

STATE
versus
PRINCE DYLAN MATORE
and
MICHAEL SIMBEYE

HIGH COURT OF ZIMBABWE
MUSAKWA J
HARARE, 6, 8, 13 & 16 February, 2, 12 & 14 March 2012, 27 October 2014, 31 March & 31
October 2016 & 19 January 2018

ASSESSORS: 1. Mr Chidyausiku
2. Mr Gonzo

Criminal Trial

(C. Manhiri), S.W. Munyoro, for the state
E. Duri, for the first accused
(S. Machiridza), (P. Chikangaise) V. Nyamukapa, for the second accused

MUSAKWA J: The accused persons are charged with murder to which they pleaded not guilty. The matter has dragged for an inordinately long time.

The facts of the matter are that on 12th July 2005 the deceased Wenceslans Mazvimavi arrived at the gate to his residence at 125 Goromonzi. It was around 2000 hours. He was driving a Nissan Hard Body vehicle with registration number 811-066 S. After he alighted from the vehicle in order to open the gate he was attacked by three people. In the process he was dispossessed of the vehicle. Soon thereafter deceased collapsed after attempting to follow the vehicle when it was being driven away. He sustained an injury at the back below the left shoulder. Upon being referred to Avenues Clinic he was pronounced dead after a short while. The accused persons were arrested whilst in possession of the stolen vehicle on 15th July 2005 at Kandeya Business Centre, Mount Darwin.

The first accused's defence outline states that on the day of the alleged offence he was at home in Zengeza 1. A brother of the second accused, Charles Simbeye visited him in the

company of Washington Kembo who had a problem with his leg. Charles Simbeye asked the first accused if he knew of a traditional healer whom they could consult. The first accused advised them to consult his mother in-law who resided in Rushinga.

On 14th July 2005 Charles Simbeye visited the first accused in the company of Prince Kembo who is a brother to Washington Kembo. They were driving a Nissan Hard Body with registration number 811-066 S.

On the following day Washington Kembo, Charles Simbeye and Prince Kembo visited the first accused using the same vehicle and a minibus that was being driven by Prince Kembo. All four of them proceeded to Mbare where Charles Simbeye went to a flat and came back with the second accused. It was the second accused who was to accompany them to Rushinga.

The two accused persons and Washington Kembo then drove to Rushinga via Shamva. In Mount Darwin they joined a fuel queue at Kandeya Business Centre. Later a Support Unit vehicle came with Police Officers who ordered them to lie down. They were accused of committing robberies in Shamva. They were assaulted. Upon being taken to Mount Darwin Police Station they were further assaulted.

The assaults persisted on the following day. They were then transferred to Goromonzi where they were again subjected to further assaults. The same ill-treatment happened when they were taken to Marondera.

On the other hand the second accused's defence outline is to the effect that he together with the first accused and the now deceased Washington Kembo planned to steal a vehicle which they would use to provide transport services to rural farmers. Thus they identified a vehicle that was used by the deceased. They then waited for the deceased to return home.

As they waited for the deceased, the latter arrived and opened the gate. That is when the second accused went inside the vehicle and drove it away. He denied any physical confrontation with the deceased. His colleagues pulled away the deceased in order to prevent him from getting to the vehicle. He was not armed as his task was to drive the vehicle.

The state opened its case by producing affidavits by Doctors Maenzanise, Maunganidze and Masokovere by consent.

In his affidavit Doctor Maenzanise states that on 12th July 2005 he was at home when he received a call from deceased's wife. He proceeded to Ruwa Family Clinic where he waited in the car park. Deceased was brought in a vehicle. He was lying unconscious on the back seat. He

noted that there was no pulse and no breathing. His shirt was blood stained. There was a stab wound at the back below the left shoulder and it had stopped bleeding. He dressed the wound and referred deceased to Avenues Clinic.

Doctor Masokovere a government pathologist conducted the autopsy on the deceased's remains on 13th July 2005. He noted that the deceased had a stab wound on the left middle of the scapular which was 3cm in length and 'L' shaped. The wound was 3cm from the spinal cord. The top of the right foot had a 2cm cut. There was a cut between the third and fourth left posterior ribs. There was also a cut in the middle lobe of the left lung as well as a cut in the superior lobe. There was approximately three litres of blood in the left chest cavity. He concluded that the cause of death was hypovolemic shock and lung injury arising from stabbing.

