REPORTABLE (97)

Judgment No. SC 122/02
Crim. Application No. 316/02

PHILLIP BEZUIDENHOUT v THE STATE

SUPREME COURT OF ZIMBABWE
HARARE, DECEMBER 20, 2002

Before CHIDYAUSIKU CJ, In Chambers

The applicant in this case was convicted of murder with constructive intent and sentenced to fifteen years' imprisonment with labour by the High Court (HLATSHWAYO J). He applied for leave to appeal against both conviction and sentence to the court *a quo*. The application was dismissed. Thereafter he applied for such leave to a Judge of this Court. I considered the application and dismissed it. I indicated that reasons for the judgment would be given in due course. These are they.

The facts of this case are that on 14 July 2001 and at about 11:30 am at the 236.5 km peg along the Harare/Mutare Road, Tara Farm, Odzi, the applicant struck Febion Mapenzauswa ("the deceased") with a motor vehicle. The deceased

died on the spot. The State alleges that the applicant did so unlawfully and with intent to kill the deceased.

It is common cause that the applicant did strike the deceased with a motor vehicle and that the deceased died.

When the charge was put to the applicant, he pleaded guilty to culpable homicide. The State rejected the plea, contending that the applicant was not only negligent but foresaw the death of the deceased and intended to bring about such death or alternatively was reckless as to whether such death occurred or not. The matter thereafter proceeded to trial.

The issue that fell to be determined by the trial court was that of the applicant's *mens rea*. In particular, whether the applicant was merely negligent, as admitted, or whether the applicant intended to kill the deceased, as contended by the State. The *mens rea* of the applicant in this case, like in many similar cases, can only be inferred from his actions immediately prior to the collision with the deceased.

The learned judge in the court *a quo*, in a very well reasoned judgment, carefully analysed the evidence of the witnesses and came to a conclusion that another court cannot but agree with.

The background to this case, which is largely common cause, is that a number of settlers had been allocated plots on the applicant's farm in terms of the land resettlement programme. This no doubt did not go down well with the

applicant. The deceased was at the applicant's farm for the purpose of being allocated a plot when the applicant killed him.

On the morning of 14 July 2001 the applicant had a physical altercation with some of the women settlers on the farm. There are different and conflicting versions of this altercation between the applicant and some of the women settlers involved. The learned trial judge quite correctly rejected certain aspects of the evidence of the settlers. He also rejected some aspects of the applicant's version of the altercation. In my view, the details of that altercation is of peripheral relevance. They are only relevant insofar as they throw some light on the conduct of the applicant later on and at the time he struck the deceased.

After analysing the evidence of the events of that morning the learned trial judge concluded as follows:

> "Whether in so doing the accused intended to kill one of them or to frighten them off is not clear. However, the evidence I accept and the conclusion I draw is that the accused was in a very agitated frame of mind that morning. It is not certain exactly what the source of his anger was but he directed his ire at the settlers. I do not believe that he reasonably suspected that the women with slashers were the ones who had assaulted his workers who included many men.
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> I accept Caroline Kashiri's evidence that the accused did, indeed, press his body on her and throttled her as alleged. Anna-Mary Sithole also was a credible witness and gave her evidence very well.
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> However, I have discounted Tapiwa Chipo Tapera's evidence that the accused had threatened that he would spill blood if his farm was acquired. Tapera struck the court as a highly emotional witness who was very bitter towards the accused, his former employer, for alleged mistreatment at the workplace. Thus, I have discarded those aspects of his evidence which are not corroborated by other witnesses."

In my view, the above conclusion appears to be a fair and balanced assessment of the evidence by the learned judge. The applicant's contention in the notice of appeal, that the learned judge's assessment is grossly unreasonable, is untenable. Even if I were to accept the applicant's contention that there was a misdirection on this issue, that misdirection does not affect the learned judge's conclusion on the critical issue of how the applicant struck the deceased and the inference to be drawn from the applicant's conduct at the time of the impact.

As the learned trial judge again correctly observed, there are two versions of how the collision occurred. The two versions, namely that of the applicant and that of the State, were summarised by the learned judge as follows:

