

Judgment No S.C. 49\2002
Civil Appeal No 319\2001

ALEX TOENDEPI NGIRAZI v THE STATE

SUPREME COURT OF ZIMBABWE
SANDURA JA, ZIYAMBI JA & GWAUNZA AJA
HARARE MAY 14 & JULY 8, 2002

R.Y. Phillips, for the appellant

N.J. Mushangwe, for the respondent

ZIYAMBI JA: The appellant was convicted by the High Court of murder with actual intent and, no extenuating circumstances having been found to exist, was sentenced to death. He now appeals against both the conviction and sentence.

The evidence led at the trial was as follows. On the 21st January 1999, the deceased, William Lawless Dane Player was discovered to be missing from his home at Christon Bank. On the previous evening at about 8pm, Maggie Madzande, who was employed by the deceased as a domestic worker, arrived at the deceased's house to serve supper. She was surprised to find the gate locked as this was unusual.

On entering the kitchen she found a note which purported to be written by her employer. It said:-

“Maggie don’t worry to cook. I have gone with my friends. I will see you tomorrow.”

Her employer had not done this before. He would go to her house and inform her that he was going out. She tried to open the doors to the lounge and bedrooms but found them locked. That too was unusual as these doors were usually unlocked. She then went home and prepared her supper. After supper she noticed that the lights at the main house had now been switched off. This caused her and the other occupants of her house including Thomas Madzande her brother (who was employed by the deceased as a gardener at the premises) to go to the main house to investigate. The deceased’s bedroom windows were closed. As they knocked, they noticed that the light in one of the toilets was switched on. They continued knocking and the light in the other toilet came on. They decided to ask the neighbours to call the Police. The Police were called and they waited some two hours after which they decided to go home.

The following morning the deceased’s dog, which normally slept in the kitchen, was found locked in the house. Using a ladder they ascertained, by looking through a trap window, that the deceased was not in his bedroom. The deceased’s cheque book which was normally kept in the lounge, was lying on a small table in the bedroom. They again caused the police to be called. Police arrived and broke into the house. The deceased was not there. A search then began for him.

The appellant and his brother Elijah Njirazi were arrested on the 8th February 1999. Both accused admitted their involvement in the murder of the deceased. The appellant wrote out a lengthy statement in which he set out in detail his plan to extort money from the deceased and how he executed that plan. The following passage is taken from his confirmed warned and cautioned statement:-

“I thought how difficult it would be for me without money. Then as I was employed at St Gerera Farm as a guard. I thought of a plan to intimidate Mr Player to give me more money. I told Justine the plan to have money. He agreed to go with me and my young brother. I had a gun which I would use, the one I had at work. So one night we went and Justine knocked. Mr Player just talked with him and refused to open saying Justine was drunk. So our plan failed that. (sic) Then I talked to my younger brother and on the twentieth of January 1999 at night we went to Mr Player. I had written a note to Maggie the house-lady in Mr Player’s name, telling her that that night she must not cook for him because friends had taken him to town. Maggie got out at seven to go get supper and (we) got in and intimidated Mr Player. We took him out and left the note for Maggie; she came back as usual at 8 o’clock and found the note. She went back to her room and we got back with Mr Player. I told him to write a cheque and signed one for \$15 000.00. I used Fana Wilson’s ID which I had picked up in town. Then as we wanted to go downstairs to lock him until the next day, I heard Maggie calling at the next plot. I knew she had detected that something was going on in the house. I told my young brother Elijah that the Police would be coming at any time. We hurried out with Mr Player and went out and waited. I realised we were at the side the way Police would come. So we changed direction and went towards the Botanic garden towards Mazoe River. We came to the river and stopped. The river was full and I told Mr Player to sit down and as he crouched down he grabbed the gun. I panicked and jumped to get it back and the trigger went off as we pulled and struggled to possess the gun. I and Mr Player. I saw him fall down at the river bank and I knew he had been shot. We ran away. My brother was shocked and I did not know what to do. As we approached St Gerera, I stopped my brother and I prayed saying Jesus forgive me I have caused the death of Mr Player. That was not my aim but it has happened. Forgive me to have included my innocent young (brother). Amen. I cried as we went to sleep. In the morning I went to the bank. I was given \$15 000.00. I telephoned Thomas as if I was Chris one of Mr Player’s boyfriends. I told him to take the BMW to George Hotel for I said we had a breakdown. I did not wait I went back. As investigations went on I ran away. One day I telephoned Christon Bank Police and told them that I would come and I was the one who had committed the crime. I telephoned Mr Player’s house I told the man who answered the phone that I had committed the crime by the river. The man said they had searched but found nothing. Then I did not know what to do. I thought of buying poison to kill myself. Then I could not. I went to find a house in St Marys until the Police got me.”

