REPORTABLE (27)

ROMEO JAMBURA
v
THE STATE

AND

1) ROMEO JAMBURA 2) NOREST TAMANGANI
v
THE STATE

SUPREME COURT OF ZIMBABWE
GUVAVA JA, UCHENA JA & MAKONI JA
HARARE: JUNE 23, 2022

T. Chikanga, for the appellants

R. Chikosha, for the respondent

MAKONI JA: This is an automatic appeal, filed in terms of s 44(2)(c) of the High Court Act (*Chapter 7;06*), against conviction and the penalty of a death sentence imposed on the appellants by the High Court on 8 June 2020 following their conviction on a charge of murder with constructive intent. Two separate appeals were filed by each of the appellants. The two appeals in question were consolidated, through an order of this Court dated 6 July 2022, as both appeals involved the same judgment.

After hearing counsel, in the matter, we dismissed the appeal and indicated that our reasons would follow. Below are the reasons for judgment.

BACKGROUND FACTS

The appellants, together Dallena Mary Mukupe (Dallena), were arraigned before the court *a quo* on a charge of murder as defined in s 47 of the Criminal Law Codification and Reform Act [*Chapter 9:23*] (the Code). The allegations against them were that on 19 November 2018, the appellants, in the company of Dallena and one Last, who is still at large, hatched a plan to rob the deceased of his motor vehicle. The deceased was a taxi driver operating in the Central Business District of Harare (CBD). They armed themselves with unknown objects and hired the deceased from town to Westlea Suburb, Harare. Along the way, the appellants and Last assaulted the deceased several times all over the body with unknown objects. The trio stole a pair of XTEP brown shoes, a Samsung GTS 5360 cell phone, car modulator, USB cables and a black wallet from the deceased. They also took the deceased' vehicle, a Honda Fit, registration number AEP 6641(the motor vehicle) and drove along Acacia Road, Westgate, Harare where they dumped the body of the deceased at a refuse dump site.

On 20 November 2018, detectives from the CID Vehicle Theft Squad, whilst investigating the robbery of a different motor vehicle, received information that first appellant was in Epworth. They proceeded to Epworth and arrested the first appellant and recovered a black Samsung GTS 5360 cell phone and a Voda phone from him. The first appellant then led the detectives to Domboshava where they arrested the second appellant and Dallena. They recovered

a satchel containing clothes, a black wallet, a pair of XTEP brown shoes, car modulators and USB cables.

On 21 November 2018, the remains of the deceased were examined by two forensic pathologists. The report from the autopsy indicated that the death of the deceased was due to mechanical asphyxia, neck contraction, and hand strangulation. The pathologists observed that the deceased was bleeding from both eyes and nostrils and that he had light bruises and abrasions all over his body.

With the cause of death not being an issue, the court *a quo* was left to determine whether or not the appellants and the other accused person were responsible for bringing about the death of the deceased. The appellants pleaded not guilty to the charge. They denied having anything to do with the deceased and that they had ever had any encounter with him on the day in question.

The first appellant outlined that on 19 November 2018 he did not enter the CBD but spent the whole day in Domboshava. He further stated that in the evening he was in the company of the second appellant and his other friend by the name Modica Tamangani. The second appellant stated that he had not entered the CBD on the day in question. He had spent the day at his home in Domboshva.

Dallena, in her defence, outlined that she and the appellants were together on the night of 19 November 2018 and that they had an encounter with the deceased during which the deceased

was assaulted and robbed of his property by the appellants and one Last. Dallena further outlined that she did not act in common purpose with the other appellants but was a victim of circumstances.

The evidence that was placed before the court *a quo*, against the appellants was both circumstantial and direct. The direct link was brought in by the evidence of Dallena who, during her defence case, detailed how the deceased was assaulted and robbed and his body later dumped in Westgate.

She further testified of how they drove off with the deceased's motor vehicle to Domboshava. They stopped at a business centre where the appellants got into a nightclub until the early hours of the morning. On their way home and as she was driving the stolen motor vehicle, she lost control of the motor vehicle and hit into a hedge at Jeremiah Gunyere's (Gunyere) homestead. Gunyere confirmed the incident and that the appellants requested that they leave the accident damaged vehicle at his homestead and they would come and collect it later. He acceded to their request. When the police visited his homestead, he identified the appellants as the ones who had left the vehicle at his homestead.

