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TAFADZWA WATSON MAPFOCHE
v
THE STATE

SUPREME COURT OF ZIMBABWE
GWAUNZA DCJ, MAKARAU JA & MAVANGIRA JA
HARARE: 2 MARCH 2020 & 29 JUNE 2021

Mr. I. Muchini, for appellant

Mr. E. Makoto, for respondent

MAKARAU JA: The appellant and another who is not a party to this appeal, **Judgment No. SC 84/21, Criminal Appeal No. SC 839/18** appeared before the High Court sitting at Harare, charged with one count of murder. After a contested trial, they were found guilty of murder with actual intent and were sentenced each to 25 years imprisonment. It was the finding of the court *a quo* that on 11 March 2011, they had unlawfully and intentionally caused the death of one Alneshto Bayeta by pushing him down a steep slope into Marongora Game Park which is infested with wild animals.

This is an appeal against both the conviction and the sentence.

Background facts

The appellant then aged 20, and his co-accused, not much older, were working in Chirundu, digging trenches for a telecommunications corporation. When the contract

ended, the two survived on odd jobs for some time thereafter. They soon ran out of money and planned to steal a vehicle.

On 11 March 2011, they approached the deceased who was working as a taxi driver, driving a vehicle belonging to one Leonard Mhundwa, and purported to hire the vehicle to Chirundu Heights. This was around 9.00p.m.

On the way to Chirundu Heights, they robbed the deceased of the vehicle and tied him up before placing him in the back of the vehicle. They then drove along the Harare - Chirundu Road and at a certain spot where the Marongora Game Park slopes steeply from the road, stopped the vehicle and there left the deceased.

When the deceased did not return with the vehicle at the appointed time, Leonard Mhundwa, the owner of the vehicle, lodged a report with the police. Investigations led to the arrest of the appellant and his co-accused who were found in possession of the motor vehicle.

After the arrest of the appellant and his co-accused, a search for the body of the deceased was conducted around the spot at which the appellant and his co-accused had left the deceased. The search was conducted with the assistance of armed Rangers from the Department of Parks and Wildlife who know the area to be infested with wild animals. Some 20 metres down the slope, a spoor showing that something had been dragged along was observed going down the slope. Along the spoor, torn and blood -stained clothes and sandals belonging to the deceased were recovered. The body of the deceased was not.

Presuming the death of the deceased at the time of the trial as the only reasonable inference that could be drawn from the facts, the court *a quo* found the appellant and his co-accused guilty of murder and sentenced them as stated above.

The appeal

Aggrieved by the conviction and the sentence, the appellant noted this appeal raising five grounds of appeal. In the first three grounds, he challenged the admissibility into evidence of a warned and cautioned statement that he made to the police upon his arrest. It was his argument that the court *a quo* erred in admitting the statement into evidence in the face of clear evidence that he had not made the statement but that he was given the statement by the police to sign. He further argued that the statement was irregular as it was “re-taken” on the orders of the confirming court after that court had declined to confirm the first statement. In his view, apart from the confession in the statement, there was no evidence implicating him in the commission of the crime. As against the conviction proper, the appellant challenged the sufficiency of the evidence against him arguing that the court *a quo* drew improper inferences that he had committed the crime. Finally he argued that the sentence imposed upon him was severe and induced a sense of shock.

From the above grounds, three issues arise for determination in this appeal. These are firstly, whether the appellant’s warned and cautioned statement was correctly admitted into evidence, secondly, whether the appellant was properly convicted of murder and finally, whether the sentence imposed on the appellant is severe and induces a sense of shock.

I deal with each of the issues below.

Whether the confirmed warned and cautioned statement by the appellant was admissible evidence

The appellant and his co accused were arrested on 1 April 2011. Four days later, on 5 April 2011, the investigating officer recorded a statement from the appellant after duly warning and cautioning him on his rights. On 12 April 2011, the appellant was taken before a magistrate for the confirmation of the statement. He successfully challenged the confirmation of the statement on the basis that the statement was not his and that he had not made it voluntarily. The confirming magistrate correctly declined to confirm the statement. However, without citing any law for his decision, the magistrate thereafter ordered the appellant and the investigating officer to record a second statement.

