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**REPORTABLE (63)**

**JIMMY MUPANDE v THE STATE**

**SUPREME COURT OF ZIMBABWE**

**MALABA DCJ, GOWORA JA & HLATSHWAYO JA.**

**BULAWAYO, NOVEMBER 26 & 28, 2013**

Mrs *J Magosvongwe*, for the appellant

Ms *S Ndlovu*, for the respondent

 **HLATSHWAYO JA:** The appellant was convicted by the High Court sitting at Bulawayo on 21 July 2005 of murder with actual intent as defined in s 47(1) of the Criminal Law (Codification and Reform) Act [*Cap 9:23*] and sentenced to death after the court found no extenuating circumstances.

No notice of appeal was filed in this matter on behalf of the appellant, only heads of argument. However, because there is an automatic right of appeal against the death sentence, it shall be assumed that the appellant herein is appealing against both conviction and sentence and that the ground of appeal are related to his defense outline and other submissions made in the course of the trial and sentence. In other words, his appeal is a challenge of the findings of the court *a quo* with respect to both conviction and sentence.

Mrs *Magosvongwe* in the heads of argument filed on behalf of the appellant, correctly conceded and as shall be shown below, that there were no meaningful submissions that could be made against either conviction or sentence and that both the conviction of murder with actual intent and the sentence of death were properly returned by the court *a quo*.

The facts which are common cause are that the appellant who was twenty-three (23) years old at the time of the commission of the offence was employed as a gardener by the deceased, Mr John Jenks, a male adult who was seventy (70) years old at the time of his death. They both stayed at House Number 3, 21 Avenue, Famona, Bulawayo, the appellant living at the worker’s quarters while the deceased stayed in the main house. On 9 November 2002 the appellant struck the deceased on the back of his head with an axe, killing him instantly. The appellant then dug a shallow grave at the back of the house in which he buried the deceased’s body. On 9 and 13 November 2002 the appellant sold the deceased’s household property, namely a 12 cubic feet Imperial refrigerator and a display cabinet, representing himself as the legal owner thereof. On 19 November 2002 the appellant was arrested in connection with the death of the deceased and he indicated to the police where he had buried the body of the deceased. The body of the deceased was exhumed and taken for a post mortem examination which showed that the cause of death was a compound comminuted skull fracture as a result of assault.

The appellant was charged with the offence of murder, convicted and sentenced to death as already pointed out.

In order for this Court to quash the conviction and sentence of the appellant, there had to be a misdirection apparent from the record sufficiently serious to vitiate the proceedings of the court *a quo*. Accordingly, I shall examine below whether the court *a quo* erred in any one or more of the following respects-

1. In finding the testimony of the appellant as not credible.
2. In finding that the appellant did not act in self- defence.

(iii)In concluding that the appellant killed the deceased with actual intent, and

1. In imposing the death penalty upon the appellant.

**CREDIBILITY OF THE APPELLANT**

The appellant was found by the court *a quo* to be an unreliable witness as he gave different and, at times, conflicting accounts of the circumstances leading to his striking the deceased with the axe. Firstly, he told the court that it was because the deceased had sodomised him. On being probed he stated that he had killed the deceased in self-defence. Even with regards to the weapon used he stated that he killed the deceased with a metal rod only to change under cross-examination and say he used to an axe. This part of the appellant’s evidence was carefully analysed by the learned Judge in the court *a quo* as follows:

“We find that the Accused’s evidence was full of inconsistencies. For example in his evidence-in-chief he stated that the reason why he killed the deceased was because he was refusing his money (for wages and painting). And that he felt that the deceased was responsible for the semen he found on his thighs. But when they probed him further, he stated that he struck the deceased because his (own) life was under threat. In his evidence-in-chief he states that he used a metal rod to strike at the deceased but under cross-examination he stated that it was an axe.”

Now, the test to be applied before a court rejects the explanation given by an accused person was set out by GREENBERG Jin *R* v *Difford* 1937 AD at 373 and quoted with approval in *S v Chidunga* SC 21/02 as follows:

“No *onus* rests on the accused to convince the court of the truth of any explanation he gives. If he gives an explanation even if that explanation is improbable, the court is not entitled to convict unless it is satisfied, not only that the explanation is improbable, but that beyond any reasonable doubt it is false. If there is any reasonable possibility of his explanation being true, then he is entitled to his acquittal.”

The above test was aptly applied by the learned trial Judge as he came to the conclusion that the appellant was an evasive witness who could not be believed. It is trite that a superior court does not lightly interfere with the findings of a lower court on the issue of credibility. See *S*v *Bezuidenhout* SC 122/02. In *Kombayi* v *Berkhout* 1988 (1) ZLR 53 (SC) at 59D KORSAH JA stated this principle, thus:

“Where the question on an appeal from the decision of a judge is one of credibility ... an appellate court would be loathe to reverse the conclusions arrived at by the trial judge, who had seen and heard the witnesses, unless it is clearly demonstrated that he had fallen into error.”

