REPORTABLE (32)

TONIC MANGOMA
v
THE STATE

SUPREME COURT OF ZIMBABWE
MAKARAU JA, MAKONI JA & MATHONSI JA
HARARE: JANUARY 17, 2020 AND MARCH 5, 2020

V.J. Matenga, for the appellant

Ms *S. Fero,* for the respondent

MATHONSI JA: This is an automatic appeal against both conviction and sentence. The appellant was convicted of murder with actual intent by the High Court sitting on circuit at Gweru on 22 September 2014. Upon conviction, the penalty of death was imposed.

After hearing argument from counsel this Court made the following order:

"It is ordered that:
1. The appeal against conviction is dismissed.
2. The appeal against sentence is allowed.
3. The sentence of death imposed by the court *a quo* is set aside.
4. The matter is remitted to the court *a quo* for consideration and imposition of an appropriate sentence."

The court stated that the full reasons for the order would follow. These are the reasons.

NON INVOLVEMENT OF THE STATE

This appeal was initially set down on 11 September 2018. The appeal could not be heard on that date because the respondent had not filed heads of argument and needed time to do so. Ms *Fero*, who appeared for the respondent, requested a postponement to enable her to file heads of argument. The court acceded to that request and issued the following order:

> "It is ordered that:-
> The appeal is postponed *sine die* to allow the respondent to file heads of argument following the late filing of the notice of appeal."

I must add that the notice of appeal had been filed only on 7 September 2018 giving the respondent little time to file heads of argument. When the appeal was again set down for hearing, the respondent still had not filed heads of argument. Ms *Fero* again appeared for the respondent and sought a further postponement of the appeal. She admitted having been served with the notice of appeal in September 2018 and being timeously served with the notice of set down. She however submitted that the matter had been allocated to someone else at the office of the National Prosecuting Authority who did not file heads of argument.

As to why that officer had not appeared before the court to explain her failure to act and why she was not making the application for a postponement herself, Ms *Fero* did not give a satisfactory explanation. It is clear that the office of the National Prosecuting Authority has been tardy in its handling of the matter and has not given it the attention that it deserves.

In terms of r 52(3) of the Supreme Court Rules, 2018, where the respondent is to be represented by a legal practitioner at the hearing of the appeal, that legal practitioner shall file a document setting out the heads of his or her argument together with a list of authorities

cited in support, within ten days of receipt of the appellant's heads of argument. Subrule (5) of r 52 provides for an automatic bar against a failure to file heads of argument timeously.

The appellant's heads of argument were filed and served on the respondent on 30 May 2018 but the respondent, even though represented by counsel, did not file its own heads of argument up to the date of the initial set down on 11 September 2018 on the pretext that the notice of appeal had not been filed and served on time. This Court gave the respondent an indulgence and postponed the matter *sine die* to allow enough time for the settling of the heads of argument. The indulgence was spurned.

It is the view of this Court that the respondent could not possibly expect a further indulgence of another postponement. In fact, there was nothing suggesting that the respondent was treating this Court with the respect that it deserves. While it is the right of the prosecution in any criminal appeal, to defend the conviction and indeed, the sentence of convicted persons, that right should be exercised within the confines of the law and the four corners of the rules of court. The court has always leaned in favour of according the National Prosecuting Authority the opportunity to present its cases and to be heard. In that regard they have always been indulged in the discretion of the court.

Unfortunately the leniency extended to that office has been completely misunderstood. It is certainly not a licence for treating the rules of court with disdain. Indeed there are no special rules governing the National Prosecuting Authority. It is a party to proceedings just like any other litigant and is required to abide by the rules. Where there has been a failure to comply or there has been a delay, a reasonable and satisfactory explanation for failure to comply or to act timeously must be rendered.

No meaningful explanation for the failure to file heads of argument was given, even after an indulgence had been extended to the respondent on a previous occasion. This is a case in which the appellant was convicted and sentenced to death on 22 September 2014. A capital sentence has been hovering over his head for almost six years. It is completely unacceptable in the circumstances for the respondent to behave as if it is business as usual. It is for these reasons that this Court refused the application for a further postponement and proceeded to hear the appeal as unopposed.