The second statement was recorded the following day and was confirmed on the same date.

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In challenging the second statement during the trial *a quo*, the appellant alleged that he had been threatened by the investigating officer with assault if the second statement was once again not confirmed. He thus did not inform the confirming magistrate that the statement was not his but that it was merely presented to him for signing.

It appears that the court *a quo* was not quite clear on the steps to take in dealing with the challenge.

The admissibility of the statement was challenged in the defence outline and orally in court when the prosecution tendered the statement with the other exhibits at the commencement of the trial.

In a terse but correct ruling, the court *a quo* provisionally admitted the statement into evidence with the other exhibits and placed an onus on the appellant to rebut the admissibility of the statement. The court was correct in provisionally admitting the statement into evidence as on its face, there was nothing irregular.

During the state case, the investigating officer gave evidence on how he had recorded the statements from the appellant and during his evidence-in-chief, the appellant in turn gave evidence on how the statement was taken. He maintained his stance that the statement was not his as certain portions of it were insertions by the police.

In the main judgment, the court *a quo* held that the appellant, through his counsel, had withdrawn his objection to the admission of the statement into evidence. This was contrary to the evidence on record. And to confirm the uncertainty that the court *a quo* appears to have been operating under regarding what to do with the challenge to the statements, it initially held that it was unnecessary for it to establish whether or not the second statement had been voluntarily made by the appellant as the appellant had withdrawn his objection to the admission of the statement. Moments later it observed that:

“Although the warned and cautioned statements were produced by consent after the accused had withdrawn their objections, it is in my view necessary to deal with the accused’s evidence of the alleged duress because of the continued reference to the statements by the accused persons. Mr *Mushonga* submitted that the accused were not challenging the confirmation of the statements *per se* but the decision by the magistrate to confirm a new set of statements.”

The court then proceeded to find that the appellant had not been unduly influenced in making the statement.

The law on the admissibility of confirmed statements is codified. It is settled.

Section 256(2) of the Criminal Evidence Act [*Chapter 9:07*] provides that a confession or statement made by an accused person and confirmed before a magistrate following the procedures laid down in s 113(3) of the Act is admissible in evidence before any court upon its mere production by the prosecutor without further proof. However, the confession or statement shall not be used as evidence against the accused if he proves that the statement was not made by him or was not made freely and voluntarily without his having been unduly influenced thereto.

In a long line of decided cases, the steps that a court must take where an accused person challenges a confirmed warned and cautioned statement is settled. It is this:

Where the accused raises a potentially sustainable challenge to the propriety of the confirmation proceedings, the court is obliged to determine the validity of that challenge as a separate issue of fact. The *onus* is on the State to prove the absence of any irregularity. If the State discharges the *onus*, the statement is provisionally admissible and the *onus* shifts to the accused to rebut the presumption that the statement is admissible. The *onus* of proof on the accused is to prove on a balance of probabilities that the statements are inadmissible. If the accused's challenge is upheld, the *onus* remains on the State to prove beyond a reasonable doubt that the accused made the statement and that he made it freely and voluntarily. (See *S v Woods* 1993 (2) ZLR 258 (SC); *S v Slatter and Others* 1983 (2) ZLR 144; *S v Manukwa and Others* 1982 ZLR 30 (SC), and *S v Gwaze & Anor* 1978 RLR 13 at 18D-H.)).

Against the yardstick set by the above authorities, the court *a quo* erred in many respects which I will not fully go into. Primarily as this was its *ratio decidendi*, the court *a quo* erred in holding that the appellant had withdrawn his challenge to the statement.

