REPORTABLE (28)

(1) FREDDY DUBE (2) THINKWELL MOYO
v
THE STATE

IN THE SUPREME COURT OF ZIMBABWE
GUVAVA JA, MATHONSI JA & MWAYERA JA
20 MARCH 2023 & 23 MARCH 2023

T. Tavengwa for the first appellant

K. Ngwenya for the second appellant

T. R. Takuva for the respondent

GUVAVA JA: The two deceased persons died painful deaths during their daily routines of trying to make ends meet. The first appellant was arrested on 11 May 2018 and the second appellant on 16 August 2019. Both appellants were charged with two counts of the murder of the two deceased persons and by judgment delivered on 17 February 2020, the High Court "the court *a quo*" found the appellants guilty and sentenced them to death. This is an automatic appeal against both conviction and sentence.

THE FACTS

In count one, the deceased was a young man aged 26. At the time of his premature death, he resided at 12559 Pumula South Bulawayo and he was operating as a private taxi driver in and around the Bulawayo City Centre. On the fateful day, the deceased was last seen by his employer touting for customers. On the same day, at or around 1900 hours, an informant, one Kudakwashe Mavhenge, driving on his way to his plot in McDonald area, Bulawayo, discovered the deceased body lying lifeless in a pool of blood.

The matter was reported to the MacDonald Police Base. When the police arrived they discovered the deceased vehicle and a white small Samsung cell phone with an Econet line 0774 788 388 were stolen during the commission of the offence. A post mortem was conducted and it was discovered that the deceased had a stab wound on the left shoulder, stab wound on the left side of the neck which raptured the jugular vein, a laceration under the left chin and defensive wounds on the ring finger and at the back of the right hand. The cause of death was then found as haemorrhage shock, perforated left jugular vein, stab wound on the neck and assault.

In count two, the deceased was also a young man aged 21 who resided at 2393 Cowdray Park Bulawayo. On 16 April 2018 at around 2000 hours, the deceased closed his shop and retired to bed in the same shop. Deep into the night, the appellants gained entry into the shop by cutting open the tent that was covering the front part of the shop. Upon gaining entry, the appellants assaulted the deceased person in the head with a sharp object that caused deep

lacerations, which led to his death. Various items from the shop were stolen and the appellants fled into the night.

The second deceased's body was found on 17 April 2018 by one Tapiwa Murambizi, who then reported the matter to the police. A post mortem was conducted and it was found that the second deceased had blood on the face and clothes, a lacerated left ear, lacerations on the head and face, depressed skull fractures and extensive subarachnoid haemorrhage. The cause of death was then discovered as extensive subarachnoid haemorrhage, multiple skull fractures, head injuries and assault.

PROCEEDINGS IN THE COURT *A QUO*

The state led evidence from first appellant's biological father, one Elliot Dube who is also a stepfather to the second appellant. He testified to the effect that appellants arrived at his homestead in the morning hours driving a silver Honda Fit and carrying various clothing and gadgets. He further testified that that the appellants told him that they were coming from South Africa and that the Honda Fit vehicle was their car that they had bought from South Africa. It was also Elliot Dube's evidence that when the police came looking for the first appellant, he fled.

The appellants gave evidence on their own behalf. The court *a quo* found the testimony of the second appellant to be contradictory and it was concluded that he was not a credible witness and was also a liar when he told different versions of his story both in the warned and cautioned statement and in his defence outline. The second appellant also testified and sought to defend himself by submitting that one Fixon had called him to assist him in selling some clothes.

The court *a quo* found that appellants were in recent possession of the goods stolen from the two deceased. The appellants were therefore found guilty of the murder of the deceased persons which murder was committed in aggravating circumstances. The court *a quo* therefore exercised its discretion and sentenced the appellants to death.

As the matter is one for capital punishment, this is an automatic appeal for both appellants and the following are their grounds of appeal.

FIRST APPELLANT'S GROUNDS OF APPEAL AD-CONVICTION

1. The court *a quo* erred in law in convicting the 1st appellant on the basis of exhibits that were not tendered in court in terms of the Criminal Procedure and Evidence Act.
2. The court *a quo* erred in law and fact and convicted the 1st appellant on the basis of circumstantial evidence after applying the doctrine of recent possession and concluding that the 1st appellant could only have intended to kill.
3. The court *a quo* erred in law by placing the onus on the 1st appellant to tell the truth and prove his innocence, instead of the state proving its case beyond reasonable doubt.

