

THE STATE

VERSUS

VUSUMUZI MOYO

AND

KHULEKANI DUMISANI NKOMO

IN THE HIGH COURT OF ZIMBABWE
MATHONSI J
BULAWAYO 20-21 OCTOBER 2011 AND 3 NOVEMBER 2011

Ms Munyeriwa for the state
Mr Ngwenya and Mrs Gororo for the accused persons

Criminal Trial

MATHONSI J: The two accused persons are facing a charge of murder the allegations being that on 24 June 2009 they wrongfully, unlawfully and intentionally killed David Mpofu, a male adult then aged 38.

It is alleged that the deceased, who resided at 59 Circular Drive Burnside, Bulawayo gave a lift to the two accused persons and their colleague, who is still at large, in his Toyota sprinter motor vehicle, silver in colour, registration number 801-918Z, at the intersection of 12th Avenue and Herbert Chitepo Street in Bulawayo. They purported to be going to Magwegwe suburb.

Upon arrival at the intersection of Hyde Park Road and Masiyephambili Drive, next to Pelandaba Cemetery, one of the accused persons used a string to strangle the deceased after which he was dragged from the driver's seat. It is alleged that accused 1 took over the wheel and drove the deceased's vehicle to Luveve Cemetery where the accused persons dumped the body of the deceased in a bush next to the cemetery. They allegedly drove away the deceased's Toyota sprinter motor vehicle.

The two accused persons pleaded not guilty to the charge of murder. In his defence outline, accused 1 stated that he knows nothing about the charge levelled against him, he does

not know the accused 2 at all, he was never at the intersection next to Food 4 Less on the day in question and that he was linked to the offence by virtue of a cellphone he was given by certain unnamed individuals he had given a lift in his Ford Laser vehicle, in lieu of payment for the lift.

In his defence outline, the Accused 2 stated that at the time of the alleged offence he was detained at Bulawayo prison on a separate charge of plain robbery. He stated that the police picked him up from prison about 12 September 2009 and assaulted him to force him to admit having committed the crime of murder. He also denied knowing the Accused 1 prior to meeting him at Bulawayo Central police station after he had been taken from prison.

The bulk of the state evidence was admitted by the accused persons in terms of section 314 of the Criminal Procedure and Evidence Act [Chapter 9:07] as it appears in the state outline. That evidence is by Nokuthula Dube, Butholezwe Sibindi, Dingilizwe Mlilo, Misheck Katoma; Dr Lylia Ncube, Charlton Tshabangu, Detective Assistant Inspector N. Nyoni, Detective Assistant Inspector Albert Zhou, Detective Sergeant Chonzi and Doctor I. Jekonya.

It is proposed to deal first with that evidence which was admitted. The evidence of Nokuthula Dube is to the effect that she is the wife of the deceased. On 24 June 2009 at about 1900 hours the deceased left home intending to buy some groceries in town. He was driving his Toyota Sprinter motor vehicle, registration number 810-918Z. When the deceased left home he had in his possession a Nokia 3310 cellphone, about R500-00 and P150-00 which items were not recovered.

The deceased never returned home and it was not until 29 June 2009 that the police advised the witness that her husband was dead and his body was at Mpilo Hospital Mortuary. On 16 July 2009 the witness was invited by the police to identify the deceased's Toyota Sprinter vehicle which had been recovered and she did that. In that vehicle was the deceased's driver's licence and I.D. document.

Butholezwe Sibindi who resides at 3379 Magwegwe North Bulawayo was a security guard at Dangale Koloji Car Park. He was on guard duties on 24 June 2009 when at midnight two men came driving a Toyota Sprinter motor vehicle registration number 801-918Z. The

driver introduced himself as P. Dhliwayo and they paid the requisite parking fee and left the vehicle for safe keeping. They never returned for it until several weeks later he reported this to his employer who called the police and they took the vehicle away on 16 July 2009.

Dingilizwe Mlilo of Block 3/108 Mpopoma Bulawayo is employed by Bulawayo City Council as a security guard at Luveve Cemetery. He is the one who alerted the authorities about the body of the deceased on the morning of 25 June 2009. This witness attended the scene with the police and observed that there were tyre marks signifying that a vehicle had made a U-turn next to where the deceased's body was. He observed that the body had been dragged from the road before it was dumped.

Police officer **Misheck Katoma** stationed at Luveve police station attended the scene where the deceased's body had been dumped on 25 June 2009. Together with two other colleagues they ferried the deceased's body to Mpilo Hospital. It was certified dead by Dr Lylian Ncube.