The record indicates that the appellant consistently denied having made the statement which he alleged was a confession to the offence. The court *a quo* was aware that right up to the end the appellant challenged the statement attributed to him. He thus “continued to make reference” to the irregularity of the statements throughout the trial as rightfully observed by the court *a quo* in its judgment.

In the absence of consent to the admission of the statement, the court *a quo* had to make a finding of fact on whether or not the statement was admissible evidence. This it did not do.

I must make the point that contrary to the finding by the court *a quo* that the confirming magistrate did not err in directing the police to record a statement from the appellant afresh, the recording of the second statement from the appellant was irregular and must be set aside. The court *a quo* was of the view that since the appellant had not advanced any law that precluded the recording of the statements afresh, the order by the magistrate was proper. Such a law is easy to find and ought to have presented itself to the court *a quo*.

The recording of extra curial statements from the accused is part of the investigation of the alleged crime. It is an exercise that falls wholly within the domain and discretion of the police. They and not the court, elect whether or not to record a statement from the accused. In our legal system which is adversarial and the magistrate or judge is a neutral umpire, the magistrate or judge has no role or place in the investigation of matters that come before the court. Therefore, he or she cannot direct the investigation of the alleged crime at any stage. It matters not that he or she will not tell the accused person on what to say in the statement as was contended by the court *a quo*. The bottom line is that the court has no

power whatsoever to direct the police to record a statement from the accused person at any stage of the investigations or of the trial. It is thus overreaching of grave proportions for confirming magistrates to direct the police to record second statements from accused persons after declining to confirm the first statement. Even if the statement that is eventually recorded from the accused is exculpatory, the bottom line is that a directive by the court to the police to record a statement from the accused is grossly irregular and so is the statement that is recorded pursuant to such a directive.

I note in passing and for the benefit of the Chief Magistrate that the directive to the police by the confirming magistrate *in casu* appears similar to one that was issued by the confirming magistrate in *Mangoma v S* SC36/20 in which this Court also set aside the statement. The police may feel obliged to comply with such directives which not only have no basis in law but may violate the rights of an accused person to a fair trial.

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I do not think that it is necessary to burden this judgment with a discussion on whether or not there is a law that precludes the police from recording a second set of statements from an accused person after the confirmation of the first has been declined. It however presents itself clearly to me that the recording of a statement from an accused person by the police, whether first or subsequent, at the instance of and in fulfilment of a directive of the court is grossly irregular.

It is therefore my finding that the court *a quo* erred in admitting into evidence the statement by the appellant on the basis that it was adduced by consent. There was no such consent. Had the court *a quo* followed the approach laid out in the authorities cited above, it

would have found, as I do, that the recording of the statement was irregular as it was at the instance of the court.

The confirmed statement by the appellant dated 13 March 2011 must be struck off the record and any reference to its contents be expunged from the evidence.

The finding that I make above must apply with equal force to the statement made by the appellant's co-accused on the same date. This is so notwithstanding that he is not a party to this appeal. His statement was recorded in similar irregular circumstances.

I now turn to the second issue. This is whether, after expunging from the record the evidence that was in the statements by the appellant and his co-accused, there remains sufficient evidence implicating the appellant in the murder of the deceased.

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Whether the appellant was properly convicted of murder

The appellant and his co-accused were charged with murder as defined in s 47(1) of the Criminal Law (Codification and Reform) Act, [*Chapter 9:23*]. The section defines murder in the following terms:

47 Murder

- (1) Any person who causes the death of another person
 - (a) intending to kill the other person; or
 - (b) realising that there is a real risk or possibility that his or her conduct may cause death, and continues to engage in that conduct despite the risk or possibility; shall be guilty of murder.

Thus, under the section, it is not necessary, as was the position under the common law, to find the accused guilty of murder with either actual intent or with constructive intent. Put differently, it is not necessary under the Code to specify that the accused has been convicted under 47(1)(a) or (b). Killing or causing the death of another person with either of the two intentions is murder as defined by the section.

