DISTRIBUTABLE (43)

JOSEPH CHANI
v
THE STATE

SUPREME COURT OF ZIMBABWE
ZIYAMBI JA, GOWORA JA & HLATSHWAYO JA
HARARE, JUNE 16 2014

S Karuwa, for the appellant

T Mapfuwa, for the respondent

GOWORA JA: After hearing counsel in this matter we dismissed the appeal against both conviction and sentence. We indicated that our reasons would follow in due course. These are they.

The appellant was convicted of one count of murder and three counts of assault as defined in s 47(1)(b) and s 89 respectively of the Criminal Law Codification Act [*Chapter 9:23*]. He was sentenced to 18 years imprisonment in respect of the murder charge. The three counts of assault were treated as one for purposes of sentence and he was accordingly sentenced to 3 years imprisonment which was to run concurrently with the sentence on the murder conviction. The appellant has noted an appeal against both convictions on all the counts and the sentences.

The events leading to the conviction of the appellant occurred on 23 September 2011. At the time he was a duly attested member of the Zimbabwe Republic Police holding the rank of Chief Superintendent. He was based at Chiadzwa Diamond Fields where he was

the second in command. The police had been deployed at the diamond fields to flush out and arrest suspected illegal diamond panners.

On the day in question the deceased, Tsorosai Kusena, his brother Onesai Kusena, their cousin Pikirai Kusena and one John Gwite were arrested in the diamond fields by security personnel employed by Mbada Diamonds on suspicion of being illegal diamond panners. They were handed over to the police and detained. A few hours later they escaped from custody and ran off in different directions. They were pursued and captured. The appellant was one of the details involved in the pursuit.

Thereafter, the deceased and his companions were returned to the base where the appellant forced each of them to stand on the ground on their heads with their feet in the air. He then proceeded to assault each of them on the small of the back and the buttocks with a switch/baton stick. The assault was sustained and lasted for a considerable period. After a while the deceased was no longer in a position to assume the position and collapsed on to the ground. The appellant persisted with the assault on all the victims. Despite his condition and obvious difficulty, the deceased was not spared from this assault. Sometime in the evening, Mandizvidza, one of the junior officers took the switch/baton stick from the appellant stopping the assault. He threw the weapon into the fire.

After the assault had been halted the deceased and the complainants were placed in cells and the deceased was heard to complain that he had been injured badly. He also expressed the fear that due to the injuries sustained from the assault he would not last. After a short while he was seen to have died. A post-mortem report compiled by the pathologist

confirmed that the deceased had bruises all over the back. No other injuries were found. The cause of death was recorded as traumatic shock as a result of assault.

On these facts the appellant was found guilty of murder with constructive intent.

The grounds of appeal are the following:

AD CONVICTION

i) The court *a quo* erred in respect of all counts by failing to attach sufficient weight to the discrepancies that were manifest in the evidence of the state witnesses

ii) The court *a quo* erred in respect of the count for murder in accepting that the cause of death was assault when the doctor who testified told the court that he did not do a full post-mortem (sic). No examination was done to establish if death was not caused by diarrhoea or vomiting which attacked the deceased prior to his death.

iii) The court *a quo* misdirected itself by finding the appellant guilty of murder with constructive intent when the evidence before it did not show that appellant foresaw that death would result from his conduct. The court a quo must have made a finding that appellant ought to have foreseen that death would ensue.

iv) The court *a quo* misdirected itself by rejecting appellant's evidence that the complainants and some police officers connived to incriminate him yet the complainants themselves told the court that they were tipped off to escape from lawful custody by the police officers who were guarding them.

v) The honourable court *a quo* erred by failing to warn itself of the dangers of relying on the evidence of the State witnesses, the majority of whom fell into either the category of suspect witnesses, or outright biased witnesses with a discernible motive to falsely incriminate the appellant.

AD SENTENCE

i) A sentence of 18 years imprisonment in respect of the charge for murder is too excessive in view of the circumstances of this matter.

ii) The court *a quo* misdirected itself by failing to treat the three counts of assault as one for purposes of sentence.

As to the first ground of appeal, it was contended on behalf of the appellant that the court *a quo* erred in failing to attach sufficient weight to the manifest discrepancies in the evidence of the witnesses called by the state. It was argued that the evidence of the witnesses regarding the number of sticks used to assault the deceased and the complainants was full of contradictions.

We were not persuaded by this submission. Contrary to the contention by the appellant, the court *a quo* found that the witnesses all gave evidence that the appellant had used one stick in the assault, which from the description could be a thick stick or a baton. In its judgment, the court *a quo* commented that although quite a number of the witnesses had spoken of the appellant having a number of sticks in his possession, in their evidence the witnesses did not suggest that the appellant had used more than one stick. The court found that they had all maintained that he had assaulted the victims with one stick. Indeed, this finding is borne out by the evidence of the witnesses.

