

THE STATE

Versus

FREDDY DUBE

And

THINKWELL MOYO

IN THE HIGH COURT OF ZIMBABWE

MOYO J with Assessors Mr P. Damba & Mr E. Mashingaidze
BULAWAYO 21 JANUARY & 17 FEBRUARY 2020

Mrs R. Takuva & B. Gundani, for the state

T. Runganga, for 1st accused

T. Ndebele for 2nd accused

Criminal Trial

MOYO J: The 2 accused persons face 2 counts of murder, it being alleged that on the 16th of April 2018 both accused persons assaulted Dumenkosini Mankebe Sibanda and Andile Ncube on the same date but at different places and at different times resulting in the death of the 2 deceased persons.

The following were tendered into the court record as exhibits. In relation to both counts;

- the state summary
- The 1st accused's defence outline
- The 2nd accused's defence outline
- A Honda Fit motor vehicle registration number AEO 6689

In relation to the 1st count the following exhibits were tendered:

- An affidavit by the police officer who identified deceased's body to the pathologist
- The post mortem report in relation to the deceased Dumenkosis Mankebe Sibanda
- The identification parade photos and notes

- Samsung cellphone belonging to the deceased

In relation to count 2 the following were tendered as exhibits;

- The affidavit of the police officer who identified deceased's body to the pathologist
- The post mortem report relating to the body of the deceased Andile Ncube
- The various items that were stolen at Inyathi Business Centre and sold to different villages in Tovo 1

All the exhibits were duly marked.

The state led viva voce evidence from 3 witnesses who are Elliot Dube, Nelson Jukwa and Siyazuza Ncube. The evidence of the following witnesses was admitted into the court record as it appears in the state summary.

The evidence of:

- Anita Ncube
- Ntombizodwa Magaya
- Noah Munongoverwa
- Allan Ncube
- Disabel Moyo
- Langalakhe Ndlovu
- Mqemane Tshabalala
- Otuwell Mudyazvavanhu
- Tapiwa Murambidzi
- Thulani Ncube
- Future Dungeni
- Sibongile Ndoya
- Tawanda Moyo
- Mula Moyo

The evidence of Dumisani Moyo and Collet Moyo was expunged from the court record.

The facts of the matter are largely common cause, that is, as to what happened to the deceased persons on the night in question and on the aspect that it is common cause that the 2 accused persons were found in recent possession of the items stolen from the deceased persons at the time that they were robbed and killed. The facts of this matter are that Dumisani Mankebe Sibanda, the deceased in the 1st count, was a pirate taxi driver using a silver Honda Fit motor vehicle registration number AEO 6689. He was employed by Ntombizodwa Magaya. On the fateful day deceased left for work plying his routes from the city centre. Deceased had a small white Samsung cellphone and he did not return home that night. The deceased was later picked while his body lay by an unnamed road near Umguza Primary School. He lay lifeless in a pool of blood. His body was picked by the police and a post mortem conducted with the following observations made by the doctor. The deceased had the following injuries

- Stab wound left shoulder right through the clavicle bone
- Stab wound left neck ruptured jugular vein
- Stab wound sub mandibular
- Laceration under the left chin
- Defensive wounds on the ring finger and back of right hand

The cause of death was given as:

- Haemorrhage shock
- Perforated left jugular vein
- Stab wound on the neck
- Assault

The second deceased person Andile Ncube was employed at a flea market at Madikane Business Centre in Inyathi. He sold various goods including clothes. He spent the whole day well as per the testimony of his neighbours. He retired to bed on that night. On the following morning, the neighbours observed that his bedroom tent was cut. They peeped and saw him.

