CUTHBERT MPOFU v THE STATE

SUPEME COURT OF ZIMBABWE
MALABA DCJ, GOWORA JA & HLATSHWAYO JA
BULAWAYO, NOVEMBER 26 & 28, 2013

S Ncube, for the appellant
G Ndlovu, for the respondent

MALABA DCJ: On 30 January 2008 the appellant appeared before the High Court in Gweru facing a charge of having committed the crime of murder as defined in s 47 of the Criminal Law (Codification and Reform) Act [*Cap. 9:23*]). The allegation was that on 25 October 2006 at Mudzimundiringe River in Village 3 Radway Farm, Chief Bvute, Mberengwa the appellant who was aged 18 years unlawfully and intentionally killed Rosemary Mundaya aged 10 years.

After a full trial, the appellant who pleaded not guilty was convicted of murder with actual intent to kill and sentenced to death, the trial court having found no extenuating circumstances.

On automatic appeal to the Supreme Court against both conviction and sentence Miss *Ncube*, who represented the appellant indicated after an initial attempt to discredit the conduct of the identification parade that upon consideration of all the circumstances of the case there was no misdirection committed by the court *a quo* in respect of both conviction and sentence.

The facts surrounding the commission of the offence were not in dispute. They can be gleaned from the evidence of state witnesses who included three school children Beatrice Shoko aged 5 years, Chidochashe Hove aged 9 years and Davison Dube aged 13. All the three children together with the deceased Rosemary Mbundaya attended at Mberengwa Primary School.

The evidence of Davison Dube was to the effect that at about 1pm he left school in the company of the deceased and her friend Christina Muyambo going to attend a road show at a bus terminus where music was being played. When they got to the road show he found the appellant dancing to the music.

They sat on a car wreckage. After a while the appellant came to where they were and asked the deceased where she lived. The deceased gave the appellant the name of a village

next to hers. When the appellant left he asked the deceased why she had lied contrary to the instruction from the head teacher that they should always tell the truth.

Davison said the appellant returned and ordered him to leave the car wreckage. He did, leaving the appellant talking to the deceased. At the end of the road show adults were invited to pick booklets that were on offer. He saw the appellant pick a booklet. The deceased told Christina that it was time for them to go home but the latter said she was not yet ready to go home. The deceased then left the road show going home.

Davison said he had the appellant in sight for about 45 minutes at the road show. He wore a bluish pair of trousers and put on a white t-shirt with vertical stripes. The appellant wore a dreadlock hair style. Although the appellant had now had his hair shaved off Davison was able to positively identify him as the young may he saw at the road show amongst ten young men of similar height who were lined up in an identification parade behind a building at Mberengwa Police Station on 31 October 2006.

Davison identified the appellant as the young man he had seen at the road show by his face and clothing. The appellant was wearing a bluish pair of trousers and putting on a

white t-shirt with vertical stripes in the identification parade. He was adamant that no one had assisted him with the identification of the appellant.

It was his evidence that he could not forget the appellant because he had had him in sight for not less than 45 minutes on 25 October 2006. Davison denied the allegation by the appellant that he had seen him in a police truck at Village 3 Radway Farm before the day of the identification parade. He also vehemently denied the allegation by the appellant that they knew each other from the village before the day of the road show. Davison said he saw the appellant in a police truck after the identification parade.

It is common cause that when the deceased left the road show going home she caught up with Beatrice Shoko and Chidochashe Hove who had not been at the road show. The evidence of Beatrice and Chidochashe was to the effect that soon after the deceased joined their company they saw a young man following them. When the young man came up to where they were he asked them which families they came from. When they told him the young man went past them and walked in front of them. As they got opposite a hill the young man turned and walked towards them.

On getting to where they were the young man made as if he wanted to go between them as they also moved to the sides to give him way. He suddenly caught hold of the deceased

by the hand and dragged her into the bush towards the hill as she screamed for help. The two girls ran home in fright and reported to their parents that the deceased had been kidnapped by an unknown man.

Beatrice said the young man they saw kidnap the deceased wore a pair of white shorts and put on a white t-shirt. He wore a dreadlock hair style and was holding a book. She picked the appellant at the identification parade on 31 October 2006 as the young man she had seen on 25 October. When asked how she was able to identify the appellant as the offender in the identification parade Beatrice said she recognized his face and the clothes. It was her evidence that at the identification parade the appellant was wearing a pair of white shorts and putting on a white t-shirt. She denied the allegation by the appellant that she was able to identify him because she knew him as he used to visit her brothers Limkani and Sparks. She vehemently denied that these two young men were her brothers.

Chidochashe also said the young man who kidnapped the deceased wore a dreadlock hair style. She said he wore a pair of white shots and put on a blue shirt. She also said she was able to pick the appellant at the identification parade because he was still wearing the same clothes.