Onesai Kusena, the complainant in second count gave evidence that the appellant was holding five sticks. In describing the assault on him he only mentioned one stick as being the assault weapon. He also stated that Mandizvidza disarmed the appellant of the stick he had been using. The appellant had then left with the remaining four sticks.

The complainant in count 3, Pikirai Kusena gave evidence to the effect that the appellant used a switch to assault all four of them including the deceased. John Gwite was the complainant in the fourth count. Like the other two witnesses, the tenor of his evidence was to the effect that the appellant had used one stick to assault all the victims.

Indeed, the police witnesses also corroborated the evidence of the complainants and confirmed that the appellant had used one stick to assault the victims. Constable Senda Nkuli stated that the appellant had prepared three switches but he saw him using one. Constable Bhobho confirmed that the appellant had one stick which he took from the vehicle. It was suggested to him that some witnesses mentioned more than one stick. The witness was adamant that he had only seen the appellant holding one stick. This witness's evidence is consistent with that of Philleman Manatsa and Edson Mandizvidza. In fact, the last witness disarmed the appellant of the weapon and threw it into the fire.

In my view, the court *a quo* cannot be faulted in the manner that it considered the evidence of the witnesses on the weapon used to assault the victims. The court was correct in its finding that despite the mention by some witnesses of the appellant having several sticks, the consistent story from all the witnesses was that only one stick was used. All the witnesses stated that Mandizvidza threw the weapon into the fire. Like the court below, I find no inconsistencies regarding the assault on the four victims.

In relation to the second ground of appeal, it was contended on behalf of the appellant that the court *a quo* erred in concluding that the deceased had died as a result of an assault when the doctor who testified in court admitted that he had not conducted a full post mortem examination.

The post mortem report produced by the Dr Kasongo was admitted into evidence by consent. The doctor gave evidence in support of the report and confirmed that the deceased had died as a result of traumatic shock following an assault. He observed bruises all over the body of the deceased. He indicated that he had not been informed that the deceased had vomited prior to his death. He had also not been informed that the deceased had had a bout of diarrhoea on the night in question.

His opinion was that neither the vomiting nor the diarrhoea would have been the cause of death in the case of the deceased. His evidence was that a person would not die after suffering from a bout of diarrhoea for a day unless the diarrhoea was due to cholera. He said that there was no evidence of cholera in Mutare during the relevant period. His evidence was to the effect that it was not necessary in every case to conduct an internal examination for a post mortem unless the cause of death is not obvious. It was his opinion that in the case of the deceased it was obvious that he had been severely assaulted.

The Investigating Officer, Musutani Chifumuna confirmed receipt of a memorandum instructing him to investigate the death of the deceased. According to the memorandum, the deceased had fallen and hit against a rock as a result of which he sustained injuries leading to his death.

According to the witness an initial examination of the body of the deceased did not show nor confirm any injuries consistent with the deceased having fallen as suggested in the memorandum. For instance, there were no injuries to the head, forehead or neck, which injuries one would expect to find in a victim alleged to have fallen as suggested had happened to the deceased in the memorandum.

As a result of the absence of injuries consistent with a fall he decided to examine the body of the deceased. He removed the clothing of the deceased and found the following injuries namely, bruising on both knees, right shoulder, the region between the buttocks and the back. He observed clotting just under the skin. There were also signs of red and black marks which led the witness to conclude that there might have been internal bleeding or that blood had clotted under the skin. There were blisters on the soles of both feet. He caused photographs to be taken of the injuries he had observed.

Initially the death of the deceased was treated as a sudden death but after further investigations it was decided to open a criminal investigation against the appellant on a charge of murder.

The court *a quo* was alive to the fact that there had not been an internal examination of the deceased, and that the post mortem report was based on an external examination. The court dealt with that aspect of the evidence as follows:

> "The court wishes to take judicial notice of the fact that it is not everybody that is taken for post mortem that a doctor seeks to open in establishing a cause of death. Even if Doctor Kasongo is not a pathologist he compiled a post mortem report. If the body had been taken before pathologists where the cause of death is obvious the issue of opening up for purposes of internal examination is not relevant. Where the cause of death is obvious there really is no need to open the body. It is only where the cause of death is hazy or in circumstances where chemical situations are alluded to as a cause of death that internal organs have to be opened up and examined. In this case, the doctor had been given the history of assault which is supported on the record and he then made his own professional observations leading him to a conclusion as to a cause of death. The other complainants were examined by different doctors who confirmed that they had been assaulted. This tallied with the manner in which Doctor Kasongo compiled the post mortem, as he also observed injuries on the back and lower back on more or less the same area as the other complainants confirming the area of assault."