The court *a quo* relied on circumstantial evidence and drew inferences or conclusions from proven events or circumstances surrounding the commission of the offence which included the recovery of the deceased's motor vehicle and his other property in the appellant's possession a day after the murder. Various other witnesses gave testimonies that linked the appellants to the commission of the crime.

In determining the matter, the court *a quo* reasoned as follows, at p101 of the record;

> "Once there was evidence led connecting the accused to the commission of the offence the accused were required to provide an innocent explanation of their possession of the deceased's personal goods and the motor vehicle. An innocent explanation would have to be reasonably possibly true. The 1st and 2nd accused inadvisably so, decided to stand by a bare denial. The inadvisability of standing by a bare denial is that facts alleged against the accused if the court then determines to be proved, are accepted without qualification. The accused loses the chance to qualify them or water down their impact. The court therefore accepted the evidence against the accused as given by the state witnesses including the evidence of the 3rd accused.
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> As far as the 3rd accused's involvement was concerned, she advisedly decided to come out clean. She narrated her involvement and that of the 1st and 2nd accused and Last. The state counsel conceded that the 3rd accused was a victim of circumstances and that she was not involved in the planning and actually executing of the murder of the deceased."

In the result, the appellants were found guilty of murder with constructive intent as defined in s 47 (1) (b) of the Act.

Regarding sentence the court *a quo* reasoned that the Constitution provides for a right to life and that such a right can only be taken away by an order of the court. It further reasoned that the fact that the appellants did not care about what might befall the deceased was borne out by the fact that they dumped him like refuse. It also found that, at that stage, nobody cared as to whether he was dead or alive, whether he would survive or get help. The court found that the appellants just resolved to steal the vehicle and the deceased's other property. That is what was uppermost in their minds.

In addition, the court *a quo* found that the appellants committed the offence in aggravating circumstances – that is - in the course of committing other offences which included

the kidnapping, carjacking, and robbery. Notwithstanding their plea of mercy, the appellants were sentenced to death.

Aggrieved, by the decision of the court *a quo*, the appellants appealed against both conviction and sentence on the following grounds:

GROUNDS OF APPEAL

AGAINST CONVICTION

"i. The court *a quo* erred both at law and facts by convicting the Appellants mainly on accomplice evidence that had been illegally obtained.
ii. The trial court erred at law by not giving due weight to Appellants' mitigating circumstances against the aggravating circumstances of the case."

SUBMISSIONS BY THE PARTIES

Mr Chikanga who appeared for the appellants challenged the conviction on the basis that the court *a quo* convicted the appellants on the basis of accomplice evidence only. In his view, the court *a quo* fell into grave error by having regard to the evidence of the accomplice when it was clear that such evidence had been illegally obtained. However, during an exchange with the court, counsel for the appellants conceded that excluding the evidence of Dallena, there was other sufficient evidence to warrant the conviction of the appellants. He also conceded that Dalenna was not an accomplice to the commission of the murder.

Per contra, *Mr Chikosha* for the respondent submitted that there was no evidence indicating a misdirection on the part of the court *a quo*. He further submitted that Dallena gave

evidence in her defence and never sought to hide her degree of participation in the matter unlike the appellants. She was not called by the State as an accomplice witness. In view of this, the court *a quo* rightly relied on her evidence.

On sentence, *Mr Chikanga* submitted that the court *a quo* misdirected itself by failing to consider the degree of participation of the appellants. He submitted that the fact that the appellants did not inflict the fatal blows ought to invoke some measure of sympathy toward them. It was his contention that the fatal blows were delivered by Last. He implored the court to invoke s 46 of the Constitution, consider foreign decisions as well as the modern stance on the issue of death penalty. In his view, the death penalty should not have been imposed.

On the other hand, *Mr Chikosha* submitted that the the court *a quo* properly exercised its sentencing discretion after correctly finding that the murder was committed in aggravating circumstances. He submitted that the crime of murder in the course of a robbery is a serious crime warranting the death penalty. He therefore prayed for the dismissal of the appeal for lack of merit.

THE LAW AND THE FACTS

What this Court is called upon to determine is two-fold. Whether the appellants were properly convicted and if so whether the sentence imposed is appropriate in the circumstances of this case.

