

THE STATE  
**versus**  
EDGAR MAJASI  
and  
PRECIOUS NKOMO

HIGH COURT OF ZIMBABWE  
MOYO J  
BULAWAYO 22-23 MARCH 2016

### **Criminal Trial**

*T. Hove* for the state  
*N. Mangena* for the 1<sup>st</sup> accused  
*T. Make* for the 2<sup>nd</sup> accused

**MOYO J:** The two accused persons face a charge of murder, it being alleged that on or about 29 August 2011 in a bush in Filabusi they murdered Alphios Mabhena an adult male.

The state tendered the following in exhibits

- 1) The state summary which was marked Exhibit 1, the confirmed warned and cautioned statements for both accused persons which were marked Exhibit 4 and 5 respectively.
- 2) The affidavit of the police officer who identified the deceased's body which was marked Exhibit 6.
- 3) The post mortem report which was marked Exhibit 7
- 4) The drill bit, which is the weapon that was allegedly used in the murder which was marked Exhibit 8.
- 5) And the psychiatrists report by Dr Poskotchinova, in relation to accused and which was marked Exhibit 9.

The first accused's defence counsel tendered the first accused's defence outline which was marked Exhibit 2.

The second accused's defence counsel tendered the second accused's defence outline which was marked Exhibit 3. The state called the evidence of the deceased's wife Sakhelene Ndlovu, she confirmed her husband's disappearance around the 21 of August 2011 while doing business in Filabusi, her efforts to locate him through the assistance of the police. She also positively identified remains that were recovered by the police in a disused mine in Filabusi as those of her husband she also positively identified the motor vehicle that was recovered from the accused persons as that of her late husband. These were the material respects of this witness's evidence.

Nomusa Zimba who stated that she had been the deceased's girlfriend, confirmed that the deceased had been in Filabusi at the material time and that he was last seen in the company of the two accused persons and other people leaving Matshayimpinzi. She also confirmed that the accused was driving a Toyota motor vehicle at that material time. Those were the material respects of this witness evidence. Lazarus Gwerena told the court that he marked for the deceased operating a compressor at the mine. He told the court that he last saw the deceased in the company of the two accused persons as they left the mine to go and buy some drill bits. He said that it must have been in September 2011. Pressed further by the first accused's defence counsel as to whether he was certain that indeed it was in September or August 2011. He then told the court that due to lapse of time he cannot insist that it was in September but it was around that time of the year. This witness gave his evidence well and nothing much turned on his cross examination. We accordingly believe this witness as we find him to be credible. The first accused's defence counsel sought to make a suggestion in his closing submissions that this witness deposed from his testimony as contained in the state summary in that in the state summary it was stated that the trio left to by explosives but in court the witness was now saying they had left to buy drill bits. This submission in my view came a little too late as the witness was never questioned on this disparity during cross examination. As it is that aspect of his evidence remains unquerried and the first accused person's defence counsel had a duty to question the witness so that his testimony would be tested in that regard. To let the witness go away and submit that he was lying does not assist the court at all. Refer to

In any event, the Supreme Court has held that witnesses are not responsible for the information contained in the state summary as it is not prepared by them neither is it prepared on their specific instructions like the accused's defence outline. Refer to the case of

Ngqabutho Ngwenya told the court that he assisted the police in recovering the remains of the deceased from a disused mine pit. He also confirmed he recovered a drill bit that could be exhibit. He said the deceased's remains were intact same for the head as there was no hair.

Evans Mangisi told the court that he bought the motor vehicle, a Toyota 2,7 petrol from the two accused persons in Gokwe, who told him that it was for their brother in Republic of South Africa. He confirmed they had brought it for accident damage repairs and he subsequently ... interested in it. He said he gave the accused persons \$40-00 to go and collect the motor vehicle papers in Harare as the first accused had told him the papers are in Harare. He also told the court that the motor vehicle was white and the first accused had asked him to paint it black but he refused as that was illegal. He said he later gave the accused persons \$180-00 to go and collect their brother so that they could finalise the deal.

