HB 271/17
HC (CRB) 120/17

THE STATE

Versus

TAURAI GWADE

IN THE HIGH COURT OF ZIMBABWE
TAKUVA J with Assessors Mrs A. Moyo & Mr P. Damba
BULAWAYO 12, 13 & 18 SEPTEMBER 2017

Criminal Trial

W. Mabhaudi, for the state
K. Nxumalo, for the accused

TAKUVA J: The accused was facing a charge of murder in that on the 19th December 2014 and at St Joseph Primary School basket ball court Beitbridge, the accused hit Onward Chiripamberi on the head with an iron bar and thereafter ran over him with a vehicle with an intent to kill him or realising that there was a risk or possibility that his conduct could cause the death of Onward Chiripamberi continued to engage in that conduct despite the risk or possibility.

The facts of this case are common cause except the identity of the murderers. They are that on the 19th day of December 2014 at approximately 20:00 hours, the deceased parked his vehicle, a Toyota Carina registration number ADK 9733 at St Joseph Primary School basket ball court. He was in the company of his girlfriend one Rudo Mashavave. Whilst the two were chatting, the accused in the company of another man arrived and smashed the driver's door window pane demanding cash and cellphones. The accused struck the deceased on the head with an iron bar and the latter got out of the car and engaged in a struggle with the former. Meanwhile, the accused's accomplice struck Rudo on the cheek with an iron bar causing her to flee from the scene screaming for help. The accused and his accomplice took over the vehicle and pursued the deceased who was running away and ran over him and they disappeared with the motor vehicle. As a result of the assault the deceased sustained various injuries.

Apart from taking the deceased's vehicle, the accused and his accomplice also stole deceased's Samsung Galaxy Note 3 cellphone with Econet Sim card number 0774397057, a

memory stick (flash) and Rudo's Samsung laptop, its bag, a counter book and a pen inscribed FBC.

The deceased was taken to Beitbridge Hospital where he was immediately transferred to Bulawayo by ambulance as his condition was considered very serious. However the deceased died on the way to Bulawayo. The police discovered deceased's vehicle on the 20th day of December 2014 abandoned along Bulawayo-Beitbridge Road with its keys inserted in the ignition. On 25 December 2014, the police acting on information arrested the accused at house number 1874 New Stands Mvuma and recovered the deceased's Samsung Galaxy Note 3 cellphone, memory stick and Rudo's Samsung laptop at that house. On the 26th day of December 2014, the police recorded a warned and cautioned statement from the accused after he had been informed of his rights in terms of section 50 of the Constitution of Zimbabwe. The accused gave his reply freely and voluntarily. The statement was confirmed by a magistrate at Beitbridge court on 29 December 2014.

The accused pleaded not guilty to the charge and filed a defence outline wherein he stated the following:

Although he was in Beitbridge on the night of the murder he did not go anywhere near St Joseph Primary School basket ball court. He alleged that the extra-curial statement was illegally obtained and that the arrest itself was illegally conducted rendering his trial unfair and detrimental to the administration of justice. Further, he indicated that confirmation proceedings were not properly conducted.

As regards the property recovered from him, he alleged that he bought the laptop from Frank, a person he met for the 1st time in Beitbridge and never saw him again. The accused denied teaming up with any other person to murder the deceased and suggested that he is a victim of mistaken identity. He claimed to have been brutalized by the police during investigations as a result of which he implicated one Bornface Musharavati whom the police arrested in Masvingo. Finally, he stated that the alleged indications were not freely and voluntarily made as he was simply ordered to point at places.

The body of the deceased was examined by Dr S. Pesanayi, a pathologist based at United Bulawayo Hospitals on 23 December 2014 who compiled a post mortem report produced in court as exhibit 3 in terms of section 278 (2) of the Criminal Procedure and Evidence Act (Chapter 9:07). The pathologist observed multiple injuries consisting (1) Friction abrasion and bruising on the left temporal region (6 x 4) cm, behind the ear (3 x 2) cm, in front of the ear (2 x 1) cm, shoulder (3 x 2)cm, forearm, arm and elbow (4 x 5) cm, back and buttock (30 x 6) cm, forearm (6 x 2) cm, arm (30 x 4) cm, hip (6 x 4) cm, thigh (20 x 6) cm.

(2) sutured wound right knee (6cm) left face 5 cm

(3) fractured right femur.

The doctor also observed that the skull had a scalp haematoma on the left parietal region. Further he observed a fractured left side sternum while noting that "most of the injuries are consistent with those caused by a motor vehicle." According to him the cause of death was-

(1) Multiple injuries
(2) Blunt force trauma
(3) Assault

The State sought the admission of the evidence of the following witnesses in terms of section 314 of the Criminal Procedure and Evidence Act Chapter 9:07.