SECOND APPELLANT'S GROUNDS OF APPEAL AD- CONVICTION

1. The court *a quo* erred and misdirected itself in both the law and the facts by convicting the 2nd appellant on both counts of murder yet the three state witnesses' *viva voce* evidence placed before it was inadequate and insufficient to sustain a conviction let alone to prove the 2nd appellant's guilt beyond a reasonable doubt as required by section 18 (1) of the Criminal Law (Codification and Reform) Act [C*hapter 9:23*].
2. The court *a quo* erred and misdirected itself in both the law and the facts by conviction 2nd appellant on both counts of murder based on exhibits and witnesses' evidence which were not tendered and placed before the court *a quo*.
3. The court *a quo* erred and misdirected itself in both the law and the facts by conviction 2nd appellant on both counts of murder in that its finding that the 2nd appellant's defence is manifestly false is grossly unreasonable in the sense that no reasonable court applying its mind to the same facts would have arrived at the same finding or conclusion.

PROCEEDINGS BEFORE THIS COURT

Counsel for the first appellant began by abandoning ground of appeal number 1. Mr *Tavengwa* for the first appellant argued that there was no evidence that placed the first appellant within the proximity of the offence. Pursuant to that, he argued that there was no evidence that proved that the first appellant did partake in the perpetration of the office for the doctrine of recent possession to apply. It was further argued that from the record, the first appellant can only be guilty of accessory after the fact. It was therefore his submission that the circumstantial evidence that was found by the court *a quo* was not sufficient to warrant a conviction.

Counsel for the second appellant abandoned all the grounds of appeal raised. Mr *Ngwenya* for the appellant submitted that the decision of the court *a quo* cannot be faulted. He submitted that the murders were committed during the course of robberies and that they were committed in aggravating circumstances. He therefore submitted that he does not have further submissions in respect of both the conviction and sentence.

In response, Mrs *T. K. Takuva* was indebted to the concession made by counsel for the second appellant. In respect of the first appellant, she argued that the court *a quo* correctly found that the two appellants were in recent possession of the property that was stolen from the deceased persons within 24 hours. She argued that the evidence of Elliot Dube was to the effect that the first appellant arrived in the same vehicle that was being driven by the second appellant that that vehicle had been stolen from the first deceased. She therefore submitted that the first appellant cannot be exonerated by a witness who was found to have been not credible.

After hearing submissions from the parties, two issues commend themselves for resolution in this appeal. They are:

1. Whether the court *a quo* erred in finding the appellants guilty of murder.
2. Whether the court *a quo* erred in imposing the death sentence.

As the second appellant had made a concession that the court *a quo* had correctly convicted and sentenced to him to death, this Court shall deal with the issues that have been raised by the first appellant only.

WHETHER THE COURT *A QUO* ERRED IN FINDING THE APPELLANTS GUILTY OF MURDER

Mr *Tavengwa'*s main born of contention was that there was no sufficient evidence that linked him to the offence. It was also his argument that the testimony of the second appellant does not place the first appellant anyway near the offence. It was his further argument that without evidence pointing to the first appellant, that he participated in the robbery and subsequent murder, he cannot have been convicted.

The court *a quo* convicted the appellants based on two aspects, the overwhelming circumstantial evidence and the doctrine of recent possession. The oral evidence of Elliot Dube together with evidence on record clearly brings out the events that occurred since the offences were committed. Elliot Dube was found by the court to have been a credible witness. The law on circumstantial evidence is settled. The requirements for the acceptance of circumstantial evidence as laid out in the case of *R v Blom* 1939 AD 188 are that:

a. the inference sought to be drawn must be consisted with the proved facts. If it is not, then the inference cannot be drawn.

b. The proved facts should be such that they exclude every reasonable inference from them save the inference sought to be drawn. If they do not exclude other reasonable inferences, then there must be doubt whether the inference sought to be drawn is correct.

The circumstantial evidence that is on record must however be clear or rather compelling as to convince the court that the facts cannot be accounted for on any rational hypothesis other than murder. See *S v Shonhiwa* 1987 (1) ZLR 215 (SC) at page 224.

