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TONGAI RODNEY JINDU
v
THE STATE

SUPREME COURT OF ZIMBABWE
GWAUNZA DCJ, MATHONSI JA & CHITAKUNYE JA
BULAWAYO, 21 JULY 2021 & 14 OCTOBER 2021

M. Mahaso with N. Sibanda, for the appellant

T.R. Takuva, for the respondent

CHITAKUNYE JA: This is an appeal against both conviction and sentence.

The appellant was convicted of two counts of murder with actual intent committed in
aggravating circumstances and sentenced to death by the High Court sitting at Bulawayo on
11 July 2018. At the conclusion of hearing of the appeal we dismissed the appeal against both
conviction and sentence. We indicated that reasons will follow in due course. These are our
reasons.

FACTUAL BACKGROUND

The appellant was arraigned before the High Court (court *a quo*) sitting at Bulawayo facing two counts of murder committed in contravention of s 47 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*], (hereinafter referred to as the Code) in aggravating circumstances.

The allegations were that in January 2017, on two separate dates, the appellant shot and killed Mboneli Joko Ncube and Cyprian Kadzurunga who were his friends. In the first count, on 12 January 2017 the appellant picked up his neighbour Mboneli Joko Ncube and one Terence Kajese outside Alasko Supermarket at the corner of Robert Mugabe Way and 11th Avenue in Bulawayo. The appellant was driving his Nissan Gloria motor vehicle registration number ACV 8914. The appellant drove with the two to Burnside where he dropped off Terence after which he drove to Hillside Shopping Centre with Mboneli. The two thereafter drove to number 13 West Mount Road, Burnside Bulawayo where, upon arrival, the appellant drew an Optima shotgun serial number 13752 from his motor vehicle, and shot Mboneli Joko Ncube twice on the chest. The deceased died on the spot.

After gunning down the deceased, the appellant mutilated his body into various parts before burying some of the dismembered parts in four different shallow graves at that property. He took some of the parts away.

On the second count the allegations were that on 29 January 2017 in the afternoon, the appellant visited the deceased at his home in Queenspark, Bulawayo. The two then left that home on a walk as friends. As the two were walking along a footpath linking Glengary and Queenspark East in Bulawayo, the appellant again armed with the same Optima shotgun which he used to shoot Mboneli Joko Ncube, shot Cyprian Kadzurunga twice on the head and abdomen causing his death. Thereafter, the appellant robbed the deceased of his LG cell phone and Asus laptop which items he later tasked another individual to sell. The appellant then ferried the body of the deceased in a wheelbarrow to his motor vehicle where he bundled the body into the boot of his motor vehicle before driving to number 13 West Mount Road Burnside Bulawayo. When he arrived there, he again buried the body at that

address after hiring two individuals to dig a shallow grave which he misled them to believe was for other innocuous purposes. The appellant also took some body parts before burying the body in the shallow grave.

The appellant's defence was to the effect that when he killed both deceased persons, he was drinking alcohol, injecting himself with heroine, and also taking crystal meth. It was his defence that he was intoxicated during the commission of the offences. In the first count, as he was in the company of the deceased he felt an urge to kill someone and he was of the belief that if he did so he would get crazy. He also indicated that after committing the second offence under the alleged intoxication he later became sad and regretful for what he had done.

In its detailed analysis of the evidence the court *a quo* found that the appellant had given contradictory testimony. In respect of the first count the account given in his defence outline differed materially from the one he gave in his evidence in chief. In his evidence in chief, he stated that he went to the shops to meet a drug dealer from whom he got heroine and crystal meth. He wanted a convenient discreet place to take the drugs and the deceased advised him to go to number 13 West Mount Road, Burnside, Bulawayo where he claimed he then took the drugs and got high. He claimed that after taking the drugs he started seeing "Lucifer" who then instructed him to kill the deceased, cut up the body, and consume the liver. He went on to say that he did a number of things upon Lucifer's command. It was no longer his own desire to get crazy upon killing someone per his defence outline. Similar contradictions were noted in respect of the second count. He now said he was working under the command of Lucifer yet this was not in his defence outline.

The court *a quo* also noted that under cross examination the appellant refused to answer critical questions alleging that he had made a pact with Lucifer never to tell anyone.

The court *a quo* also noted that it was not in dispute that the appellant shot and killed the two deceased persons. His only defence was that he did it upon the devil's instruction and he was under the influence of drugs hence his claim that he was mentally unstable at the material time.

The insanity defence was thrown out on the basis that the appellant was examined on 16 November 2017, at the instance of the court itself, and the medical practitioners who examined him concluded that he was fully alert and oriented in all aspects; and that he was mentally stable and fit to stand trial.