It further appears to me that the distinction between a conviction of murder with actual intent and murder with constructive intent, which under the common law greatly influenced the court in assessing sentence is no longer as significant or material as it was. The sentence to be imposed for murder, committed with the intent specified in s 47(1)(a) or (b), has also been codified as I shall show below.

In framing his fourth ground of appeal, which gives rise to the issue under discussion, the appellant had this to say:

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“4. The court erred in adopting an armchair approach in adopting and applying the circumstantial evidence doctrine and make unsubstantiated inferences which are not supported by evidence that the appellant killed the now deceased. The appellant had no intention to kill or to cause whatever harm to the now deceased. The now deceased drop off (*sic*) alive and unharmed at Marogoro (G)ame (P)ark after the boom gate.”

I temper down my criticism of the inelegant manner in which the ground was framed in recognition of the fact that the appellant noted this appeal in person and counsel took over the matter at a later stage. Before the hearing of the appeal, counsel could however have amended the ground to make it conform to the rules of this Court in terms of clarity and precision. Nothing however turns on this. I understood the ground to be an attack on the finding *a quo* that the appellant and his co accused had killed the deceased with actual intent.

During the hearing of the appeal, counsel for the appellant made two concessions which have a direct bearing on the second issue in this appeal. Firstly, he conceded that the court *a quo* properly found, on the evidence that was before it, that notwithstanding that his remains were never found, Alneshto Bayeta was dead at the time of the trial. Secondly, he conceded that the only reasonable inference that could be drawn from the facts of this appeal is that the deceased died after being left by the appellant and his co-accused in the game park. He thus conceded that the deceased died at the hands of the appellant and his co-accused. He however urged us to find the appellant guilty of murder with constructive intent at most or guilty of culpable homicide, instead of guilty of murder with actual intent as was found by the court *a quo*.

Both concessions were properly made.

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The facts that are common cause in this appeal and which I captured in the background to this appeal above, come largely from the appellant and his co-accused. In explaining their possession of Leonard Mhundwa's motor vehicle, the appellant and his co-accused gave the only account that is before the court of what happened from the time they purported to hire the deceased's vehicle in Chirundu to the point where they left him 42 kilometres away on the Harare-Chirundu Road in the middle of the game park.

It is common cause that when they hired him, Alneshto Bayeta was alive. He has not been seen since. His torn and blood stained clothes were recovered along a spoor down a slope in an animal infested game park. The only reasonable inference in part to be drawn from these facts is that Alneshto Bayeta is dead.

It is on the above basis that I accept the first concession by appellant's counsel as having been properly made. Alneshto Bayeta is dead.

It is further common cause that the remains of Alneshto Bayeta were never recovered. The precise cause of his death will remain unknown. What is common cause however as indicated above, is that he was alive at the time the appellant and his co-accused robbed him of the vehicle that he was driving. He died thereafter. The appellant and his co-accused admit to setting in motion a series of events that caused the death of Alneshto Bayeta.

There was direct evidence before the court *a quo* that the deceased's blood stained and torn clothes were found along a spoor that started 20 metres down the slope where the appellant and his co-accused admit leaving the deceased. The inference by the court *a quo* that it was the body of the deceased that was dragged along the spoor cannot be faulted.

The fact that the spoor started some 20 metres down the slope has exercised my mind to a large extent. What reasonable inference is to be drawn from this fact other than that the deceased or his body was thrown 20 metres down the slope? The possibility that the deceased may have wandered down the slope in the darkness after being ejected from the car is not only fanciful but is also born of my own imagination as the appellants did not so argue. I reject it. The only reasonable inference that one draws from the starting point of the spoor down the slope is that the deceased or his remains were thrown 20 metres down the slope. It is therefore my finding that, beyond reasonable doubt, the deceased or his remains were thrown 20 metres down the steep slope.

