

(1) FARAI LAWRENCE NDLOVU (2)
WELLINGTON GADZIRA
v
THE STATE

SUPREME COURT OF ZIMBABWE
ZIYAMBI JA, GARWE JA & HLATSHWAYO JA
BULAWAYO, MAY 8, 2014

Mr *T Muganyi*, for the first appellant

Mr *F Museta*, for the second appellant

Mr *T Hove*, for the respondent

HLATSWAYO JA: The appellants Farai Lawrence Ndlovu and Wellington Gadzira, aged twenty-three and thirty-seven years respectively, at the time of the commission of the offence and were arraigned before the High Court sitting at Gweru Circuit on 22 May 2012 on two counts of murder as defined in s 47 of the Criminal Law (Codification and Reform) Act [Cap 9:23]. It is alleged they killed one Michael Sunderland ("first deceased") and Geoffrey Andrew Willian Povey ("second deceased") who were aged thirty-seven and sixty-five years respectively at the time of their death.

The appellants pleaded not guilty but after a full trial they were both convicted of murder with constructive intent in respect of the first deceased and of murder with

actual intent in respect of the second deceased. The trial court, finding no extenuating circumstances, passed the sentence of death upon both appellants. The appellants having an automatic right of appeal to the Supreme Court filed this appeal against both conviction and sentence.

No grounds of appeal were filed with respect to the first appellant, counsel being of the view that no meaningful submissions could be advanced to assist this appellant. For the second appellant only one ground of appeal was proffered challenging the sentence imposed as "excessive". However even counsel for the second appellant in his heads of argument conceded that the conviction and sentence were proper and there was no misdirection on the part of the trial court. At the hearing of this appeal both Mr *T Muganyi*, for the appellant, Mr *F Museta*, for the second appellant submitted, and correctly so in my view, that they had no meaningful arguments to place before the court to assist their respective clients.

The brief facts of this case which were largely common cause appear from the State summary and evidence given at the trial. On 27 March 2011, the first and the second appellants met the first and second deceased at Puzey and Payne Garage, Gweru. The appellants had told the now deceased

persons that they had some gold for sale and that there was a gold rush near Kwekwe River. The deceased occupied the front seat of their motor vehicle, a Nissan Patrol registration number ABK 0999 while the appellants got into the back of the motor vehicle. The appellants had in their possession what the State called a bottle of cyanide poison and what the appellants termed some tablets to induce drowsiness of the deceased to facilitate the robbery of their properties. The appellants put the poisonous substance in the drinking water of first and second deceased persons which was in the cooler box at the back of the vehicle. On arrival at Cactus Farm about 10 km from the Gweru-Kwekwe road, the first and second deceased drank the poisoned water. The first deceased died instantly after drinking the water. The second deceased vomited and regained consciousness. He was subsequently struck on the head by one of the appellants and died on the spot. The two appellants took from the deceased among other things their Nissan Patrol vehicle, two metal detector, \$260 cash and a hunting knife from the first deceased and \$100 cash and beige desert boots from the second deceased.

The appellants were confronted by the police while driving the stolen vehicle along the road to Sango Boarder Post near Chikombedzi leading to the arrest of the first

appellant on 29 March 2011. The second appellant escaped but was later arrested in Bindura on 11 July 2011.

On 31 March 2011, Dr A R Casteiinos carried out post mortems on the remains of the deceased persons and concluded that in respect of the first deceased the cause of death was indeterminate due to severe state of decomposition. In respect of second deceased he concluded that the cause of death was:

- (a) depressed skull fracture
- (b) head injury
- (c) assault

Although the appellants' counsel conceded that both conviction and sentence were properly made by the court *a quo*, three matters call for comment, whether the appellants were aware that the pills given to the deceased were lethal, liability for the death of the second deceased in the light of both the appellants implicating each other and the proper sentence in the circumstances.

CONVICTION ON COUNT ONE

The submission was initially made, but subsequently abandoned, on behalf of the appellants that the State had not proved beyond reasonable doubt that the appellants were aware that that pills given to the deceased were lethal and that

they only intended to make them drowsy to facilitate theft of their property. Since no toxicology report was produced by the State to prove the lethal effect of the pills, so the argument goes, it is possible that the appellants merely negligently but unwittingly overdosed the deceased, causing the pills to go beyond just making them drowsy. Thus, the appellants would have been negligent in administering an unknown substance without bothering to ascertain the effect or correct dosage and would have been guilty of culpable homicide rather than murder with constructive intent. As has been pointed out already, this submission is not sustainable in the light of the evidence and was rightly abandoned.

The appellants could not have intended to merely to drug the deceased without killing them because the first deceased Sunderland, knew the first appellant very well and would have been able to identify him upon recovering leading to the arrest of the duo. Further, when the second deceased showed signs of recovery, even though still too weak to offer any resistance to the theft, the appellants promptly hacked him down with a pick in order to silence him forever. It is also true that when the accused realised that the substance was killing their victims instead of making them just drowsy they did not abandon their enterprise and render assistance to the stricken but persisted with the robbery. Hence, the trial court correctly dismissed the appellants' claim that they

drugged the deceased to facilitate theft of their property and correctly held that they rightly found them guilty of murder with constructive intent with respect to the first deceased.

CONVICTION ON COUNT TWO

While the evidence and the post-mortem report show that the second deceased was killed by the striking of the back of his head with a pick, it was not established who actually committed the deed. Both the appellants implicated each other. However, regardless of who committed the fatal deed, it is evident that both the appellant approved of the killing of the second deceased. None of them sought to actively dissociate themselves from the crime but they both drove the deceased's car, wore the clothes of the deceased and used the deceased persons' prospecting machinery. As was stated in *Alex Toendepi Ngisazi v The State* SC 49/02:

"If someone is killed, then generally speaking, the one who fires the shot, and those of his colleagues who know he is armed and who do not actively disassociate themselves from the killing are guilty of murder and whether the intend is actual or constructive, are likely to be sentenced to death."

Thus both the appellants were properly found guilty of murder with actual intent in respect of the second count.

SENTENCE

Mr *Museta* for the second appellant, correctly conceded, in my view that there were no extenuating circumstances in the commission of these offences. Poising a victim and leaving him to die as happened in the case of the first deceased, poisoning a victim and then fatally striking him with a pick when he showed signs of recovery and as he pleaded to be taken to hospital are all inherently wicked acts. This was a callous double killing committed in the course of a robbery. In the case of *Robert Chingaona v The State* SC 105/02 it was stated thus:

“Warnings have frequently been given that, in the absence of weight extenuating circumstances a murder committed in the course of a robbery will attract a the death penalty.”

The trial court did not find any extenuating circumstances and correctly imposed the maximum penalty on the appellants.

CONCLUSION

The trial court did not misdirect itself in finding the two appellants guilty of murder with constructive intent in respect of the first deceased and murder with actual intent with respect of the second deceased and imposing the death penalty on the appellants.

Accordingly, both appeals against conviction and sentence be and are hereby dismissed.

ZIYAMBI JA: I agree

GARWE JA: I agree

Messrs Dube-Banda, Nzarayapenga & Partners, 1st appellant's legal practitioners

Messrs Mashayamombe & Company, 2nd appellant's legal Practitioners

The Prosecutor General's Office, respondent's legal practitioners.