

REPORTABLE (18)

LEO MATIBE v THE STATE

**SUPREME COURT OF ZIMBABWE
CHIDYAUSIKU CJ, ZIYAMBI JA & MAKONESE AJA
BULAWAYO, MARCH 25 & APRIL 1, 2012
JUDGMENT RELEASED ON 28 FEBRUARY 2017**

F Museta, for the appellant

T Hove, for the respondent

CHIDYAUSIKU CJ: This appeal was heard on 08 October 2013 in Bulawayo. The appeal against both conviction and sentence was dismissed. Reasons for judgment were given *ex tempore* at the time of the dismissal of the appeal.

A request has been made for a more detailed judgment for onward transmission to the Executive for it to consider the issue of the prerogative of mercy or commutation of the death sentence. The following are the detailed reasons.

The appellant was convicted of murder with actual intent and no extenuating circumstances were found. The appellant was therefore sentenced to death. The court *a quo* heard evidence from a number of State witnesses, which evidence the court *a quo* found credible and accepted.

The State led evidence from the following witnesses –

The first State witness was Leonard Dube (“Dube”), an accomplice witness who was properly warned by the trial court to tell the truth. Dube told the court that on 26 September 2007 at between 7 and 8 pm the appellant, in the company of one Collen Tsikidze (“Tsikidze”), who is still at large, came to his place of residence. Tsikidze invited him to accompany them into town to look for some money to drink beer. Dube asked how they were going to raise money to buy beer, to which Tsikidze indicated that he was a police officer attached to the traffic section and as such he was going to arrest those who pirate without permits. Tsikidze offered Dube bus fare as he had no money. When they got into town, they went to Khami Bar along Robert Mugabe Way and stood outside the Bar. They did not apprehend anyone and they decided to go back to Edgars Stores where they had been dropped off when they got into town. After a while the trio decided to go back to Khami Bar. It was around 3 am when Dube suggested that they go back home since they had not managed to arrest anyone and had not had a sip of beer. The appellant then suggested that they go behind Allabama, just near Khami Bar. They saw a white vehicle parked behind Allabama. They went past it and stood at a corner. Tsikidze asked how many people were in the vehicle and the appellant answered that there was only one person. Dube deliberately contradicted him and said there were two people in the vehicle in the hope that his colleagues would leave the vehicle alone and proceed home. The appellant and Tsikidze told Dube that he was lying. They suggested that they go back to the vehicle to check again. When they got to the vehicle, Tsikidze went to the driver’s side and knocked on the door. The deceased, a white person, raised his head. Tsikidze produced his police identity card and informed the deceased that he was under arrest for wrongful parking. The deceased invited them into the vehicle so that they could go to Bulawayo Central Police Station. Tsikidze sat in the front passenger seat while Dube and the appellant sat in the back seat. Tsikidze directed the deceased where to go and

they drove past Bulawayo Central Police Station. The deceased noticed that they had driven past the police station and began to ask whether they were genuine police officers. Tsikidze again produced his police identity card. Dube also asked the appellant where they were going and the appellant told him to keep quiet. After travelling a short distance further, the appellant said: “Lister finish off this person, finish him off so that we go”. Dube asked the appellant what he meant, and the appellant told him to shut up. At that moment the deceased suddenly stopped the vehicle and Tsikidze pointed a firearm at the deceased. Dube suddenly opened the door and ran away towards Chicken Inn near Tredgold Building. He later boarded a bus home and retired to bed. At around 9 am the next day Tsikidze came to Dube’s place of residence and remonstrated with him for running away the previous night. They walked towards the gate and Dube saw a white car parked by the gate. He saw the appellant seated in the car. Tsikidze told Dube that he was of very little help the previous night and gave him two hundred rands. He told Dube to keep his mouth shut. Dube asked Tsikidze where they got the vehicle and he replied that it belonged to his girlfriend. After Tsikidze and the appellant had left his residence, it dawned upon Dube that the vehicle was the one that he had seen in town the previous day.