They called him and he did not respond. As they peeped they realised that deceased's body was covered in blankets save for his legs. They also saw blood stains on accused's blankets. The neighbours advised others and subsequently deceased's employer. They also noticed bare foot prints and tennis shoe prints at the scene. The foot prints proceeded to the T-junction linking Mudlenuck to Bulawayo-Nkayi Road where they also noticed light motor vehicle tyre marks. The police were called and the deceased's body was later ferried to the hospital. The owner of the flea market stall that deceased in count 2 operated, also attended the scene upon being informed of deceased's demise. He found various clothing items and other gadgets missing together with his bags. The doctor upon conducting a post mortem examination on the 2nd deceased's body observed the following;

- Blood on the face and clothes
- Lacerated left ear
- Lacerations on the head and face totaling 5 in number
- Haemtona on left paretial and temporal region
- Depressed skull fractures left paretal region
- 2 fractures on the skull
- Extensive subarchnoid haemorrhage

The cause of death was given as;

- Extensive subarchnoid haemorrhage
- Multiple skull fractures
- Head injuries
- Assault

The State case

The state led viva voce evidence from Elliot Dube the biological father to accused 1 and a stepfather to accused 2. He told the court that on a date he did not remember, but in 2018, the 2 accused persons arrived at his homestead in the morning hours driving a silver Honda Fit and

carrying various clothing and gadgets. They told him that they were from the Republic of South Africa and that the Honda Fit motor vehicle was their car that they had brought from South Africa. The car had no registration plates and upon questioning them about that they said the plates were inside the motor vehicle. He told them to put them back on but they did not. The accused persons had for sale various clothing items and some gadgets which were sold to neighbours. He was given a pair of takkies by the 2 accused persons. He had not known accused 2 who was arriving at his homestead for the 1st time. He said accused 1 was known to be in South Africa and he had not lived with accused 1 before. Accused 1 lived with his maternal grandparents. He said he had last seen accused 1 at his home around the time he completed his grade 7 and then he understood him to be in South Africa until when accused 1 came on that day in 2018. Elliot Dube said there was no other person that came with the accused persons, they were only 2 and they claimed ownership of the assets they had. Elliot Dube also confirmed that the Honda Fit had one small size wheel. He said upon leaving his homestead, the 2 accused persons left together and then accused 1 later came back alone. He also confirmed that when the police came looking for accused 1, accused 1 had gone to herd cattle and when he saw the police he fled. He said he did not know him as Lizwe Moyo. This witness told the court the truth. He was credible, he answered all questions in a meaningful way. His demeanor in the witness box said it all. He testified against his own and stepson.....

The evidence of Noel Jukwa was primarily in relation to his attendance at the scene. He confirmed the injuries on the deceased in count 2 and he confirmed the presence of a set of 2 foot prints that led to the main road where tyre marks supposedly of a light motor vehicle were present, together with the 4th tyre being smaller than the others and being of a biscuit type. He then told the court that later in May 2018, he attended to Elliot Dube's homestead where he recovered various clothing items and some gadgets from the villagers and from Elliot Dube's homestead. He then called the employer of the deceased in count 2 who positively identified some as his property that was in the custody of the deceased at the time he was killed.

Siyazuza Ncube was the next state witness. He told the court how he conducted the identification parade and how the person found in possession of the Samsung cellphone that

belonged to the deceased in count 1, identified accused 1 as the person from whom he had bought the cellphone. That was the state case.

The defence case in relation to accused 1 is in the form of the confirmed warned and cautioned statement, the defence outline and the *viva voce* evidence that he gave in court. In his confirmed warned and cautioned statement accused 1 says that the property he was found in possession of which includes a tablet, he bought it from accused 2 and his brother for \$40 and that the 2 had left a laptop and 3 bags containing clothes intending to come and collect the property. He further said they brought a sky blue Honda Fit without registration plates and they sold some property to villagers. He also stated that they told him that they had been sent by the owner of a mine with his motor vehicle so that they employ on his behalf 2 workers for his Arda Mine in Umguza.