On the 22nd January, two days after the deceased was killed, the appellant arrived at Maggie's house. He was acting strangely. He said he had come to visit their child. He was in a hurry to leave and showed no interest when she tried to relate to him the events of the previous two days. Maggie later learnt that the appellant was arrested that same evening but had escaped from custody.

The following Monday, the 25th January, the appellant telephoned Maggie telling her that she would never see the deceased again. He told her that he wanted to commit suicide as he did not know why he had 'done this'. He did not disclose what he had done. She next saw him on the day he was finally arrested. On that day the appellant wept and asked for forgiveness from Maggie her mother and brother for 'what he had done'.

Patience Matombo who is married to the appellant's brother was selling mealies by the roadside on the 29th January. The appellant came up to her and said that he had come to say farewell because he had killed a white man. He described to her how he, in the company of the second accused person, had bound the deceased and forced him to write a cheque after which they had taken him to the river where he had shot the deceased using the gun which was issued to him for his duties as a crop guard. He had then thrown the body into the river.

Thomas Madzande's evidence related to the events of the 20th and 21st January and was corroborative of the evidence given by Maggie. He spoke of the unusual happenings at the deceased's residence on the night of the 20th, the search for

the deceased and the report to the police. The next morning he went, in the company of a neighbour, to make a report to the police. He returned with the police including one Sgt Mugumbate. They had to break the doors in order to gain entry into the house. Later that day, he received a telephone call from a person named Chris stating that the deceased had had a breakdown and that he was to take the deceased's BMW motor vehicle to George Hotel. He complied with this request on the advice of the police but no one came to collect the vehicle.

The deceased's body was found in the Mazoe river on the 11th February, 1999. A post mortem examination performed 4 days later revealed that the cause of death was: 'fractured skull; brain laceration; haemorrhage; gun shot wounds'.

The 303 rifle issued to the appellant was examined by an expert firearms examiner, Charles Hayley. He found that the weapon was in good condition and had been fired although it was not possible to determine when. It was his evidence, having seen photographs of the body of the deceased, that the injury to the head was consistent with having been caused by a shot fired from such a rifle. A bullet from a pistol would not cause such an injury and the possibility of the injury to the deceased having been caused by the body hitting objects in the river as it was carried downstream was 'so remote as to be non existent'.

In his defence outline, the appellant sought to lay the blame for the killing of the deceased on Sgt Mugumbate (hereinafter referred to as 'Mugumbate') who was, at the time of the deceased's death, the Officer-in -Charge of Christon Bank

police base. At the time of the trial, Mugumbate was deceased. The appellant alleged that he had had a homosexual relationship with the deceased commencing in 1990. In or about December 1998 he decided to report the matter to the police as the deceased had repeatedly failed to fulfil certain promises and the relationship was causing problems in his married life. He reported the matter to Mugumbate who advised him that the deceased was influential and would not be prosecuted. He further revealed to the appellant that he himself was having a similar relationship with the deceased. Mugumbate and the appellant then hatched a plan to extort money from the deceased by threatening to report him to the police. They planned to do so on the 20th January 1999. On the evening of that day the two, wearing masks provided by Mugumbate and accompanied by the second accused, the appellant's brother, went to the deceased's house and executed the plan in the manner described by the appellant in his warned and cautioned statement save that in the defence outline he said that when they arrived at the river, the deceased grabbed the rifle from the appellant and during the ensuing scuffle Mugumbate shot the deceased with a pistol and rolled the body into 'the flooded waters of the Mazoe river as it had rained a few hours before'. The appellant and his brother were warned not to mention the killing to anyone. In return, Mugumbate undertook to frustrate investigations and also to ensure that the cheque was not stopped before its encashment. The appellant was given the identity card of one Fana Wilson so that they could encash the cheque the following day. He was also requested by Mugumbate to telephone the deceased's residence and ask that the deceased's vehicle be brought to Avondale. The plan was that Mugumbate would drive the car away and sell it. Thereafter he would report it stolen. The appellant telephoned the house and asked for the vehicle as instructed but the plan failed

