

THE STATE  
**versus**  
NHLANGANISO LUPHAHLA  
and  
AUGUSTINE NCUBE

HIGH COURT OF ZIMBABWE  
MATHONSI J with Assessors Mr Sobantu and Mrs Dhlula  
BULAWAYO 16 AND 17 FEBRUARY 2016

### **Criminal Trial**

*W. Mabhaudi* for the state  
*Mrs N. Dube-Tachiona* for the 1<sup>st</sup> accused  
*R. Dzete* for the 2<sup>nd</sup> accused

**MATHONSI J:** Only three words are needed to describe the killing of a 16 year old girl Praise Mpofu and the attack on her partner Brian Dube on 15 July 2015 on the shores of the mighty Zambezi River: senseless, cruel and evil.

On the afternoon of 15 July 2015 the deceased and her boyfriend were taking a stroll along the Zambezi River when the romantic and idyllic scene they had set up for themselves was disturbed by the arrival of two rogue elements, one wielding a log. They accused the deceased and her companion of treading on a prohibited area. As the boyfriend sensed danger and tried to dial a number on their cellphone he was struck with a log on the back of the head and later pummelled until he lost consciousness. He was undressed, had his hands tied from the back and robbed of all his valuables which included a black satchel containing a white medion akoya laptop, earphones, an MP3 with a 4 gigabytes flash, some sweets and a black Samsung cellphone belonging to the deceased which he was holding.

The deceased was then frog marched further up the river bank and into the thick bushes away from the boyfriend who was still being attacked with a log on the head by one of the assailants. At another spot the deceased was struck with logs on the head and neck until she died. Her lifeless body was dragged into the river where it was later found floating long after the assailants had made good their escape.

The two accused persons are facing a charge of robbery and another of murder resulting from the facts I have just outlined. In the first count it is alleged that on 15 July 2015 and along the Zambezi River in Victoria Falls the two of them wrongfully, unlawfully and intentionally used violence against Brian Dube, aged 21, in order to induce him to relinquish control over his property which is to say that they hit him on the head several times threatening to kill him before stealing his black satchel, medium akoya laptop, a black Samsung cellphone, an eight gigabytes flash, earphones, an MP3 with a four gigabytes memory card and cash amounting to \$11-00. In the second count, it is alleged that on the same date they each or one of them did wrongfully, unlawfully and intentionally kill Praise Mpofu a female juvenile.

The allegations are that the first accused was aged 34 while the second accused was aged 27 and residing at A5745 Old Pumula Bulawayo and 7153/22 Pumula North, Bulawayo respectively when they robbed the complainant in count one and killed his girlfriend Praise Mpofu in the manner that I have outlined above.

The two accused persons pleaded not guilty to the charges and in his defence outline, accused one stated that he travelled to Victoria Falls with accused two in order to visit his younger brother who had bought a car. On the fateful day the two of them proceeded to the Zambezi River to collect Zambezi water for accused two which he needed for use at his church. Once there they met one Nhlalo Lunga, a friend of accused two. The deceased and Brian Dube were also by the river. Lunga then accused Brian of sleeping with his girlfriend, the deceased. As Lunga and accused two confronted the two love birds as he, accused one, watched, the deceased ran into the bush with Lunga in hot pursuit. Accused two struck Brian with a log causing him to faint before following Lunga and the deceased into the bushes leaving him trying to resuscitate Brian.

Although Lunga returned accused two remained in the bush with the deceased who was heard screaming before she became silent. Upon his return, accused two started interrogating Brian and he, accused one, left Brian being interrogated by accused two, and does not know what became of the victims. He admitted taking the laptop, the Samsung cellphone and \$11-00. He later sold the laptop in Bulawayo. In his defence outline accused two admitted being in Victoria Falls on the fateful day along with accused one. He and accused one then went sightseeing by

the Zambezi River as he, accused two, had never been there. As they did that, he did not know that accused one was a murderer who wanted to recruit him to be part of his nefarious deeds.