The deceased's friend Charlton Tshabangu of 520 Nkulumane Bulawayo is the one who identified the deceased's body at Mpilo Hospital Mortuary on 29 June 2009 before notifying his wife and giving the deceased's particulars to the police.

Detective Assistant Inspector N. Nyoni is attached to CID Homicide in Bulawayo. His evidence is to the effect that he witnessed the recording of warned and cautioned statements from the accused persons. He is the one who conducted an identification parade on 14 September 2009. He informed the two accused persons that they had a right not to participate in the parade but the accused persons elected to do so. The two were in positions four (4) and eight (8) in the parade of twelve (12) participants. The identifying witness pointed them out and positively identified the two (2) of them by touching each on the shoulder.

Detective Assistant Inspector Albert Zhou's evidence is to the effect that he participated in conducting the identification parade as a runner. Detective Seargent Chozi's evidence is that during the parade conducted on 14 September 2009 he took part as a witness guard. Nkosilathi Sibanda had no prior contact or sight of the participants of the parade.

The evidence of Dr I. Jekeny was also admitted. He conducted the post mortem on the body of the deceased and compiled a report. We shall return to that report later in this judgment.

The admitted evidence establishes the following:

- (a) On 24 June 2009 the deceased left his home driving his silver Toyota sprinter motor vehicle at about 1900 hours.
- (b) he had in his possession a cellphone and some money .
- (c) he never returned home but was murdered by strangulation that same night and his body was dumped in a bush next to Luveve Cemetery. He was robbed of his vehicle, cellphone and money.
- (d) His motor vehicle was later dumped at Dangalekoloji car park in Luveve by two men and was only recovered on 16 July 2009 as those who dumped it never returned for it.
- (e) After the two accused persons were arrested, an identification parade of twelve (12) people was conducted at Bulawayo Central station where the witness, Nkosilathi Sibanda picked out the two accused persons as the people who had robbed him on the night of 24 June 2009.

We shall return to the identification parade later in this judgment.

The state also led evidence from two more witnesses namely Nkosilathi Sibanda and Detective Assistant Inspector George Zuze.

Nkosilathi Sibanda is a reporter employed by Umthunywa Newspaper and resides at 129 Emakhandeni Bulawayo.

On 24 June 2009 at about 2100 hours, he was proceeding home when he boarded a lift at West End garage in 6th Avenue, Bulawayo. Another man boarded with him and the two sat

at the back seat of the vehicle which was a Toyota sprinter, silver in colour. Inside the vehicle were two men, the driver and a passenger sitting next to the driver in front.

The courtesy light inside the vehicle was illuminated and it remained so, until he alighted from the vehicle. That way he was able to see the occupants of the vehicle properly.

When they got to Njube turn off, the passenger who had boarded with him alighted leaving him and the two men in the vehicle. As they approached his destination at Magetsini, Nkosilathi informed the driver that he was dropping off at the bus stop. He was ignored. Instead the driver pressed the central lock button and locked all the doors.

The vehicle turned right at Luveve Road and Masiyephambili turn off and drove towards Victoria Falls Road with the witness pleading with the occupants to drop him to no avail. When they got to Emakhandeni Hall, the witness says he pleaded again asking to be dropped off but the driver, who he says was the Accused 1, swore to him saying he was in the habit of boarding people's cars. When they got to the fly over bridge on that road, the second man, who he identified as the Accused 2, commanded him to draw closer to him, got hold of his jacket collar and struck him with a fist on the right eye. The Accused 2 then started stripping him of his clothes.

The vehicle made a U-turn at the "Ngozi Mine" dumping site and was parked next to the road. Whereupon the Accused 1 started searching the witness's jacket pockets. He was abandoned at that point naked, except for his inner short, before his assailants sped off in the Toyota sprinter motor vehicle. He found his way back home and later made a report at Entumbane police station.

Much later when the police came looking for him at his home, he was taken to Central Police Station where he identified his pair of jeans and new balance trainers which had been recovered in the Toyota sprinter.

At a later stage he was invited by the police to identify his assailants in an identification parade of ten (10) or more people. The police told him they had picked up "some guys" and wanted him to have a look at them and see if his assailants were present. He assured the police

that he had had a good look at the two assailants and was sure he could identify them if he saw them again.

Nkosilathi told the court that he had not seen the suspects prior to the parade and had not seen the parade being assembled. He stated that the police did not point out any of the suspects. He however stated that the ten (10) or so participants were not of similar build and were dressed differently. The witness says he was able to quickly pick out the Accused 2 as the person who had been sitting next to the driver and had assaulted him while holding him by the collar. This was because the sight of his face, which was light in complexion, was smallish with a side beard, and his bold head had remained indelibly etched in his memory.