FACTUAL BACKGROUND

The appellant was 27 years old when he was arrested and charged with the crime of murder as defined in s 47 (1) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] ("the Criminal Law Code"). The State contended that on 22 September 2013 the appellant proceeded to Msoreka Mavengano Bushe's ("the deceased") homestead in Village 10A Zviuma Chief Nhema, Shurugwi at night. He found the 85 year old deceased having supper. The deceased lived alone. It was alleged that the appellant attacked the deceased with a metal axe and metal rod inflicting fatal injuries to the head, face and left leg from which the deceased died instantly.

It was the State's case that after the death of the deceased, the appellant ransacked his house and took with him several items of property which he hid in order to conceal the offence. The deceased's body was discovered in a pool of blood the following morning by one Itayi Melusi who made a report leading to the arrest of the appellant.

Following his arrest, the appellant made indications to the police which led to the recovery of a black suit, a metal rod, a big knife and a salt shaker belonging to the deceased.

The appellant also gave a warned and cautioned statement to the police but the magistrate at Shurugwi refused to confirm the first statement when it was taken to her for confirmation. This was after the appellant had alleged that he had been assaulted by the police to induce him to make a confession.

Subsequent to that, the police officers investigating the matter booked the appellant out of Hwahwa Remand Prison for purposes of recording a second warned and cautioned statement from him. They took the appellant to the same magistrate at Shurugwi Magistrates Court for confirmation of the second statement. The magistrate confirmed the statement as this time, the appellant did not raise a complaint against the police.

At the trial, the appellant pleaded not guilty to the charge. The State produced the appellant's second warned and cautioned statement in terms of s 256 (1) of the Criminal Procedure and Evidence Act [*Chapter 9:07*], among other evidence. It also relied on the evidence of one Evia Matura, the Provincial Magistrate who conducted the confirmation proceedings and Detective Vumindaba Mpofu, the investigating officer, among other witnesses.

The appellant's defence, although he had submitted two diametrically different defence outlines, was that he had been assaulted by the police forcing him to confess having killed the deceased and robbing him of his property. He had also been assaulted to force him to make indications which led to the recovery of property, some of which belonged to the deceased. He was not involved in the murder of the deceased. He had only been given a bag with clothes by Tulani Rukwe who had proceeded to the deceased's homestead on the fateful

night with Victor Nzombe. The two had been panning for gold with the appellant at Dopota gold mining area. He later sold some of the clothes given to him in his village.

THE COURT *A QUO*'S FINDINGS

The court *a quo* found the State witnesses, particularly the investigating officer, credible. It accepted the evidence of Vumindaba Mpofu in its totality especially when relating to the recording of the confession made by the appellant and the statement of indications, as "the demeanour of (the) witness and the narration that he gave as well as the manner in which he answered the questions" suggested truthfulness.

On the admissibility of the warned and cautioned statement, the court *a quo* embraced the evidence of the Provincial Magistrate who confirmed it as truthful without questioning how, the same court which had refused to confirm an earlier confession, found nothing wrong with the appellant being brought back to confirm a confession in respect of the same matter. The remarks of the trial court in that regard are pertinent:

> "Nothing much turns on her (Evia Matura) testimony and she appeared to the court to be telling the truth. More so she is a judicial officer who was not shown to have an interest in the matter. In fact she had refused earlier on to confirm a statement that the accused person had said he had given under duress. So the court believes that indeed even when she did the confirmation for the second time she adhered to the proper procedure."

The court *a quo* concluded that the appellant had failed to discharge the onus placed on him by s 256(2) of the Criminal Procedure and Evidence Act [*Chapter 9:07*] to show, on a balance of probabilities, that the confirmed warned and cautioned statement was not made freely and voluntarily. In the court *a quo*'s view the statement was properly confirmed.

Significantly, the court *a quo* found that even were the confession and the statement of indications found to be inadmissible, the appellant would not escape conviction by reason of the deceased's property found in his possession. In doing so, the court *a quo* found ample evidence that the appellant committed the offence of murder in the course of a robbery. It returned a verdict of guilty of murder with actual intent.

After the verdict, the court *a quo* went on to enquire into the existence of extenuating circumstances as would preclude the imposition of the death penalty. After finding none the court *a quo* sentenced the appellant to death. The appellant enjoyed an automatic right of appeal owing to the penalty imposed.