It is at this stage therefore that this Court will ask the question as to what facts in the present matter have been proved from which such an inference may be drawn. The proved facts are that:

1. the deceased person in count 1 was murdered and dispossessed of his Samsung cellphone and his employers Honda Fit that was in his custody.
2. That the appellants were found in recent possession of these items, precisely within 24 hours of the commission of the crime.
3. The deceased person in count 2 was also brutally murdered and dispossessed of his employers stock. He was also dispossessed of his own tablet cellphone.
4. The second appellant was found in the possession of the items stolen from the deceased in count 2 within 24 hours of the deceased having been robbed of the same.

The inference that is sought is that the appellants murdered the two deceased persons and stole the goods that was in their possession. It is the evidence of Elliot Dube, who was found to be a credible witness by the court *a quo* that the appellants drove home in the silver Honda Fit vehicle and that they were selling various clothing and electric gadgets. It was also his evidence that when the police came looking for the first appellant, he fled.

It is puzzling at the same time suspicious as to why a person would run away from the police when they are not guilty of anything. That fact alone points to the guilt of the first appellant. The circumstantial evidence in this matter is overwhelming and is allowed because the evidence is consistent with no other reasonable inference than that the victims are dead and that they were murdered by the appellants. Surely all the inferences in this case point to the fact that the appellants murdered the two deceased persons in the course of robbery and started to sell the stolen goods in exchange for maize.

The first appellant disassociates himself from the offence and argues that there is nothing that links him to the commission of the offence. We do not find merit with this submission. The doctrine of recent possession puts the nail the coffin. Recent possession refers to a situation whereby an accused person is found with the belongings of a deceased person which were stolen prior to or soon after the commission of the murder. It is therefore important to note that the doctrine of recent possession is based on an inference being drawn that the possessor of recently stolen property stole the property, cannot give an innocent explanation of his possession and the inference that he stole the property is the only reasonable inference that can be drawn from such possession. See *S v Kawadza* 2005 (2) ZLR 321 (H) at p 324.

In other words recent possession can be used to found a conviction if the court after sifting through the whole evidence before it finds that the only reasonable inference, which can be drawn from the recent possession is that the accused stole the property. This Court has analyzed the evidence of all parties and is of the view that the appellants were indeed found in the possession of the goods that belonged to the two deceased persons soon after their premature deaths. No innocent explanation is given as to how they acquired the goods. Their statements were contradictory and full of loopholes. Such a failure to account for the goods coupled with the fact that the first appellant fled when the police came looking for him is proof that indeed they had stolen the goods. The court *a quo* did not misdirect itself. It was indeed correct that the death of the two deceased persons occurred during the commission of the robbery.

The court therefore rejects the first appellant's contention that his guilt was not proved beyond reasonable doubt and that there was no sufficient evidence that linked him to the murder of the two deceased persons. The appeal against conviction against the first appellant is without merit and ought to fail.

WHETHER THE COURT *A QUO* ERRED IN IMPOSING THE DEATH SENTENCE.

Having found the appellants guilty of the murder of the two deceased persons, the court a quo imposed the death penalty. The court *a quo* found that the murders did occur in aggravating circumstances. It was the court *a quo*'s findings that the appellants were on a mission to rob the deceased and during the course of the robbery, voluntarily butchered the deceased persons in order to accomplish their mission and that such gruesome acts were committed within

a space of 24 hours. The court *a quo* therefore exercised its discretion and imposed capital upon the appellants.

It is therefore the discretion of the trial court, which an appeal court is reluctant to interfere with except in glaring situations of irrationality or unreasonableness. I do not find any circumstances that warrant the interference with the discretion. An appeal court will only interfere with the exercise of discretion in limited circumstances. See *Barros & Anor v Chimpondah* 1999 (1) ZLR 58 (S).

I am of the view and satisfied that the court *a quo* properly exercised its sentencing discretion. The court *a quo* correctly finds that there were indeed aggravating circumstances in that the murder of the deceased persons was committed during the course of a robbery. There is therefore no reason as to why this Court should interfere with the sentence that was imposed by the court *a quo*.

DISPOSITION

The appellants were properly convicted of the murder of the two deceased persons in aggravating circumstances. The court *a quo* in imposing the death penalty properly exercised its sentencing discretion.

In the result it is ordered as follows;

The appeal be and is hereby dismissed with costs.

MATHONSI JA: I agree

MWAYERA JA: I agree

Mutuso, Taruvinga & Mhiribidi, 1st appellant's legal practitioners

T. J. Mabhikwa & Partners, 2nd appellant's legal practitioners

National Prosecuting Authority, respondent's legal practitioners