Ernest Mazvimavi a young brother of the deceased was the first state witness. He told the court that at the time of the incident he resided with the deceased and his family. He used to see the second accused at Goromonzi Rural District Bar when he accompanied the deceased. On the morning of the fateful day the deceased had taken the witness to school in the morning. He was then doing Form 4 at Chinyika School.

Around 8 p.m. on that day he heard the sound of a vehicle approaching. He went towards the gate as he used to open it for the deceased. Before he rounded the corner as he made his way from the gazebo he heard a muffled cry.

As he arrived at the gate he saw deceased being manhandled by three people. The vehicle was facing the gate. The second accused then got into the vehicle and drove it into some object as he tried to maneuver it. Then one of the three persons ran and got into the vehicle as the third one remained where the deceased was.

The witness and deceased tried to follow the vehicle. In the process deceased fell down and the witness took him to a nearby guava tree. The third assailant who had remained behind then passed them walking very fast.

The witness rushed home from where he returned with the deceased's wife using another vehicle. A neighbor, Lloyd Moyo took over driving from the deceased's wife. The deceased was placed in the back seat and they went to Goromonzi Police Station. They did not take long at Goromonzi Police Station from where they proceeded to Ruwa where the deceased was attended to by Doctor Maenzanise. Thereafter they proceeded to Avenues Clinic where the deceased was soon pronounced dead.

After the deceased's burial he was invited to Goromonzi Police Station where he saw the motor vehicle that had been recovered. The motor vehicle had damages. He could not recall which part had been damaged. He could also not recall its registration number. He was present when accused persons made indications at the scene of crime.

The court noted that this was a bitter witness. He stated on his own that given the chance he would avenge the deceased's death. He admitted that on the day the accused persons made indications he wanted to assault them. Police had to restrain him. His bitterness is understandable. After all, on the fateful day deceased's last words were to the effect that the witness had let him down.

Despite the apparent bitterness his evidence was straightforward notwithstanding his failure to recall such mundane details like the registration number of the vehicle. He did not seek to exaggerate. If he was really out to fix accused persons he could have claimed to have identified all three assailants at the scene of crime. He seemed not to have noted what was being indicated by the accused persons on account of the emotions that were running high. He did not even attempt to claim that he saw the deceased being stabbed by any of the accused persons.

Lloyd Moyo, a neighbor of the deceased testified in connection with the assistance he rendered from the time he responded to the distress call. His evidence corroborated that of Ernest Mazvimavi. The only difference between their testimonies was that according to Lloyd Moyo the purpose of going to Goromonzi Police Station was to report the incident. On the other hand, Ernest Mazvimavi stated that they had gone to seek Police assistance which was not forthcoming.

The next witness to testify was Assistant Inspector Ncube of Support Unit. He stated that on 15 July 2005 they were on duty at Border Gezi Youth Training Centre in Mount Darwin when they received a report in respect of the accused persons.

Having been given the description of a Nissan Hard Body with registration number 811-066 S they proceeded to Kandeya Business Centre which was a short distance away. They saw the vehicle in a fuel queue. They swiftly approached it and ordered the occupants to disembark and to lie down on their bellies with hands on their heads. He had noted that of the three occupants one was in the front seat whilst two were at the back. They appeared to have been drinking as there were two empty beer cans on the ground. The occupants of the vehicle

were the two accused and one Washington Kembo. There were twenty six rounds of ammunition in the vehicle.

As the accused persons lay on the ground a mob converged on the scene. Some members of the public commenced to assault one of the suspects and Police Officers managed to quell the lynching. They subsequently handed over the suspects and the exhibits to Mount Darwin Police.

This witness gave his evidence in a forthright manner. His recollection of events given the time lapse was good. He did not take note of every minute detail of operation and this appears to accord with the exigencies of the situation they found themselves in.

The next witness to testify for the state was Detective Sergeant Kusema. At the material time he was based at Marondera Police Station and attached to Criminal Investigations Department.

He became aware of the case a day after its occurrence. He was not part of the team that went to collect suspects from Mount Darwin. However, he was part of the team that went for indications at Goromonzi. His role was to take photographs. As always happens in respect of indications he could not distinguish between what was pointed out and what the accused said in pointing out. It is trite that what a suspect says in pointing out must always be proved by the prosecution to have been said freely and voluntarily.

