REPORTABLE (27)

BRIGHT KWASHIRA
v
THE STATE

THE SUPREME COURT OF ZIMBABWE
MALABA DCJ, GOWORA JA & GUVAVA JA
BULAWAYO, MAY 5 & 8, 2014

M Ndlovu, for the appellant
N Ngwenya, for the respondent

GUVAVA JA: On 3 July 2006, the appellant and an accomplice were convicted of murder with actual intent to kill and robbery of Ommund Peter Sivertsen by the High Court. The appellant was sentenced to death on 3 July 2006. The appellant's accomplice, due to his age, was sentenced to twenty years imprisonment for the murder charge and five years' imprisonment for robbery.

This is an automatic appeal against the conviction and sentence of death imposed on the appellant. Mr *Ndlovu* who appeared on behalf of the appellant submitted that he had no useful submissions to make with regard to the conviction. On the facts of this case the concession was properly made.

The facts of the matter are these. The appellant was aged between nineteen and twenty years at the time of the offence. His accomplice was aged between eighteen and twenty years according to the dental assessment report prepared by Dr Makwarimba. The deceased was seventy-one years old at the time of his death. On 18 January 2004 the

appellant and his accomplice proceeded to Modena Farm, Sherwood in Kwekwe where the deceased resided on his own. They intended to steal from the deceased. Upon arrival the two jumped over the electric fence using a wooden pole in order to avoid getting electrocuted. Once they gained access into the deceased's yard the appellant and his accomplice spent the night in the yard waiting for the deceased to wake up. When the deceased was conducting a perimeter check of the fence in the morning, they attacked him with iron rods. The appellant struck the deceased on the head several times with the iron rod until he fell down. They continued to strike the deceased on the head and all over the body until he died. The appellant and his accomplice then carried the deceased's body and buried it in a shallow grave. They went into the house and stole the deceased's property. They also took off their clothes and wore the deceased's clothes. They loaded the stolen property into the deceased's truck, a Mazda B2000 registration number 623-073C and drove away from the premises.

Along the way they met Mr Andries Van Heerden who was the deceased's neighbour. He recognised the deceased's motor vehicle which was being driven by the appellant's accomplice. He became suspicious as he knew that the deceased did not have any employees. He followed the motor vehicle and blocked it with his car. The appellant and his accomplice then stopped the car. Mr Van Heerden recognised the appellant as he once worked for him. The appellant and his accomplice abandoned the car and left the scene. Mr Van Heerden drove to the deceased's home and contacted one Schalk Burger. They forced open the gate and after a search of the yard, discovered the body of the deceased buried in a shallow grave. A report was made to the police. The police exhumed the body and recovered the iron rods that were blood stained. Mr Van Heerden drove the deceased's motor vehicle with all the stolen property to his home.

The deceased was taken to Kwekwe Hospital mortuary for a post-mortem examination. The examination by Doctor Munongo revealed that the deceased had sustained multiple bruises all over the body. He sustained a deep cut on the head. The cut on his head was 7 cm long and broke the cranial bone and penetrated the brain. The deceased died due to brain injury and hypovolemic shock.

The appellant and his accomplice were arrested on 24 January 2004 at Bushdale Custom Milling, Empress in Zhombe whilst still wearing the deceased's clothes.

The appellant and his accomplice freely and voluntarily made confirmed warned and cautioned statements in which they confessed to the killing of the deceased and set out the facts surrounding the commission of the offence which are not different from the facts narrated so far. These are the same facts that were found by the trial court as common cause. On these facts the court *a quo* correctly found both the appellant and his accomplice guilty of murder with actual intent to kill.

On the question of sentence, Mr *Ndlovu* sought to argue that the appellant was a youthful offender who had been misled by his accomplice. Mr *Ndlovu* pursued this argument on the misapprehension that the appellant was younger than his accomplice. However when it was pointed out to him by the court that the appellant was in fact older than his accomplice he abandoned his submission and conceded that the court *a quo* had correctly found that there were no extenuating circumstances.

The trial court was aware of the principle that youthfulness is an extenuating factor provided that the actions of the offender are consistent with immaturity. In respect of the appellant the court *a quo* stated the following:

> "In this case we have considered all the factors which may be regarded as extenuating and weighed them against the aggravating factors. Youthfulness, as already indicated is the main extenuating issue. However, as against this factor, the assault was gruesome. It was an attack by two people on an old man aged 71 years, using metal rods that have been produced as exhibit 8 and as we have found there was no need to be so vicious in order to steal from this old man.
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> After killing the deceased, the accused buried him in a shallow grave and stole his property and loaded it into his vehicle and drove off. They covered the shallow grave with asbestos sheet in order to conceal their offence. We consider that the aggravating features in this case, outweigh those that tend to reduce the accused's moral blameworthiness, and in the circumstances we find that extenuating circumstances do not exist."

It is the view of the court that the learned judges' reasoning cannot be faulted. It has been stated on numerous occasions that murder committed in the course of a robbery is likely to disentitle an offender of a finding of extenuating circumstances and attract the death penalty unless there are weighty extenuating circumstances.

In *S v Sibanda 1992* (2) ZLR 438 (S) at 443 F-H GUBBAY CJ said:

> "Warnings have frequently been given that in the absence of weighty extenuating circumstances, a murder committed in the course of a robbery will attract the death penalty. This is because, as observed in *S v Ndlovu* S34-85 (unreported):
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> '… it is the duty of the courts to protect members of the public against this type of offence which has become disturbingly prevalent. People must feel that it is possible for them to enjoy the sanctity of their homes, to attend at their business premises, or to go abroad, without being subjected to unlawful interference and attack"

In this case the deceased, who lived alone, was a harmless old man, aged seventy-one years, who could have been subdued by the appellant and his accomplice without killing him. The assault on the deceased was vicious and totally unnecessary.

The court is satisfied that the trial court did not misdirect itself in finding that no extenuating circumstances existed in respect of the appellant.

Accordingly the appeal is dismissed.

MALABA DCJ: I agree

GOWORA JA: I agree

Mlweli Ndlovu & Associates, appellant's legal practitioners

The National Prosecuting Authority, respondent's legal practitioners