

ZACHARIA AMOS SIMANGO
v
THE STATE

THE SUPREME COURT OF ZIMBABWE
MALABA DCJ, GOWORA JA & GUVAVA JA
BULAWAYO, MAY 5 & 8, 2014

L Ncube, for the appellant

W Mabhaudhi, for the respondent

GOWORA JA: The appellant, his mother-in-law and his wife were charged with murder, it being alleged that on 7 February 2003 they unlawfully and intentionally killed Ndakaziva Mapako at Arda Ingwizi Estate, Plumtree. They pleaded not guilty but after a lengthy trial the appellant was convicted of murder with actual intent to kill. The other two were found not guilty and acquitted. The trial court was unable to find extenuating circumstances. The appellant was sentenced to death. This is an automatic appeal against both conviction and sentence.

The salient facts of the matter are the following. The appellant's in-laws reside in Chiredzi. Shortly before the occurrence of the events surrounding the murder of the deceased, the appellant went to visit his in-laws. He told them that he could find employment for his father-in-law and requested the latter to accompany him to Arda Ingwizi Estates. The father-in-law declined the offer. The appellant was however able to persuade his mother-in-law to go to Ingwizi with him on the pretext that he was in a position to provide them with maize.

On 6 February 2003, the appellant and his mother-in-law, Mhlaba Hurudza were at Plumtree bus terminus intending to board transport to Arda Ingwizi Estates where the appellant was employed and resided. The deceased, who was in the vicinity, was heard enquiring about green mealies for purchase and resale. The appellant indicated that he could provide a source for the mealies and suggested that she come with them to his homestead. The deceased who had a baby strapped on her back accepted the appellant's offer. She boarded the same bus as the appellant and his mother-in-law.

When they alighted at Bhulu bus stop, the appellant indicated that he wished to remain behind and gave them directions to his homestead. This was despite the fact that neither the deceased nor the mother-in-law knew the way to the compound. They got lost and were assisted by a man who advised them that the appellant had fled the compound after being accused of theft. He took them to the appellant's homestead where they found his wife. The appellant did not make an appearance. They retired to bed in the same room.

Around midnight, the appellant came and knocked at the door to the hut in which they were sleeping. He indicated that the deceased should accompany him to the fields so that he could give her the mealies. She got up and left with the appellant. She took her baby with her. She did not return to the compound.

At 4am the appellant returned to his homestead. He told his family that he had to flee the area as he was wanted for theft. He gave his wife Z\$500 and fled leaving his wife and her mother at the homestead. Later that same morning the appellant's wife and the mother-in-law learnt that the deceased had been found dead in the fields. Her child was

found crying near the body of the deceased. The child was holding a piece of bread in one hand.

The pathologist who examined the body of the deceased compiled a report. The body was in early stages of decomposition. An external examination revealed a stab wound on the left ear. The internal examination revealed fractures to the skull in the left occipital region and also the temporal region. There was massive subarachnoid haemorrhage of the brain. The cause of death was recorded as; subarachnoid haemorrhage, multiple skull fractures and assault. The post mortem examination results revealed wounds consistent with having been caused by a heavy sharp object.

On these facts the trial court found the appellant guilty of murder with actual intent to kill. In well written heads of argument, Mr *Ncube*, counsel for the appellant conceded that the conviction was properly arrived at. In our view the concession is proper. The evidence against the appellant was overwhelming. The evidence of the appellant's wife and mother-in-law provided a link to the appellant as the perpetrator of the heinous crime.

The appellant lured the deceased to his homestead on the pretext that he was able to find her a source for green mealies. In the early hours of the morning he lured her to the field and she was subsequently found dead. He was the last person to be in her company. Shortly after luring her to the fields he fled from the area after an attempt to remove his family from the same area. In the morning that he left he gave his wife Z\$500. This was despite the fact that he was not employed and had no visible means of raising funds. The deceased had come with funds to buy mealies.