(1) Edwin Garikai
(2) Sakekile Mpofu
(3) Davidzo Paradzi
(4) Bekithemba Moyo
(5) Dr A V Jira
(6) Dr Pesanayi

There being no objection, their evidence was duly admitted.

The State then led viva voce evidence from three witnesses starting with Rudo Mashavave (Rudo) the girlfriend of the deceased. She stated that on the night in question she was seated in deceased's car chatting when two men approached the vehicle from both sides. The one on the driver's side smashed the window pane to the driver's door using an iron bar/rod. At the same time the other assailant approached her and opened the door hitting her on the cheek with an iron bar demanding cash and cellphones. Meanwhile the deceased had gone out of the vehicle to confront the assailant referred to by Rudo as Mr X. The one who had assaulted her whom she referred to as Mr Y ransacked the vehicle using a torch. She took this opportunity to bolt out of the car screaming for help. Her screams caused some people to come to her rescue. She looked back and saw that the car's head lamps had been switched on and that the engine was running. She saw the deceased being knocked down and run over by the vehicle. Both X and Y fled the scene in this vehicle and she went to where the deceased was lying. She observed that he had sustained very serious injuries and she hired a motor vehicle that ferried him to the police where she made a report and later to hospital. When she fled, she left her laptop, its bag and a pen inscribed FBC. The witness positively identified the property at CID Beitbridge on the 26th of December 2014. She however said she could not clearly see the facial features of the assailants apart from their stature which she described as "tall" and "short". Visibility was poor as the only source of illumination was an electric bulb in one of the class rooms. Consequently she could not positively identify the accused as one of the assailants. However she was certain that the deceased had his cellphone in the car on the day in question.

Under cross-examination, the witness denied the claim by the accused that he bought the laptop in the street from one Frank, arguing that it does not make sense that the accused bought the laptop together with her pen and counter book. She also denied the suggestion by the defence counsel that she was "improving her case as she went along". According to her this was not the case because the pen, book and laptop bag were entered by the police in their exhibit book. This shows that these exhibits are not an after-thought as these entries were made shortly after their recovery.

In our view the evidence of Rudo was clear and straight forward. She gave her evidence well and answered questions truthfully. Although, naturally she would feel a sense of revulsion at looking at a man who killed her boyfriend, she nevertheless conceded that she was unable to identify him as the assailant. This, in our view demonstrates her honesty and credibility as a witness. In fact the totality of her evidence remained intact even after cross-examination. We have no reason to disbelieve her. We therefore accept her evidence in its entirety.

Charles Kangoma also testified for the State. He is a member of CID Law and Order Section based in Beitbridge at the time of the commission of the offence. On 25 December 2014, he joined a team of detectives that arrested the accused at his house number 1874 New Stands Mvuma. They arrested the accused at approximately 0600 hours and he was advised of his rights in terms of sections 50 and 70 (c) of the Constitution by their team leader one Risias Dhova accused said his name was Tawanda Msekiwa. When asked to produce all the property stolen in Beitbridge, the accused showed them many items including electrical gadgets, solar panels, amplifiers, more than 4 cellphones, memory sticks and 3 laptops in a 20 litre bucket. He identified exhibit 5 as one of the laptops that was placed in a bucket. The witness also said they recovered a Samsung Galaxy cellphone from the accused.

On their way to Beitbridge accused implicated one Bornface Musharavati as his accomplice. He then provided Musharavati's phone number and the police asked him to speak to Bornface. They arranged to meet at a bus stop near Nemamwa Growth Point outside Masvingo. When Bornface arrived, the police arrested him and he led then to his rural home where they recovered solar panels, cellphones and amplifiers. This recovery subsequently led to Bornface's conviction and is currently serving lengthy prison terms.

Before the team reached Beitbridge, at approximately 10km from Beitbridge the accused led detectives to a spot in the bush where they recovered a laptop bag, counter book and an FBC pen belonging to Rudo. Once they arrived at station, they handed all the property to the investigating officer. He confirmed that these exhibits were recorded under entry numbers 31 and 32 of 2015 in the exhibit book.

Under cross-examination, the witness said the accused gave them the Galaxy Note 3 phone and the memory stick. He in fact retrieved these items from his bedroom. He denied that the accused was assaulted after his arrest. The witness also denied that the cell phone belongs to the accused because it was positively identified by the deceased's wife as her late husband's cellphone.

