DISTRIBUTABLE (109)

Judgment No. SC 129/02

Crim. Appeal No. 137/02

EDWARD DIMA BHEBHE v THE STATE

SUPREME COURT OF ZIMBABWE
CHIDYAUSIKU CJ, MALABA JA & GWAUNZA AJA
BULAWAYO, JULY 25, 2002 & MARCH 20, 2003

C P Moyo, for the appellant

I M Nyoni, for the respondent

MALABA JA: The appellant was convicted of the murder of one Selina Dube with actual intent to kill her. The trial court, having found no extenuating circumstances, sentenced him to death. The appeal is against conviction and sentence.

The deceased, who was aged sixty-three years, and the appellant resided at a compound at Induna Farm in the Inyathi District of Matabeleland North Province. She was married to the appellant's uncle.

It is common cause that on 27 February 1999 the deceased, her husband and the appellant were drinking beer at the local business centre. At about 9 pm the deceased left the business centre proceeding home. She left her husband and other residents at the business centre, but the appellant also left shortly thereafter.

The deceased never got home. She was found dead on 28 February 1999 in a bush next to the path leading to the compound. She had been brutally

murdered. The doctor who carried out the autopsy on the body observed the following marks of violence on the deceased's body:

(a) Multiple bruises, wounds on the occipital region, right maxilla and mandibular region. Compound fracture of the right sub mandibular bone. Compound and comminuted fracture of the right maxillary bone down to the maxillary sinus, compound fracture of the right interior orbital region.

(b) Multiple double rib fractures of the right chest wall from T2 to T12 near the midline with resultant haemopneumothorax, lung collapse and meadistanal shift to the left. The overlying chest wall muscles and right breast have tissue pneumalosis (i.e. air in the tissues). The right breast is bruised and has a huge haematoma."

The deceased's vaginal introitus was bruised with green grass around it. The vagina was found to be oedematous and abrased, suggestive of effective penetration. The internal examination revealed extensive subarachnoid haemorrhage, ruptured liver and gall bladder. The doctor concluded that the deceased had been raped and mercilessly killed. Two blood-stained stones were found at the scene where the deceased's body lay.

The appellant was arrested on 28 February 1999 in connection with the murder of the deceased. On 1 March 1999 he made a warned and cautioned statement to Sergeant Bedza at Inyathi Police Station. He is recorded as having said:

> "I admit the charge of killing Selina Dube. I came across Selina Dube along the way as she was coming from Queens Mine proceeding home to Three Leaders Mine at around eleven o'clock at night. When I had come across her on the way, I asked her why she was bewitching me. She then tried to brazen it out by offering to have sexual intercourse with me. I refused to have sexual intercourse with her and I picked up some stones and hit her with them numerous times about the face and head. They were two stones. After I had hit her I left her lying and rolling about on the ground and proceeded to my house at Three Leaders Mine. I left Selina Dube still alive.

She died after I had left and I had not intended to kill her. My aim was to get Selina Dube to tell me what she had against me."

On 3 March 1999 the appellant was taken by members of the Criminal Investigation Homicide Department of the Zimbabwe Republic Police based in Bulawayo for indications at the scene of the murder. In the course of making indications the appellant was asked why he believed the deceased was bewitching him. He is recorded as having said:

"I came to know of it after my wife had deserted to her family home where she was told by some prophets that she had been bewitched by the deceased and that she (the deceased) was bewitching me as well."

The appellant was taken before a magistrate for the confirmation of the two warned and cautioned statements on 3 March 1999. He admitted that he had made the statements freely and voluntarily without any undue influence having been brought to bear upon him. The two statements were confirmed.

The murder of the deceased having been established, the issue at the trial was whether the appellant was the killer. The only evidence by which the State linked the appellant with the murder was the confession he allegedly made in the warned and cautioned statement recorded on 1 March 1999. The appellant alleged at the trial that he did not make the statement freely and voluntarily. He said he had been assaulted by the police.

It became clear in the course of the trial that the appellant had no complaint against the police details who recorded the warned and cautioned statement at Inyathi Police Station. He said he was assaulted by the members of the Criminal Investigation Department after the statement had been recorded. When asked why he had not told the magistrate who confirmed the warned and cautioned statement that he had been assaulted by the police, the appellant said the police details who assaulted him were seated outside the courtroom during the confirmation proceedings. He said he was afraid that if he told the magistrate about the assault and the police details heard about it they would assault him again when he left the courtroom.