It is also common cause that upon receipt of the report of her daughter having been kidnapped Maybe Nyoni ran to the scene of the crime followed by her late husband who was not feeling well. After searching the area near the hill to no avail Maybe went to Mberengwa Police Station to report the disappearance of her daughter. The police appear to have disbelieved her story and dismissed her. She went back and joined other villagers in search for her daughter.

The body of the deceased was found lying on the river bank. The bluish pant the deceased had been wearing when she went to school that morning was missing. The skirt she had worn under the uniform had been removed and tied tightly around her neck. The head had a skull fracture and four blood stained big stones lay next to the deceased's head.

The matter was reported to the police who were quick to attend the scene of the crime this time. Kenias Razuwika who was the Officer-in-charge crime at Mberengwa Police Station attended the scene of the crime at about 1750 hours on 25 October 2006. He observed that the deceased had a fracture on the left side of the head. The left elbow was also fractured. There were four blood stained big stones near the deceased's body. He took the stones as exhibits.

The body was not taken for a post mortem examination before 31 October 2006. At the time the body was examined by a medical doctor at Mnene Hospital on 31 October 2006 it was already in the early stages of decomposition. It was no longer possible to establish evidence of rape. The post mortem examination report shows that the deceased had the following injuries - fractures behind and above the right ear. There was dry blood in the nostrils, face, mouth, lips and both ears.

The cause of death was found to be "cardio respiratory arrest due to head injuries".

There is no doubt from the evidence of the commission of the offence that the person who kidnapped and killed the deceased did so with the intention of bringing about her death. The fact of the murderer having the specific intention to kill the deceased is established by the evidence of the skirt which was tied tightly around the deceased's neck to strangle her and the fractures of the skull inflicted deliberately with blunt instruments.

It is also common cause that in the night of 26 October 2006 the appellant was arrested at number 53C – Mine in Mberengwa where he worked as a gold panner. It is also common cause that on 31 October 2006 an identification parade in which appellant participated was organized and conducted at Mberengwa Police Station.

There were nine young men of appellant's height who were chosen randomly from the local business centre to take part in the parade. The nine young men wore dreadlocks. The identification parade was conducted from a place behind one of the buildings at the police station.

The participants were unknown to the witnesses who were in a victim friendly office whence they could not see what was happening at the identification parade. The appellant who had shaven his hair wore a bluish pair of trousers and put on a white t-shirt with vertical stripes. He was advised by the officer conducting the parade that he had a right not to take part in the identification parade. It was further explained to him that he was free to choose any place in the parade.

The appellant chose to stand at the far end of the parade and became the tenth participant. Of the six witnesses who took part in the identification three state witnesses Beatrice, Chidochashe and Davison picked him out as the offender. After each witness identified him the appellant would be told by the officer conducting the identification parade that he had a right to change position. He decided to remain in the same position.

Photographs of the young men lined up in the identification parade were taken. Photographs of each witness touching the appellant as he or she identified him were also taken. They were produced in court as exhibits.

Although, Miss *Ncube*, at the beginning of the hearing of the appeal sought to impugn the credibility of the identification evidence on the ground that the parade was not organized and conducted in accordance with standard requirements, it is clear from the evidence that the organization and conduct of the identification parade met the required standards. Not only were the participants made to line up at a place hidden from the witnesses all the nine wore dreadlock hair styles.

The appellant who had worn a dreadlock hair style at the time the offence was committed whether by him or not had shaven his hair at the time he took part in the identification parade. The police had clearly made it more difficult for the child witnesses who had seen a young man wearing a dreadlock hair style on 25 October 2006 to identify him nonetheless when he no longer wore the dreadlocks. The clear possibility was that if the children had acted on their imagination they would have picked one of the young men in the identification parade who wore a dreadlock hair style.

The appellant himself realized the credibility of the identification by the three witnesses because he alleged in evidence that they had seen him before the identification parade. He was in fact challenging the witnesses to admit having seen him either in a police truck or at their villages. The witnesses vehemently denied the allegation sticking to their evidence that the positive identification of him as the offender was based on their observation of him on the 25 October 2006.

On the credibility of the state witnesses the court *a quo* had this to say. On Beatrice Shoko it said:

> "The court found her to be a very intelligent young girl and was very coherent and consistent and straight forward in giving her evidence. Despite the fact that, the deceased was her sister she, however, remained calm throughout her evidence. We therefore have no hesitation but to accept her evidence as credible."

On Chidochashe the court *a quo* said:

> "Despite the absence of dreadlocks she was able to positively identify him at the police station.
>
> … Despite her age the witness struck the court as an honest witness who withstood all the skillful cross examination by the defence counsel. The court has no doubt that she was a credible witness. Her evidence corroborated that of Beatrice Shoko in all material respects."