It is true that the conviction of the appellants was anchored on both circumstantial and direct evidence. The direct link was brought in by the third accused in the court *a quo*, Dallena, who gave a detailed account of how the deceased was killed and robbed of his belongings by the

appellants and Last. Counsel for the appellants, to his immense credit, conceded that the accused persons were not convicted entirely on the evidence of Dallena, who the appellants labelled an "accomplice witness". It might be necessary to consider whether or not the third accused person, Dallena was an accomplice. In this respect, s 195 of the Criminal Law (Codification and Reform) Act defines an accomplice as follows-

> "accomplice" means a person, other than an actual perpetrator of a crime
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> *(a)* **who incites or conspires with an actual perpetrator** to commit a crime, with the result that a crime is subsequently committed; or
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> ***(b)*** who, **having authority, whether lawful or otherwise, over an actual perpetrator** and
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> i. knowing that an actual perpetrator intends to commit a crime; or
> ii. realising that there is a real risk or possibility that an actual perpetrator intends to commit a crime; authorises the actual perpetrator to commit the crime; or
>
> *(c)* who
>
> i. knowing that an actual perpetrator intends to commit a crime; or
> **ii.** realising that there is a real risk or possibility that an actual perpetrator intends to commit a crime; **renders to the actual perpetrator any form of assistance which enables, assists or encourages the actual perpetrator to commit the crime;"**

In essence, an accomplice is a person who, himself/herself, participates or assists in the commission of a crime, other than the perpetrator(s) and is guilty of criminal conduct that is the subject matter of the charge before the court. As observed earlier, Dallena testified that she was a victim of circumstances and the evidence before the court *a quo* showed that in whatever manner Dallena was involved, she had no intention to make cause with the appellants. In addition to that, as rightly pointed out by the court *a quo, she* tried to warn the appellants to desist from their unlawful conduct and was threatened by Last.

Further to that, Dallena reported what had transpired, on the fateful night, to the second appellant's sister at the first earliest opportunity and repeated the same account to the police officers. Her evidence also corroborated that of the other witnesses who were before the court *a quo.* It was evident that she was not involved in the planning and execution of the crime in *casu.* To that end, she did not qualify as an accomplice and it is not surprising that she was found not guilty and acquitted.

In light of the concession made by the appellants' counsel, I will not delve much into other factors which the court took into consideration in convicting the appellants. The evidence against the appellants was overwhelming. I must say that having been found in possession of stolen items belonging to the deceased, the appellants were also struck by the doctrine of recent possession as provided for in s 123 of the Code. Possession placed the *onus* on the appellants to explain it. The appellants failed to provide an innocent explanation of their possession of the deceased's personal goods and the motor vehicle. The appellants decided to stand by a bare denial.

I conclude that the court *a quo* was entitled to convict the appellants as it did, the evidence led by the state having been overwhelming. Everything considered, there is no merit in the appeal against conviction. It is hereby confirmed.

Regarding sentence, the provisions of s 337 (1) of the Criminal Procedure & Evidence Act *(Chapter9:07)* as read with s 47 of the Code are instructive. The former gives the court *a quo* the discretion to pass the sentence of death upon an offender convicted of murder if it finds that the murder was committed in aggravating circumstances.

In terms of s 47 (2) of the Criminal Code:

"(2) In determining an appropriate sentence to be imposed upon a person convicted of murder, and without limitation on any other factors or circumstances which a court may take into account, a court shall regard it as an aggravating circumstance if-

(a) the murder was committed by the accused in the course of, or in connection with, or as the result of, the commission of any one or more of the following crimes, or of any act constituting an essential element of any such crime (whether or not the accused was also charged with or convicted of such crime)-

(i) ---

(ii) ---

(iii) **kidnapping or illegal detention, robbery, hijacking, piracy or escaping from lawful custody; or.**

(iv) ---"

It is settled that sentencing is within the discretion of the trial court. This was aptly captured in *Muhomba v The State SC 57/13* at p 9 as follows:

