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Judgment No. SC 23/10
Crim. Appeal No. 201/05

(1) MASIMBA MBAYA (2) SAMSON RAISI v THE STATE

SUPREME COURT OF ZIMBABWE
CHIDYAUSIKU CJ, SANDURA JA & GWAUNZA JA
HARARE, OCTOBER 30, 2006 & MAY 24, 2011

D Chinawa, for the first appellant

G Chingoma, for the second appellant

V Shava, for the respondent

CHIDYAUSIKU CJ: The appellants in this case were charged with and convicted of murder with constructive intent. The trial court found no extenuating circumstances and sentenced the appellants to death. The appellants now appeal against both conviction and sentence.

Counsel for the appellants submitted that they have no useful submissions to make in respect of both appellants' appeals against their conviction.

The evidence against the appellants is overwhelming. I am satisfied that the concession is properly made. The appellants admitted taking part in the robbery during the course of which the deceased was killed. They, however, contend that it was one Chanaka Sithole ("Sithole") who shot and killed the deceased in the

course of the robbery. The court *a quo* accepted the appellants' contention that it was Sithole who shot the deceased. The court *a quo* found the appellants guilty of murder with constructive intent, on the basis of common purpose.

The evidence that Sithole and the appellants were acting in common purpose is overwhelming. The facts that the court *a quo* found proven are that on 12 November 1998 the appellants, together with one Sithole, left Marondera and proceeded to Brookmead Farm in Bromley, intent on carrying out a robbery. When they arrived at Brookmead Farm one Edward Charles Benzies was fatally shot in the course of the robbery. The court *a quo* accepted that the person who pulled the trigger was Sithole, who has since died.

The court *a quo* found that each of the appellants played the rôle in the robbery set out in their respective warned and cautioned statements. In his warned and cautioned statement the first appellant, Masimba Mbaya, had this to say:

> "I have understood the caution but I do/do not admit to the charge. What happened is that myself and Samson Raisi and Chanaka Sithole left Marondera with the intention of stealing at Bromley, Brookmead Farm. When we arrived there, we shared the things which we had brought which include(d) two knives and a gun. I took a knife. Samson Raisi also took a knife. Chanaka Sithole was the one who had the gun which he had placed inside his trousers.
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> We were seen by the guard who looks after that place and gave a chase after him and managed to stop (him) and then we started fighting him which led to the white man hearing what was taking place outside. The white man came outside holding a gun and we left the guard for the white man. I kicked the gun upon arrival and it dropped down together with the white man.
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> I tied him up with a green vest. Whilst I was tying him, I heard a gunshot. I did not know that he had been shot since he was talking. Myself and my other colleagues Samson Raisi and Chanaka Sithole then got into the house and took two VCRs, three envelopes which had money amounting to $900.00 if I am not mistaken, and a big mirror."

The rôle of the appellant Samson Raisi appears in his own warned and cautioned statement which, in relevant part, reads as follows:

> "I have understood the caution but I do not admit that it is me who did the killing. We left being three, thus myself, Masimba Mbaya and Chanaka Sithole, going to look for money at Brookmead Farm. We left Marondera during night time and boarded a lift to Bromley. I was carrying a bag containing a gun belonging to Masimba Mbaya and Chanaka Sithole. In the same bag were two knives belonging to Masimba Mbaya and Chanaka Sithole. When we arrived at Brookmead, Chanaka Sithole removed the gun from the bag and Masimba Mbaya also removed one knife. I was left standing by the gate to Brookmead Farm whilst the two, Masimba Mbaya and Chanaka Sithole, got into the yard. When these two were within the premises, they got hold of the guard and later called me to look after the guard whom they had already tied up his both hands. Masimba Mbaya (and) Chanaka Sithole later got/went to the house of a white lady Janipher and I heard a sound of a gunfire. The guard later escaped from me and I went to inform my fellow mates. It was at this time I saw a lame white man who was tied both hands with I white a white (sic) vest.
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> I got into the house and took one VCR and Masimba Mbaya and Chanaka Sithole were in some bedrooms. When I saw vehicle light(s) coming, I called them and they came. Masimba Mbaya came holding another VCR and Chanaka Sithole came out holding a mirror and his gun. We left that place running and started to walk after a distance heading for Seke. When we were near Seke Road, Masimba Mbaya suggested that we hide the gun and he took it from Chanaka Sithole and hid it in a hole."