The police details who recorded the appellant's warned and cautioned statements gave evidence. They denied the allegation that the appellant was

assaulted. The learned judge found that the appellant had not discharged the *onus* on him to show that the confirmed warned and cautioned statement and indications were not made freely and voluntarily without any undue influence having been brought to bear upon him.

The finding by the learned judge is unassailable. The assault on the appellant would have been perpetrated after the warned and cautioned statement had been recorded from him. The assault, if at all it had been committed, would not have had any bearing upon the exercise of free will by the appellant at the time the warned and cautioned statement was made. The appellant did not say in evidence that he did not make the warned and cautioned statement freely and voluntarily.

> The learned judge correctly found that the police details who recorded the statement from the appellant to the effect that the deceased was bewitching him would not have known of the circumstances in which the appellant came to the belief that the deceased was bewitching him. That kind of information could only have come from the appellant.
>
> In *R v Sambo* 1964 RLR 565 at 571 A-G BEADLE CJ said:

> "If the accused mentions facts in his confession the knowledge of which he could only have come by by being connected with the crime, the mention of such facts will, of course, be most cogent evidence to show that the confession is genuine. But even if the accused may have been questioned by the police on these very facts, their mention still has considerable probative value. If an accused freely makes a long statement and all the known facts fit in their proper sequence into this statement, this may often be sufficient reason on which to base a conclusion that the confession is genuine, even if the police may previously have questioned the accused on these facts. Because unless the police put the actual words of the statement into the accused's mouth, if his only knowledge of the true facts has come from police questioning, he is hardly likely to present a coherent and convincing story into which all the known facts dovetail perfectly. A confession of such a type will often, therefore, itself prove its genuineness."

As there was evidence *aliunde* proving that the deceased had been murdered, and having found that the appellant's confession was genuine, the court *a quo* was entitled to return a verdict of guilty of murder with actual intent to kill. See s 273 of the Criminal Procedure and Evidence Act [*Chapter 9:07*]; *R v Taputsa & Ors* 1966 RLR 662; *S v Jokasi* 1986 (2) ZLR 79; *S v Shoniwa* 1987 (1) ZLR 215; *S v Dube* 1992 (1) ZLR 234.

The appeal against conviction cannot succeed.

On sentence, it was argued by Mr *Moyo*, on behalf of the appellant, that the trial court misdirected itself in finding that the appellant's belief that the deceased was bewitching him did not constitute a factor of extenuation. He argued further that the court *a quo* should have found that the appellant had taken alcohol and that its influence upon him reduced the degree of his moral blameworthiness.

Mrs *Nyoni* readily conceded that in appropriate circumstances belief in witchcraft and intoxication can constitute extenuating circumstances. She contended, however, that the court *a quo* found that the appellant killed the deceased to cover up the crime of rape he had committed on her. In other words, what was occupying the appellant's mind at the time he killed the deceased was fear of being identified by her as the rapist and not the belief that she was bewitching him.

The learned judge said:

> "We do not believe that an allegation of witchcraft is what really attracted the punishment that this woman suffered.
>
> But as regards the rape it was clear that if he had raped her and left her alive she would have reported him and put him into trouble. In view of that, it is

> our observation that the killing must have been not linked to the witchcraft but clearly was intended to cover up the rape which was a very serious crime. The stoning was clearly intended to ensure that she die(d) and (did) not remain alive."

The effect of the finding of the court *a quo* was therefore that the murder was committed to conceal the rape which the appellant had committed on the deceased.

In *Ephraim Dube v S* S-124-2000 the death sentence was upheld on appeal where the accused had killed the deceased after raping her. GUBBAY CJ, at p 3 of the cyclostyled judgment, said:

> "On these gruesome and horrific facts it is not surprising that the trial court concluded, and rightly so, that the deceased had been killed by the appellant in order for her not to reveal that it was he who raped her."

Having decided that the appellant killed the deceased in order to destroy evidence of his identification as her rapist, it is not surprising that the court *a quo* found that there were no extenuating circumstances for not imposing the death sentence.

The appeal against sentence must also fail.

The appeal is accordingly dismissed.

CHIDYAUSIKU CJ: I agree.

GWAUNZA AJA: I agree.

Pro deo