

DISTRIBUTABLE (44)

NKANYEZI MOYO v THE STATE

**SUPREME COURT OF ZIMBABWE
GWAUNZA JA, PATEL JA & GUVAVA JA
BULAWAYO, NOVEMBER 25 & 26, 2013**

Ms *S Ngwenya*, for the appellant

Mr *T Makoni*, for the respondent

GWAUNZA JA: The accused, Nkanyezi Moyo, aged forty-six (46) years at the time, appeals against the judgment of the High Court of 17 January 2013, in terms which he was convicted of murder with actual intent, and sentenced to death. The victim was Samson Ndobha Moyo, aged eighty-two (82).

It was alleged that on 6 August 2011, the appellant met the deceased near Moza River in Mangarame area, Tsholotsho. Some words were exchanged between the two over a previous confrontation, resulting in the appellant dispossessing the deceased of the axe he had been carrying and striking him several times on the head and once on the back between the shoulder blades. On realising that his victim had died as a result of the assault, the appellant dragged the body into a nearby bush and buried it in a shallow grave in Moza River. He went on to hide the bloodstained axe and its broken handle as well as the deceased's right gumboot in an anthill. He then hid the deceased's left gumboot in a bushy area near Simotsi River, and his bloodstained green tracksuit in Manzanyama River.

A search the next day by the deceased's family and villagers, during which they followed a spoor they had seen, resulted in the discovery of the deceased's nearly naked body, buried in the shallow grave. A report was made at Plumtree Police Station and the body was exhumed from its shallow grave and later ferried to United Bulawayo Hospital for a post mortem examination. Although the post mortem report indicated that the cause of the death could not be ascertained due to the body's state of decomposition, the doctor noted in the same report that the body had injuries to the head and back. These observations were consistent with the injuries described by the various witnesses, including the police and the deceased's relatives, who had viewed the body after its exhumation.

It is not in dispute that after receiving information of bad blood between the appellant and the deceased the police arrested the former and charged him with the murder of the latter. At the subsequent trial, the appellant pleaded not guilty to the charge.

There were no eye witnesses to the events that resulted in the death of the deceased, Samson Ndoba Moyo, nor was there any evidence placed before the court *a quo* which directly linked the appellant to the killing. The conviction of the appellant, of murder with actual intent and after a full trial, rested solely on the indications that he made to the police and which led to the recovery of personal items belonging to the deceased. The items had been hidden in scattered places around the scene of the killing.

The appellant alleged that he had not freely nor voluntarily made the indications, since he had been severely assaulted by the police. He further alleged that the items that were allegedly discovered following his indications, and which were dug out of their hiding places while he was being photographed by the police photographer, had actually

been previously retrieved by, and at the direction of, the deceased's brother, Sikwamula Filias Moyo. Such items, he averred, had then been "planted" in the various locations with the objective of framing him for the death of the deceased. His evidence hinted at some collusion between the police and the said Filias Moyo, in retrieving the said items from where they had been hidden and then putting them back before directing him to make indications. He went further and alleged that the said Filias Moyo could have killed the deceased.

From the record, it is evident that three sets of indications were made following the discovery of the deceased's body. The first indications were made by the deceased's brother Filias Moyo, on 8 August 2011. These indications, according to Sergeant Trust Tamusenga, who was present and made a sketch plan, were limited to the identification of –

- (1) the place where the deceased's spoor was spotted;
- (2) the trail of the spoor to where the deceased's right gumboot was found in a hole in an anthill; and
- (3) the place where the body was discovered.

These indications were witnessed by some villagers, who included the then suspect, i.e. the appellant.

The second indications were made the following day by the appellant, after his arrest and therefore as a suspect in the killing. Again, these indications were witnessed by some villagers, who included Chibutu Mashwana, a witness who gave evidence for the prosecution. It was the evidence of Chibutu Mashwana that the deceased's brother, Filias Moyo, was not present when these indications were made. Filias Moyo's evidence that

indeed he had not attended the scene where these indications were made was further confirmed by Sergeant Tarusenga. The Sergeant stated that after the retrieval of the deceased's blood-stained axe following indications by the appellant, he and his team went to the deceased's homestead and found Filias Moyo there. They then asked if he could identify the axe, which he did.

During the indications, the appellant pointed to the same hole from which the deceased's right gumboot had been retrieved by Filias Moyo on the day the body was discovered. It was from this hole that the appellant then retrieved the axe and its broken handle, which was later identified as belonging to the deceased. The axe was buried deeper in the hole than had been the deceased's right gumboot. It had bloodstains on it and was taken to have been the weapon used in the killing of the deceased.

The police sergeant and Chibutu gave consistent evidence to the effect that the appellant complained about not feeling well during the process that led to the retrieval of the axe. The exercise was then suspended and the appellant was taken back to Plumtree.

