

REPORTABLE (48)

(1) CHINEKA MUPANDE (2) GCOBANI MKWANANZI (3)
RENIAS MAPFUMO
v
THE STATE

**SUPREME COURT OF ZIMBABWE
GOWORA JA, GUVAVA JA & BERE JA
BULAWAYO, 20 NOVEMBER, 2019**

Adv *G. Nyoni*, for the appellants

Ms *N. Ngwenya*, for the respondent

GUVAVA JA: This is an appeal against the entire judgment of the High Court of Zimbabwe sitting at Gweru which found the appellants guilty of culpable homicide as defined in terms of s 49 of the Criminal Law Codification and Reform Act [*Chapter 9:23*] (the Act).

FACTUAL BACKGROUND

The appellants are former members of the Zimbabwe Republic Police stationed at Harare and were attached to the Criminal Investigation Department in the Vehicle Theft Squad. On 31 December 2008, there was a break-in at the 1st appellant's house in Mvuma. Following the break-in, the appellants drove from Harare to Mvuma to carry out investigations. They conducted investigations in Mvuma and arrested 6 persons. They were brought to Mvuma Police Station for further investigation.

On 3 January 2008 the appellants interrogated the suspects. Whilst doing so, it was alleged that they took turns to assault the deceased with a baton stick under his feet and all over his body, in order to force him to make a confession. The deceased's condition started deteriorating prompting the appellants to take him to Gweru Provincial Hospital. The deceased was admitted for two days and he died on 10 January 2008. On 10 January 2008, a post-mortem examination was conducted with the report indicating that the deceased had died as a result of asphyxia, gastric contents aspiration and trauma from the assault.

As a result of the death of the deceased, the appellants were arrested and charged with murder as defined s 47 (1) of the Act. They were arraigned before the court *a quo* and they pleaded not guilty. They averred that the suspects were detained by Mvuma Police officers and not them. They denied assaulting the deceased or any of the suspects. They contended that one Stansilous Madyara ("Madyara"), a constable in the Zimbabwe Republic Police stationed at Mvuma and the investigating officer were at all material times present and in charge of the suspects.

The State led evidence through several witnesses including Madyara. He testified that he witnessed the deceased being assaulted with a baton stick and a bottle by the 3rd appellant on his knees prompting the deceased to confess to stealing at the 1st appellant's house.

In the closing submissions, the appellants submitted that Madyara was not a credible witness. It was their submission that Madyara had been implicated by one of the suspects and that he acted in common purpose with the appellants. It was submitted that at most, the appellants could be found guilty of culpable homicide as the intention to kill had not been proved by the State.

FINDINGS BY THE COURT A QUO

The court *a quo* made a finding that Madyara was a credible and competent witness. It found that the evidence that had been led did not show that Madyara acted in common purpose with the appellants but rather his role was only of taking notes. The court further found that the appellants had not harboured an intention to kill the deceased, both actual and legal. It however found that the appellants' were negligent in the manner that they conducted themselves in assaulting the deceased with the intention of forcing a confession from him so that they could recover the stolen property.

In the circumstances, the court found that the appellants' actions negligently caused the death of the deceased and convicted them of culpable homicide. Consequently, the appellants were sentenced to 10 years imprisonment with two years being suspended for five years on condition that the appellants were not within that period convicted of any offence involving violence.

GROUND OF APPEAL BEFORE THIS COURT

Aggrieved by the decision of the court *a quo*, the appellants noted this appeal against conviction and sentence on the following grounds of appeal:

“1. The court *a quo* erred and misdirected itself in failing to make a finding that the State's star witness Stanslous Mudyara was a suspect witness when there was clear evidence that:

(a) He was implicated by other suspects who were detained with the deceased for having assaulted them.

(b) He was implicated by the second state witness Munyaradzi Chirwa in court for having assaulted him.

(c) He had been charged and a docket prepared against him for assaulting the suspects who had been detained with the deceased.

(d) He was an interested party.

2. The court *a quo* erred in failing to treat the evidence of one Stanslous Madyara with deserved caution as he was a suspect witness.
3. The court *a quo* grossly misdirected itself in making a finding that the alleged assaults on the deceased caused the death and failed to give credence on the post mortem report which revealed that the deceased had injuries on the neck and lower lip which the state did not attribute to the appellants.
4. The court *a quo* erred by absolutely disregarding the evidence of Munyaradzi Chirwa which corroborated the appellants' story.
5. The court *a quo* improperly exercised discretion resulting to a sentence that induces a sense of shock, more particularly in that:

(a) It gave weight on the aggravating factors instead of balancing it with the mitigating factors and interests of the criminal justice machinery.”

APPELLANTS' SUBMISSIONS BEFORE THIS COURT

In urging the Court to exercise its discretion and overturn the decision of the trial court, counsel for the appellants submitted that the court erred in convicting the appellants of culpable homicide based on the evidence of Madyara as he was an interested party and was therefore inclined to falsely implicate the appellants. He argued that the witness was part of the team of detectives who interviewed and interrogated the deceased. Given such, counsel contended that the court *a quo* erred in failing to treat Madyara's evidence with caution as he was an accomplice yet the court took a restrictive interpretation of the word “accomplice”.

Having misdirected itself and applied the strict interpretation of the definition of accomplice, the court did not warn itself of the inherent dangers of relying on the testimony of a suspect witness. Consequently, counsel for the appellants prayed that the conviction be set aside.