This witness' evidence was given well. Most of it was in fact corroborated by the accused who accepted that the cellphone and laptop were recovered from him by this witness and his team. Further, his version is supported by probabilities in that if the police knew about Bornface and his location in Masvingo, then one would have expected them to arrest him before proceeding to Mvuma. The fact that they arrested Bornface on their return trip supports the witness' testimony that they only became aware of Bornface and his address from the accused. Also, the accused agreed with the witness that a laptop bag containing a counter book and an FBC pen was recovered in the bush. More importantly, this witness' testimony is corroborated by the accused's confirmed warned and cautioned statement in material respects.

For the reasons, we have no hesitation in accepting this witness' testimony wherever it conflicts with that of the accused.

Prisca Shaba was the state's last witness who testified that she was deceased's wife. On the 19th December 2014 she was informed by relatives while at home that her husband had been robbed and was in hospital. She immediately visited him but discovered that he had very serious injuries and could hardly talk. The deceased died on his was to United Bulawayo Hospitals. After the accused's arrest, she was called by the police and she positively identified her husband's Samsung Galaxy Note 3 cellphone and a memory stick. Under cross-examination, the witness insisted that she identified the memory stick by colour and that it contained notes relating to her HIV project. When the defence counsel kept on asking questions relating to the ownership of the memory stick the court ordered both parties to view the contents of the memory stick. At the end it was common cause that the memory stick belongs to the witness as it indeed contains her HIV Psychology notes or project.

As regards the cellphone, the witness said that it was tempered with in that it had been "flushed" resulting in the deletion of all information relating to her husband. She also said the phone was activated on 24 December 2014 and used until the 26th of December 2014. The gallery and whatsapp function are empty.

The witness' evidence reads well. In fact even after cross examination, no meaningful dispute was revealed. There can be no doubt that the cellphone and the memory stick belong to the deceased and was obtained through a robbery on 19 December 2014. Indeed her evidence is corroborated by the accused in his warned and cautioned statement wherein he admits that the deceased gave him a Samsung cellphone during the robbery. We find this witness to be a credible witness whose evidence is worth of belief. We therefore accept it.

The accused gave evidence under oath albeit badly. He insisted that he did not commit the offence and narrated how he was arrested including the recovery of the property. He admitted that the police found 3 laptops in his house but denied that they were inside a bucket. He denied implicating Bornface and that he made indications relating to the recovery of a laptop bag, counter book and an FBC pen. However, he admitted that he knows Bornface. The accused vehemently denied that his warned and cautioned statement was confirmed in court by a magistrate. He also said he did not make the statement at all as all that he did was to sign it in prison because the police said he would defend himself in the High Court where this statement was required. We must point out that this version is in conflict with paragraph 5 of the defence outline where it is contended that the statement was "not freely and voluntarily made by him as it was made under duress". What is noteworthy is that in his evidence in chief he said he never made the statement. There is a world of difference between these two assertions.

The accused maintained that he purchased the cellphone in Harare in November 2014 well before the deceased's death. He denied possessing the memory stick, bag and pen. He also insisted that he bought the laptop in Beitbridge from one Frank on 13 or 14 December 2014. According to him Frank had no papers to prove that he was the owner. Also he admitted that he did not obtain Frank's full particulars. The same goes for the person who sold him the cellphone

in Harare. Despite all these shortcomings, he maintained that he acted reasonably in acquiring the property. What we find baffling is that this version contradicts what he said in his warned and cautioned statement. Even more perplexing is his insistence that he purchased the property well before it was stolen from its lawful owners. The question is how on earth can this happen? The accused had no explanation except to say he does not know when deceased's property was stolen. In view of the credible evidence from state witnesses surrounding the ownership of the property, which evidence we have already embraced, we are convinced beyond any reasonable doubt that the accused's explanation is false. Quite clearly, there is no reasonable possibility of his explanation being true.

The accused insisted that he is a victim of mistaken identification. Indeed identification of the assailants is the key issue in this trial. It is common cause that there is no direct evidence of identification in that the offence occurred in the dark, thereby incapacitating the sole eye witness from noticing the assailants' features. Consequently the state partly relied on circumstantial evidence to prove its case. This is so because they also relied on a confession by the accused in his confirmed warned and cautioned statement.