The witness produced photographs that he took of the two accused when they made indications. It was also noted that the photographs had accompanying explanations from the accused persons regarding what was being pointed out. The court had to direct the prosecutor to delete part of the narration as it was clearly inadmissible as against the accused persons.

The photographs in question depict accused persons making indications against the background of features the witness explained as being found in the vicinity of the place where the deceased resided. Some of the remarkable features were a dump site, a house that was under construction as well as a white single cab vehicle with a canopy. Its registration number is 811-066 S. It must be noted that these are mute indications as the state did not seek to lead evidence on the statements accompanying them. Suffice to also note that both accused persons were in handcuffs and were barefooted.

The last witness to testify for the state was Fungai Kagunguwe who used to be a member of Criminal Investigations Department at Marondera.

He was part of a team of detectives that went to collect the accused persons and the motor vehicle and ammunition from Mount Darwin on 16 July 2005. He went in the company of detective assistant inspectors Chaparira and Ndebele. On the way back he rode with the accused persons at the back of deceased's vehicle. None of the suspects complained of any pain or injury. The motor vehicle was subsequently identified by Ernest Mazvimavi. Ernest Mazvimavi also confirmed to them that the ammunition belonged to the deceased. He denied that the accused persons ever mentioned the name Charles Simbeye during the course of their investigations. He also witnessed accused persons making indications in Goromonzi. The indications were made separately. The places that were pointed out were deceased's residence, a building that was undergoing construction, a dirt road and a bushy area.

The first accused person testified in his defence. He maintained that he was not present when the deceased was attacked. He claimed to have been in Chitungwiza where he sold fuel. He claimed to have been in the company of Farai and Lameck Madziro. In the evening of the day of the incident he claimed to have been at home with his wife.

As for the trip to Mount Darwin, the first accused stated that the second accused's elder brother, Charles Simbeye came driving the motor vehicle they were eventually found in possession of. Together they went to Mbare where they met one Washington Kembo. Washington Kembo is a brother-in-law of the second accused. The second accused also emerged. Charles Simbeye indicated that he could no longer travel to Mount Darwin but the second accused was now going to drive them. Apparently Washington Kembo had a problem leg. The first accused's mother-in-law was a traditional healer and Washington Kembo was going to consult her.

The first accused confirmed their arrest at Kandeya Business Centre. He also chronicled the ill-treatment and assault they were subjected to by Police Officers.

It emerged during the cross-examination of the first accused that he once worked as a Prison Officer. However, at the time of this offence he had left the job. He claimed that he got to know that the vehicle was stolen a day after his arrest. He further stated that the second accused only confessed to theft of the motor vehicle when they were in Marondera. He also claimed that the second accused and his brother used to steal motor vehicles. As to why the second accused implicated him, he stated that the second accused wants to protect his brother. The second accused's brother was said to have been facing a slew of other allegations. He insisted that

Charles Simbeye was involved and despite Police Officers being informed they remained indifferent.

At the commencement of his evidence in-chief the second accused indicated that he was admitting to the charge. Upon clarification from defence counsel he stated that he was not involved in the killing of the deceased.

The second accused stated that he was approached by the first accused who had been referred to him by his sister, one Stella. In the course of discussing the prevailing economic hardships the first accused suggested that they should procure a motor vehicle for income generation.

When they went to the local shops they met the second accused's brother in-law, Washington Kembo. They discussed a plot to steal a motor vehicle. As it turned out there was a parked Nissan Hard Body close by. The first accused suggested that they should steal a similar motor vehicle. Washington Kembo indicated that he knew the owner of the Nissan Hard Body and that they could way-lay him at the gate to his house. It also turned out that the second accused knew the deceased's young brother, having attended the same school.

According to the second accused the plan was that if the owner of the targeted motor vehicle resisted they would use stones. He denied that they were armed with any weapons. They took positions outside the gate, with the second accused on one side. When the deceased arrived, he disembarked in order to open the gate. The second accused ran behind the motor vehicle and got inside. He engaged reverse and ran into a ditch. He struggled to get out and drove and stopped after about 50 metres. He opened the door and called out to the others who told him to proceed. As he drove off someone banged on the motor vehicle signaling him to stop. It turned out to be the first accused.