GROUNDS OF APPEAL

The appellant raised three grounds of appeal in his appeal against both conviction and sentence. They are:

"1. The court *a quo* grossly misdirected itself in finding the appellant guilty of murder based on a warned and cautioned statement which was obtained through duress by the investigating officers. The court failed to consider that a warned and cautioned statement obtained through duress is inadmissible and cannot form the basis of a conviction.
2. The court *a quo* grossly misdirected itself in finding the appellant guilty on the basis of circumstantial evidence which did not lead to the inescapable conclusion that the appellant had committed the crime. There was evidence from the appellant of where he got the deceased person's items but the court *a quo* erroneously disregarded such evidence.
3. The court *a quo* grossly erred in considering the absence of extenuating circumstances in passing the death penalty. The constitution stipulates the sentence of death should be passed only if the existence of aggravating circumstances is established and the court failed to consider these circumstances."

ISSUES FOR DETERMINATION

This appeal raises only 2 issues for determination by the court, namely:

1. Whether the appellant was properly convicted; and
2. Whether the sentence was proper in the circumstances.

WHETHER THE APPELLENT WAS PROPERLY CONVICTED

This is a case in which the State did not have any direct evidence of the commission of the offence. It relied entirely on the confession of the appellant and circumstantial evidence strewn all over the record. For that reason, there was a pressing need for the trial court to carefully and meticulously test the evidence before arriving at a verdict of guilt or otherwise.

It is common cause that the appellant made a statement to the police on 30 October 2013 in which he admitted having planned to kill the deceased who was rumoured as having sold a beast and had money. He confessed having executed his plan on the evening of 22 September 2013 using an axe with a metal handle while in the company of an accomplice who was armed with a metal rod. He also admitted having robbed the deceased of his belongings. It is however the reliability of that confession which presents some legal challenges given the circumstances under which the statement was recorded and confirmed by the Provincial Magistrate at Shurugwi.

It is common cause that the appellant initially gave a statement to the police under caution , which, upon being taken before the provincial magistrate for confirmation in terms of s 113 of the Criminal Procedure and Evidence Act [*Chapter 9:07*] was not confirmed after the appellant alleged duress. It is also common cause that after that failed attempt at confirmation, the investigating officer who had recorded the statement, booked the appellant from remand prison. He set about recording a second statement from the appellant, which

statement was again witnessed by the same police officer who had witnessed the unconfirmed statement.

The statement was taken to the same provincial magistrate for confirmation. On the second occasion, the appellant did not raise a complaint and the second statement was confirmed. Once the statement was confirmed by a magistrate the provisions of s 256(2) of the Act set in. It provides:

> "A confession or statement confirmed in terms of subsection (3) of section one hundred and thirteen shall be received in evidence before any court upon its mere production by the prosecutor without any further proof.
>
> Provided that the confession or statement shall not be used as evidence against the accused if he proves that the statement was not made by him or was not made freely and voluntarily without him having been unduly influenced thereto, and if, after the accused has presented his defence to the indictment, summons or charge, the prosecutor considers it necessary to adduce further evidence in relation to the making of such confession or statement, he may re-open his case for that purpose."

The above provision places the onus on an accused person whose statement has been confirmed in terms of s 113 to prove that it was not made freely and voluntarily. The statement itself, once confirmed, is admissible in terms of s 256(1) upon its mere production by the prosecution. It is however the confirmation itself which was questionable. It is trite that a statement induced by duress in the form of torture, physical beating or mistreatment of an accused person would not be made freely and voluntarily. An accused person should not be threatened, harassed or even offered some benefit if he or she makes a confessionary statement.

A statement made under those circumstances is clearly unreliable and, for that reason, is inadmissible as evidence. This court has, in the past, gone to the extent of holding that even the denial of access to legal representation to an accused person renders a statement made thereafter inadmissible. See *S v Woods & Ors* 1993 (2) ZLR 258(S).

The procedure for confirming extra-curial statements is designed to curtail proceedings in a criminal trial by reducing prospects of trials – within – trials. The confirmation proceedings however should not be a mere formality because the statement, once confirmed, can be admitted in evidence at the trial on mere production. It is therefore imperative that the presiding magistrate, not only adheres strictly to the procedure for confirmation, but also thoroughly investigates the freeness and voluntariness of the statement.

Where possible an accused person must be made to identify those he or she accuses of applying undue pressure on him or her to make a statement. Where an accused person has identified them resulting in the magistrate refusing to confirm the statement, it certainly does not make sense for the culprits to be allowed to return to the same accused person and record another statement and have it confirmed.

