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Judgment No. SC 125/02
Crim. Appeal No. 182/01

(1) GODDEN MATANGA (2) GUIDESON KANYEMBA

v THE STATE

SUPREME COURT OF ZIMBABWE
CHIDYAUSIKU CJ, MALABA JA & GWAUNZA AJA
HARARE, OCTOBER 22, 2002 & MARCH 10, 2003

P Takavadiyi, for the first appellant

T Chitapi, for the second appellant

S Mushangwe, for the respondent

GWAUNZA AJA: When the appeal papers in this matter were filed, there were two appellants. The second appellant subsequently died in prison, before the appeal could be heard. This effectively left only one appellant, the first appellant, whose appeal to this Court in relation to the murder charge was automatic following the death penalty imposed on him for murder with actual intent.

The facts of the matter are aptly summarised in the respondent's heads of argument and are repeated verbatim for convenience:

> "The first appellant, the second appellant and Charles Farai Mubika, who has not prosecuted his appeal, are alleged to have plotted together to kill Heather, the first appellant's employer, and to steal her property. Thereafter, acting in concert, the first appellant carried out the killing by strangling her and hitting her head against a rock. (He then piled logs on top of the body and burnt it to ashes). Thereafter he stole the deceased's wallet, a cell phone and a bunch of keys. On that night, after the killing, the first appellant met with the second

> appellant and arranged that the second appellant would remove the deceased's motor vehicle the following day. The second appellant was then given the deceased's cell phone to sell and $100.00 to use (for) transport.
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> The second appellant proceeded to Mufakose where he met Charles F Mubika and gave him the cell phone and he in turn sold the cell phone for $2 500.00. From that amount, Mubika received $500.00, whilst the first and second appellants received $1 000.00 each. On the following day, the second appellant, with the assistance of the first appellant, removed the deceased's motor vehicle from her premises and proceeded to Mufakose to see Mubika.
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> The second appellant teamed up with Mubika and drove the vehicle in and around Harare as well as to Kutama visiting friends and relatives. The second appellant, acting in concert with Mubika, caused two speakers to be removed from the motor vehicle and these were sold. The two were arrested whilst the motor vehicle was still in their possession."

I shall in this judgment refer to the first appellant as just "the appellant".

Upon seeing the police, who had arrested his co-accused, the appellant panicked and took rat poison in an attempt to kill himself, but was saved after being rushed to hospital. Before going to the hospital, the appellant showed the police the place where he had burnt the deceased's body to ashes. While in hospital, the appellant recorded a warned and cautioned statement, which was confirmed two days later by a magistrate.

In the court *a quo* the appellant pleaded not guilty to both the murder and theft charges. In respect of the former, he tendered a plea of culpable homicide. In respect of the theft charges, he pleaded not guilty to the theft of the motor vehicle but guilty to the charges of theft of the wallet and the cell phone.

The court *a quo* found him guilty on the charge of theft of a motor vehicle and sentenced him to eight years' imprisonment with labour.

As there were no eyewitnesses to the events that resulted in the deceased's death, the appellant was the only person who could shed light on the matter. He did not do well in that respect, as he gave conflicting versions of what had happened between him and the deceased immediately before her death.

The first version he gave is contained in the warned and cautioned statement, whose contents the appellant now wishes to dissociate himself from. He challenged the admissibility of the statement, alleging that he had not made it freely and voluntarily. Be that as it may, the relevant portion reads as follows:

> "I went inside the yard and went to the compost and it was around 11 am. I set up the fire to attract (the deceased) Heather but she did not come immediately. Probably she was occupied in the house at that moment.
>
> So I continued doing normal garden duties and at around 11.45 hours Jane came and they spent some time together playing music. At around 1300 hours Jane left. I went and put more fire in the garden. At around 1600 hours Heather came down to the garden, running, using vulgar language while I put up the fire and she didn't like that.
>
> I took the kitchen knife from my right hand pocket. I tried to pierce it through her stomach but it bent and she screamed. As I was panicking, I strangled her and slammed her on the rock and kept strangling her. The last words she said were that "Why, why, why?" and then she died. Then I dragged the body onto the fire and there were still some slight movements and I took the spade and hit her on the side of the head. The spade is by the swimming pool room.
>
> I took some bushes and put (them) on the fire and when the bushes were used up I took four tyres and eight logs and put (them) on the fire, burning the body. Then I went to the house, upstairs to her bedroom and I collected the car keys, wallet, cell phone (and) sunglasses and came back to the fire. I took cash amounting to Z$350 and I threw the wallet into the fire as well as a handbag with cosmetic stuff. I threw the coins by the swimming pool engine.

> I threw the shoes outside the durawall and the knife into the bush. I left the fire burning and I took the cell phone with me and the cash and the car keys and the house keys."

In subsequent versions the appellant substantially embellished this statement.

In his defence outline, the appellant explained that when the deceased came out, protesting at his lighting of the fire close to her flowers, she had given him a "hard clap" in the face, and followed this up with a punch to his forehead with clenched fists, and scratches administered all over his body. He had then held her by the neck and pushed her down, causing her to fall on her back and hit a rock that was nearby. She had then gone quiet and had blood oozing from her nose and mouth. He realised she was dead after he had failed to detect any heartbeat or pulse.

In his examination-in-chief, the appellant repeated the part about the abusive language and the slap in the face. He added:

> "She punched me and started scratching me. I held her by the collar of her dress. She then increased, my lord, the way she was scratching me. She also reached for my private parts. I grabbed her hard by the collar and hit her against a stone."

In re-examination by his counsel, the appellant said:

> "My lord, I did not intend killing her. We fought and she died accidentally during the fight. My lord, she died when I hit her against a stone or rock on the ground."

During indications to the police at the scene of the crime, the appellant said:

> "After grabbing I pushed her towards this way of which she fell on this rock and (I) started strangling her. As I was doing that she was also scratching me. She acted like she was dead. I pushed her on this rock and slammed her on the rock."

What emerges consistently from these different versions is the fact that there was an altercation between the two, and that the deceased was pushed by the appellant and fell on her back. The major contradiction in the appellant's differing versions is whether the deceased hit her head against the rock "accidentally" when she fell, or whether the appellant deliberately hit her head against the rock in question, causing her death.

Based on these contradictions, and other inconsistencies in his testimony, the learned trial judge, in my view correctly, reached the conclusion that the appellant was not a credible witness. He also noted that the appellant's demeanour was poor, and that some aspects of his evidence were found to have been "patently manufactured" to comply with the defences of his two co-accused.

The trial court also considered the challenge, by the appellant, of the admissibility of his warned and cautioned statement.

The appellant did not deny signing the statement in question, nor giving the assurance to the magistrate who confirmed it that such statement had been made freely and voluntarily. He, however, had an explanation for these actions.

In relation to the recording of the statement, the appellant averred that such statement was in effect prepared by the police. He accused the police of

assaulting him as he was laid up in his hospital bed, and refusing to accept the statement that he was giving them concerning the manner in which the deceased had died. He also accused them of having threatened to implicate his mother in the crime if he did not accept their version of events. In addition to this threat, the appellant asserted he was coerced into signing the confession as formulated by the police, by the assurance from them that he would be given a lighter sentence or even be released.

As for the confirmation of the statement, the appellant averred he had not denied before the magistrate that it had been made freely and voluntarily because he feared further assaults from the police, and believed he would get a lighter sentence and see his mother released from remand prison.