Accused two went on to state that they indeed met the deceased and Brian Dube at a secluded place by the bush. Accused one was armed with an okapi knife which he then used to threaten him ordering him to participate in the robbery of the deceased and Brian. They then proceeded to rob them. Accused one took the deceased away and it was only later that he found out that the deceased had been killed. He did not take part in that killing which was done by accused one and he only participated in the robbery under duress.

Almost all of the evidence lined up by the state was admitted by the accused persons in terms of section 314 of the Criminal Procedure and Evidence Act [Chapter 9:07] as it appears on the state outline. That is the evidence of Oliter Sibanda, Kirth Nyathi, Justice Simali, Kudakwashe Chibira, Enock Dende, Ngonidzashe Zhou, Artwell Sibanda and Dr Roberto Trecu.

In addition to that we have the post mortem report of Dr Roberto Trecu and the medical report of Tofireyi Patson which were produced in terms of s278(2) of the Criminal Procedure and Evidence Act [Chapter 9:07]. That section provides that in any criminal proceedings in which it is relevant to prove any fact ascertained in any examination carried out by or any opinion of a medical practitioner relating to any fact or treatment, an affidavit made by the doctor stating that he or she carried out such an examination and ascertained facts and arrived at such opinion, shall be *prima facie* proof “on its mere production” of those facts and that opinion.

The admitted evidence proves the following, that;

- 1) The two accused persons visited accused two’s aunt at her curios stand at about 14:30 hours on the day in question dressed in clothing that was observed by Brian Dube during the attack. They left Oliter Sibanda going to the Zambezi River.
- 2) On 17 July 2015 accused one sold the median akoya laptop stolen from Brian to Kirth Nyathi at a shop at Bulawayo Centre. When Kirth Nyathi learnt of the robbery and murder in Victoria Falls he suspected that the laptop he had purchased from accused one was stolen there. He then approached the police and gave them a description of accused one which may have led to his arrest.
- 3) On 16 July 2015 the deceased’s body was found floating in the Zambezi river with head injuries. Two blood stained logs and clothing were recovered from the scene.

- 4) When accused one was arrested in Bulawayo on 18 July 2015 he was found in possession of a black satchel, grey shoes, green tracksuit bottom, red Polo striped T-shirt and a Samsung cellphone, property which and either been stolen from the victims or was worn by him at the scene of the crime.
- 5) Subsequent to that both accused persons made indications at the scene freely and voluntarily and were also picked out by Brian Dube at separate identification parades conducted on 20 and 26 July 2015 at Victoria Falls Police Station.

Over and above the admitted evidence which squarely places the two accused persons at the scene of the crime and links accused one to both crimes by virtue of the property of both the deceased and Brian Dube which he either sold or was found in his possession, there was also the medical evidence produced in terms of s278 of the Criminal Procedure and Evidence Act [Chapter 9:07].

Dr Roberto Trecu who conducted the post mortem observed the following marks of violence on the body of the deceased;

- “1. Circular haematoma on the right foot.
2. Two circular laceration(s) and abrasion on the left hand.
3. Abrasions on the left knee, chest, right shoulder, right eye.
4. Two circular lacerations on the lower lip.
5. Laceration on the occipital area.”

He also noted a skull bone fracture and concluded that the cause of death was

- “1) severe cerebral damage
- 2) subdural haematoma and skull fracture
- 3) severe head trauma due to beating injury.”

In addition to the above admitted evidence and the medical evidence produced in terms of the law, the state led evidence from Brian Dube, the surviving victim. He was a very impressive witness and the clarity of his delivery left the defence with scarcely anything to challenge in his testimony. He was quick to point an accusing finger at the two accused persons as being the only people who attacked them on 15 July 2015.

Brian was very clear that it was accused two who attacked him with a vicious log which he identified in court, exhibit 2, a very ugly and lethal weapon weighing 2,240kg which is 1,1 metres long. He told of how he passed out as a result. He later regained consciousness only to

be frog-marched into the bush where accused two produced an okapi knife which he used to threaten the deceased and he tried to rape her.

