNA profile. That links the work suit to the scene of crime of the murder of the deceased. We have already found that the work suit belongs to accused 2.

For these reasons accused 2 is culpable in so far as deceased's death is concerned. It is therefore our conclusion that the 2 accused persons did act wrongfully and unlawfully on the date in question by robbing the deceased and in the process inflicting fatal injuries.

It is for these reasons that both accused are found guilty of the crime of murder.

Sentence

The 2 accused persons are convicted of murder. They are both 1st offenders. They have no sound family values, they spent 5 years 11 months in pre-trial incarceration. They however, started at the deep end, an innocent life was lost at the hands of the accused persons, who were just fuelled by greed. The deceased died a painful death at the hands of the 2 accused persons. Accused 1 has shown some measure of remorse. Accused 2 was only aged 22 years at the

relevant time. Accused 1's remorse and accused 2's age do inform this court to exercise some strain from passing the death sentence or life imprisonment as clearly this is a murder that was committed in aggravating circumstances, in that the murder was committed during a robbery. The court also notes that they have spent almost 6 years in pre-trial incarceration although accused 1 did contribute to this by feigning mental illness in 2018, it seems the state also later contributed to the delay. Ordinarily I would have sentenced the 2 accused persons to 30 years imprisonment but this court will knock off 5 years to cater for the pre-trial incarceration meaning that the accused persons will be given 25 years. Nothing will be suspended from the 25 years as the aggravating feature of a murder committed during a robbery meant that they could even be sentenced to death or life imprisonment. The accused persons are accordingly sentenced as follows:

Each accused person is sentenced to 25 years imprisonment.

National Prosecuting Authority, state's legal practitioners
Mathonsi-Ncube Law Chambers, 1st accused's legal practitioners
Cheda & Cheda Associates, 2nd accused's legal practitioners