He also managed to pick out the Accused 1 as the person who had been the driver. He was assisted by his clear recollection of his build which was bigger with broad shoulders which he remembered clearly from the way he stirred the vehicle when turning. He also vividly remembered his face with wider cheek bones. He stated that he had had a good look at his assailants during the ordeal as he had spent considerable time talking to them in the vehicle.

Detective Assistant Inspector George Zuze is the investigating officer in this case with 17 years experience in his job. In the course of his investigations he says he interviewed Nokuthula Dube, the deceased's wife who had told him that when the deceased left on the fateful night, he had in his possession, among other things, his cellphone. The officer then took down the cellphone number which he used to obtain the call history from the cellphone service provider.

When he did, he noted that at about midnight on the night in question a call had been made to a landline in Gwabalanda from the deceased's cellphone. From another service provider he was able to obtain the address where the call was made to. He and other officers then raided that house on the night of 10 September 2009.

He said they interviewed the occupant, Gerald Sibanda, who turned out to be a prophet. Sibanda confirmed that on the night of 24 June 2009 he had indeed received a call from a client of his he recalled as Moyo who stays in Cowdray Park and that the said Moyo had wanted spiritual assistance. The prophet led the police to No. 150 Cowdray Park, Bulawayo, the residence of Accused 1, whom they found with his wife in the early hours of the morning. The

Accused 1 also confirmed that he knew the prophet Sibanda as they go to the same church. The Accused 1 was then arrested.

The witness went on to say that at the Accused 1's home they saw a Ford Laser motor vehicle, red in colour, which was a non runner and appeared to had been off the road for a while.

He stated that when the Accused 1 was cautioned, he immediately admitted involvement in the killing of the deceased and implicated the Accused 2 as having been with him when the crime was committed. This led to the arrest of the Accused 2 who by that time was detained at Bulawayo Prison on another charge he having been detained on 8 July 2009 after killing the deceased. He produced the prison record, exhibit 7, to that effect. Officer Zuze said Accused 1 freely and voluntarily led a team of detectives for indications and he recused himself as the investigating officer.

After the arrest of the Accused 2, the witness administered a caution upon him and he also volunteered to go and show officers the scene of crime. The team of officers was put together and went for indications with the Accused 2.

As there were other witnesses, arrangements were made for them to participate in an identification parade. Most witnesses failed to pick out the accused persons except for Nkosilathi Sibanda who identified them in the parade as having been the people who robbed him while driving a silver Toyota sprinter.

This witness also recorded warned and cautioned statements from the two accused persons which he says were made freely and voluntarily without any undue influence being brought to bear upon them. On that score his evidence is partially corroborated by the admitted evidence of Detective Assistant Inspector Nyoni.

The two state witnesses gave their evidence very well. They did not try to exaggerate anything, their demeanour was excellent and they gave a user friendly factual account of what they witnessed. We have no reason whatsoever to fault their evidence, subject to the comments we will make regarding the identification parade involving Nkosilathi.

In addition to the foregoing evidence, the two accused persons' confirmed warned and cautioned statements were produced as exhibits 4 and 5 respectively.

In his statement Accused 1 stated as follows:

" I am Vusumuzi Moyo 29-233834 F24 and Khulekani Dumisani Nkomo and Brilliant – I admit because we boarded a motor vehicle at Food 4 Less; a Toyota Sprinter silver in colour registration number 801-918Z heading for Magwegwe. We got to robots that are near the cemetery, Khulekani strangled him and removed him from the driver's seat and I then took up the driver (sic). I started driving that car and the(n) Khulekani said we should head for Luveve cemetery where on arrival he and Brilliant assisted each other and got out with the owner of the motor vehicle. I had misgivings when I saw them dragging him, I asked what the matter was and he said he will pick up strength that is why when we left there I still had misgivings about it. I took the motor vehicle and kept it at a car park. We left and boarded an emergency taxi and went away. We parted there. The car park is in New Luveve opposite Masina beer garden."

The Accused 2's statement is shorter. It reads as follows:

"Khulekani Dumisani Nkomo I do agree that I was in the company of Vusumuzi Moyo and Ashi. We got transport at Food 4 Less and proceeded to go and rob someone of his vehicle. Vusumuzi bound him (with) a string/cord and we departed. We left the person in some bush I cannot identify. Thereafter we transported two youngmen. One of them disembarked at Njube and we left the other at Ngozi Mine after robbing him of his phone."

Clearly therefore in their warned and cautioned statements, which were confirmed by a magistrate in terms of section 113 of the Criminal Procedure and Evidence Act in proceedings held in camera the two accused persons confessed to the crime. The procedure provided for in the Act was followed to the letter.