According to Brian it is accused one who dragged the deceased further into the thicket as accused two remained clobbering him with a log. He later heard the deceased screaming from the thicket where accused one had taken her. Although he tried to stand up to see what was happening to her (he had been made to lie down with his hands tied from behind), accused two struck him with a log several times until he lost consciousness. He only regained consciousness in the evening and he got assistance. He was admitted to hospital for four to five days and has still not recovered as he has a fractured neck and has problems with his eye sight.

Brian does not know at what stage the deceased died and who killed her although her screaming occurred when she was with accused one. He also does not know if she was eventually raped before she died.

Brian Dube gave his evidence extremely well. A clever young man whose level of education is Form 6, he did not try to exaggerate anything, his demeanor was perfect and as such we have no reason to fault his story. In any event, it is a story that is corroborated by all the admitted evidence and to a large extent, by the accused persons' own escalatory testimonies.

Drama started when the two accused persons started presenting their defences. They did not hesitate to blame each other for the offences as they desperately tried to down play their roles in the commission of the offences. In the end their defences are mutually destructive. They engaged so much in character assassination of each other that in the end nothing meaningful could be picked from the ruins.

Accused one tried to project accused two as the main perpetrator together with a fictitious figure by the name Nhlalo Lunga who just happened to emerge from nowhere at the scene of the crime and to then conveniently disappear from the surface of the earth even before he had accomplished what he had come for. Suddenly accused two who, according to him has a church which required, not holy water as is in vogue at the moment, but Zambezi water, had turned into a fiend who just set upon both Brian and the deceased unprovoked and with no discernable motive.

Accused two also tried to minimize his involvement and to present himself as the victim of duress who participated in the crime at the behest of accused one who had recruited him to the

world of murderers that he belonged to. But then life can never be that easy and one cannot get away with such heinous criminal conduct by authoring a fiction story with neither an introduction, theme, nor indeed a conclusion. Rocket science is not required to see the defences of the two accused persons for what they are, a tissue of lies by desperate individuals confronted with so overwhelming evidence that they could not conjure anything meaningful in their defence. Accused two failed dismally to establish the essentials of compulsion as provided for in s243 of the Criminal Law Code. The evidence of Brian Dube which we have accepted not only places them at the scene of the crime, it also shows that they were co-perpetrators. Accused two struck the first blow on Brian and continued immobilizing him with blows as accused one dragged the deceased away to her death kicking and screaming.

The accused persons wasted a lot of their time trying to point at each other as being the person who struck the fatal blow. In our view that was an exercise in futility because the law as it stands now places the onus on them to prove that they did not associate with each other.

In terms of s196 (1) and (2) of the Criminal law Code [Chapter 9:23];

“(1) Subject to this section, where –

- (a) two or more persons knowingly associate with each other with the intention that each or any of them shall commit or be prepared to commit any crime; and
  - (b) anyone of the persons referred to in paragraph (a) (‘the actual perpetrator’) commits the crime; and
  - (c) anyone of the persons referred to in paragraph (a) other than the actual perpetrator (‘the co-perpetrator’) is present with the actual perpetrator during the commission of the crime;
- the conduct of the actual perpetrator shall be deemed also to be the conduct of every co-perpetrator, whether or not the conduct of the co-perpetrator contributed directly in any way to the commission of the crime by the actual perpetrator.

(2) If the state has established that two or more accused persons—

- (a) were associated together in any conduct that is preparatory to the conduct which resulted in the crime for which they are charged; or
- (b) engaged in any criminal behavior as a team or group prior to the conduct which resulted in the crime for which they are charged; and that they were present at or in the immediate vicinity of the scene of the crime in circumstances which implicate them directly or indirectly in the commission of that crime, then it shall be presumed, unless the contrary is shown, that –
- (c) they knowingly associated with each other for a criminal purposes; and
- (d) the crime actually committed—

- (i) was the crime for the commission of which they associated with each other; or
- (ii) was, if not the specific crime for the commission of which they associated with each other, a crime whose commission they realized was a real risk or possibility.”