In his defence outline marked exhibit 2, accused 1 says in paragraph 2 that at the material period and on the day in question he was at his parents' homestead when accused 2 came in the company of a friend driving a silver Honda Fit with no number plates. In paragraph 3 of this defence outline he stated he did not know anything about the origins of the clothes that the 2 had brought and left for sale. In his *viva voce* evidence in court, he said that he arrived at night at his father's homestead, after having been away since 2015. He got home unannounced, all the way from South Africa, after 3 years, he decided to get into a bedroom hut that was unoccupied and slept until morning. In the morning he did not bother to wake up until all the people woke up and left for the fields. Accused 2 and a SaMaMoe then came in a Honda Fit. They brought various items. Himself, accused and Brandon then left for the shops, on one hand he said himself and accused 2 left for the shops so it is not clear as to which is which. Pressured further to explain this anomaly in his evidence he started saying he was drinking and could not remember. He further said accused 2 said the clothes belonged to his (accused 2's) friend and that they were assisting one another. When asked why his own father would lie against him he said his father was sick and did not see anything. Asked about his relationship with his father he said his father loved him because he did good things for him. He said when the police came to his father's homestead, he attempted to flee because he had game meat in his possession. During

cross-examination he said that the items that were found in his possession specifically the tablet cellphone had been given to him by accused 2's friend as security when he lent him \$40,00 as he (accused 2's friend) had no bus fare to go back to Bulawayo. He said the surety transaction occurred the following day at the shops. He said SaMaMoe never stayed at his father's homestead. His testimony became difficult to follow when he confirmed that the Fixan referred to by accused 2 in his defence outline is the SaMaMoe and the aspect that accused 2 said Fixan left the same day when he (accused 2) was saying Fixan was around the following day. He then also said Fixan left the same day but they saw him at the shops the following day. Asked what his brother said in his defence outline Fixan left for Bulawayo the same day, he said, no Fixan did not leave for Bulawayo the same day but the following day he was still there when he gave him the tablet cellphone as surety at the shops. Accused 1 also said Fixan and accused 2 had arrived at 7am and yet in his evidence in chief he had said they arrived at around 10am. He denied selling the cellphone at the shops but also it was his testimony that, at the shops when the cellphone was sold he got too drunk to recall most things. He said he could not comment on whether they got to cross roads as he was too drunk and had lost control of his faculties but nonetheless, he did remember the transaction where Fixan gave him the tablet cellphone as security and he gave Fixan \$40,00. When asked that the cellphone according to accused 2 was sold at cross roads he said he could not remember anything. Accused 1 clearly decided to have selective memory on this aspect.

This first accused's defence case has numerous problems.

Firstly, he told the court different versions in his confirmed warned and cautioned statement he talks of accused 2's brother Lizwe Moyo who came with accused 2. In his defence outline he talks of accused 2's friend whom he does not name. In his *viva voce* evidence he says it was accused 2's friend whom accused 2 called SaMamoe. He tried to disown his warned and cautioned statement but did not discharge the onus on him required by the law if ever he sought to disown it. In fact in his defence outline he does not mention any problems with the warned and cautioned statement at all. It is trite that a statement confirmed by a magistrate will be produced as evidence before the court without any further ado. Again in his statement to the