Nothing much arose during the cross examination of this witness. He gave his evidence well and we find that he told the court the truth. The investigating officer Gugulethu Sibanda testified on the matter he followed up on the case, landing him on Lazarus Gwerena who told him that the deceased had last been seen in the company of the two accused persons. He then went to look for accused two found him in his home and he admitted to the mine and led the police details to the disused mine pit where the deceased's remains were recovered. He also implicated accused one. The investigating officer followed upon this lead to Gokwe and recovered the motor vehicle from the deceased's Evans Mangena who led him to the first accused persons. The accused's wife positively identified both the deceased's body the motor vehicle. Nothing much turned on this witness testimony.

The evidence of Dennias Ndlovu, Walter Pfava, Constable Marufu, Sibanda Election, Debra Madewa Maniko and Dr S Pesanai was admitted into the court record by consent in terms of section 314 of the Criminal Procedure and Evidence Act [Chapter 9:07]. The first accused person's defence outline is to the effect that he bought the said motor vehicle from deceased in

300g of gold. Deceased had a business partner called Khumbulani Tshuma and they sold the motor vehicle to him while together. He paid a deposit of 100grams of gold and later paid 200grams to Khumbulani Tshuma when Khumbulani Tshuma demanded it. At that time the deceased was said to have travelled to the Republic of South Africa. In his defence outline he said the agreement of sale was verbal. He denied ever selling the said motor vehicle to Evans Mangisi.

In his evidence in Chief the first accused person told the court that he entered into a written agreement of sale with the deceased when they sold each other the motor vehicle. He admitted to being given \$40-00 by Evans Mangisi to go and collect the motor vehicle papers from Harare although he said he just wanted Mangisi to give him money when he said he was going to collect the motor vehicle papers from Harare, since he had all the papers at his house in Gokwe. He told the court that he never went back to Filabusi and that he never heard of deceased or his death. He also told the court that later, he was give \$40-00 by Evans Mangisi and he gave the second accused person who had insisted sometime in mid-October the \$40-00 as money for busfare. There is an issue with the first accused's version of events where he told the court that second accused came to Gokwe at the time that he (first accused) took the motor vehicle for repairs to Evans Mangisi, but at the same time he says the second accused come mid-October and yet he also says they took the motor vehicle to Mangisi in September. It is not clear as to what exactly transpired here.

The bottom line having is that the first accused person confirms that the second accused person did come to Gokwe at the material time. I will later show the significance of this when I assess the evidence.

The second accused person admitted in his defence outline to committing the offence but that he was not of mental state at the time, was intoxicated had diminished responsibility and was not aware of his actions.

I now move to assess the facts before me. The following facts are established in this case.

- 1) That the deceased was last seen by Nomusa Zimba and Lazarus Gwerena in the company of the accused person.
- 2) That at the time he was driving the Toyota motor vehicle that was subsequently recovered from the first accused person after being implicated by the second accused person.
- 3) That indications by the second accused person led the police to the disused mine pit where deceased's remains were found.
- 4) That a drill bit was also found in the disused mine pit where deceased was found.
- 5) That the remains found in the disused mine pit where the deceased's
- 6) That the motor vehicle found in possession of Evans Mangisi was the deceased's
- 7) That Evans Mangisi had gotten the motor vehicle from the two accused persons.
- 8) That the two accused persons disappeared at the time the deceased disappeared and were never seen again until January 2012 when they were sought by the police and arrested.

The court in this matter has to resolve accused one's participation in the offence as accused two's participation is not in issue. He does not dispute participation but he denies liability on the grounds of diminished responsibility.

I will therefore assess the facts as they relate to the first accused. The first accused person is the one who handed over the motor vehicle belonging to the deceased to Evans Mangisi for repairs.

He alleges that he bought the motor vehicle from deceased with 300grams of gold, first paying 100grams to deceased then 200grams to his business partner Khumbulani Tshuma. In his defence outline he says the agreement of sale was verbal in his evidence in chief he says the agreement of sale was written but was taken by the police. I find that the first accused person is not telling the truth in this respect for he says in his defence outline the agreement was verbal. The investigating officer testifies, is not questioned about the existence of a written agreement of sale at all by first accused's defence counsel. The investigating officer is excused and the defence case opens, first accused then says that there was a written agreement that was taken from him by the police. If the accused was telling the truth in this respect, he would have given his lawyer the correct instructions in this regard and the lawyer could have put the investigating

officer to task on that issue. As it is, its of no consequence because the police who are alleged to have taken the agreement, were represented by the investigating officer in court, but were never questioned on that crucial point. The only conclusion are can is that the issue of a verbal agreement of sale was an afterthought. I find that the accused person clearly told lies in this regard. This leads the court to draw the inference that there was never any agreement of sale at all.