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The court *a quo* threw out the appellant's defence and found him guilty of murder with actual intent. It found that the murders were committed in aggravating circumstances that immensely outweighed the mitigatory circumstances. It sentenced him to death in terms of s 47(4) of the Code as read with s 337 and 338 of the Criminal Procedure and Evidence Act [*Chapter 9:07*].

As regards his mental state at the time of the commission of the offences, the court *a quo* held that the meticulous planning and execution of the crimes by the appellant pointed to a person who was in full control of his mental faculties.

Aggrieved by the findings of the court *a quo*, the appellant lodged the present appeal on a single ground alleging that the court *a quo* erred and seriously misdirected itself

in convicting him on two counts of murder when there was cogent evidence that he was mentally incapacitated to appreciate the implications of his actions at the material time of committing the said offences.

THE ISSUE FOR DETERMINATION

Whether or not the court *a quo* erred and misdirected itself in not finding that the appellant was mentally incapacitated at the time of commission of the offences.

APPLICATION OF THE LAW TO THE FACTS

The issue of the appellant's mental capacity to stand trial was determined by the court *a quo* after ordering that he be examined. Both medical practitioners determined that he was of sound mind. However, it was appellant's submission on appeal that the court *a quo* should have assessed whether he was mentally sound at the time of commission of the offences and not whether he was mentally stable to stand trial. Counsel for the appellant submitted that the circumstances in which the appellant caused the death of the two deceased persons were out of the ordinary or expected human behaviour and as such show that he suffered from mental incapacity at the time of commission of the crimes.

Per contra, counsel for the respondent submitted that the essential elements for the offences were proven. Counsel further submitted that where one relies on the defence of insanity, the burden rests on him/her to prove that he/she suffered from mental incapacity at the relevant time in terms of the proviso to s 18(4) of the Code. *In casu*, Counsel submitted that the appellant failed to place such evidence before the court *a quo*. Counsel contended that a mere say so of one's lack of mental capacity does not suffice and that in terms of the proviso to s 225 of the Code, a verdict that a person was mentally disordered will not be

returned if the person's mind was only temporarily disordered or disabled by the effects of alcohol or a drug.

The record of proceedings shows that the court *a quo* ordered that the appellant's mental capacity be examined which resulted in the two medical reports that were placed before it. The reports confirmed that the appellant was of sound mind and fit to stand trial. Further to the medical reports, the court *a quo* made factual findings which supported the position that the appellant was of sound mind when he committed the said crimes. It found that after killing the first deceased, the appellant hid the body at the property after which he drove about 15 kilometres to Glengary suburb, Bulawayo. He also went to the deceased's home to look for him so that he could throw off suspicion. He then sent an SMS (text message) to the deceased's relative using the deceased's mobile phone number pretending to be the deceased informing them that he was fleeing from the police to South Africa. He did this again to distance himself from the crime. He dug graves to hide the dismembered body parts showing that he was fully aware of his actions.

On count two, after killing his victim, the appellant drove all the way to town to pick up two people to assist him to dig the grave and lied to them that he needed a dump pit. Later, the appellant hired another person to fill up the pit and lied to him that the pit was abandoned by plumbers who were working there. He then asked this individual to sell the deceased's laptop instead of selling it himself in order to distance himself from the offence. He again sent an SMS to the second deceased's mother pretending to be the second deceased informing her that he was fleeing from members of the army who wanted to kill him because of some sensitive information he had hence he was going to South Africa.

The act of sending messages to his victims' relatives was aimed at ensuring that the families of the deceased persons would not look for the deceased believing that they had fled to South Africa. The appellant also lied to the police and misled them about his contact with the second deceased. Before being charged with the crimes, the appellant attempted to escape from police custody upon realising that his cover was about to be blown.

The above sequence of events shows that the appellant had planned to commit the offences. He carefully chose his victims, led them to isolated places where he killed them and buried parts of their remains that he had no use for at the same property where he was the caretaker. He cannot be taken to have been mentally incapacitated in the circumstances. His mental faculties were fully functional.

What is more condemnatory or damning is the fact that the appellant executed the offences and cover-ups over a number of days. He could not have been under the influence of drugs at all material times. Assessed cumulatively, the appellant's actions point to the fact that he executed the offences with craftiness and precision. From taking the gun from his mother's place, hiding the bodies, hiring help, looking for the first deceased after killing him, to sending messages to deceased's relatives pretending to be the deceased persons all point to meticulous planning by someone of sound mind. I am of the view that this illustrates the point that the appellant was in full control of his senses when he executed the crimes. In that light, the court *a quo* cannot be faulted for finding, in the face of such overwhelming evidence before it, that the appellant was mentally stable at the time of committing the crimes.

