REPORTABLE (35)

Judgment No S.C. 19\2002
Civil Appeal No 215\2001

ROBERT MUGWANDA v THE STATE

SUPREME COURT OF ZIMBABWE
CHIDYAUSIKU CJ, EBRAHIM JA & ZIYAMBI JA
HARARE FEBRUARY 26 & JUNE 6, 2002

L. Uriri, for the appellant

M. Gurure, for the respondent

CHIDYAUSIKU CJ: The appellant in this case together with his two sons Gilbert Mugwanda and Casper Rice (hereinafter referred to as Gilbert and Casper respectively), were charged with the murder of one Simba Muringanzara. All the accused pleaded not guilty but were found guilty. The appellant and Gilbert were found guilty of murder with actual intent while Casper was found guilty of murder with constructive intent. The court found that extenuating circumstances existed in respect of Gilbert and Casper. The court sentenced each of them to twelve years' imprisonment with labour. The sons have not appealed against the conviction and the sentence imposed on them. The court found no extenuating circumstances in respect of the appellant and sentenced him to death. He now appeals against both conviction and sentence.

The State case was as follows: On 26 December 1997 the deceased Simba Muringanzara and the appellant were at Kahobo Business Centre in Gokwe. Also present at the Business Centre were Gilbert and Casper as well as some relatives and friends of the deceased who gave evidence for the State.

At some stage during the day Gilbert and Casper confronted the deceased and Kuwirirana accusing them of having taken $50 from them. Casper kicked the deceased whilst making the above accusation. After this incident the appellant and his sons went and sat under a tree.

Later in the day, when it was about to get dark the deceased and his companions left the Business Centre to go home. As they were leaving, the appellant and his sons followed them. When the appellant and his sons caught up with the deceased and his companion, the appellant shouted that they should be beaten up.

After the appellant's shout, Gilbert and Casper ran forward and started assaulting Kuwirirana, a brother of the deceased. Casper struck Kuwirirana with a fist. Gilbert then stabbed Kuwirirana with a knife on the back.

The deceased, who had been walking ahead noticed that his brother Kuwirirana was under attack and had fallen down, and returned in order to rescue him. When the deceased got to Kuwirirana, the appellant who had remained behind arrived at the scene and stabbed the deceased with a knife on the chest below the right breast.

The deceased started running away and the appellant and his sons chased after him. The deceased turned to look back and the appellant struck him with an axe above the right eye. The deceased ran away and the appellant declared that the fight was over and he walked back to the Business Centre with his sons.

The deceased was found dead the following morning. The post mortem report showed that death was caused by haemorragic shock and heamothorax due to a chest stab wound.

The defence case is essentially the same as the State case. The only difference is that the appellant denies stabbing the deceased. He suggests it was Gilbert who stabbed the deceased. Gilbert himself is evasive about whether he is the one who stabbed the deceased. The court *a quo* accepted the evidence of the State witness that it was the appellant who inflicted the fatal stab wound. That conclusion cannot be faulted. The court *a quo* found that the State witnesses were better witnesses and accepted their evidence in preference to that of the accused. This Court, as an appeal court will not readily interfere with the finding of a trial court on issues of credibility. In the result I am satisfied that the evidence establishes the following facts:

(1) that the appellant and his sons followed the deceased and his companion and engaged them in a fight as described by the State witnesses;

(2) that it was the appellant who fatally stabbed the deceased;

(3) that the deceased sustained the injuries set out in the post mortem report following the attack by the appellant and his sons.

The injuries sustained by the deceased are set out in the post mortem report. It reads in part as follows:-

"INTERNAL EXAMINATION:

There is a 6 mm stab wound in the left mid elavisular line of the fifth intercostal space. The stab wound traverses the intercostal muscles into the percardium. There is an associated haemothorax and haemopericardium of about 2000 mls.

…

CAUSE OF DEATH: HAEMORRHAGIC SHOCK

File (2) Haemothorax
Police (1) Chest Stab
IJ/cn MURDER"

The State witnesses alleged that the appellant struck the deceased with an axe on the face. This evidence is not corroborated by the post mortem report. The post mortem report does not reveal any injury on the deceased, that is consistent with the deceased having been struck by an axe. The doctor was not called to explain this so the issue remains unresolved. The probabilities are that the injury caused by the axe was insignificant and did not warrant mentioning. There is no doubt that if such injury, assuming it was there, had in any way contributed to the death of the deceased the doctor would have mentioned it.