because members of the neighbourhood watch committee had insisted on accompanying Mugumbate to the police station.

The following day, the appellant cashed the cheque. He was given \$3 000 by Mugumbate who retained the remaining \$12 000. After his arrest on the 22nd January, 1999, he was taken to the police base for questioning. Mugumbate facilitated his escape from the cells. He was given a national identity card for his use in the event of a road block as well as a passport for his brother's use. He was advised to call Mugumbate regularly to update him as to the progress of the investigations and to receive advice as to how to evade the police. In the event that investigations were successfully carried out, Mugumbate would steal the docket from the police. For these reasons, he did not disclose to the police the role of Mugumbate in the murder of the deceased.

This defence was, not surprisingly, dismissed by the court *a quo*. Neither the appellant nor any of the witnesses had made any prior mention of Mugumbate. Maggie, whose evidence the court accepted to be reliable, told the court that the appellant had wanted to commit suicide because of what he had done and asked forgiveness from her. Indeed, Maggie is the mother of the appellant's child and no reason was disclosed as to why she should lie against the appellant. Patience was also found by the court to be a reliable witness. Similarly, no reason was given as to why she should lie against the appellant who is her brother-in-law.

The firearms examiner's evidence established that the injury to the deceased could not have been caused by a pistol.

The evidence of the appellant's guilt was overwhelming. Indeed Mr *Phillips*, who appeared for the appellant was, understandably, unable to make any submissions against the correctness of the conviction. Accordingly the appeal against conviction is dismissed.

I turn now to the question of sentence. The trial court found that there were no extenuating circumstances and passed the death sentence. It is trite that an appellate court will not interfere with the finding of a trial court that no extenuating circumstances exist unless there was a misdirection or irregularity:-

“ 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 were present, unless it is one to which the trial Court could not reasonably have come.”

S v Masuku And Others 1985 (3) SA 908 (A) at 912D; *S v Mateketa* 1985 (2) ZLR 248 (S) at 255D.

No misdirection was alleged and none is apparent on the record. This was a callous killing committed in the course of extortion and in furtherance of a premeditated course of action. The possible intervention of Maggie was thwarted by the note which was left in the kitchen. The deceased was forced to write a cheque for \$15 000 and was thereafter taken to the river and shot. The following day, the appellant brazenly cashed the cheque and utilised the proceeds. Indeed, counsel for the appellant was unable to make any submissions in favour of the appellant. It

cannot be said that the conclusion that no extenuating circumstances exist was one to which the trial court could not reasonably have come.

The killing in this case was akin to one committed in the course of a robbery. In respect of the latter, this court has said:-

“We have said time and again that to carry a firearm on a robbery expedition is to run the risk that someone will be killed. 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 intent is actual or constructive, are likely to be sentenced to death. See *S v Mubaiwa* 1992 (2) ZLR 362 (S); *S v Sibanda* 1992 (2) ZLR 438 S; *S v Chareka & Anor* S-40-93; *S v Ngulube & Anor* S-112-93; *S v Kusaya & Anor* S-95-94; *S v Beaton* S-95-95”.

See *Dube v The State* S 245-96.

Accordingly the appeal against sentence is devoid of merit and it is also dismissed.

SANDURA JA: I agree

GWAUNZA AJA: I agree

Pro Deo