Subsection (8) of s196 makes it clear that the section can only be used to convict a co-perpetrator of murder if he or she was present with the actual perpetrator while the victim was still alive and before the mortal wounds had been inflicted. It does not help the accused persons because they were present.

In our view, the matter is resolved. There can be no doubt that the two accused persons acted in common purpose in robbing their victims and killing the deceased. Their intent is apparent from their conduct. They first pummelled the boy, Brian who may have posed more danger to them. The blows with a log were directed at the head clearly intending to kill him. When they left him he had passed out and they thought that he was dead. It was only by dint of luck that he survived to help bring the culprits to book.

Having accounted for the boyfriend they were left with the deceased at their mercy, a juvenile girl of 16 years. Physically she had no chance against two mature and strong man. Whatever their reason was for dragging her further into the bush shall forever remain a mystery because she was not allowed to live to tell her story. There was therefore method in all this madness. To eliminate all possibilities of evidence that would lead to their arrest.

I have already referred to the post mortem report and the nature of the injuries. In addition to that her body was thrown into the river as a complete seal of disposal, a clear indication that she was given no chance to survive.

It was stated in *S v Mugwanda* 2002(1) ZLR 574 (S) 581 D- F that for a trial court to return a verdict of murder with actual intent, it must be satisfied beyond a reasonable doubt that:

- (a) either the accused desired to bring about the death of his victim and succeeded in completing his purpose; or
- (b) while pursuing another objective, the accused foresees the death of his victim as a substantially certain result of his activity and proceeds regardless.

After fatally bashing the deceased the way they did, a helpless and innocent young girl, the

accused persons went on to dispose of her body by throwing it into the Zambezi River presumably in the hope that it would be washed away never to be seen again. They could only have desired one outcome, bringing about her death. In any event this was a murder committed in the course of a robbery, a robbery which could have been achieved without killing anyone.

In the result, the two accused persons are found guilty of murder with actual intent. They are also found guilty of robbery.

#### Reasons for sentence

In assessing sentence we have considered all the mitigating factors which have been set out by your respective legal practitioners. In respect of accused one, he is 34 years old while accused two is 28 years old. Accused one is a first offender and a father of two minor children. He is married, and is the sole breadwinner. Accused two is married with children, is a vendor, has a previous rape conviction.

Whatever it is that is there in favour of both accused persons pales to insignificance when considered against the aggravation. Two young people were having a quiet afternoon in the comfort of each other's company, as they were entitled to in a free Zimbabwe, when they were accosted by two blood thirsty and senseless assailants who mercilessly preyed on them in the most despicable and unimaginable fashion.

The degree of violence directed against them was so much that there can be no justification whatsoever for it. It is the type that could only be perpetrated by a fiend, the real incarnation of the devil.

Just what has become of our society. Children deserve to joyfully run up the fields, to bask in the sun and to swim in our rivers which are our heritage without fear of lurking danger. They deserve to grow up in an environment of freedom and happiness not to be always locked away at home in fear of being targeted by criminals with no respect for other people's lives and freedom.

Society does not need people like you with an insatiable thirst for blood, people who can still sleep soundly at night after battering a defenceless young girl and throwing her body to crocodiles. It is the duty of this court to come hard on such individuals in order to register society's revulsion at such criminality and to uphold the sanctity of human life. This country can

ill-afford to continue losing blossoming human capital at the hands of senseless criminals who themselves do not add any value to society and are in fact a lost cause.

You deserve to be permanently moved from society so that our children can live a normal life and have their turn in society.

Accordingly, you are sentenced as follows:

1. On one count of robbery you are each sentenced to 10 years imprisonment.
2. On one count of murder – you are each sentenced to life imprisonment.

*National Prosecuting Authority, the state's legal practitioners  
Dube-Tachiona & Tsvangirai, 1<sup>st</sup> accused's legal practitioners  
Maronedze, Mukuku and Partners, 2<sup>nd</sup> accused's legal practitioners*