In this case the conclusion by the court *a quo* is a result of a fair and balanced assessment of the evidence which this Court cannot lightly interfere with. There are other instances in the case where the appellant clearly lied which further dented his credibility. For example, he initially claimed to the police that the deceased had gone to Victoria Falls and had given him the property to sell before revealing that he had killed and buried the deceased. His assertion that he had been instructed by the deceased to sell the household goods and that the deceased had communicated with the buyer to that effect was firmly refuted by the unchallenged and credible evidence of the buyer, Leonard Ncube, who stated that the appellant had approached his firm, Phoenix Security, in his individual capacity and signed for the sold property as the legal owner and that the deceased had never communicated with his firm.

In the light of the above, the court *a quo* rightly rejected the appellant’s version of events and held that the appellant struck and killed the deceased on 9 November 2002, looted and sold his household goods.

**DID THE APPELLANT ACT IN SELF DEFENCE?**

The main basis of the appellant’s defence was that he had killed the deceased to save his own life from an imminent lethal attack by the deceased. The appellant’s version of events was that the deceased wanted to shoot him and also strike him with a metal rod, so he then countered the “attack” by striking the deceased with an axe twice on the back of the head. The appellant’s account is so riddled with improbabilities that the court *a quo* did not hesitate to reject it. How does a man armed with a lethal firearm on one hand also brandish a metal rod on the other hand? To achieve what? To shoot and then strike or strike and then shoot? The combination of weapons is just bizarre. Secondly, as the court below noted, it is well-nigh impossible to strike a person who is about to shoot you on the back of his/her head as alleged by the appellant.

The requirements of self-defence are well-settled in our law. Section 253 of the Criminal Law (Codification and Reform) Act lists the requirements as-

1. There must be an unlawful attack;
2. The attack must be upon the accused or a third party;
3. The attack must have been commenced or imminent;
4. The action taken by the accused must have been necessary to avert the attack; and
5. The means used to avert the attack must be reasonable.

The above requirements are cumulative and all must be satisfied before the defence may succeed. However, the appellant’s defence of self defence founders miserably on the very first hurdle. The alleged illegal attack is so improbable it can only be a figment of the appellant’s desperate imagination. Thus, the learned Judge properly dismissed the defence and stated as follows:

“The fact that the Accused used an axe which he obtained ... in the servants’ quarters, proceeded to strike an unarmed person on the head twice and ... buried him and thereafter looted his property demonstrated beyond reasonable doubt that the accused intended to kill the deceased. His evidence is therefore rejected.”

**DID THE APPELLANT HAVE ACTUAL INTENTION TO KILL?**

The appellant was the only witness, as the perpetrator, of the actual occurrence of the crime and, thus, there is no direct evidence as to his intention. However, Ms*S Ndlovu* for the respondent submitted, and in my view correctly so, that where there is no direct evidence as to the intention of the accused such intention can be inferred from the surrounding circumstances, as was done in the case of *S* v *Mugwanda* SC 19/02. In the present case the following circumstances are highly suggestive of an actual intention to kill-

(a) The nature and seriousness of the injuries inflicted as per the post mortem report and the vulnerability of the part of the body, the back of the head, to which the blows with an axe were directed. In *Learnmore Judah Jongwe* *v* *The* *State* SC62/02 the learned CHIEF JUSTICE CHIDYAUSIKU CJ, stated that where an accused aims several blows at a vulnerable part of the body, the inevitable inference is that the accused must have intended to bring about the death of the deceased by his actions or, at least, foresaw the death of the victim as a virtual certainty.

1. After striking the deceased, the appellant as per his evidence rather than render help to the victim who was still alive chose to visit his house at the other end of town in Matshobana Township leaving the deceased lying on the floor.
2. After killing the deceased the appellant buried him in a shallow grave in secret, continued to occupy the house of his victim as if nothing had happened and proceeded to loot and sell his household goods. These actions are suggestive of murder with actual intent for the purpose of robbing and benefitting from the deceased’s property.

Thus, after taking into account the above circumstances cumulatively, the court below did not misdirect itself in concluding that the appellant killed the deceased with actual intent.

**AD SENTENCE**

The conviction of murder with actual intent being proper, it follows that the sentence of death is proper too after the trial court’s finding that no extenuating circumstances existed which would have justified the imposition of a sentence other than the death sentence.

In the present case after the accused had been found guilty of murder with actual intent, the trial Judge carried out an inquiry into extenuating circumstances. Both counsel for the defence and the State were in concurrence that there were no extenuating circumstances, that there was nothing which lessened the appellant’s moral blameworthiness. The court *a quo* found likewise. At any rate, the existence or otherwise of extenuating circumstances is a matter exclusively within the jurisdiction of the trial court. In *S* v *Mateketa* 1985 (2) ZLR 248 (S) at 255D it was stated thus:

“The principle is well settled that the question as to the existence or otherwise of extenuating circumstances is essentially one for decision by the trial court and that, in the absence of misdirection or irregularity this court will not interfere with a finding that no extenuating circumstances are present, unless it is one to which the trial court could not reasonably have come.”

The court *a quo’s* conclusion that there are no extenuating circumstances cannot be faulted and hence its sentence is proper.

**CONCLUSION**

The appeal against both the conviction and sentence imposed is dismissed.

**MALABA DCJ:** I agree

**GOWORA JA:** I agree

*Danziger & Partners*, appellant’s legal practitioners

*Attorney-General’s Office,* respondent’s legal practitioners