

REPORTABLE (44)

ONIAS NYONI
v
THE STATE

IN THE SUPREME COURT OF ZIMBABWE
GWAUNZA JA, GARWE JA & GUVAVA JA
BULAWAYO, JULY 28, 2014 & JULY 30, 2014

H Malianga, for the Appellant

S Ndhlovu, for the Respondent

GARWE JA: This is an appeal against conviction for murder with actual intent and the sentence of death that was imposed consequent upon such conviction.

The deceased, Rice Phiri, was employed at New Base Construction Company, Zvishavane. He resided at Makwasha Village, Chief Masunda, Zvishavane. His place of residence was within walking distance of Zvishavane town. He would use a bush path from his homestead to Zvishavane and back to his homestead. The deceased and the appellant were known to each other as they stayed in the same area.

On 24 November 2004 the deceased finished work at about 5:00pm and proceeded to his home along the footpath. He had in his possession a satchel containing his

pair of overalls inscribed with the words “New Base” at the back, a sack containing ten (10) kilogrammes of wheat meal and an unknown amount of cash. He was waylaid by an assailant and stabbed on the back with a sharp object. His property was then taken. When the police eventually recovered his body, they found two wounds – one on the back and another on the chest. The wounds appeared to have been caused by a knife or bullet. The police also recovered the satchel together with the overalls from the scene and the ten (10) kilogrammes of wheat meal from the appellant’s residence.

A post mortem examination was carried out on the 29 November 2011. At that stage the body was in an advanced state of putrefaction. The doctor was consequently unable to ascertain the cause of death.

The allegation in the court *a quo* was that it was the appellant who killed the deceased and thereafter took his property.

In his defence in the court *a quo*, the appellant admitted finding the pair of overalls and sack of wheat meal at a spot on the side of the road and taking them. He further admitted that he gave the meal to his workmate Forward Machingauta to take to his house. He admitted that he took the overalls and an empty sack and inserted these in a hole in an anthill. He however denied seeing the deceased or in any way injuring him. The appellant told the court *a quo* he believed that the wheat meal and overalls had been dropped or abandoned by thieves who were known to frequent this area.

The court *a quo* found that the appellant had possession of the property of the deceased soon after he had been murdered. Further that the appellant took the property which

included the deceased's wallet and identity card and hid these in a hole in an anthill not very far from where the deceased's body was found. It was also the finding of the court *a quo* that at no stage did the appellant attempt to surrender the deceased's items to the police and that when he was confronted by the police he and his wife denied all knowledge of the deceased's property. It was only after the police had searched the appellant's house and recovered the bag containing the wheat meal that the appellant then came up with the story that he had found the property in the bush. The court further found that, when invited by the police to show them the spot where he had found the items, the appellant had declined to do so. In general the court found that the appellant's version was improbable and that the evidence, though circumstantial, pointed towards the appellant as the person who had committed the gruesome murder in order to commit a robbery. The court *a quo* accordingly found the appellant guilty of murder with actual intent and, finding no extenuating circumstances, sentenced him to death.

In his submissions before this Court, counsel for the appellant had no meaningful submissions to make against both conviction and sentence. In the light of the fact that the appellant had possession of the deceased's property soon after he had been killed, that he hid some of the property in a hole in an anthill, that when approached by the police he initially denied all knowledge of such property and lastly that his explanation as to how he came to be in possession thereof was rejected as false, counsel for the appellant conceded that there was no proper basis upon which the findings of the court *a quo* could be impugned.

On a careful perusal of the facts and the evidence, I am satisfied that the explanation given by the appellant was by no means credible or probable. He was unable to explain why, having found the items, he did not report to the police. He could not explain

why he then hid some of the property in a hole in an anthill. According to the investigating officer, in addition to the pair of overalls, there was also a wallet and an identity card belonging to the deceased in the hole.

It is common cause that the deceased did not return home after work on Wednesday 24 November 2004. It is also not in dispute that the following day, Forward Machingauta accompanied by Gift Chingwe and Arnold Mudzuri were taken by the appellant to the anthill where the appellant retrieved the bag of wheat meal which he gave to Forward Machingauta to take to his homestead. It is common cause there was a blue pair of overalls, a wallet and an identity card belonging to the deceased in the same hole.

What emerges clearly from the evidence is that the appellant had possession of the deceased's property shortly after the murder. When confronted by the police he denied all knowledge and only admitted having found the items when the police searched his hut and recovered the bag of wheat meal belonging to the deceased. He declined to show the police where he had found the items in the bush. Moreover the appellant knew the deceased as they stayed in the same area. The deceased's identity card was recovered from the hole where the overalls were found. At the time he placed the various items in the hole the appellant must have known the identity of the deceased as his identity card was amongst the items. These facts, taken together with the fact that his explanation on how he came into possession was highly improbable, suggest that indeed it was the appellant and nobody else, who must have murdered the deceased and taken his property.

In the circumstances I agree that the finding by the court *a quo* that the appellant committed murder with actual intent cannot be impugned. Nor can the finding by

the court *a quo* that this was a murder committed to facilitate a robbery, be said to be wrong. It is well established in our law that a murder committed to facilitate a robbery attracts the death penalty unless there are weighty extenuating circumstances. Further as this was an exercise of discretion, this Court has no basis for interfering with the findings of the court *a quo* in the absence of a misdirection or other irregularity.

In the circumstances, the appeal against both conviction and sentence must fail.

The appeal is accordingly dismissed.

GWAUNZA JA: I agree

GUVAVA JA: I agree

Job Sibanda & Associates, appellant's Legal Practitioners

The Attorney-General's Office, respondent's Legal Practitioners