On these facts the court *a quo* convicted the appellant and Gilbert of murder with actual intent or *dolus directus*. The learned judge, in his reasons for judgment, had this to say on this issue:-

> "Having regard to all the evidence that I have dealt with, our finding is that the three of them were ready, armed to attack this group. It is clear also and we accept the evidence of the witnesses that earlier in the day, accused three had kicked the deceased in the Shop, and accused one had threatened Kuwirirana with the axe. This suggests that they were ready to fight, but on realizing that they could not do it at the Shops, that explains why they spent the rest of that afternoon sitting under a tree and waiting. And when they saw them leave the Business Centre, they then followed and attacked.
>
> Accused one and two were armed with knives. They then attacked with the knives. Knives are dangerous weapons. Stabbing into one's body with a knife one cannot say whether there could be limits to the extent of the injury or not. When you stab on the chest in particular, you cannot say that you did not intend to kill when you know what vital organs are inside that part of body.
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> Accused one delivered a blow into exactly that portion of the deceased's body. He stabbed him on the chest below the right breast. And having done that much, he still chopped him with the axe Exhibit 9 above the right eye. Accused two armed similarly with a knife which is exactly the same as that of his father, except for the colour, attacked Kuwirirana and stabbed him on the back.
>
> It is not clear what satisfaction accused one had when he decided that the fight was over and asked his sons to stop so that they could go. It would seem, he was then aware that he had caused serious injuries on the deceased." (underlining is mine)

The reasoning of the learned judge leading to the conclusion that the appellant and Gilbert had actual intent is not easy to follow. In this case there is no direct evidence on the *mens rea* of the appellant. The appellant's avowed intention was not to kill the deceased but to assault him. It follows, therefore, that the *mens rea* of the appellant has to be inferred from the circumstances of the case. It is not an

easy task to determine an accused's *mens rea* in a case such as this one where a single stab wound inflicted to a vital part of the body results in death. It would appear from the above quoted remarks of the learned trial judge that because death ensued the appellant must have positively intended to bring about such a result. This approach is erroneous. The correct approach, in my view, is that set out *S v Sigwahla* 1967 (4) SA 556 (A). The facts in *Sigwahla's* case, *supra*, bear a very striking resemblance to the facts of this case. In *Sigwahla's* case, *supra*, the facts were that one Simon, the main State witness, the deceased and the appellant, all employees of the same construction company met at a nearby shopping centre where they bought and ate chips on pay day. When it was almost dark the deceased and his companion left. Simon followed them shortly thereafter. The deceased, his companion and Simon were each pushing a bicycle. This was on a foot path across open veld. Someone grabbed Simon's bicycle. He turned and saw four men including the appellant, who had been at the shopping centre. The appellant grasped Simon's bicycle and threatened him with a long knife. Simon stood still. One of the men with the appellant took the bicycle. The appellant robbed him of R8 which was in his pocket and also of a coat. At that point the deceased, who was ahead, turned back and approached the scene. The four robbers went towards him with the appellant in the lead. When they reached the deceased, who appeared to want to pass by, the appellant sprang forward and, with an upraised arm, struck the deceased on the left front of his chest. The deceased jumped and fell. Simon fled but came back again and found that the deceased was lying there dead.

According to the medical report on the deceased the cause of death was a stab wound of the heart. The medical report described the wound as follows:-

"There is a ½ incised wound over the 2nd interspace 1" to the left of the sternal midline on the anterior chest wall. The track of the wound passes downwards medically and backwards into the chest cavity through the 2nd interspace, enters the pericardial sac incises the right ventricle of the heart, and terminates, Total depth is about 4"."