Thus the second accused denied having a confrontation with the deceased. He did not know about the deceased's death until Police informed them the day after their arrest. He further stated that when the first accused got inside the motor vehicle he explained that he had dispossessed the deceased of a bunch of keys to which was attached a knife. In the process of dispossessing the deceased, the latter had been 'scratched' on the shoulder.

Post the robbery, it was the second accused's testimony that they decided to drive far. Hence the journey to Mount Darwin. It had been mooted that they offer transport to cotton farmers in Muzarabani.

In quite a number of respects the second accused was very candid in some of the developments. For example, he explained what led to their arrest at Kandeya. In Shamva they had robbed the owners of an ox drawn cart. This is the incident that led to their arrest. He also denied that they were assaulted save for Washington Kembo. He explained that Washington was assaulted by members of the public because he had attempted to flee.

The second accused also told the court that upon being questioned he admitted that they had stolen the motor vehicle. In the process he implicated the first accused and Washington Kembo. He disputed the first accused's claim that he has a brother called Charles Simbeye. He denied that his brother was involved in the robbery. He gave the names of his brothers as Justice, Marley, Simon, Kelvin and Stanley.

The second accused also told the court the assaults he received at the hands of police officers had nothing to do with the present case. The Police Officers who assaulted him were from Vehicle Theft Squad.

In further contradicting the first accused, he told the court that he had never seen the first accused with a wife. Whilst in custody the first accused wrote a statement in which he sought to implicate the non-existent Charles Simbeye. The first accused sought to influence him to adopt that version.

At the close of the State case Mr *Duri* sought the discharge of the first accused, contending that no *prima facie* case had been established against him. I dismissed the application and indicated that full reasons will be provided in the main judgment. In the first place, the evidence that was placed before the court was such that a court acting carefully might convict the first accused. The first accused's association with a motor vehicle that had been stolen in the course of a fatal robbery needed an explanation. Secondly, the first accused had subsequently pointed out certain features at the scene of crime. If he was not involved in the robbery, how did he happen to make the indications? These were the two factors that the court considered in dismissing the first accused's application for discharge at the end of the State case.

It took so long for respective counsels to file their closing submissions. State counsel only filed his submissions on 1 September 2017. At some stage a phone call had to be made to the Deputy Prosecutor General to prevail upon Mr *Munyoro* to attend to the outstanding issues. Granted that Mr *Munyoro* is not the original prosecutor, he had had ample time to familiarize himself with the facts of the matter. As at the time of handing down judgment the defence

counsels had not filed their closing submissions and such conduct is deplorable. Mr Duri brought to the court's attention that he filed his submissions on 20 October 2017. He availed a copy stamped by the Registrar but curiously his submissions never found their way into the record. He nonetheless gets the benefit of the doubt in that regard.

Analysis Of The Evidence

The second accused placed himself at the scene of crime. The only issue in as far as his liability is concerned is whether there was common purpose with the first accused and the outstanding suspect to kill the deceased. I will revert to some aspects of his testimony later.

Ernest Mazvimavi testified that he saw three people manhandling the deceased. He was candid enough to admit that he did not see the actual stabbing of the deceased. He only saw the deceased subsequently collapsing after the assailants had gone.

Even though Ernest Mazvimavi did not identify the first accused, we will accept the second accused's testimony that he was present. Evidence of the second accused is admissible against the first accused. The second accused did not waver on his insistence that the first accused was present. In the first place, it was the second accused's testimony that they plotted the robbery together. It would not be coincidence that Ernest Mazvimavi also observed three people although he only identified the second accused. It is also no coincidence that the accused persons were arrested whilst in possession of the stolen motor vehicle three days after the robbery.

The first accused's explanation for the trip to Mount Darwin is again at cross purposes with that given by the second accused. The first accused's explanation for the trip is that they wanted Washington Kembo to consult his mother-in-law who is a traditional healer. If they were truly going to Mount Darwin for that purpose was there need to divert to Shamva where the robbery of the cart crew took place? One would have expected the accused persons to head straight to Mount Darwin. I am aware that ultimately Shamva links with Mount Darwin, but the explanation given by the second accused appears more convincing. I do not see why the second accused was willing to incriminate himself unless there is some truth to it. If the second accused had simply sought to incriminate the first accused whilst completely exonerating himself there would have been cause to be more cautious.