These warned and cautioned statements were admitted in the court *a quo* as having been made freely and voluntarily by each of the respective appellants. The appellants did not in their Defence Outline challenge the admissibility or accuracy of the warned and cautioned statements. The appellants' evidence in court was at variance with the warned and cautioned statements. Their evidence in court sought to play down their rôle in the murder. The court rejected their evidence as an afterthought intended to exculpate or minimise the rôle that the appellants played in the murder. This assessment of the evidence by the court *a quo* cannot be faulted. I accordingly accept that the court *a quo* was correct in concluding that the rôle played

by each of the appellants was as set out in the warned and cautioned statements. On this evidence, murder with constructive intent was the correct verdict.

Having found the appellants guilty of murder with constructive intent, the court *a quo* found that there were no extenuating circumstances and imposed the death sentence.

Counsel for the appellants submitted that extenuating circumstances existed in this case. In this regard, counsel relied on the finding of constructive intent and the rôles that the appellants played, as set out in their evidence in court. As I have already stated, the evidence of the appellants was properly rejected. The sentencing of the appellants was therefore correctly based on the rôles the appellants played, as set out in the warned and cautioned statements.

The only mitigating fact is that the court found constructive intent as opposed to actual intent. As against this, it is common cause that the deceased was brutally gunned down in the course of an armed robbery. The deceased was totally neutralised, having been tied up and secured to a chair. The deceased was disabled and cannot have posed any danger to the appellants when he was cold-bloodedly shot and killed by Sithole. The killing of the deceased was downright cruel and senseless. The appellants did nothing to dissociate themselves from this barbaric act. If anything, they proceeded with the robbery in the full realisation of what Sithole had done.

Given the above situation, the question that arises is whether the court *a quo* should have found circumstances of extenuation to exist.

This Court, as an appellate court, can only interfere with the finding of the lower court regarding the existence or otherwise of extenuating circumstances on two grounds. Firstly, this Court can only interfere with the finding of the existence or otherwise of extenuating circumstances if the court *a quo* misdirected itself, in which case this Court will be at large and can make its finding in place of that of the court *a quo*. The second basis on which this Court can interfere with the finding that no extenuating circumstances existed is if it is satisfied that the finding of no extenuating circumstances is one which no reasonable court could have reached.

Dealing with the first basis for interfering with the finding of no extenuating circumstances, I am satisfied that the court *a quo* did not in any way misdirect itself in considering the existence or otherwise of extenuating circumstances. Indeed, neither of the appellants' counsel suggested that there was such a misdirection. Accordingly, this Court is not at large on the issue of extenuation on the basis of a misdirection.

I now turn to the second possible basis for interference.

In the case of *S v Steel* AD 53/73, at p 3 of the cyclostyled judgment, MACDONALD CJ had this to say:

> "This Court can only interfere with the finding of the trial court that there were no extenuating circumstances if it considers that the trial court's decision was one which a reasonable court couldn't reach."

Having regard to the facts of this murder, there is no way it can be said that the conclusion of the court *a quo* was one which no reasonable court could have reached, in particular taking into account the following facts: (1) the killing of the deceased was done in the course of a robbery. In this regard GUBBAY CJ, in the case of *S v Sibanda* 1992 (2) ZLR 438 (S) at p 443, had this to say:

> "Warnings have frequently been that, in the absence of weighty extenuating circumstances, a murder committed in the course of a robbery will attract the death penalty."

I associate myself with the remarks of the learned CHIEF JUSTICE in *Sibanda's* case *supra*.

There were no weighty circumstances in this murder that was committed in the course of a robbery which would warrant the imposition of a sentence other than the death sentence. The killing of the deceased, as the court *a quo* correctly observed, was callous and senseless, in that the deceased was a cripple who had been tied up and posed no danger to the robbers at the time he was shot. The killing of the deceased in the circumstances of this case reveals total contempt for human life by the appellants. The actions of both appellants indicate that although they did not actually pull the trigger, they both associated themselves wholeheartedly with the actions of Sithole.

In the result, I am satisfied that the court *a quo* did not misdirect itself on the issue of extenuating circumstances, and that the conclusion it reached cannot

by any stretch of the imagination be categorised as one which no reasonable court could have reached.

Accordingly, the appeals against the sentence are also dismissed.

Finally, I wish to point out that the delay in finalising this matter is regretted. The delay was due to the fact that the file in this matter was inadvertently filed away before the judgment was handed down.

SANDURA JA: I agree

GWAUNZA JA: I agree

Pro deo