> "I move on now to consider how the impact occurred. The accused's version is that he had moved off his correct left lane of travel into the right or incorrect lane in order to speak window to window to the occupants of the Astra Estate vehicle parked off the road. As he approached the car at a speed of 70 km/h or probably less, he says the occupants, one after the other, first the front passenger followed by the back passenger one, the backseat one, and lastly the driver got out of the car, each closing their respective doors, and started running away, the passengers heading towards the wheat fields. The driver started running parallel to his vehicle in the Harare direction, slipping as he did so on the gravel on the verge of the road. The accused says at that moment he realised that he was not going to be able to speak to the occupants as he had intended. He then glanced back to see if it was safe for him to move back to his correct lane. That, he says, is when the impact occurred. He did not stop but proceeded to Odzi Police Station where he made a report.
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> The version of the impact as given by Godfrey Gola and corroborated by Tapiwa Makombe and other settlers is significantly different. According to Gola, he, together with Tapiwa and the deceased had gotten into the deceased's car which was parked off the road and were about to drive off when he says he heard the women screaming at the top of their voices warning them of impending danger. He looked up and saw the accused speeding in his vehicle towards them. The accused had left his correct lane of travel and was bearing (down) on them, holding the steering firmly leaning forward. He feared that it might be a suicide attack and dived out of the car, as did Makombe who was in the back passenger seat. Both fell into a ditch. The deceased was slow to react and was struck as he just came out of his door."

The learned trial judge accepted the evidence of the two State witnesses, Gola and Makombe. He made a favourable finding on those two witnesses' credibility. In so doing he impugned directly or indirectly the credibility of the applicant.

It is now settled that a superior court does not lightly interfere with a finding of a lower court on the issue of the credibility of witnesses.

Apart from this, there are a number of undisputed facts and probabilities that support the State version.

Firstly, shortly before the applicant struck the deceased with his motor vehicle, the applicant, on the one hand, and the deceased and the people around the deceased's vehicle, on the other hand, exchanged hostile gestures as the applicant drove past the deceased's vehicle. Initially the applicant drove past the deceased's vehicle going towards Harare. He then turned round and drove past the deceased's vehicle driving towards Mutare. The applicant then again turned around and drove towards Harare. It is common cause that on this third occasion he left his correct lane of travel and drove towards the deceased's vehicle, which was parked off the lane for traffic travelling in the opposite direction. That is when he struck and killed the deceased.

Secondly, the applicant's evidence in court of what occurred and why he drove towards the vehicle of the deceased is at variance with his warned and

cautioned statement to the police. This discrepancy seriously undermines the credibility of the applicant as a witness.

Thirdly, and in my view most significantly, on his own evidence the applicant was travelling at about 70 km/h at the time of the impact. A driver wishing to have a window to window talk, as the applicant contended, with persons in the deceased's vehicle would have slowed down to a crawling speed to enable him to stop and talk to the deceased, who was in his vehicle. At the time of the impact, if the applicant's version were true, he should have been almost coming to a stop.

Fourthly, the damage to the applicant's vehicle, the fact that the deceased was thrown into the air and landed on the tarmac behind the applicant, and the fact that the deceased's shoes were thrown as far as the wheat fields, clearly shows that the applicant's vehicle was travelling at a considerable speed at the time he struck the deceased.

In this regard the learned judge concluded as follows:

> "The manner in which on impact the deceased was thrown up in the air and landed on the tarmac behind the accused's vehicle, the fact that one of the deceased's shoes flew into the middle of the wheat field, the injury sustained by the deceased as already noted, and the shattering and puncturing of the windscreens as shown in Exhibit L, all these factors are consistent with high speed and … inconsistent with the accused's version of events.
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> I find the testimonies of Gola and Makombe credible and reliable. They did not exaggerate. For example, Gola refused to give an estimate of the speed and limited himself to maintain(ing) that it was high. Makombe estimated the speed at 100-120 km/h. Their description of how the accused approached them, hugging the steering and bearing (down) on them has a ring of truth to it and does not sound like embellishment. Which is possible despite the accused's submissions to the contrary that within a split second the mind can take in a lot of details, especially in a moment of extreme danger.

> Doctor Sidhile too was prepared to make concessions where warranted and his evidence that the accused must have been travelling at a high speed is supported by other evidence as noted already. The *actus reus* having been established."

The reasoning and conclusion of the learned trial judge is convincing and there are no prospects of a superior court coming to a different conclusion.

When an individual drives towards a group of people at high speed, as the applicant did in the manner described by witnesses the court *a quo* found credible, there is no room for doubt that such person foresees death as a consequence of his actions and is reckless as to whether death ensues as he persists with that course of conduct.

I was therefore satisfied that there were no prospects of success on appeal against conviction.

Upon conviction the applicant was sentenced to fifteen years' imprisonment with labour. The court *a quo* found the following factors of extenuation –

(a) a constructive intent; and

(b) extreme emotional disturbance.

There is very little else that can be said for the applicant in regard to sentence.

For a superior court to interfere with the sentence, the sentence has to be so manifestly excessive as to cause a sense of shock. Alternatively, if the court misdirected itself, then a superior court is at large on the question of sentence.

On the facts of this case, even if a superior court were to conclude that there was a misdirection, there is very little prospect of it reducing the sentence imposed. If anything, the court *a quo* in this case erred on the side of leniency.

Gonese & Ndlovu, applicant's legal practitioners