"On the question of sentence, it has been said time and again, that sentencing is a matter for the exercise of discretion by the trial court. The appellate court would not interfere with the exercise of that discretion merely on the ground that it would have imposed a different sentence had it been sitting as a trial court. There has to be evidence of a serious misdirection in the assessment of sentence by the trial court for the appellate court to interfere with the sentence and assess it afresh. The allegation in this case is that the sentence imposed is unduly harsh and induces a sense of shock. In *S v Mkombo* HB-140-10 at p 3 of the cyclostyled judgment it was held that:

'The position of our law is that in sentencing a convicted person, the sentencing court has discretion in assessing an appropriate sentence. That discretion must be exercised judiciously having regard to both the factors in mitigation and in aggravation. For an appellate tribunal to interfere with the trial court's sentencing discretion there should be a misdirection see *S v Chiweshe* 1996(1) ZLR 425(H) at 429D; *S v Ramushu and Others* S-25-93.'

It is not enough for the Appellant to argue that the sentence imposed is too severe because that alone is not misdirection and the appellate court would not interfere with a sentence merely because it would have come up with a different sentence. In *S v Nhumwa* S-40-88 (unreported) at p 5 of the cyclostyled judgment it was stated that:

"It is not for the court of appeal to interfere with the discretion of the sentencing court merely on the ground that it might have passed a sentence somewhat different from that imposed. If the sentence complies with the relevant principles, even it if is severe than one that the court would have

> imposed sitting as a court of first instance, this Court will not interfere with the discretion of the sentencing court.""

An appeal court may only interfere in a sentence imposed by a lower court if the latter failed to exercise its discretion in respect of the sentence in a judicious manner. This is notwithstanding that an appeal court may have imposed a different sentence. If the lower court exercised its discretion properly, there is then no basis for an appeal court to interfere and it will not do so.

The applicable principles where the trial court has convicted a person of murder with constructive intent are set out in s 47(2) and relate to a consideration of the existence or otherwise of aggravating circumstances which abound *in casu*. I would also like to digress and make the point that in mitigation, counsels for the appellants in the court *a quo* submitted that, because the appellants had been convicted of murder with constructive intent, it reduced their moral blameworthiness. The distinction between constructive and actual intention is no longer material. The sentiments in *Tafadzwa Mapfoche v The State* SC 84/21 at p. 10 are apposite:

> "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." (My underlining)

I associate myself with the above sentiments. What is crucial is that murder was the end result whether the intention was constructive or intentional. Thus, where such circumstances exist as provided for under s 47 (2) of the Code, the court may, in its discretion, impose the death penalty. The section was enacted in order to align the Code with section 48 of the Constitution of Zimbabwe, 2013, which provides for the right to life as follows:

> "Every person has the right to life. A law may permit the death penalty to be imposed only on a person convicted of murder **committed in aggravating circumstances"**

The court *a quo* correctly found that that the murder was committed in aggravating circumstances, that is, in the course of a kidnapping, hijacking and robbery. The seriousness of the offence needs no emphasis. See *Mapfoche supra* at p 14. Murder is essentially a violation of the victim's Constitutional right to life. The appellants carried out a vicious assault without regard to the consequences thereof and specifically whether he died or not. The appellants attacked the deceased and dumped him "like refuse" as per the court *a quo*'s words. The injuries sustained by the deceased as per the post mortem report illustrate the brutality with which the attack on the defenseless victim was perpetrated.

In addition to that, the court *a quo* rightly found that the appellants, after dumping the deceased, went on a leisure escapade at a bottle store, thereby accentuating their moral turpitude. The court *a quo* also found that the appellants exhibited no sign of remorse throughout the trial. The conduct of the appellants draws the ire rather than sympathy of any right-thinking members of our society. The court *a quo* properly weighed the appellants' personal circumstances that they were breadwinners against the seriousness and prevalence of the offence.

In the result, it has not been shown that the court *a quo misdirected* itself in the manner in which it exercised its discretion in sentencing the appellants. This is one of many cases where robberies escalate to murder which have now become commonplace in our jurisdiction. The ground of appeal against sentence is devoid of merit and ought to be dismissed.

In view of the above, the conclusion is ineluctable that the appeal has no merit and ought to be dismissed.

Accordingly, it was for the above reasons that we issued an order dismissing the appeal.

GUVAVA JA: I agree

UCHENA JA: I agree

Bachi-Mzawazi & Associates, appellant's legal practitioners.

The National Prosecuting Authority, respondent's legal practitioners