The third and last indications were done the following day, this time in the absence of any villagers. Only the police team and photographer witnessed the events. During these indications, the appellant led the team and pointed to a location from which, this time, the deceased's left gumboot was retrieved. This location was said to be some eight hundred (800) metres away from where the axe had been retrieved. After that, the appellant led the team to a location said to have been 1,6 kilometres away from where the right gumboot had been retrieved. At this location the deceased's green tracksuit top and pants were retrieved.

The court *a quo*, in our view, correctly dismissed the evidence of the appellant that the police had colluded with Filias Moyo in executing what could only have been an elaborate plot to implicate him in the killing of the deceased. His evidence, despite the valiant effort by his counsel on appeal, Ms *S Ngwenya*, to persuade us otherwise, was far from credible. It was also contradicted by other evidence before the Court. The appellant did not explain how, when nor why the police would have chosen to collude with Filias Moyo in the manner suggested. Filias Moyo and Chibutu Mashwana both said they had no reason to lie against the appellant. There, is in our view, no reason to fault the trial court's finding that it credibly established that Filias Moyo's indications on 8 August 2011 were made solely for the purpose of showing the police how and where the deceased's body and one of his gumboots had been found. The appellant, it appears, had difficulty in separating the events surrounding, as well as the witnesses to, the different indications referred to above. This is borne out by his evidence, which was effectively discredited, that Filias Moyo was present and witnessed the indications that he, the appellant, made and which led to the retrieval of the axe. His reference to the said Filias having retrieved some items belonging to the deceased in all probability refers to the indication by Filias Moyo, to the police, of the location of the deceased's right gumboot. The indications which led to the retrieval of the deceased's axe, his left gumboot and tracksuit from locations scattered some considerable distance from each other were done by the appellant in the subsequent two (2) days. It is difficult to conceive when and how Filias Moyo could have colluded with the police to stage the scene that the appellant alleges.

Counsel for the respondent referred us to s 258(2) of the Criminal Procedure and Evidence Act [*Cap 9:07*] which states as follow:

"It shall be lawful to admit that anything was pointed out by the person under trial or that any fact or thing was discovered in consequence of information given by such a

person notwithstanding that such pointing out of information forms part of a confession or statement which by law is not admissible against him on such trial.”

Counsel further referred us to *S v Nkomo* 1989(3) ZLR 117 (SC) where it was held that indications leading to the recovery of the murder weapon are admissible as they are external from the accused. It was stated as follows in that case:

“When a man points out a thing his act proves that he had knowledge of some fact relating to the thing.”

On the basis of the law and authority cited, it is argued for the respondent that the court *a quo* correctly accepted the indications made by the appellant, which led to the recovery of the murder weapon. Further, that since the admission of that evidence was “lawful” as contemplated by s 258(2) of the Criminal Procedure and Evidence Act, a trial within a trial was not a prerequisite to the admissibility of such indications.

We are persuaded by these submissions.

The appellant pointed to the place where the axe was buried so deeply that some digging was necessary to retrieve it. He could not have done this unless he had knowledge of some fact relating to the item concerned. The appellant then led the police to two other locations from where other items belonging to the deceased were retrieved. It can in our view, and by parity of reasoning, be assumed that the appellant had knowledge of some facts relating to these items. The locations from which the items were recovered were so spaced as to reasonably suggest a deliberate effort to conceal and prevent their random discovery. All this leads to the inevitable conclusion that the appellant buried the items in the places that he indicated. The items having been identified as belonging to the deceased, all reasonable doubt was, in our view, removed that the appellant had caused the deceased’s

death. That is so because the deceased's body was discovered without the clothes and gumboots in question. His body bore signs of injuries consistent with those inflicted from the use of an axe.

Counsel for the appellant cited authorities regarding the proper use of circumstantial evidence. She referred to *R v Bloom* 1939 AD 188 at 202-203 where the cardinal rules of logic governing the use of such evidence in a criminal trial are set out as follows:

- “1. The inference sought to be drawn must be consistent with all the proved facts and*
- 2. The proved facts should be such that they exclude every reasonable inference from them save the one sought to be drawn.”*

We are satisfied, on the basis of the evidence assessed above, that the inference that the appellant killed the deceased was properly drawn. From the indications that the appellant made it is evident that he had knowledge of the facts pertaining to the killing. The proved facts and manner of death of the deceased, in our view, exclude any other reasonable inference except the one drawn.

We find, in the result, that the appellant was properly convicted of the murder, with actual intent, of Samson Ndoba Moyo. The sentence of death was accordingly appropriate.

As far as extenuation is concerned, this court finds no fault with the court *a quo*'s finding that there were no extenuating circumstances.

Accordingly the appeal against conviction and sentence is dismissed.

PATEL JA: I agree

GUVAVA JA: I agree

Messrs Coghlan & Welsh, appellant's legal practitioners

The Attorney General's Office, respondent's legal practitioners