

COLGATE DUFFEN MUDENDA
v
THE STATE

SUPREME COURT OF ZIMBABWE
MALABA DCJ, GUVAVA JA & TAKUVA AJA
BULAWAYO, AUGUST 3, 2015

L Sibanda, for the appellant

K Ndlovu, for the respondent

MALABA DCJ: This is an appeal against the sentence of death passed on the appellant by the High Court on 21 March, 2012 following a conviction of murder of Innocent Mudimba with actual intent to kill him. After hearing counsel, the Court dismissed the appeal and indicated that reasons for the decision would follow in due course. These are they.

The facts on which the trial court found that the deceased had been murdered by people who had the actual intention to kill him are set out in the judgment of the court *a quo*. These are they.

The deceased was aged 19 years at the time he met his death. He resided at Gillian Munkuli's homestead, Sikaputa Village 1, Binga. On 3 May 2011 at about 2000 hours, the deceased retired to bed with his young brother Pronounce Munkuli. At about 0400 hours the following morning, Pronounce Munkuli woke up and discovered that the deceased was not on

the bed and the bedroom door was slightly open. A few minutes later the deceased entered the hut holding his neck with both hands and fell to the floor writhing in agony. The deceased's young brother tried to ascertain what had happened but the deceased did not respond. Seeing this, he called his grandmother who was sleeping in another hut. When the elders entered the bedroom hut they discovered that the deceased had died. He had a deep cut on the throat from which he was bleeding profusely. A report was made at Binga Police Station.

The police attended the scene and conveyed the deceased's body to Mpilo Hospital in Bulawayo for a post-mortem examination. The post-mortem examination revealed a very deep wound, four centimeters long across the lower neck just above the left collar bone, cutting the left subclavian artery and penetrating to the right apex of the chest cavity collapsing the right lung. As a result of the wound, the deceased bled profusely and he died of haemorrhagic shock.

On 9 May 2011, following investigations, police from Criminal Investigations Hwange arrested the accused in connection with the offence.

The direct evidence on which the court found that the appellant was involved in the murder of the deceased and that he had the requisite intent to kill the deceased was the confirmed warned and cautioned statement made by him and recorded at Hwange Police Station on 12 May 2011. The appellant said:

"I Colgate Duffen Mudenda do admit that I killed the deceased person. I was in the company of Bhilo, Chiyanembo, Peter, Petros and Mr Daniel. Chiyanembo, Daniel and Peter entered the hut. I remained outside watching for anyone who would be awake by then. At this homestead there are several houses but they entered into the hut and lifted

the deceased and took him to the kraal. Bhilo held the deceased from the back while Petros collected dripping blood into an empty sugar plastic. Chiyanebo stabbed the deceased on the wind pipe (oesophagus) with the knife while I also held him from the back. After that Mr Daniel and Chiyanebo lifted the deceased's body and placed it in the deceased's bedroom hut. After that each of us left for his homestead. I then followed Mr Daniel so that he gives me some money that we were promised after successfully killing someone. Mr Daniel gave me US\$700.00. Out of that money I gave \$50.00 to my junior wife to buy her blanket at Sinamatelele of which she did. I then used \$50.00 in drinking beer and in gambling school. When the rumour had spread that I killed a person, I then took the remaining \$600.00 and hid it underground in the mountain area of Bulawayo Kraal."

The trial court correctly found, on the analysis of the contents of the warned and cautioned statement, that it was an expression of a genuine confession by the appellant of his involvement in the planning and murder of the deceased. The statement contains references to facts which could only have come to the knowledge of the appellant through direct participation in the conspiracy and the execution of the agreement to kill the deceased for money and to extract warm blood from his body for ritual purposes. Not only did the appellant give a comprehensive statement of what he said happened, the facts to which it relates were presented in a coherent manner producing a convincing story into which all the known facts dovetailed perfectly. *Edward Dima v The State* SC-129-07.

There was sufficient evidence aliunde showing the deceased was killed in the manner revealed by the appellant in the warned and cautioned statement. The appellant was seen running from the direction of the deceased's homestead soon after the deceased had his throat slit with a sharp object. Three days later, he voluntarily and freely told the deceased's grandmother and grandfather that he had taken part in the killing of the deceased. At the trial, the appellant

did not proffer any defence. He was contented with proffering a bare denial as a defence to the charge. The conviction is, in the circumstances, unassailable.