The trial court was, however, not satisfied the appellant had successfully discharged the burden which he bore, of proving that the confirmed warned and cautioned statement had not been made by him freely and voluntarily. The learned trial judge's reasons are given as follows:

> "The State called the policemen responsible for the taking of the statement and indications from Godden. They denied the allegations made against them. Godden was co-operative they said and gave his own statement and indications freely.
>
> There was nothing in the way that the policemen gave their evidence or in the content of their evidence which would or might lead us to believe that they were not telling the truth. They gave their evidence well. They were not shaken in cross-examination. The statement which Godden had given is detailed and factual. It contains matter that could not have been known to the police. It is consistent where the events it describes coincide with events relevant to this case that are otherwise before us from evidence or common cause.
>
> It is consistent with the indications that Godden admits he made and which he says were made freely and voluntarily. …

> … Godden's original defence outline stated only that the confirmed warned and cautioned statement was not made freely and voluntarily. There was no suggestion that the police had made that statement and not Godden. This claim only appears in Godden's supplementary defence outline and evidence. So too (was) the claim that the police had incorporated some manufactured indications of their own within Godden's indications. …
>
> For the reasons already given, we reject as untrue the evidence given by Godden on these points and accept that the warned and cautioned statement and the record of the indications produced by the State as Exhibit(s) 7 and 11 in this trial were made by Godden and are a true account concerning the death of Heather and are admissible against him."

I find no fault with the reasoning and conclusions of the learned trial judge. The warned and cautioned statement and the indications were properly found to be admissible against the appellant.

Even though other evidence before the court, for instance the speed with which the appellant, after burning the deceased's body, took the deceased's property and shared it with his co-accused, suggests that the murder was premeditated, this is put almost beyond doubt when regard is had to the first part of the appellant's warned and cautioned statement. He alluded to him and his co-accused having planned to kill the deceased and to having, five days previously, tried to put into operation a plan they had hatched to achieve this objective. The plan involved the burning, by the appellant, of a fire close to the deceased's flowers in the garden, a circumstance that was certain to get her out of the house to investigate. This plan, according to his warned and cautioned statement, was foiled, unwittingly, by the deceased and the appellant's mother. This did not deter the appellant and his colleagues, as this passage illustrates:

> "On Friday (the) 30th day of June 2000 in the afternoon we talked about the previous issue which failed and Guideson shouted at me and his friends were also disappointed. Guideson said we should organise this mission and we

> actually organised the mission. Guideson said if I kill Heather and burn her body they wouldn't notice that and they would think that Bob did something since they were separated."

"Bob" was the deceased's estranged husband.

The finding of the court *a quo*, in the light of all this evidence, that the appellant intentionally killed the deceased cannot, in my view, be faulted. What has to be considered, given this finding, is whether the appellant proved a defence to his actions.

In his defence outline and evidence in the court *a quo*, the appellant raised two defences, that is, self-defence and provocation. He asserted that he had pushed the deceased and slammed her head against a rock, firstly in self-defence against the physical attack perpetrated on him by the deceased, through the slap and punch to his face and scratches all over his body. Secondly, or alternatively, the appellant justified his actions on the basis that he had been provoked by the deceased when she attacked him both verbally and physically.

The court *a quo* rejected the appellant's other versions of the events immediately before and during his attack on the deceased and accepted the one in his warned and cautioned statement. As correctly noted by the learned trial judge, no mention was made in that statement of the deceased having physically attacked the appellant. All that is mentioned was the shouting and use of vulgar words. The appellant's two defences therefore have to be considered from the perspective that the deceased only verbally attacked the appellant.

I will consider self-defence first.

The requirements for self-defence are now well established. As correctly contended for the State, these are –

(i) that there must be an unlawful attack;

(ii) that the attack must be upon the accused or upon a third party;

(iii) that the attack must have been commenced or was imminent;

(iv) that the action taken by the accused must have been necessary to avert the attack; and

(v) that the means used to avert the attack must be reasonable.[1]

These requirements envisage a physical attack.