RESPONDENT'S SUBMISSIONS BEFORE THIS COURT

Per contra, counsel for the respondent submitted that the finding by the court *a quo* that Madyara was a witness and not an accomplice was unassailable. There was evidence placed before the court *a quo* which showed that the witness did not actively participate in the interrogation and assault of the deceased. Counsel submitted that the witness was assigned to assist the appellants by taking notes as they interviewed the suspects. He was also asked to attend to the recovery of the 1st appellant's stolen television after the deceased had confessed to the theft. He further argued that the appellants were superiors to the witness, with the 1st appellant being an assistant inspector, 2nd appellant a sergeant whilst the witness was a constable and as such he could not stop his superiors from interrogating and assaulting the deceased.

Counsel also submitted that an accomplice is a person who knowingly, voluntarily and with common intent unites with the principal offender in the commission of a crime, and may assist or encourage the principal offender with the intent to have the crime committed. He submitted that the witness could not have been found to be an accomplice as from the evidence on record, the witness did not actively participate in the interrogation and assault of the deceased. He stuck to his mandate of taking down notes and there was no evidence which showed that he had an intention to assist the appellants in assaulting the deceased. Consequently, counsel for the respondent prayed that the appeal be dismissed in its entirety.

ISSUE FOR DETERMINATION

It seems from the grounds of appeal and arguably made before the court that there is whether or not the court *a quo* erred in finding the appellants guilty of culpable homicide in terms of s 49 of the Act.

APPLICATION OF THE LAW TO THE FACTS

What can be gleaned from the judgment of the court *a quo* is that the appellants' conviction was a result of an objective assessment of all the evidence upon which the court *a quo* made several findings of fact. These are that; Madyara was not a suspect witness, that his testimony was credible and could be relied on. The trial court also concluded that the evidence led did not show that Madyara had acted in common purpose with the accused persons and as such, he could not be regarded as an accomplice witness. The court *a quo* went on to highlight the inconsistencies evident in the appellants' testimonies and it found that the inconsistencies in the appellants' testimonies corroborated Madyara's testimony as to what transpired during the interrogations.

It is trite that an appellate court is loath to interfere with the findings of fact made by the trial court unless the findings are grossly unreasonable. This position was articulated by this Court in *Hama v National Railways of Zimbabwe* 1996 (1) ZLR 664 (S), wherein it held that:

“The general rule of the law, as regards irrationality, is that an appellate court will not interfere with a decision of a trial court based purely on a finding of fact unless it is satisfied that, having regard to the evidence placed before the trial court, the finding complained of is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at such a conclusion.”

It is not enough to merely aver that another court would have arrived at a different conclusion on the same set of facts. One must go beyond that to prove that the court in making its decision had taken leave of its senses and therefore the finding is irrational. The finding that Mudyara was not an accomplice witness cannot be faulted as in reaching that finding, the judgment of the court *a quo* shows that it was alive to the principles that ought to be applied when dealing with evidence of an accomplice. In *Zimbabwe Banking Corporation Limited v Ndlovu* SC 61/04, the Court held that:

“It is trite that evidence is not rejected simply because it is given by an accomplice or a suspect witness. Rather, the court has to examine the evidence before deciding whether it is believable. If necessary, corroborative evidence then has to be sought.”

In casu, the court found Madyara’s role to be that of taking notes following an instruction from the appellants who were his superiors in the police force. It also found his evidence to be believable and was corroborated by the inconsistencies in the appellants’ evidence. In my view, the findings of fact made by the trial court in concluding that the evidence of Madyara was credible cannot be faulted. The appellants have failed to demonstrate before this Court that the finding is so grossly unreasonable such as to warrant an interference by this Court.

More importantly, the conviction of the appellants predicated on single evidence witness is permissible at law. Section 269 of Act permits a court to convict a person on the single evidence of a competent and credible witness. In *R v Mokoena* 1932 OPD 79 at 80, it was stated that the evidence of such a single witness must be found to be “clear and satisfactory in every material respect”. Hence, a court can make a decision to convict based on evidence of a single witness provided that it is reliable, credible and the court is convinced beyond a reasonable doubt that the sole witness has spoken the truth.

The court *a quo* was convinced that Madyara told the truth based on his demeanour in the witness box and the detailed narration he gave of the assault that was perpetrated on the deceased by the appellants. The Court has noted that the ultimate finding by the court *a quo* that Madyara was a credible witness was not impugned in the appellants grounds of appeal placed before this Court. The Court therefore finds no basis of interfering with the finding that Madyara was a credible witness and the weight that was attached to his evidence by the court *a quo*. Further to that, Madyara's evidence was corroborated by the post mortem report which concluded that the deceased died as a result of trauma from assault, among other causes of his death. The holding of the Court in *S v Banana* 2001 (1) ZLR 607 (S) is instructive where it remarked as follows:

“Where the evidence of the single witness is corroborated in any way which tends to indicate that the whole story was not concocted, the caution enjoined may be overcome and acceptance facilitated. But corroboration is not essential. Any other feature which increases the confidence of the court in the reliability of the single witness may also overcome the caution.”

The Court takes the view that the finding that Madyara was a credible witness, considered in the light of proven facts and probabilities, particularly the post mortem report, all lead to an inescapable conclusion that the appellants caused the death of the deceased.

DISPOSITION

It follows from the foregoing that this appeal is without merit and ought to fail. It is accordingly ordered as follows:

“The appeal be and is hereby dismissed.”

GOWORA JA : I agree

BERE JA : I agree

Nyoni Advocates' Chambers, appellant's legal practitioners

The National Prosecuting Authority, respondent's legal practitioners