After his arrest the appellant made indications to the police leading to the recovery of a pair of blood stained trousers. The blood on the trousers was tested and found to belong to group type B which was consistent with the blood group of the deceased. The blood did not belong to the appellant.

It was submitted on behalf of the State that the court *a quo* did not err in its assessment of the circumstantial evidence adduced against the appellant. The requirements for placing reliance on circumstantial evidence were met. In assessing the evidence the court *a quo* made the following remarks:

“We accept that there was no direct evidence adduced in this Court concerning the death of the deceased. The court had to rely on circumstantial evidence. The law on circumstantial evidence was correctly summed up by WATERMEYER JA in the much celebrated case of *R v Blom* 1939 AD 188 at 202 and 203 when the learned judge referred to “two cardinal rules of logic” which govern the use of circumstantial evidence in a criminal trial:

“(1) the inference sought to be drawn must be consistent with all the proven facts

(2) the proved facts should be such that they exclude every possible inference from them save the one to be drawn”

The proved facts in this case are that contrary to his denials, the accused 2 (appellant herein) in the company of accused 1 met the deceased at Plumtree Bus Terminus on 6 February 2003. Accused 2 was a total stranger to the deceased and offered to show the deceased where green mealies were being sold.

Accused 2 and accused 1 together with the deceased boarded transport to Ingwizi Estate and disembarked at Bhulu bus stop where the deceased and accused 1 were subsequently escorted home by accused 2’s homeboy one Obvious Mutale. During the middle of the same night or in the early hours of the 7th February 2003, the accused 2 knocked at the door to his home and told accused 3 to awake the deceased so that he would go and sell her green mealies.

The following morning the deceased was found dead and her child was seen wandering about close to the deceased's body.

The accused 2 on gathering that the police were making enquiries about the demise of the deceased gave accused 3 Z\$500 (Zim dollars) and tried to induce her and accused 1 to immediately depart for their home area, despite him not having secured dry maize for the accused 1, the sole reason why he had travelled with her from Chiredzi.

The only reasonable conclusion we have unanimously arrived at given this scenario is the accused 2 murdered the deceased to obtain money from her which he knew she had, and which he desperately required and that given the cause of death as captured in exhibit one, the accused 2 must have intended the death of the deceased.”

It is our view that the court *a quo* correctly applied the principles of law enunciated in *R v Blom (supra)* on circumstantial evidence and that the inferences that the court came to were consistent with the proven facts. The reasoning of the court cannot be faulted in any manner. The conviction is unassailable.

As regards sentence, the court found that there were no extenuating circumstances in the commission of the murder. Mr *Ncube* was unable to advance any meaningful submissions with regard to extenuation. He was correct.

Before the trial court counsel for the appellant was unable to advance any argument on extenuation. The appellant who was unemployed and was a fugitive from justice after being accused of theft hatched a scheme to obtain money from the deceased. He then lured her to Ingwizi. He had no means of providing her with mealies because he did not have any. He then lured her to the bush at night and killed her in a most brutal manner. The post mortem report talks of the injuries sustained by the deceased as being consistent with a

heavy sharp object. The deceased's baby was abandoned in the bush at night and was found crying near the dead body of its mother.

Apart from the viciousness of the murder itself there is the fact that the motive was to rob the victim. It is trite that in the absence of weighty mitigating circumstances, murder committed in the course of robbery will attract the death sentence. In *S v Sibanda* 1992 (2) ZLR 438 (S) GUBBAY CJ stated:¹

“Warnings have frequently been given that in the absence of weighty extenuating circumstances a murder committed in the course of a robbery will attract the death penalty.”

The learned trial judge found no extenuating circumstances and accordingly imposed the ultimate penalty. That decision cannot be faulted.

Accordingly, the appeal is dismissed.

MALABA DCJ: I agree

GUVAVA JA: I agree

James, Moyo-Majwabu and Nyoni, appellant's legal practitioners

The National Prosecuting Authority, respondent's legal practitioners

¹ At p443F-H