It is a settled position of the law that an appellate court will not interfere with factual findings made by a lower court unless those findings were grossly unreasonable in the sense that no reasonable tribunal applying its mind to the same facts would have arrived at the same conclusion, or the lower court had taken leave of its senses or the decision is so outrageous in its defiance of logic that no sensible person having applied his or her mind to the question to be decided could have arrived at the decision. See *ZINWA v Mwoyounotsva* SC 28/15. In *casu*, there was no such misdirection.

The appellant's appeal also related to the sentence imposed by the court *a quo*. The court *a quo* sentenced the appellant to death after considering the manner in which he executed the crimes. In terms of s 47 (2) of the Code, it is an aggravating circumstance in terms of which a court convicting an accused person may impose capital punishment, if the murder was committed in the course of or in connection with or as a result of the commission of a robbery. In the second count, the victim was robbed of his property thus aggravating his case. Further, it is an aggravating circumstance if the murder was one of a series of two or more murders committed by the accused over any period of time. In terms of s 47 (3) of the Code, a court may also regard it as an aggravating circumstance with the same effect on sentence if the murder was premeditated. In the Court's view, all these circumstances exist in the manner in which the two victims were killed underscoring the very serious nature of the offences.

Two people were killed and their remains disposed of in similar circumstances within a period of only seventeen days in January 2017 pointing to propensity to commit murder. In fact, some of the victims' body parts were carted away to an unknown place and the appellant was not willing to disclose where the missing parts were taken to. Though the

appellant claimed to have consumed some of the parts, this was a bare assertion and, in any case, there were still some parts he refused to account for. He showed no remorse by refusing to explain what he did with those other missing parts stating that he had made a vow to “Lucifer” not to speak about what happened. This bordered on arrogance as the medical practitioners determined that he was of sound mind to stand trial. The appellant may have killed the deceased for any other motives including harvesting of parts for nefarious ritual purposes.

In *Muhomba v The State* SC 57/13 at p9, MALABA DCJ (as he then was) reiterated that:-

“On the question of sentence, it has been said time and again, that sentencing is a matter for the exercise of discretion by the trial court. The appellate court would not interfere with the exercise of that discretion merely on the ground that it would have imposed a different sentence had it been sitting as a trial court. There has to be evidence of a serious misdirection in the assessment of sentence by the trial court for the appellate court to interfere with the sentence and assess it afresh. The allegation, in this case, is that the sentence imposed is unduly harsh and induces a sense of shock.”

It is not enough for the Appellant to argue that the sentence imposed is too severe because that alone is not misdirection and the appellate court would not interfere with a sentence merely because it would have come up with a different sentence. In *S v Nhumwa* S-40-88 (unreported) at p 5 of the cyclostyled judgment this court stated that:

“It is not for the court of appeal to interfere with the discretion of the sentencing court merely on the ground that it might have passed a sentence somewhat different from that imposed. If the sentence complies with the relevant principles, even if it is more severe than one that the court would have imposed sitting as a court of first instance, this Court will not interfere with the discretion of the sentencing court.”

In *casu*, the appellant has not shown that the court *a quo* did not exercise its discretion judiciously. The court considered that the manner in which the appellant executed

the murders and covered them up pointed to someone who was in control of his mental faculties. As such the penalty imposed upon him was proper in the circumstances. There is no evidence of mental incapacity to warrant a special verdict. One does not create mental incapacity by blaming the heinous crimes on ‘Lucifer’ and refusing to shed more light to critical questions on how the crimes were committed and motives thereof. The court *a quo* cannot be faulted for the sentence it imposed.

A point of concern is that upon finding the appellant guilty of murder with actual intent on both counts of murder the court *a quo* passed one sentence of death. This is an improper method of sentencing an offender with two or more counts of murder. A complication would arise if for instance the appellant’s appeal was to succeed on one count and fail on the other count. Where it is intended to impose a death sentence the proper approach is to impose the death sentence on each count separately. See *Judgment No SC 154/21 (Dube 1992)* Criminal Appeal No. SCB 160/19 ZLR 234(S). In as far as the appeal as a whole has no merit no complication will arise warranting resentencing the appellant.

The conviction and sentence in respect of both counts are hereby confirmed.

DISPOSITION

It was for the above reasons that we found that the appeal against both convictions and sentence had no merit and dismissed the appeal.

GWAUNZA DCJ : I agree

MATHONSI JA : I agree

Tanaka Law Chambers, appellants' legal practitioners

National Prosecuting Authority, respondent's legal practitioners

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