The other fact which supports our finding on the non-existence of an agreement of sale is that the deceased, sold the car to first accused and immediately disappeared, with no trace. First accused says he left for Gokwe, never returned to Filabusi, never communicated with deceased and yet he was waiting for the deceased to come back from Republic of South Africa where he had gone to do the change of ownership papers from August 2011 to January 2012 when the first accused person was arrested, its almost six months. The first accused's behavior of just staying quietly in Gokwe and doing nothing to follow up on the deceased so that change of ownership could be effected, clearly shows that he was aware that there was no deceased to follow up on as he knew deceased was dead.

Again, Evans Mangisi's testimony that the two accused person approached him and said the motor vehicle was their brother's and they wanted it repaired and later entertained the thought of buying it is supported by accused one's version that accused two was indeed there at the relevant time. This is because the two accused persons had stolen the motor vehicle together and taken it to Gokwe together since it was their loot. That is why the second accused person went to Gokwe and featured in the transaction as stated by Evans Mangisi. There is no other reasonable explanation for the second accused's presence even the first accused person himself was at pains to explain the second accused person's visit. The reason proffered by the first accused that he had care to see how cotton is planted is palpably false and I reject that. Also, the first accused person confirms that there is a second batch of money that come from Evans Mangisi and was given to the second accused person. Mangisi says it was \$180-00 and that it was for the second accused to go and fetch their brother for the change of ownership of the motor vehicle.

The first accused person says Mangisi gave him \$40-00 because he had used his motor vehicle to carry groundnuts and he gave all the money to second accused who had visited but had no busfare. This does not make sense at all, that the second accused person sets on a journey to Gokwe to see how cotton is planted when he does not have enough funds to travel and is conveniently present when deceased's motor vehicle was being delivered to Mangisi for repairs and subsequent sale. The only reasonable conclusion that can be drawn is that the second accused person was in Gokwe to finalise the transaction him and the first accused had stated of robbing the deceased and in the process killing him.

Whilst the confessions made by the accused persons were not confirmed and whilst what they said in those confessions cannot be admitted as evidence in this court. Their indications are nonetheless admissible. It was the investigating officer's evidence that both accused persons indicated to the police the disused mine pit that the deceased's body was found in the pit wherein they threw his body after killing him. The first accused said while he did indications of the pit to the police it was already after the first accused had taken them there and he knew the area where the pit was and the police then forced him to point to it.

The state case in this matter is dependent on circumstantial evidence. In the case of *R v Blom* 1939 AD 188 it was held that in reasoning by inferences there are two cardinal rules of logic which cannot be ignored.

- 1) That the inference sought to be drawn must be assistance with all the proved facts. If it is not the inference cannot be drawn.
- 2) The proven facts should be such that they exclude every reasonable inference from them same the one sought to be drawn if they do not excludes other reasonable inferences there must be a doubt whether the inferences sought to be drawn is correct.

In this case, the following facts have been proven by the evidence before me

- 1) The accused persons were the last seen with the deceased above.
- 2) The deceased disappeared at that material time never to be seen again.
- 3) The accused person themselves also disappeared at that material time.

- 4) Both the accused persons upon arrest pointed at the disused mine pit in which deceased's remains were found.
- 5) The motor vehicle that belonged to the deceased was recovered from the Evans Mangisi who told the court that he recovered it from the two accused persons.
- 6) The first accused persons assertion that he bought the motor vehicle has been rejected by this court for the simple reason that he lies about the agreement, firstly he says it was verbal and secondly he says it was written and the police took it away. The investigating officer was never challenged in this regard. And the fact that he took the motor vehicle to Gokwe at about the same time that deceased disappeared never too be seen again, as well as that he never pursued the issue of the change of ownership for six months shows that there was never any agreement of sale. The first accused person is just lying.
- 7) The first accused persons lies are corroborative of the state case for he has gone out of his way to lie so that he escapes culpability. The authority for the principle that an accused persons' lies can amount to corroboration is the case of *Katerere v S* SC 55/91 and *S v Nyoni* SC 118/90.