The accused persons also gave evidence. The Accused 1 stated in essence that he knows nothing about the offence but was linked to the offence because of a cellphone, a Nokia 1600 which he had been given by unnamed individuals he had given a lift while pirating, on "a certain day", he did not specify. It had been given to him in lieu of the fare and he was to hold onto it as the unnamed owners would phone him on that number to give him his money and recover their phone.

While still in possession of that phone, he had taken advantage to make a phone call to one Shepherd. At a subsequent date he had returned the phone to the owners and collected the pirate taxi fare. While admitting having telephoned prophet Sibanda, whom he says he knew as "Mdawini", he denied having phoned him on the night of 24 June 2009 and denied that the prophet has a landline.

The Accused 1 stated that the police had been led to his residence by three fellow worshippers of his leading to his arrest. He stated that they had assaulted him to admit to about 22 counts of robbery and car jacking and to the killing in the present case. Although he had led the police to the people who had given him the phone, he was surprised when one of the officers started calling them by name before firing shots into the air forcing that group of people to flee.

He said the police had then turned on him and using threats and violence, they forced him to confess to the killing of the deceased. He could not mention the duress during confirmation proceedings because he was still afraid of the police officers some of whom had remained in the court room.

Unfortunately for Accused 1 the story is incoherent and does not make any sense at all. The cellphone stolen from the deceased was a Nokia 3310 and not a Nokia 1600. The deceased's cellphone was used to call prophet Sibanda after he had been killed on a landline in Gwabalanda. If he says he did not call Sibanda on the phone he had got from his customers but phoned Shepherd, then it must follow that it is not the deceased's phone which was used to phone Shepherd.

All this does not explain that the deceased's phone was used to phone prophet Sibanda who in turn told the police that he had been called by the Accused 1 for spiritual assistance. This is the evidence we have already accepted and it links the Accused 1 to the commission of the offence.

The Accused 2 stated in his evidence that he does not know where he was on the night of 24 June 2009. He said that while in prison in September 2009 he was approached by the police who told him he was facing several charges of car jacking and robbery. They took him to

Central Police station where charges were preferred against him after which he was assaulted to force him to confess. He did not sustain any injuries as a result of the assault but was able to get medication in prison.

Accused 2 said that his warned and cautioned statement was given under duress. Under cross examination he said the police took him for indications saying they would just take him to where Accused 1 had led them. The Accused 2 had a difficult time explaining why he had raised an alibi in his defence outline that at the time the offence was committed he was in prison. This was after his alibi had been busted when Detective Assistant Inspector Zuze produced the prison register showing he had only been detained on 8 July 2009. In the end he could not give any explanation for this disparity.

The evidence of the two accused persons is hopelessly unreliable, incoherent and has an air of fiction in it. It simply cannot be believed and we reject it in toto.

This is a case where there is no direct evidence linking the accused persons to the commission of the offence. It is a case where there are bits of evidence strewn all over the place and it remains for us to piece it together and see if, circumstantially, it leads to a conclusion of guilt or otherwise.

The law relating to circumstantial evidence is found in Hoffman and Zeffertt, The South African Law of Evidence, 4th ed, at pages 589-590 where it is stated:

“In R v Blom 1939AD 288 at 202, 203 Watermeyer JA referred to ‘two cardinal rules of logic’ which governed the use of circumstantial evidence in a criminal trial;

- ‘(1) The inference sought to be drawn must be consistent with all the proved facts. If it is not, then the inference cannot be drawn.
- (2) The proved facts should be such that they exclude every reasonable inference from them save the one to be drawn. If they do not exclude other reasonable inferences, then there must be a doubt whether the inference sought to be drawn is correct’.”

That passage was cited with approval in S v Vhera 2003 (1) ZLR 668(H) at 679 D-G and more recently in S v Dzira HB 149/11 at page 2-3.

The question is, can it be said that the only inference to be drawn from the proved facts is that the accused persons did commit the offence. The facts proved from the evidence of the

two state witnesses (not that we have already set out those proved from the admitted evidence), are that:

- (a) certain two people driving a silver Toyota sprinter gave a lift to Nkosilathi at West End garage and later forcibly took him to “Ngozi Mine” where they robbed him of his clothing and cellphone;
- (b) during Nkosilathi’s ordeal in the Toyota sprinter, the courtesy light was on giving sufficient lighting for him to have a good look at those two people and he spent a considerable time with them during which one of them drew him closer by the collar and punched him in the face.
- (c) Nkosilathi’s jeans and trainers were recovered in the Toyota sprinter which belonged to the deceased.
- (d) the deceased’s cellphone line which had been taken from him after he was killed was used by Accused 1 to phone prophet Sibanda on his landline in Gwabalanda as he sought spiritual healing.
- (e) the two accused persons made confessions to the police in their statements which were confirmed by a magistrate in accordance with the law.
- (f) Nkosilathi, the victim of a robbery perpetrated using the deceased’s vehicle, picked the two accused persons in an identification parade.