Although the first accused claimed the defence of *alibi*, this is rebutted by the testimony of the second accused. Again, there is corroboration of the second accused's testimony from the fact that Ernest Mazvimavi saw three people struggling with the deceased. Even though the first accused claimed to have been with his wife, it was again the second accused's testimony that he was not married. The matter was postponed several times to enable the first accused to secure the person he claimed to be his wife. The best the court heard was that she was in Botswana. No convincing explanation was advanced as to why that witness could not travel to Zimbabwe. As for other witnesses the first accused intended to call, it turned out that they are deceased. These are Farai and Lameck Madziro, whom the first accused claimed were in his company on the day of commission of the offence. It turned out from cross-examination of the first accused by counsel for the second accused that Farai Madziro died in 2008 whilst serving a prison term at Chikurubi Prison.

The matter stands to be decided on the basis of the law that was applicable prior to the promulgation of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. In this respect reference is made to s 284 of the Code. The present matter was committed prior to the enactment of the Act.

State counsel cited the case of *S v Mgedezi and Others* 1989 (1) SA 687 which is authority on common purpose. The case is one of the authorities cited in *S v Mubaiwa* 1992 (2) ZLR 362 (S) in which McNALLY JA had this to say about common purpose at 370-

“The landmark decisions on common purpose in Southern Africa start with *S v Safatsa* 1988 (1) SA 868 (A), yet neither that case nor any but one of the many that have since followed it were cited either in this court or in the trial court. I refer in particular to *S v Mgedezi & Ors* 1989 (1) SA 687 (A); *S v Motaung & Ors* 1990 (4) SA 485 (A); and *S v Khumalo & Ors* 1991 (4) SA 310 (A).

These cases make it clear that:

1. Each individual in a common purpose case is to be judged on his own mens rea;
2. The actus reus of the accused, on which his criminal responsibility for the murder is founded, consists, not necessarily in an act which is causally linked with the death of the deceased, but solely in an act by which he associates himself with the common purpose to kill.”

See also *S v Chauke and Others* 2000 (2) ZLR 494 (SC). In that case the appellant and others resolved to escape from custody. In the process they disarmed prison officers. In the ensuing shootout one of the escapees shot and killed a Prison Officer. The appellants were charged with and found guilty of murder. Having been sentenced to death they took their appeal to the Supreme Court. In dismissing the appeal against conviction it was noted that none of the

appellants dissociated themselves from the moment that the first prison officer was disarmed. This entailed that that they were prepared to shoot their way out of prison. It did not matter which of the appellants fired the fatal shot. Thus the killing of the deceased fell within the common design of the appellants.

Coming to the present matter we know from the second accused's admission that they intended to commit robbery as opposed to mere theft. Robbery is theft accompanied with the use or threats of force. According to the second accused, they resolved that in the event that the deceased resisted they would use stones. On this aspect, the second accused could not have been telling the truth. The robbery took place at night. There is no evidence that the accused armed themselves with stones for the eventuality of overcoming resistance by the deceased. They could not possibly hope to scour for stones at the scene in the event that the deceased resisted because there would not be time for that. As can be noted, the moment the deceased arrived at the gate his young brother responded although this coincided with the attack on the deceased.

I have already detailed the wounds that were inflicted on the deceased. Such injuries could not have emanated from mere scratching in the course of wresting a bunch of keys to which was attached a knife from the deceased, as the second accused claimed he was made to believe by the first accused.

The murder weapon was never recovered. It is immaterial that it has not been established as to who between the two accused persons fatally stabbed the deceased. The two of them together with another planned to rob the deceased. This entailed the use of violence to overcome resistance. They must have foreseen the possibility of the deceased being injured in the process but were reckless as to the consequences. There was no dissociation and even after the attack on the deceased the accused persons continued to associate together and were thus arrested whilst in possession of the stolen motor vehicle.

Accordingly, both accused are found guilty of murder with constructive intent.

National Prosecuting Authority, legal practitioners for the state
V. S. Nyangulu & Associates, first accused's legal practitioners
Kashiri & Partners, second accused's legal practitioners