HOLMES JA at pp 569G-571A, on these facts considered the issue of the appellant's *mens rea* and concluded as follows:-

"The next question is whether the State proved beyond reasonable doubt that the appellant intended to kill the deceased. At this stage I use the word intention in the sense of *dolus directus*, i.e. where the will is directed to compassing the death of the deceased. It is sometimes said that a person is presumed to intend the reasonable and probable consequences of his act. As to that, I had occasion to point out in *R v Sacco*, 1958 (2) SA 349 (N) at pp 351H to 353C, that it is simpler to speak of inferences of fact than of presumptions; that the practical approach is to eschew piecemeal processes of reasoning, and to look at all the facts at the end of the case, and from that totality to ascertain whether the inference in question can be drawn; and that inferences do not affect the incidence of the *onus* or proof - they assist its discharge.

Stabbing cases are usually a matter of degree, and intention must not be inferred by hindsight from the fact of death. The part of the body injured is relevant, but in the present case the deceased was walking and the appellant jumped forward as he struck. Hence it cannot be inferred beyond reasonable doubt that he actually aimed at the heart as distinct from the general area of the upper body. Accordingly, the fact that the thrust did land with fatal consequences above the heart does not, in all the circumstances, necessarily give rise to the inevitably inference that the appellant intended to kill, in the sense of directing his will towards the bringing about of the death of the deceased.

That, however, does not conclude the enquiry because the following propositions are well settled in this country:

1. The expression 'intention to kill' does not, in law, necessarily require that the accused should have applied his will to compassing the death of the deceased. It is sufficient if the accused subjectively foresaw the possibility of his act causing death and was reckless of such result. This form of intention is known as *dolus eventualis*, as distinct from *dolus directus*.

2. The fact that objectively the accused ought reasonably have foreseen such possibility is not sufficient. The distinction must be observed between what actually went on in the mind of the accused and what would have gone on in the mind of a *bonus paterfamilias* in the position of the accused. In other words, the distinction between subjective foresight and objective foreseeability must not become blurred. The *factum probandum* is *dolus,* not *culpa*. These two different concepts never coincide.

3. Subjective foresight, like any other factual issue, may be proved by inference. To constitute proof beyond reasonable doubt the inference must be the only one which can reasonably be drawn. It cannot be so drawn if there is a reasonable possibility that subjectively the accused did not foresee, even if he ought reasonably to have done so, and even if he probably did so.

See *S v Malinga and Others* 1963 (1) SA 692 (AD) at p 694 G-H; and *S v Nkombani and Another* 1963 (4) SA 877 (AD) at pp 883A-C, 890B, 895F.

In the present case the salient facts are that the appellant was armed with a long knife which he held in his hand; that he advanced upon the approaching deceased; that as he came up to him he jumped forward and raised his arm and stabbed him in the left front of the chest; that the force of the blow was sufficient to cause penetration of four inches and to injure his heart; and that there is nothing in the case to suggest subjective ignorance or stupidity or unawareness on the part of the appellant in regard to the danger of a knife thrust in the upper part of the body. In my opinion the only reasonable inference from those facts is that the appellant did subjectively appreciate the possibility of such a stab being fatal. In other words I hold that there exists no reasonable possibility that it never occurred to him that his action might have fatal consequences, as he was advancing on the deceased with the knife in his hand and as he was raising his arm to strike and as he was aiming a firm thrust in the general direction of the upper part of his body. It is true that he had consumed six bottles of 'Kaffir beer'; but this did not prevent him from knowing what he was doing following after Simon and robbing him of money and clothing, and in responding to the deceased's turning back to see what was going on. (I shall deal later with the question whether the consumption of liquor reduces his moral culpability). And there can be no question but that the appellant was reckless whether or not death ensued from his action. In the result the State proved the required legal intention to kill (*dolus eventualis)*; and the conviction was justified."

I respectfully find myself in agreement with the learned judge of appeal's approach set out above.

Professor G. Feltoe, in his book, *The Guide to Zimbabwean Criminal Law* discusses the distinction between positive or actual intent, and constructive intent or legal intent in a manner that is very lucid and instructive. The learned author characterises the distinction as follows:-

"**Actual Intention**

(a) Desires death. Death is aim and object.

or

(b) Death is not aim and object but in process of engaging in some activity foresees death as a substantially certain result of that activity and proceeds regardless as to whether this consequence ensues.