The evidence of the assault perpetrated on the deceased is overwhelming. It is common cause that when the deceased was arrested he was in good health. He was fit enough to escape from lawful custody together with his companions. Members of the police which included the appellant chased them for a considerable distance through the bush. When the deceased was re-arrested he was able to walk, climb into the police vehicle and disembark without being assisted. A few hours later he lost his life after the sustained attack by the appellant. The conclusion by the doctor that the cause of death was obvious cannot be impugned and the court *a quo* cannot be faulted in accepting the conclusion by the doctor that the deceased died as a result of traumatic shock due to the assault.

It is contended on behalf of the appellant, that the court *a quo* misdirected itself in making a finding that the appellant was guilty of murder with constructive intent when the evidence before the court did not establish that the appellant subjectively foresaw that death would ensue from the assault of the deceased.

Section 47 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*], provides in relevant part:

> "(1) Any person who causes the death of another person-
> a) intending to kill the other person; or
> b) realizing that there is a real risk or possibility that his or her conduct may cause death, and continues to engage in that conduct despite the risk or possibility; shall be guilty of murder."

In *S v Mugwanda* 2002 (1) ZLR 574, at 581E-F, **CHIDYAUSIKU CJ**, in describing the test to be applied in determining the question of intent in a murder had this to say:

> "On the basis of the above authorities, it follows that for a trial court to return a verdict of murder with actual intent it must be satisfied beyond a reasonable doubt that:
>
> (a) either the accused desired to bring about the death of his victim and succeeded in completing his purpose; or
>
> (b) while pursuing another objective foresees the death of his victim as a substantially certain result of that activity and proceeds regardless.
>
> On the other hand, a verdict of murder with constructive intent requires the foreseeability to be possible (as opposed to being substantially certain, making this a question of degree more than anything else). In the case of culpable homicide, the test is: he ought to, as a reasonable man, have foreseen the death of the deceased."

In order to prove its case against the appellant, the state called six witnesses to the assault, three of whom were complainants in the assault charges. The other three were police details. All the witnesses gave graphic details of a horrific assault upon the victims and especially the deceased. The victims were made to stand on their heads. The appellant would then assault each in turn with a switch whose diameter was estimated by one of the police details as 3cm or 4cm. This same witness stated that the appellant would direct the assault at the end of the spine, just above the victims' buttocks. He was using severe force. The witness assumed duty at about 6 pm. The appellant was already in the process of assaulting the victims. The assault was stopped at about 7 pm. It was only stopped due to the intervention of Mandizvidza, a junior ranking officer to the appellant.

According to the witness, after the appellant left the cells where the assault victims were, the deceased was lying on the floor groaning. He was no longer able to walk and had to be assisted to go outside in order to relieve himself. The witness was emphatic that the deceased was not at the time suffering from diarrhoea. However, he kept vomiting. At times he would heave, without any vomit coming out. The witness was about to go off duty when he decided to wake up the victims so that he could hand them over to his relief. He attempted

to wake up the deceased and realised that he had died. It was his evidence that all the victims had injuries on the back, knees and bottom of the feet.

Mandizvidza, the officer who disarmed the appellant described the switch/baton stick as being between 50 and 70 cm in length. He described its diameter as 5 cm. He told the court that the appellant had assaulted the victims for a protracted period and was using severe force. The deceased died shortly after he had stopped the assault.

In the post mortem report, the pathologist recorded that he "found bruises all over the body".

There is no direct evidence of the *mens rea* of the appellant in this case. Therefore, it cannot be stated that it was the appellant's avowed intent to kill the deceased. As such the appellant's intent can only be inferred from the circumstances surrounding the offence.

The appellant was a senior police officer at the time that the events leading to the death of the deceased occurred. He was a Chief Superintendent. At the time he appeared in court for the trial he had been in the service of the police for twenty-six years. It is safe to say that he had considerable experience as a police officer. He confirmed that as a police officer, he was aware through experience of people who had died as a result of being assaulted. Yet, with full knowledge of the consequences that an assault may lead to the death of a victim he subjected the deceased to a sustained assault on the spine.

The evidence before the trial court was that after a time the deceased was unable to keep his body in an upright position as demanded by the appellant. He was no longer able

to place his head on the ground and was lying on his stomach, unable to block the blows. Still, the appellant persisted with assault stopping only as a result of the intervention of a junior officer. The post mortem report speaks to bruises all over the body and it was the evidence of the doctor that an internal examination was not necessary because the cause of death was obvious due to the external injuries he observed.

After the assault the deceased could not stand, walk or squat. He had to be assisted in relieving himself. From the evidence of the state witnesses it is safe to infer that the reason why the deceased could not stand was due to the fact that his spine had been badly injured from the assault. The appellant ordered his victims to assume a position from which he could inflict the most severe damage to their bodies. In my view, the appellant must have, and in fact, did foresee the possibility that the assault would result in the death of deceased. The court *a quo* cannot be faulted in its reasoning on intent.