Indeed, in confirmation proceedings it is critical that the presiding magistrate be on guard and closely look out for suspicious factors tending to point to undue influence having been brought to bear on an accused person to make a statement or confession. These include the lengthy delay in recording the statement or in bringing it to court for confirmation.

Confirmation proceedings must always be held in camera in order to allow an accused person the freedom to raise any complaints against his or her police handlers. The investigating officer and his or her team should never be allowed anywhere near the court room where the proceedings are being conducted. Their presence tends to intimidate the accused person preventing him or her from reporting any mistreatment to the magistrate.

In the present case it may well be, as attested by the presiding magistrate, that the accused person did not raise any complaints against the police and that he admitted having made the statement freely and voluntarily. However, alarm bells should have chimed in the mind of the magistrate the moment she saw the same accused person whose confession she had refused to confirm a few days earlier, being brought back for confirmation of another confession in respect of the same offence.

Having said that, it occurs to me that it is wholly inappropriate for the police, who would have had the confirmation of a statement recorded from an accused person rejected by a magistrate, to go back and seek to record another statement and to have it confirmed. It renders the whole exercise a farce. To my mind, once confirmation of the recorded statement has been rejected, the investigators must live with that outcome. The matter should end there. After all, the prosecution is not precluded from placing reliance on the statement at the trial. Only that it bears the onus of showing that it was made freely and voluntarily.

In my view, the court *a quo* fell into grave error when it accepted and relied on the confession of the appellant which was confirmed in such circumstances. This is more so regard being had that the appellant had proffered an explanation for the two statements and why he had not objected to the confirmation of the second one. He said that he had been assaulted to induce a confession and that when the statement was taken for confirmation, the investigating officer and his team he accused of assaulting him were allowed into the court room. They had threatened that if he prevented confirmation they would assault him further.

It is trite that where an accused person has given an explanation, the court is not at liberty to reject it unless satisfied, not only that the explanation is improbable, but that it is,

beyond a reasonable doubt, false. See *R v Difford* 1973 AD 370 at 373; *S v Mapfumo & Ors* 1983(1) ZLR 250. In my view, reasonable doubt existed as to the reliability of the appellant's confession, it being common cause that the same officers who had recorded and witnessed the unconfirmed statement undertook the same exercise for the second time.

It is important to note, that notwithstanding, the confession was not the only evidence linking the appellant to the commission of the offence. I have said that the evidence of the State was circumstantial. The proper use of circumstantial evidence can be regarded as settled in our jurisdiction. There are two cardinal rules of logic governing the use of such evidence in criminal proceedings. They are that:

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.

See *R v Blom* 1939AD 188 at 202-203 (quoted with approval in *Moyo v The State* SC 65/13).

The evidence is essentially that the appellant was found in possession of property belonging to the deceased after his arrest. In fact, it is him who made indications leading to the recovery of the property in question. Exhibit 6 is a black suit belonging to the deceased. The jacket was recovered on top of a mountain while the trousers was found at the appellant's home in a room used by the appellant. The appellant also led the investigating team to a cave where a metal rod, exhibit 7, and a big knife, exhibit 9, were recovered. The knife was identified by Shepherd Bushe as belonging to the deceased. Also recovered following the appellant's indications at another cave at Boman Kopje was the deceased's salt shaker.

It is true that the appellant tried to challenge the admissibility of the indications which he made, stating that the indications were conducted the same day that he made the statement to the police under duress. According to him those indications were inadmissible by reason that he had been assaulted. In my view, the challenge to the indications was of no moment at all. The trial court did not have to rule on their admissibility by reason of the provisions of s 258(2). It reads:

> "It shall be lawful to admit evidence 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 person notwithstanding that such pointing out or information forms part of a confession or statement which by law is not admissible against him on such trial."

This provision was applied in *Moyo v The State* (*supra*) where the court stated:

> "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 those 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."

The same reasoning is applicable to the present case. Even if the indications were not admissible, the evidence of the recovery of the items of property belonging to the deceased, could lawfully be admitted. Indeed, when a person points out an item, his or her act proves that he or she had knowledge of some fact relating to the thing. See *S v Nkomo* 1989 (3) ZLR 117 (S) at 125D.