There is therefore no other inference to draw from the facts before me, save for the one that the two accused persons killed the deceased. Whilst factually it cannot be proven what really transpired when they killed the deceased and the reasons thereof, what can be clearly inferred from the facts is that their possession of the deceased's motor vehicle means that they killed the deceased in order to dispossess him of his belongings.

#### Second accused's plea of diminished responsibility

The second accused's person pleads an unsound mind and diminished responsibility. The psychiatrist report also states that there is a reasonable possibility that at the time of the alleged crime the accused was suffering from a disorder (substance use disorder). At the time of crime he was in a state of diminished responsibility due to alcohol and cannabis intoxication.



The facts of this matter as a result of the possession of deceased's motor vehicle after killing him show that the second accused persons killed the deceased during the course of stealing from him. They went with the deceased wherever they were going and lured him to the place with the disused mine pit that they could throw his body into after killing him. This entails pre-meditation. There was planning prior to the subsequent assault on the deceased and theft of his motor vehicle. It is our considered view that a person of an unsound mental state cannot however be alive to issues enough to recognize a robbery victim as well as a robbery opportunity. Not only did they rob deceased after killing him but they planned on the disposal of his body with hope that it would never be found. They also took away his motor vehicle and told Evans Mangisi that it was for their brother in the Republic of South Africa and that they were selling it. Months after the death of the deceased, the two accused persons were still pursuing their motive of selling the motor vehicle to realize money. It can thus not be said that an offence that involves planning spanning across several months can be said to have occurred when a person's responsibility had been diminished. Such a finding can only be made in those at "the spur of the moment offences." It cannot be held in our view that a person who plans a robbery, lures his victim so that he creates the opportunity to rob, kills his victim and dumps his body in a disused mine pit to conceal the evidence, travellers with the loot from the deceased all the way from Filabusi to Gokwe, and even finds a potential buyer, can be held to be of unsound mind. Infact the facts point otherwise. This is in fact a person with a very active mind.

In the case of *S v Chikanda* SC 99/05 on the issue of medical evidence pointing to a diminished responsibility the Supreme Court had the following to say:

The applicant claimed that he was not in his full senses at the time of the murder. He said he was drunk, he was angry, he was provoked by his wife, she was accusing him of having been with some prostitutes. The doctor in that case recorded that in his opinion, at the time of the alleged offence the accused suffered from a diminished responsibility. The doctor's opinion in, that case (like in this case) was not based on any physical examination of the applicant immediately before or immediately after the incident. It was based on the history of the applicant's behavior and interviews with his relatives.

It was not (like in this case) supposed by factual evidence of what happened at the time of the murder. There was no evidence (like in this case) which pointed towards any strange adult of the applicant immediately before or after the murders he had committed.

The judge went on to the case of *Walton v The Queen* 1978 (1) ALL ER 542, where the House of Lords made it clear that where medical reports of diminished responsibility are not supported by some other facts from the evidence the jury is entitled to reject the claim of diminished responsibility if there are factors which justify that rejection.

It is for the reasons we have alluded to above, that true reject accused two's defence of diminished responsibility and we also reject the psychiatrists report as it is not founded on fact.

Both accused persons unlawfully and wrongfully killed the deceased.

We now move on the deliberate on what the accused persons are guilty of murder committed during the cause of a robbery or theft, as inferred from these facts, followed by the disposal of the body in a disused mine pit, commonly be that of one where the accused persons intended to kill the deceased, rob him, dispose of his body and disappear with his motor vehicle.

No other finding can be made on these facts except that the accused persons killed the deceased after having formulated in their minds the desire to do so. We accordingly find both accused persons guilty of murder with actual intent.

*National Prosecuting Authority*, applicant's legal practitioners  
*Coghlan & Welsh*, 1<sup>st</sup> accused's legal practitioners  
*Marondedze, Mukuku & Partners*, 2<sup>nd</sup> accused's legal practitioners