In casu, the court concluded that only a verbal attack had been launched by the deceased against the appellant. To "defend" himself against this attack, the appellant perpetrated, on her person, a savage physical assault. He hit the deceased's head against a rock while strangling her, and thereafter struck her head with a spade after detecting slight movements in her body. This attack by the appellant, could, in my view, not be said to have been an action necessary to avert the verbal attack that the appellant alleged was launched on him by the deceased. Nor can it be said that the means that the appellant took to avert the attack were

[1] *S v Ntuli* 1975 (1) SA 42; *S v Motleni* 1976 (2) SA 403; *S v Golaith* 1972 (3) SA 1.

reasonable. The appellant clearly failed to satisfy the requirements for a defence of self-defence, as set out above.

In the light of this, I am satisfied the learned trial judge properly dismissed that defence.

This leaves the other defence, that of provocation. It is, again, correctly contended for the State that the appellant failed to prove this defence. Once the court *a quo* had decided that the death of the deceased was intentional, the next stage of the inquiry would be whether the appellant had felt so provoked that he lost his self-control and, in that state, attacked the deceased, and, if so, whether the provocation that he had received was sufficient to justify his having retaliated in that manner.

The learned trial judge was not persuaded that the verbal attack on the appellant by the deceased was sufficient to justify him losing self-control in the manner that he did, so as to reduce the crime from murder to culpable homicide.[2] I agree. The appellant might have felt angry at being shouted at, but the retaliation that he took was, in my view, grossly disproportionate to both such anger and the provocation alleged.

That defence was, again, properly dismissed.

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[2] *R v Tanganyika* 1958 R & N 228; *R v Bureke* 1959 (2) R & N 353.

The learned trial judge found no other extenuating circumstances in the case. He was satisfied that the nature of the attack by the appellant on the deceased and the determination which he showed in continuing with the attack after his first failure were consistent with a planned, deliberate and brutal attack on her, without justification.

Against the background of an intention to kill having been proved, the defences proffered by the appellant having been dismissed, and no other extenuating circumstances having been found, the conviction of the appellant of murder with actual intent cannot be faulted. Nor can the resultant death sentence.

It should be noted in relation to the death sentence that counsel for the appellant, Ms *Takavadiyi*, entreated the court *a quo* to consider as mitigatory the fact that the appellant was a youthful twenty years old at the time of the offence, and that he was a first offender.

The killing of the deceased was callously planned and executed. The appellant and his friends were not deterred from carrying out their mission by the failure of their first attempt to kill the deceased. The killing itself was savage and brutal. The immediate cremation of the deceased was part of the deadly plan and was designed to hide the crime. The crime was committed solely in order for the appellant and his friends to steal the deceased's property. These factors suggest a complete lack of respect for human life. While the appellant's youth and the fact that he was a first offender may have constituted mitigating circumstances in other

circumstances, *in casu* these were, in my view, totally eclipsed by the aggravating circumstances. The sentence passed by the court *a quo* cannot be faulted.

The appellant also appeals against both the conviction and sentence in relation to the theft of the deceased's motor vehicle.

The appellant does not deny collecting the deceased's car keys from the house and handing them over to the late Guideson Kanyemba, the second appellant. According to his warned and cautioned statement, the appellant then helped the second appellant push the car to the gate and drive off in it. The second appellant, according to the statement, was going to sell the car, bring back the money and share it with the appellant. That the intention of the appellant was to steal the car and permanently deprive (by then the estate of) the deceased of it, is further supported by the fact that the second appellant never brought the car back but instead, together with the other accused, Farai Mubika, drove it around for several days and sold the radio speakers before they were arrested. Having thus facilitated the removal of the motor vehicle from the deceased's house, the appellant cannot now dissociate himself from all that happened to it thereafter. The removal and sale of the speakers in particular was not consistent with an intention to return the vehicle to its owner.

The learned trial judge correctly noted that theft from employers generally and theft of motor vehicles in particular were both prevalent and serious crimes in Zimbabwe. The conviction of the appellant for theft, and the sentence of eight years' imprisonment with labour, were, in my view, appropriate under the circumstances. That appeal, too, must fail.

In the result, the appeal against conviction and sentence in relation to the charges of murder and theft is dismissed.

CHIDYAUSIKU CJ: I agree.

MALABA JA: I agree.

Pro deo