The fact that the deceased's property was pointed by the appellant means he was in possession of it at locations of his own choosing. His possession triggered the application of s 123 of the Criminal Law Code which provides:

> "(1) Subject to subsection (2) where a person is found in possession of property that has recently been stolen and the circumstances of the person's possession are such that he or she may reasonably be expected to give an explanation for his or possession, a court may infer that the person is guilty of either theft of the property or stock theft, or of receiving it knowing it to have been stolen whichever crime is more appropriate on the evidence, if the person –
>
> (a) cannot explain his or her possession, or
>
> (b) gives an explanation of his possession which is false or unreasonable.
>
> (2) A court shall not draw the inference referred to in subsection (1) unless the circumstances of the person's possession of the property are such that, in the absence of an explanation from him or her, the only reasonable inference is that he or she is guilty of theft, stock theft or receiving stolen property knowing it to have been stolen, as the case may be."

Clearly possession placed the onus on the appellant to explain his possession. His explanation is that he was given a bag full of clothes by a colleague. The explanation is not only improbable, it is demonstrably false. The colleague in question was not located and was not shown to exist. The reason for the colleague's generosity was not given.

All the proved facts exclude every reasonable inference from them other than that he stole the property from the deceased's home. Unfortunately, in this case it is not only theft but also murder because the deceased was murdered before his property was taken. The circumstantial evidence led proved that it is the appellant who killed the deceased and stole his property. He was properly found guilty.

In my view, this having been a murder committed in the course of a robbery, the court *a quo* correctly found the existence of actual intention. That finding is supported by a number of factors including the age of the deceased and the injuries he sustained. The injuries

included a deep cut on the skull and lower lips suggesting that blows were directed to the most vulnerable part of the human body, the head. The test for actual intention is that:

(a) Either that the accused desired to bring about the death of the victim and succeeded in his or her purpose; or

(b) While pursuing another objective the accused foresees the death of the victim as a substantially certain result of that activity and proceeds regardless.

See *S v Mugwanda* 2002(1) ZLR 574(S) at 581 D-E. The appellant was properly convicted because the test was satisfied.

Regarding sentence, that need not detain us here because it was settled by this Court in *Mutero v The State* SC 28/17. The court *a quo* inquired into the existence of extenuating circumstances. When it found none, it imposed capital punishment. In doing so the court *a quo* proceeded in terms of s 337 of the Criminal Procedure and Evidence Act [*Chapter 9:07*] without regard to s 48 (2) of the constitution which had come into effect in 2013 prior to the trial of the appellant.

In terms of s 48 of the Constitution, a law may permit the death penalty to be imposed only on a person convicted of murder committed in aggravating circumstances. The law must permit the court a discretion whether to impose the death penalty or not. In the *Mutero* case *supra*, this Court dealt with the sentencing of an accused person convicted of murder with actual intent before the alignment of s 337 of the Criminal Procedure and Evidence Act to the Constitution and found that the section as it stood then was inconsistent with s 48(2) of the Constitution.

This is because s 337 provided for the death penalty where extenuating circumstances were not found. On the other hand, s 48(2) of the Constitution, which overrides any other law inconsistent with it, allows the imposition of the death penalty only where murder is committed in aggravating circumstances. Even then, the court has a discretion to impose it or not to.

The following remarks of GOWORA JA in that case are apposite:

> "… most fundamentally, s 48(2) requires that the death penalty be provided for in a law permitting a court to pass sentence for a murder committed in aggravating circumstances. Therefore, it stands to reason that s 48 is not such law. In my view, it is an enabling provision for the promulgation of the necessary law. In the absence of the contemplated law therefore the trial court could not pass a sentence of death. To do so would be a violation of s 48(2)" (The underlining is for emphasis).

It was not until the promulgation of Act No. 3 of 2016 in June 2016 that s 47 of the Criminal Law Code was amended to provide for the imposition of the death penalty where murder is committed in aggravating circumstances. It is now contained in subs (2) of s 47. This can only mean that it was not only incompetent for the trial court to inquire into the existence or otherwise of extenuating circumstance, but also to impose the death penalty. No law existed then regulating the imposition of such a sentence.

The sentence cannot stand. It has to be vacated for that reason. It is for these reasons that the court issued the order set out above.

MAKARAU JA: I agree

MAKONI JA: I agree

Wintertons, appellant's legal practitioners

National Prosecuting Authority, respondent's legal practitioners