In examining the evidence of identification, we are mindful of the pronouncement of Holmes JA in *S v Mthetwa* 1972(3) SA 766 at 768 where he said:

“Because of the fallibility of human observation, evidence of identification is approached by the courts with some caution. It is not enough for the identifying witness to be honest; the reliability of his observation must also be tested. This depends on various factors, such as lighting; visibility and eyesight; the proximity of the witness; his opportunity for observation, both as to time and situation; the extent of his prior knowledge of the accused; the mobility of the scene; corroboration; suggestibility; the accused’s face, voice, build, gait, and dress; the result of identification parades; if any, and of course, the evidence by or on behalf of the accused. The list is not exhaustive. These factors; or such of them as are applicable in a particular case, are not individually decisive, but must be weighed one against the other, in light of the totality of the evidence, and the probabilities.”

We have warned ourselves against the risks attendant upon identification. We have noted that the parade itself was not properly conducted especially as it would appear that one of the investigators is the one who led the witness to the parade although the parade itself was conducted by someone else. We have noted that the participants were just clustered together dressed differently and not of the same build.

In spite of all this our view is that the identifying witness- whom we have found to have been impressive indeed and who stated that his eye sight was perfect- spent a long time very close to and had close contact, with the suspects in the vehicle. He was therefore able, in view of proximity, opportunity and contact to observe them. His picking them out can therefore be relied upon.

In any event this is not a case which hinges entirely on identification. There are other pieces of evidence linking the accused to the offence. The Accused 2 was fingered by the Accused 1 who was connected by the prophet after a phone call in the middle of the night seeking spiritual healing, presumably following of the killing of the deceased. Therefore the only inference to be drawn is that the two accused committed the offence. We are therefore satisfied that the state has proved its case against both accused persons beyond a reasonable doubt.

As to the intent of the accused persons, we examine the post mortem report in which DR I Jekonya observed the following marks of violence on the deceased's body:

- “(a) Right forehead bruises
- (b) Sandy soil in the nostrils and around the mouth and between the lips and teeth.
- (c) There is 4mm wide neck groove which is deeper on the front about a centimetre below the voice box. The groove runs from the front going backwards transversely on both sides of the neck and ends at the back of the neck near the midline. It is about 2mm deep below the voice box (deepest part) and becomes more superficial as it goes backwards.”

The doctor remarked that the findings are consistent with ligature strangulation with a rope or cord.

In *S v Chigwanda* 2002(1) ZLR 574(S) at 581 D –F the Supreme Court stated:

“For a trial court to return a verdict of murder with actual intent, it must be satisfied beyond 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, foresees the death of his victim as a substantially certain result of that activity and proceeds regardless.”

We agree with Ms *Munyeriwa* for the state that by strangling the deceased the way the accused persons did, they intended the death of the deceased or at least foresaw the death as a substantially certain result.

The two accused persons clearly acted in common purpose and were indeed a tug team from the moment they attacked the deceased to the time they disposed of his body and right up through the robbery of Nkosilathi. Therefore the conduct of one is imputed on the other.

Accordingly both accused persons are found guilty of murder with actual intent.

Extenuation

This was a murder committed in the course of a robbery. The accused persons planned and prepared well for the robbery of the deceased. They set about isolating their victim by luring him to a place far away from the hustle and tumble of the city centre in Magwegwe.

They clearly intended to rob him of his vehicle. Given that they were a gang of three they could have easily over powered the deceased and divested him of his vehicle without resorting to killing him.

They elected to kill him and their conduct is unforgivable whichever way one looks at the matter.

Extenuating circumstances are those facts associated with the crime which serve in the minds of reasonable men to diminish, morally, the degree of the accused persons guilt. They are facts which have a bearing on the commission of the crime which reduce the moral blameworthiness of the accused.

In the present case the only thing which propelled the two accused persons was greed and sheer evilness and nothing else.

We are therefore unable to find extenuating circumstances in this case.

Sentence

The two accused persons shall be returned to custody where the sentence of death shall be executed on each of them according to law.

*Criminal Division, Attorney General's Office, the state's legal practitioners
Maronedze, Mukuku, Ndove and partners, 1st accused's legal practitioners
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