The further contention by the appellant was that the trial court misdirected itself in rejecting the appellant's evidence that there was connivance on the part of the witnesses to incriminate him of the offences. It was suggested that proof of the connivance could be gleaned from the evidence of the civilian witnesses that they had been tipped off to escape from lawful custody by some of the police witnesses.

The complainants to the assault charges all gave evidence. Their evidence was consistent in so far as it dealt with the assault. The only discrepancy in the evidence was whether the appellant had more than one weapon. Despite this all of the witnesses including the police witnesses stated that the appellant had only used one switch/baton stick in the assault. Apart from the witnesses to the assault, the state called the investigating officer to testify. His

evidence was clear that the death of the deceased had been reported as a sudden death arising from a fall. The memorandum prepared in relation to the death of the deceased was false. The investigating officer discounted the report and investigated the death as a suspicious death.

The cause of death was obvious. The appellant was the only person who was seen assaulting the victims and there was no evidence placed before the court *a quo* of a conspiracy by the witnesses. The complainants told the court that they had been warned by some of the officers to escape because the appellant had a history of assaulting suspects. This warning was confirmed in the actions that the appellant thereafter took. He badly assaulted the suspects leading to the death of one of those suspects. I find no misdirection.

As for the contention that the witnesses were suspect witnesses and that there was a risk that they would falsely implicate the appellant, I find no substance in the contention. There is on record ample evidence of a vicious assault on the deceased and the other three victims. The medical evidence is on the record. The photographs produced in relation to the assault provide mute testimony of the severity and brutality with which the assault was perpetrated. They capture the horrific injuries sustained by the complainants. In my view, the reports and photographs confirm in all respects, the witnesses' evidence of the assaults on themselves on themselves as well as the deceased.

The doctors who examined the complainants and compiled the medical reports were not known to the complainants or the deceased. The appellant was not able to give a credible reason why the complainants and his colleagues would conspire to lie against him and falsely implicate him.

All the evidence pointed at the appellant as the assailant. The fact that the three assault victims were suspected diamond panners cannot detract from their evidence that they were assaulted. The appellant was not the only police officer engaged in the operation that netted the illegal diamond panners. The charges against the appellant are not related to the panning. The charges relate to the assault on them. There is no suggestion from the appellant that someone else assaulted them. All he says is that they were never assaulted.

Further the fact that the other police details could have faced disciplinary charges has no bearing on the cogency of their evidence. The appellant was not the only senior officer at the base, he was the second in command and the appellant has not substantiated his allegation of conspiracy by the witnesses.

I find no misdirection on the part of the court in convicting the appellant of murder with constructive intent.

In relation to the sentence, counsel for the appellant conceded that there was no basis for attacking the sentence imposed. He accepted that the court *a quo* imposed an appropriate sentence. The concession was in my view proper in the circumstances.

Both grounds of appeal against sentence were not well taken. The first, that the court a quo misdirected itself by not suspending a portion of the sentence of eighteen years imprisonment on the murder conviction cannot be sustained for the simple reason that the law does not permit the suspension of any portion of such sentence. Section 358 (2) of the Criminal Procedure and Evidence Act [*Chapter 9:07*] provides in relevant part:

> (2) When a person is convicted by any court of any offence other than an offence specified in the Eighth Schedule, it may —

(*a*) postpone for a period not exceeding five years the passing of sentence and release the offender on such conditions as the court may specify in the order; or

In turn, the Eighth Schedule reads as follows:

EIGHTH SCHEDULE (Section 358)
OFFENCES IN RELATION TO WHICH POSTPONEMENT OR SUSPENSION OF SENTENCE, OR DISCHARGE WITH CAUTION OR REPRIMAND, IS NOT PERMITTED

1. Murder, other than the murder by a woman of her newly born child.
2. Any conspiracy or incitement to commit murder.
3. Any offence in respect of which any enactment imposes a minimum sentence and any conspiracy, incitement or attempt to commit any such offence.

Whilst the court *a quo* had a discretion in the duration of the sentence of imprisonment that it could impose, it had no power to suspend any portion of such sentence.

Turning to the sentence imposed in respect of the three counts of assault that the appellant stands convicted of it is common cause that the court took all three counts as one for purposes of sentence. It also ordered that the sentence of three years should run concurrently with the sentence in respect of the murder conviction.

The approach of the court cannot therefore be faulted in any way.

It was for the above reasons that we dismissed the appeal in its entirety.

ZIYAMBI JA: I agree

HLATSHWAYO JA: I agree

Karuwa & Associates, applicant's legal practitioners

National Prosecuting Authority, respondent's legal practitioners