police he said that he bought a tablet cellphone, but in *viva voce* evidence he said it was given to him as surety against the sum of \$40,00 that he had learnt Fixan. In his defence outline paragraph 2, he gives the impression that during that period and at the material time, he lived at his father's homestead. He does not tell us anything about his arrival from South Africa on the night before, he then only tells us anything about his arrival from South Africa on the night before, he then only tells us this in his evidence in chief where he reveals that his father Elliot Dube had short down his version that he lived at his homestead. He then says he arrived at night all the way from South Africa, for the 1st time since 2015, did not announce his arrival and just went into a hut and slept, even the following morning, he did not wake up, until all the people had left for the fields? The accused was coming after 3 years since 2015 per his own testimony and he went into a hut in the middle of the night and slept until the following morning people woke up, left for the field and he just slept? This is very awkward it should be conveniently stated to try and explain why Elliot Dube did not see the accused all the time until when accused 2 arrived. When questioned on the circumstances wherein he exchanged the \$40 with the tablet cellphone he started to say he did not recall what happened at cross-roads as he was too drunk to remember. Yet on the other hand he vehemently denied selling the cellphone at cross-roads. So which is which? Did he remember what happened at cross-roads so that he could dispute selling the cellphone? Or did he get too drunk to recall anything that transpired there? Accused 1 was prevaricating in his story to the court which story as I have already illustrated was obviously very difficult for him to keep intact. His version fell apart on its own and this court can safely conclude that accused 1 is not a credible witness and that in fact he lied to this court. He even 1st told the court that his relationship with his father was good and that his father loved him but later at the end of his testimony when he was being asked questions that suggested that his father told the truth since he had no reason to lie against him, he then started yet another version that his father had sold his beast without his consent and he had questioned him about it so that could be the reason he lied. Accused 1's *viva voce* evidence showed clearly that even accused 1 had realised that his father's version was unassailable, because he then tried to sync his version with that of his father when he took to the witness stand. That is to say, he tried to change his version from that he had been residing at his father's homestead to that he had arrived unannounced at night with nobody seeing him. He also tried to shift his version to that this 2nd person who came

with accused 2 immediately went away to live with his girlfriend. So that Elliot Dube's testimony that he did not see any other person which is clearly the truth, could be explained when being juxtaposed with his version. The frantic efforts by accused 1 to tailor-make his evidence in chief so as to tally with Elliot Dube's evidence shows that even accused 1 himself saw that the witnesses' testimony could not be faulted in any manner.

In relation to the 2 accused his defence outline says he got a phone call from Fixan who asked him to assist in selling some clothes. He then suggested they sell them at the rural home exchanging them with maize. They then arranged to go to Silobela and Fixan would arrange the transport. Fixan then came with a silver Honda Fit which they used to take the clothes to Silobela. They found Freddy Dube (Accused 1) in Silobela. Fixan then wanted to see his girlfriend at cross-roads. They then went to cross-roads. When at cross-roads Fixan received a phone call from Bulawayo and he then left for Bulawayo. While still at cross-roads he told Fixan he had no money to fuel the car back to Silobela. Fixan then suggested that they sell his while Samsung cellphone, they looked for a buyer, found one and then sold the cellphone. Fixan then left for Bulawayo having said accused 2 should remain behind with the Honda Fit and selling the clothes, while still at Silobela he phones Fixan and requested to use the Honda Fit motor vehicle to Gwanda. He had a breakdown near Gwanda, he left the car in the custody of another person and when he came back he saw the police, he fled the scene as he had no drivers' licence.

In his *viva voce* evidence the 2nd accused person told the court that he received a phone call from his friend Fixan who said he had some clothes for sale. They agreed to sell the clothes in Esigodini and they did not manage to sell them, accused 2 then told Fixan they could sell the clothes in the village in exchange for grain. They then went to Silobela. At Elliot Dube's homestead in Silobela, he found accused 1 who told him he had arrived the previous night. Fixan then told accused 2 that he (accused 2) would find him at Msilahobe. Elliot Dube arrived and they then removed the clothes and started selling them to villagers. They then left for Msilahobe, where they picked Fixan and proceeded to cross-roads. At about 6pm Fixan then said he had received a phone call and thus had an emergency to attend and he was then leaving.

He said he would leave the motor vehicle and that because the motor vehicle had no fuel Fixan then suggested that a cellphone he had in his possession be sold to raise money for fuel. Accused 2 then sold it. Accused 2 then refueled the motor vehicle and went back to the rural home. He stayed at the rural home, sold the clothes and then told Fixan he had managed to sell the clothes. Fixan said he would then arrange for a truck to come and collect the grain. He then left with accused 1 in the motor vehicle for Bulawayo where he later met Fixan. He then gave Fixan a book with a list of what he had sold and he then requested from Fixan to use the motor vehicle on a trip to Gwanda. His motor vehicle developed a puncture and he left it to get assistance. When he came back there were then police officers by the motor vehicle causing him to flee since he had no drivers' licence.