Legal Intention

Does not mean to bring about death but foresees it as possibility whilst engaged in some activity and proceeds with the activity regardless as to whether death ensues.

(a) subjective foresight

(b) as to possibility not probability

(c) recklessness."

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 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 the present case the following salient facts are relevant to the determination of the appellant's *mens rea*:

(a) It is common cause that the avowed intention of the appellant was to assault the deceased and his companions. It follows therefore that the death of the deceased was not the desired objective. It occurred while the appellant was engaged in the desired activity of assaulting the deceased and his companion. The fight was over $50. There is nothing to suggest that the appellant desired to kill, as opposed to punishing, the deceased for the theft of $50.

(b) In pursuance of the appellant's activity, the assault of the deceased, one stab wound was inflicted. The degree of force and depth of the wound is unknown. While the stab wound was certainly inflicted to a vital part of the body there is no conclusive evidence that it was deliberately aimed at that part of the body or fatuously landed there in the course of the assault on the deceased.

On these facts, I am satisfied that it cannot be said that the only reasonable inference to be drawn is that the appellant did foresee the death of the

deceased as a substantially certain consequence of his activity. These facts however, in my view, are sufficient to establish beyond reasonable doubt that the appellant did foresee the possibility of the death of the deceased as a consequence of the assault and persisted with the assault regardless. On this basis the appellant should have been found guilty of murder with constructive and not positive intent. Accordingly the verdict of the court *a quo* is altered to one of guilty of murder with constructive intent. To that extent the appeal against conviction succeeds.

SENTENCE

The appellant was sentenced on the basis of having been found guilty of murder with actual intent. That verdict has been altered. It follows therefore that this Court is at large on the question of sentence. The issue of the existence or otherwise of extenuating circumstances has to be determined on the basis that the appellant is guilty of murder with constructive intent.

It is now accepted that constructive intent on its own or taken together with other factors can constitute extenuation. There is no evidence that the appellant's actions were influenced by drink. The influence of alcohol, therefore, is not a factor in this case. The stab wound was inflicted in the course of an assault largely pursued by the appellant and his sons over a petty issue, namely the alleged theft or robbery of $50. Given these facts, does the constructive intent on its own in this case constitute a circumstance of extenuation justifying the imposition of a sentence other than a death sentence? In my view it does. I hold this view because the foreseeability of the possibility of death in this case was rather remote. If the

foreseeability of death was close I might have concluded otherwise, see *S v Sigwahla, supra*.

This is a very serious case of murder deserving of a very serious punishment. As I have already stated there was no provocation. The appellant was not under the influence of alcohol. In my view, taking all the factors of this case into account, the appellant should be sentenced to life imprisonment.

Section 25(1) and (2) of the Supreme Court Act [Chapter 7:13] confers on this Court jurisdiction to rectify any irregularity in the proceedings of an inferior court that might come to its attention.

What I have said in respect of the conviction of the appellant applies with equal if not greater force to Gilbert and Casper. Their role in the assault of the deceased does not sustain the inference that they foresaw the death of the deceased. There is no evidence that they were aware that their father was in possession of the knife used to stab the deceased although they must have seen the axe which may or may not have been used in the assault. On the facts of this case Casper and Gilbert ought to have foreseen the possibility of death and should both have been convicted of culpable homicide and not murder with constructive intent. In their case the verdict of murder is hereby set aside and substituted with culpable homicide.

They both were sentenced on the basis of a conviction for murder which has been set aside. Consequently that sentence cannot stand and is hereby set aside. In my view, taking into account all the aggravating and mitigating

circumstances of this case the justice of this case can be met by the setting aside of twelve years' imprisonment with labour imposed on each of them and substituting a sentence of seven years' imprisonment with labour.

In the result the appeal succeeds to the following extent. The appellant's conviction of murder with actual intent is altered to one of murder with constructive intent and the sentence of death is set aside and substituted with life imprisonment.

The convictions of Gilbert and Casper are hereby altered from murder to culpable homicide. The sentence of twelve years' imprisonment with labour is reduced to seven years' imprisonment with labour in respect of both.

EBRAHIM JA: I agree

ZIYAMBI JA: I agree

Pro Deo