On the sentence, the applicable law on 21 March 2011, when the death penalty was imposed, was s 337 of the Criminal Procedure and Evidence Act [*Cap. 9:97*]. The relevant law obliged a court convicting an accused person of murder, to impose a sentence of death unless it was of the opinion that there were extenuating circumstances. The legal practitioner who represented the appellant in the trial, indicated that after careful consideration of all the facts surrounding the commission of the offence, he had no meaningful submission to make on extenuating circumstances.

The public prosecutor was not sure whether the fact that the appellant was not the one who cut the deceased's throat with a knife, could constitute a factor of extenuation of the appellant's moral blameworthiness. The trial court made it clear that such a factor did not amount to extenuation where an accused, who had been involved in a conspiracy to kill a person, did not dissociate himself from the execution of the agreement but instead took an active part in the murder.

The court *a quo* said:

“The accused was a conspirator and an accomplice in the murder of one Innocent Mudimba. It is not in dispute that the killing was motivated by ritual killing at the instigation of a businessman one Daniel Mudimba, who committed suicide soon after the commission of the offence. The defence counsel has properly conceded that he has no meaningful argument to advance in extenuation and therefore he has not sought to raise any factors. The State has raised an aspect which it feels might lead to a finding of extenuating circumstances in that the accused person was hired to be part of the gang that killed for ritual purposes. The State takes the view that since the accused did not actually

deliver the crucial blow that led to the demise of the deceased that may be considered to be an extenuating circumstance. We have come to the conclusion that the accused was hired to kill. His role was not defined at the outset but he was an active participant. In his confession he states that he held the deceased person from the back whilst his throat was being slit for the purpose of collecting blood from him. The accused's moral blameworthiness is no different from the person who actually stabbed the deceased. As we have said the action of one of the conspirators was the action of all the conspirators. Accused person could have chosen to dissociate himself but he was tempted by money. Such killings are abominable to society and to any right thinking person. The accused's conduct in confessing in a written statement is not consistent with his action in court on trial where he chose to deny responsibility altogether. His moral blameworthiness is very high. The fact that he did not deliver the blow in our view cannot amount to an extenuating circumstance."

Mr *Sibanda*, on appeal, conceded that on the facts and the law applicable at the time, the court *a quo* did not misdirect itself in passing the sentence of death. The concession was properly made. Mr *Sibanda*, however, sought to argue that the provisions of s 48(2) of the Constitution should be applied by the court in determining the correctness or otherwise of the decision by the court *a quo* to impose the death penalty on the appellant. The argument was based on the view that sentencing is a process, suggesting that the court can act as if it was at large and assess the factors of sentencing before finding a misdirection on the part of the court *a quo*.

The Court was not persuaded by Mr *Sibanda*'s argument. The argument overlooked the fact that the task of the sentencing court was to impose the sentence of death, in accordance with the law applicable to the facts before it at the time of sentencing.

The task of the Appellate Court is to determine the question whether the court *a quo* misdirected itself in the finding of facts and application of the law in terms of which it was

required to act at the time of sentencing. Section 48(2) of the Constitution has no retrospective effect. It came into effect on 22 May 2013 whilst the death penalty, the legality of the imposition of which is under review, was imposed on the appellant on 21 March 2012. It talks of what a court, which has convicted an accused person of murder, has to take into account before imposing the death penalty. There has to be a moment between the conviction and imposition of a death penalty when s 48(2) of the Constitution would apply. Section 48(2) of the Constitution does not apply to a case where the death penalty was considered and imposed before the coming into effect of the new Constitution. The moment after conviction of murder when the trial court had to consider all the relevant factors and decide whether or not to impose the death penalty, had long been used in terms of a different law applicable at the time.

It was for these reasons that the appeal was dismissed.

GUVAVA JA: I agree

TAKUVA AJA: I agree

Webb, Low & Barry, appellant's legal practitioners

Prosecutor General's Office, respondent's legal practitioners