Under cross examination he said that from Tovo 1 where Elliot Dube's homestead is to Msilahobe it's a distance of about 10 km. He then said when they got to Elliot Dube's homestead he drove as he is the one who was familiar with the place.

He was questioned why in his defence outline he stated that himself, Fixan and accused 1 left for the shops and yet in his evidence in chief, he now stated that Fixan left for Msilahobe first. The distance that Fixan was to walk to Msilahobe was about 10km and he was not familiar with the area. Under cross-examination he also stated that Fixan was to pay him commission. Questioned on that aspect which was not a departure from his defence outline where he said the 3 of them (accused 1, Fixan and himself) left for the shops and now that he was saying Fixan left alone he said his lawyer did not understand. He also confirmed that Elliot Dube did not see Fixan that is why he said only the 2 of them came. He confirmed that the Honda Fit had a small tyre.

Accused 2, like his brother told different versions to this court in that in his defence outline he does not tell us about Fixan coming to Esigodini to sell the clothes to gold panners and that it was only after failing to sell to the panners that the trip to Silobela was then mooted. In fact paragraph 2.2 of his defence outline says that he told Fixan that the only way he could assist him was by taking the clothes to his rural home. In his defence outline he says the 3 of them

Fixan, accused 1 and himself then left for Cross Roads when Fixan waited to see his girlfriend but in court he said that Fixan left on his own and decided to walk a distance of 10km. This is surprising as Fixan decided to walk for 10km in unfamiliar territory when in fact he had a car? Clearly, just like his brother, accused 2 realised that Elliot Dube was a credible witness and he then struggled to find a way to explain why Elliot Dube did not see Fixan that is why the information on the aspect of Fixan leaving to the shops now differs as between the evidence given orally in court and the defence outline. Accused 2 is merely trying to panel beat his story to try and adapt to the terrain of the evidence as given by Elliot Dube.

The question that this court has to answer is who murdered the 2 deceased persons in this case. That is the only question that this court has to determine. Everything else will flow after this aspect has been determined. The following is common cause:-

- 1) That deceased in count 1 was brutally murdered and dispossessed of his Samsung cellphone and his employer's Honda Fit motor vehicle that was in his custody.
- 2) That accused 1 and 2 were found to have been in recent possession of these items, precisely within 24 hours of the commission of the crime.
- 3) It is also common cause that the deceased in count 2 was brutally murdered and disposed of his employer's stock in trade that he was selling at Mucklenuck Business Centre. He was also dispossessed of his own tablet cellphone
- 4) Again, the 2 accused persons were found to be in recent possession of the items stolen from deceased in the 2nd count, within 24 hours of the deceased having been robbed of same.

Circumstantially, the only reasonable inference to draw would be that the 2 accused persons perpetrated the murders in question but for their attempt to proffer a defence that introduces a 3rd party, who supposedly brought these items and caused them to be in recent possession of same.

This court then has to make a finding as to whether the defences proffered are reasonably possibly true in the circumstances. This court's conclusion will be that the defences proffered

are not necessarily possibly true in the circumstances of this case and that in fact the defences are manifestly false and here is how.

Both accused persons departed from their defence outlines naturally as already shown herein because both had a fabricated version which when they realised after giving their defence outline to their lawyers, that the version were shattered after the testimony of Elliot Dube, they then desperately tried to panel beat in their oral evidence. As is usually the case they failed hopelessly as the glaring disparities could not be ignored.

They both frantically tried to explain why Elliot Dube did not see the 3rd person who had also arrived. Since this was an afterthought they failed dismally to account for Elliot Dube's failure to see the 3rd person. Accused 1 said that he, accused 2 and Brendon left for the shops and then changed to say it was him and accused 2 who left long after Fixan had gone. Accused 2 said in his defence outline all 3 left for the shops but later changed to say Fixan left earlier and on foot, walked 10km when he had a car, and he decided to walk in unfamiliar territory. Certainly these are just fibs. Fixan did not know this area and was taken by accused 2 for the sole mission of selling clothes, but suddenly had a girlfriend at the shops and had to abandon his purpose for selling clothes?