In *Rex* v *Blom* 1939 AD 493 at 508-9 it was said that in reasoning by inference in a criminal case there are two cardinal rules of logic which cannot be ignored. The 1st rule is that the inference sought to be drawn must be consistent with all the proved facts: if it is not, the inference cannot be drawn. The second rule is that the proved facts should be such that they exclude every reasonable inference from them save the one sought to be drawn: if these proved facts do not exclude all other reasonable inferences, then there must be doubt whether the inference sought to be drawn is correct. See also *S* v *Vhera* 2003 (1) ZLR 668 (H) and *S* v *Tambo* 2007 (2) ZLR 33 (H). The state also relied on the doctrine of recent possession in terms of which the possessor of recently stolen goods is presumed to have been the thief. See *S* v *Skweyiya* 1984 (4) SA 712 (A). It should be noted that there is no magic meaning in the doctrine of recent possession and that it is really a matter of inferential reasoning in the light of all the facts of the case. In other words, the court should have regard to all the proved facts and decide whether an inference of guilt could be inferred.

In *S* v *Kawadza* 2005 (2) ZLR 321 (H) it was held per UCHENA J (as he then was) that evidence of recent possession may be used in any case where theft is an element of the crime. It follows therefore that the doctrine is applicable on a charge of robbery. Further, the doctrine has since been codified in section 123 of the Criminal Law Codification and Reform Act Chapter 9:23. A court may infer that the possessor is guilt if he:-

(a) cannot explain his or her possession; or
(b) gives an explanation of his or her possession which is false or unreasonable. See *S* v *Makawa* SC-107-95; *S* v *Ringanayi* S-84-83.

As regards the degree of proof required in criminal matters, GILLESPIE J's remarks in *S* v *Makanyanga* 1996 (2) are apposite. He stated that, "A conviction cannot possibly be sustained unless the judicial officer entertains a belief in the truth of a criminal complaint, but the fact that such credence is given to the testimony for the state does not mean that conviction must necessarily ensue. Similarly, the mere failure of the accused to win the faith of the bench does not disqualify him from an acquittal. Proof beyond a reasonable doubt demands more than that a complainant should be believed and the accused disbelieved. It demands that a defence succeed wherever it appears reasonably possible that it might be true. This insistence upon objectivity far transcends mere considerations of subjective persuasion which a judicial officer may entertain towards any evidence."

Applying these principles to the facts *in casu* we find that the following are the proved facts;

(1) that on the day in question the deceased and Rudo were seated in the deceased's car at St Joseph Primary School basket ball court.
(2) that while chatting in the car, they were confronted by two assailants who robbed them of a laptop and its bag containing a counter book and an FBC pen. They were also robbed of a Samsung Galaxy Note 3 cellphone.
(3) that the assailants hit and ran over the deceased with his own car after Rudo had fled from the scene.

(4) that the deceased sustained very serious injuries which according to the pathologist caused his death.

(5) that most of the injuries deceased sustained were caused by the motor vehicle which was used as a weapon.

(6) that all the property produced by the state as exhibits was found in accused's possession and that this possession was recent.

(7) that the accused failed to give a reasonable explanation of his possession of the loot in circumstances where the absence of such an explanation leads one to conclude that the only reasonable inference is that he robbed Rudo and the deceased of their property.

(8) that in fact the accused gave a false explanation in that he claimed to have bought the property before it had been lost or stolen.

(9) that the accused freely and voluntarily made his warned and cautioned statement to the police and that statement was properly confirmed.

(10) that from the totality of the evidence including the post mortem report, the accused acted with actual intent to kill the deceased. It is clear that the force that hit the deceased was severe to cause a fracture of the sternum and right femur. All in all the deceased sustained multiple injuries.

(11) that the murder was committed in aggravating circumstances as provided for in subsection 2 of section 47 of the Criminal law Codification and Reform Act (the Act).

In the circumstances we therefore find the accused guilty of murder with actual intent.

Reasons for sentence

In assessing sentence we have had regard to the following factors: Accused is a 33 year old 1st offender who is married and has two children who attend school. He is the sole bread winner for his young family. This is all we can find in mitigation.

In aggravation, we find that this is a murder convicted in the most gruesome manner by a person who has no respect for human life. The accused murdered an innocent family man who

was minding his own business. What we find astonishing is the cold and heinous manner the accused murdered the deceased whose body was literally crushed by his own motor vehicle. The accused was motivated by greed. This was a violent and senseless killing of a person who posed no threat whatsoever to the accused.

In terms of section 47 (2) (a) (iii) of the Act when determining an appropriate sentence to be imposed upon a person convicted of murder, the court shall regard as an aggravating circumstance that the murder was committed in the course of a robbery among other offences. *In casu* the murder was committed in the course of a robbery. In terms of section 47 (4) of the Act the accused is liable to the death penalty if the murder was committed in aggravating circumstances. Accordingly, we are of the view that the death penalty is the appropriate penalty in this case.

Consequently, the sentence of the court is that the accused be returned to custody and the sentence of death be executed upon him according to law.

National Prosecuting Authority, state's legal practitioners
Ncube & Partners, accused's legal practitioners