On Davison the court *a quo* said:

> "He also did not see the accused until at the police station when he positively identified him as the man whom he had seen at the business centre. He managed to identify him even when he no longer had dreadlocks. When asked as to how he had identified him he said he had identified the accused by his face a opposed to his clothes. He also stated that the deceased was wearing a blue trousers and a white shirt. Again this witness was subjected to a rigorous cross examination but this did not in any way sway him from his evidence which he gave in a straight forward manner. This witness' evidence although it is at variance with one of the above witnesses as far as the clothes are concerned he no doubt corroborated both of them in terms of identifying accused by his face despite the absence of dreadlocks."

The court therefore has a case in which the trial court found each of the child witnesses called by the state to have given credible evidence with the effect that their evidence was found to have corroborated each other on the crucial fact of the identification of the appellant as the offender. Unless it is demonstrated that a trial court fell into error in the assessment of the credibility of witnesses it had the advantage of seeing and hearing whilst giving evidence an appellate court would not lightly interfere with a finding of credibility by a trial court.

In this case the court *a quo* was aware of the dangers of mistaken identification where child witnesses are involved. It clearly looked closely at the circumstances of the case to see whether there were factors which militated against acceptance of the evidence of the witnesses as credible.

It is of particular importance that all the three witnesses attested to seeing a young man who wore a dreadlock hair style. Davison had the young man within sight at the road show for no less than 45 minutes. The young man spoke to the deceased in his presence. He also addressed him directly telling him to leave the car wreckage. He saw him pick up a booklet at the end of the road show. The young man seen by Beatrice and Chidochashe was in possession of what they said was a book. The ability of Davison to describe the facts relating to the different encounters he had with the young man at the road show attests to the reliability of his evidence that the young man was the appellant.

The evidence given in support of the defence case corroborated the evidence of identification of the appellant as the offender. It is common cause that late in the afternoon of 25 October 2006 the appellant was at Number 53C – Mine when a white motor vehicle arrived. He mistook the motor vehicle for a police car and ran away.

Early in the morning of 26 October 2006 the appellant went to Tendai Muzenda's homestead. There he asked for a pair of scissors and a mirror saying he wanted to shave his hair. He told Tendai that he wanted to remove the hair and *ipso facto* the dreadlocks to disguise his identity from the police because of an offence he had committed with one Newman. Although

the appellant referred to an offence he said he had committed with Newman it is clear that he had all along worn the dreadlock hair style without any fear of identification.

On 15 November 2006 the appellant gave a confirmed warned and cautioned statement in answer to the allegation that he had killed the deceased. The appellant said:

> "On 25 October 2006 from morning I was carrying gold ore with Tinaye with a scotcart. The scotcart broke down and we untied the donkeys. I then went back to the compound. A police vehicle arrived and then I ran away from them. I went to Tinaye's place until it was dark. After that I went back and slept in Number 71C – Mine. I woke up the following day and I went to Meredisi. When I got there I was barbed my hair by my sister-in-law Givemore's mother. I had always wanted to barb the hair because the hair had turned brown. I later went back to the compound and on the way I met Sparks who told me that the whole community was accusing me of raping and murdering the girl."

Firstly, the reason he gave for having the hair shaven is at variance with the reason he gave to Tendai.

Secondly, Tinaye gave evidence to the effect that he last saw the appellant at 12pm and did not see him until 4pm. The evidence of Tinaye destroyed the appellant's alibi. In his evidence the appellant had said he was with Tinaye at the time the offence was alleged to have been committed. The appellant could either be with Tinaye or at the place the state witnesses said he was at about 1pm on the day in question. The alibi having been destroyed by

the evidence of Tinaye the appellant was shown by credible evidence to have been at the road show at about 1pm and shortly thereafter kidnapping the deceased on her way home from school in the company of Beatrice and Chidochashe.

The court *a quo* was alive to the fact that it was dealing with a case in which the guilt of the accused was sought to be established by circumstantial evidence. It was satisfied upon application of the relevant test that the only fact which can be established by reasonable inference from all the circumstances of the case was that the appellant was the killer of the deceased.

The court *a quo* said:

> "In our view, the accused's activities point to no other way other than his full involvement in the murder of the deceased. The question then is, is there any other inference which a reasonable court can draw other than that the accused is responsible for that murder. The answer in our view is in the negative. We find that there is no other inference which can exclude his innocence."

The decision of the court *a quo* is supported by evidence. There is therefore no basis on which the court can interfere with the conviction of the appellant of murder with actual intent to kill the deceased.

It had been suggested in the court *a quo* which argument was not pursued by Miss *Ncube* on appeal that the youthfulness of the appellant at the age of 18 years was an extenuating circumstance. In dismissing the argument the court *a quo* correctly observed that the facts surrounding the commission of the offence show an element of courage and wickedness on the part of the appellant wholly inconsistent with youthful behaviour. The court shares the same view.

There is no basis for interfering with the finding of the court *a quo* on the absence of extenuating circumstances.

The appeal against both conviction and sentence is dismissed.

GOWORA JA: I agree

HLATSHWAYO JA: I agree

Majoko & Majoko, appellant's legal practitioners

Attorney General's Office, respondent's legal practitioners