Again, at the shops Fixan sells a cellphone to fuel a car that is his that he then chooses to leave and use other modes of transport to travel to Bulawayo for an emergency? Not only does Fixan fuel a car that he decided not to use, Fixan in fact goes on to borrow \$40,00 for transport to go to Bulawayo, when he has a cellphone to sell and fuel his own car? In fact the 2 accused person's version on Fixan are so hopeless that they are in fact clearly false. Accused 1 calls Fixan Lize Moyo in his confirmed warned and cautioned statement, a brother to accused 2. In his defence outline he refers to this Fixan as accused 2's friend whose name is apparently not mentioned. In his evidence in chief he calls this Fixan "SaMaMoe" and says that what accused 2 called Fixan. It is surprising how this Fixan when he arrived at Elliot Dube's homestead, suddenly got disinterested in his very purpose for this journey. He just left everything and went to see his girlfriend by the shops. Not only did he abandon his mission but he walked for 10km in

unfamiliar territory, leaving someone else to use his car? The different version told by the 2 accused persons in regard to what happened in relation to this Fixan on the day they arrived at Elliot Dube's homestead, it testimony enough to show that this is a fictitious person that has been brought in through a concocted story to try and avoid culpability. Fixan does not exist. This is buttressed by the fact that the evidently credible and honest. Elliot Dube never saw this person. As a result this court will further find that what Elliot Dube told the court in relation to the arrival of the accused person, is the only truth. It being the only truth, this court will safely conclude on the basis of Elliot Dube's version that, the accused persons did arrive together driving the Honda Fit stolen from the deceased in count 1 and carrying the loot stolen from deceased in count 2. They claimed to be coming from South Africa and they did profess ownership of the assets that they brought. Elliot Dube was even given by them a pair of takkies which they would not be able to just distribute in the absence of the owner, if indeed the owner was a 3rd party. It is for these reasons that this court will dismiss the 2 accused persons' version, not only as being improbable and unreasonable, but as being manifestly false. I accordingly find that it is the 2 accused persons who murdered and robbed both the deceased in a bid to dispossess them of their belongings. The 2 accused persons did act wrongfully and unlawfully on the date in question.

The verdict

The 2 accused persons set upon a mission to rob the 2 deceased persons and violently butchered the 2 deceased to accomplish such a mission and successfully implemented their plan. The only reasonable conclusion that can be made on the actual status of the 2 accused persons in both counts, is that they intended to kill their victims in a bid to rob them. The 1st deceased had numerous stab wounds to the head and face, both vulnerable parts of the body. The 2nd deceased was also battered several times on the head resulting in multiple skull and face fractures. Both the vulnerable parts of the body. The accused persons could not have harboured any other intention except to kill. It is for these reasons that both accused persons are found guilty of murder with actual intent on each count.

Finding on aggravating circumstances

The 2 accused persons are convicted of 2 counts of murder with actual intent. The state has submitted that these murders were committed in aggravating circumstances, warranting that the death sentence be imposed for the following reasons:

- That the murders were premeditated
- That they were committed during the carnage of a robbery
- That they were committed in a series of 2 or more seeing they are 2 counts.

Both defence counsels have not submitted anything to cause the state submission as clearly there is nothing meaningful that can be submitted in its regard. This court finds that there are indeed aggravatory circumstances in this matter in that the 2 accused persons set upon a mission to rob the deceased, they voluntarily butchered the deceased in order to accomplish their mission, they then dispossessed the deceased of their property. They also killed 2 people over a short period of time. It is the finding of this court that there were indeed committed in aggravating circumstances warranting that capital punishment be imposed. The 2 accused persons cannot escape capital punishment in the circumstances.

Sentence

Both accused persons are sentenced to death on each count.

National Prosecution Authority, state's legal practitioners
Tanaka Law Chambers, 1st accused's legal practitioners
Lazarus & Sarif, 2nd accused's legal practitioners