

(1) VUSUMUZI MOYO (2) KHULEKANI NKOMO
v
THE STATE

**SUPREME COURT OF ZIMBABWE
MALABA DCJ, GARWE JA & GOWORA JA
BULAWAYO, MARCH 25, 2013**

Miss *S Nkomo*, for the appellant

A Munyeriwa, for the respondent

MALABA DCJ: This is an appeal against both conviction and sentence of death for murder with actual intent to kill. The court *a quo* found that there were no extenuating circumstances and passed the death sentence on the appellants.

The facts of the case are these. The deceased who was aged 38 years at the time of his death drove his motor vehicle from his house to town at about 7pm on 24 June 2009. At the corner of Herbert Chitepo and 12th Avenue he gave a lift to the two appellants and an accomplice who indicated they were going to Magwegwe. They drove along Khami Road and then into Hyde Park Road. At the intersection of Hyde Park Road and Masiyambili Road, near Pelandaba Cemetery, the second appellant who was sitting behind the deceased placed a nylon cord around the deceased's neck and strangled him.

Once satisfied that the deceased was dead they pushed the body on to the passenger seat. The first appellant took over the car and drove it to Luveve cemetery where they dumped the body in a bush. They took his cellphone a Nokia 3310 and his money. The

appellants drove back into town and picked two passengers at West End garage using the stolen car. One of the passengers was Nkosilathi Sibanda a reporter with a local newspaper.

The appellants drove towards Luveve and one of the passengers alighted on the way whilst Nkosilathi remained in the car. When they got to his destination the appellants refused to stop. The first appellant instead activated the central locking system whilst accelerating. They drove the motor vehicle towards Victoria Falls Road and stopped at Ngozi Mine turn off.

The second appellant proceeded to assault Nkosilathi with clenched fists and open hands. They later stripped him of all his clothes and footwear. He was left wearing only his underwear. They took his ZTA 35 cellphone.

The appellants then abandoned Nkosilathi. They drove to an overnight car park in Luveve where they left the car. The car was recovered from the car park about three weeks later.

At about midnight the day of the deceased's death the first appellant phoned prophet Sibanda using the deceased's cellphone. He was seeking spiritual assistance. The call was later traced by the investigating officer leading to the arrest of the first appellant. The first appellant immediately admitted his involvement in the murder of the deceased and the robbery of Nkosilathi. He implicated the second appellant who was arrested at Bulawayo Prison. He had been detained there on 8 July 2009 on charges of carjacking and robbery.

The appellants made warned and cautioned statements in which they admitted their involvement in the commission of the offence. The statements were subsequently confirmed by a Magistrate.

On 14 September 2009 Nkosilathi identified the two appellants at an identification parade conducted at Bulawayo Central Police Station. The post-mortem report shows that the deceased died of asphyxia by a ligature.

On these facts the court *a quo* found that the appellants acted in common purpose. Consequently they were found guilty of murder with actual intent to kill.

On appeal the appellants sought to attack the conviction on the basis that the evidence was circumstantial and the identification parade was not organised properly. The suggestion that the first appellant did not phone the prophet Sibanda on the night in question is not borne out by the evidence. The evidence shows that it was on the basis of the call he made to Sibanda using the deceased's cellphone that the first appellant was arrested.

The evidence of the identification of the two appellants by Nkosilathi was challenged on the grounds that the participants were not of the same height, did not wear similar clothing and that Nkosilathi was escorted to the parade by the investigating officer. They also challenged the reliability of the evidence of Nkosilathi on identification on the grounds that the conditions prevailing during the time he was with the assailants were not conducive to proper identification.

In view of the fact that the appellants confessed in their warned and cautioned statements being with Nkosilathi in the motor vehicle and treating him in the manner he described removes the case from that of circumstantial evidence and mistaken identity.

In a well reasoned judgment the court *a quo* came to the conclusion with which the court agrees that the appellants committed the offence of murder with actual intent to kill.

On the question of extenuation the court *a quo* came to the conclusion that as it was a murder committed in the course of a robbery there were no extenuating circumstances. On appeal the appellant's legal practitioner indicated that she had no meaningful submissions to make in respect of the finding by the court *a quo*. The unanimous view of the court is that the concession was properly made. In *S v Matongo & Ors* S-61-05 it is stated that:

“The law in this regard is clear. A murder committed in the course of a robbery attracts the death penalty unless there are weighty extenuating circumstances”.

There are no weighty extenuating circumstances in this case.

Accordingly the appeal against both conviction and sentence is dismissed.

GARWE JA: I agree

GOWORA JA: I agree

Kenneth Lubimbi & Partners, appellants' legal practitioner

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