The second State witness to testify was Kenneth Matanhire. He told the trial court that on 22 October 2007 Tsikidze and the appellant signed a loan agreement with him for an amount of three thousand five hundred rands. As security for his money, the witness took possession of the white vehicle brought by Tsikidze and the appellant. The witness further told the trial court that Tsikidze and the appellant shared the loan amount equally. It is quite clear from this evidence that Tsikidze and the appellant were at all material times working together in this robbery and murder.

The evidence of the rest of the State witnesses was admitted in terms of s 314(1) of the Criminal Procedure and Evidence Act [*Chapter 9:07*]. Nothing turns on this evidence.

The trial court found that Dube was an honest and credible witness whose evidence is reliable. This conclusion of the court *a quo* cannot be faulted.

In his defence, the appellant's testimony was that on 26 September 2007 he met Tsikidze at Pumula. Tsikidze suggested that they go into town and he agreed. On their way they invited Dube to accompany them. When they arrived in the city, they walked around until they came across the deceased who was parked near Pines Brothers Supermarket. Tsikidze advised the deceased that he was under arrest for wrongful parking. They ordered the deceased to drive to the police station. When Tsikidze diverted the deceased from the route to Bulawayo Central Police Station, the deceased panicked and stopped the car. Tsikidze produced a pistol and shot the deceased once in the head and he died. The appellant told the trial court that Tsikidze placed the deceased on the front seat and he took charge of the motor vehicle and drove off to Nyamandlovu where they dumped the deceased's body. Tsikidze searched the deceased and recovered seven hundred rands and gave the appellant two hundred rands.

The court *a quo* was not impressed by the appellant as a witness. It concluded that the appellant must have known that Tsikidze was armed with a pistol and was fully aware of the mission to commit robbery using the gun. The evidence clearly established that the appellant freely participated in the disposal of the body of the deceased. The appellant had an equal share of the proceeds of the pawning of the deceased's vehicle. After the deceased had been shot, the appellant remained in the company of Tsikidze and assisted him in dumping the

deceased's body. The appellant gladly participated in the sharing of the loot. The appellant's account of the events of the fateful day is so improbable that the trial court quite rightly disbelieved his account.

In short, the evidence clearly established the following rôle played by the appellant in the commission of the offence –

1. The appellant was in the company of Tsikidze and Dube on the night the deceased was killed. They were looking for someone to rob when they came upon the deceased.
2. The appellant was a former police officer.
3. His accomplice, Tsikidze, effected an illegal arrest of the deceased.
4. The appellant noticed that Tsikidze had diverted the deceased from the police station route but did nothing about it.
5. When Dube asked the appellant where they were going, the appellant rebuked him and ordered him to shut up.
6. When Tsikidze produced a pistol the appellant did not stop him. The appellant, as a former policeman, must have known that that was unlawful.
7. The appellant and his accomplice Tsikidze dumped the deceased's body.
8. The appellant participated in the sharing of the loot.
9. The appellant was a signatory to the written loan agreement in which they pledged the deceased's motor vehicle.

10. The appellant participated in the disposal of the deceased's property.
11. The appellant was found in possession of the pistol that was used in the murder of the deceased.

On the basis of the above evidence, it is quite clear that the appellant freely participated in the commission of the offence. There is very little difference, if any, between the appellant and Tsikidze, who actually pulled the trigger and shot the deceased. Their degree of participation in this crime is equal.

The evidence in this case establishes beyond doubt that the appellant was guilty of murder with actual intent.

As regards sentence, the appellant is guilty of murder with actual intent. The murder was committed in furtherance of a robbery. This was a cold-blooded murder motivated by greed. There is nothing that can be said in the appellant's favour. In the circumstances the court *a quo* was unable to find extenuating circumstances. Indeed, even counsel for the appellant was unable to make any meaningful submissions in respect of both conviction and sentence.

Accordingly, the appeal was dismissed and both the conviction and sentence upheld.

ZIYAMBI JA: I agree

MAKONESE AJA: I agree

Pro deo