Quite apart from the finding that I make above and in addition thereto, there is no disputing the fact that, in all that they did on the night in question, the appellant and his co-accused must have realised that there was a real risk or possibility that their conduct might cause the death of the deceased and, notwithstanding that risk or possibility, continued with such conduct. The appellant's counsel has submitted that the appellant acted "recklessly." The appellant's conduct went beyond "recklessness" or gross carelessness. He must have realised and foreseen the real risk or possibility of death arising from his conduct right from the time he and his co-accused robbed the deceased of the motor vehicle. He did not desist from such conduct at any stage.

It is on the basis of the above that the concession by the appellant's counsel that the appellant and his co-accused be found guilty of murder "with constructive intent", inapplicable as that verdict may be, was properly made. By the same token, having accepted that the appellant acted recklessly in causing the death of the deceased, the submission that the appellant be found guilty of culpable homicide becomes untenable and must be rejected.

It is therefore my finding that on the evidence that was common cause, and without in any way relying on the appellant's warned and cautioned statement, the appellant and his co-accused were properly convicted of murder as defined in s 47 of the Code.

I now turn to the final ground of appeal in this matter. It is the challenge to the severity of the sentence that was imposed on the appellant.

Whether the sentence imposed on the appellant was severe and induces a sense of shock

The ground of appeal attacking the severity of the sentence is framed as follows:

“Ad Sentence

The court *a quo* erred by imposing a sentence which was so manifestly severe as to induce a sense of shock considering the following:

- a) The learned judge erred in paying lip service to the vast mitigating factors proffered by the appellant.
- b) The learned judge erred by not discounting sentence after making a finding that the appellant was a youthful first offender
- c) The learned judge erred in passing a sentence which instead of rehabilitating the accused persons, it breaks them.
- d) The learned judge erred by failing to consider that the accused person were youthful offenders who still need to explore vast opportunities in life if given proper rehabilitation, can be integrated into the society.”

The sentence that a court convicting an accused person of murder under s 47(1) of the Code has also been codified under subs (4) which provides that:

“(4) A person convicted of murder shall be liable-

- (a) Subject to ss 337 and 338 of the Criminal Procedure and Evidence Act [Chapter 9:07], to death, imprisonment for life or imprisonment for a period of not less than twenty years, if the crime was committed in aggravating circumstances as provided in subs (2) or (3).....”

Sections 337 and 338 of the Criminal Procedure and Evidence Act [Chapter 9:07], provide for sentences following a conviction of murder and the persons upon which the death penalty may not be imposed respectively. They are of no direct application in this appeal.

I note that no attempt was made to link the challenge to the sentence imposed on the appellant to the above provisions of the Code. Instead, the ground of appeal and the oral argument proceeded as if the sentencing discretion of the court *a quo* was at common law.

Thus, there was no argument before us that the murder of the deceased in this appeal was not committed in aggravating circumstances to warrant the sentence that the court *a quo* imposed. Indeed this would have been an untenable submission to make in the circumstances of this case where it is common cause that the murder was committed in the course of and to facilitate a robbery. The law takes a very dim view of a murder committed during the course of a robbery. In addition to the numerous case decisions on the matter, the Code lists murder committed during a robbery as murder committed in aggravating circumstances.

We thus have no basis for interfering with the sentence imposed by the court *a quo* as it falls within the provisions of s 47(4) of the Code for a murder committed in aggravating circumstances.

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Disposition

The appellant has been successful in challenging the admissibility of his warned and cautioned statement and in setting aside the finding by the court *a quo* that the murder of the deceased was committed with actual intent. He has not however succeeded in setting aside his conviction and the sentence that was imposed on him. The net result is that his appeal, being an appeal against conviction and sentence, must be dismissed.

In the result, I make the following order:

The appeal against conviction and sentence is dismissed.

GWAUNZA DCJ : I agree

MAVANGIRA JA : I agree

Kachere Legal Practitioners, appellant's legal practitioners

The National Prosecuting Authority, respondent's legal practitioners

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