DISTRIBUTABLE (40)

Judgment No. SC 51/09
Crim. Appeal No. 182/01

CHARLES FARAI MUBIKA v THE STATE

SUPREME COURT OF ZIMBABWE
SANDURA JA, ZIYAMBI JA & GARWE JA
HARARE, JULY 15, 2008

M Kamudefwere, for the appellant

R K Tokwe, for the respondent

SANDURA JA: The appellant was found guilty by the High Court on two counts. On the first count he was found guilty as an accessory after the fact to the murder of Heather Margaret Desmond ("the deceased"), and was sentenced to twelve years' imprisonment with labour. On the second count he was found guilty of theft of the deceased's motor vehicle and cellphone, and was sentenced to eight years' imprisonment with labour. He appealed against conviction on each count.

After hearing both counsel, we allowed the appeal in respect of the first count, quashed the conviction and set aside the sentence of twelve years' imprisonment with labour. However, in respect of the second count, we dismissed the appeal in its entirety. We indicated that our reasons would be given in due course. I now set them out.

The facts in this case are as follows –

1. The deceased lived at 12 Broadmead Lane, Chisipite, Harare, and Godden Matanga ("Godden") was her gardener. At the time of her death the deceased and her husband had been separated for eighteen days.

2. On Saturday, July 1, 2000, Godden attacked and killed the deceased in her garden. He then dragged the deceased's body onto a burning compost heap, and placed some logs and old vehicle tyres on top of the body in order to make sure that the body was incinerated.

3. Godden then went to the deceased's bedroom and took the deceased's handbag, wallet, cellphone, sunglasses, house keys and car keys, before returning to the compost heap where the deceased's body was burning. At the compost heap he removed the money from the deceased's wallet, about Z$350, and threw the wallet and the handbag into the fire. Shortly thereafter, he quickly left the premises and went to see his cousin, Guideson Kanyemba ("Guideson") at 29 Steppes Road in Chisipite. He briefed Guideson on what he had done, and gave him the cellphone and some money, and asked him to sell the cellphone. Godden then returned to his cottage at the deceased's residence at about 6 pm.

4. After receiving the cellphone from Godden, Guideson took it to his friend, the appellant, in Mufakose Township, Harare, on Saturday evening,

July 1, 2000. He found the appellant at a party at about 10.30 pm and spoke to him privately. He showed the appellant the cellphone and told him that it was his, and that he wanted to sell it because he wanted to raise some money so that he could buy some petrol for a motor vehicle he had left at Chisipite. When the appellant asked him whose motor vehicle it was, Guideson said it was his employer's vehicle, but added that the employer was not in Harare. The appellant advised Guideson that nobody would buy the cellphone at that time of night, and that it was better for them to look for a buyer on the following day. However, Guideson said he needed some money urgently and was prepared to sell the cellphone for a price as low as Z$3 500 or Z$3 000. The two men then decided to go to a night club in the city where the appellant sold the cellphone for Z$2 500, out of which he was given Z$500 by Guideson. The two men then returned to the appellant's residence in Mufakose Township.

5. On Sunday, July 2, 2000 Guideson left Mufakose in the morning and went to the deceased's residence to collect the deceased's motor vehicle. He saw Godden at his cottage. Godden gave him the keys for the deceased's motor vehicle, and the two men pushed the motor vehicle out of the premises. Guideson then drove the motor vehicle to the appellant's residence in Mufakose, leaving Godden at the deceased's premises.

6. At about 10.30 am on that Sunday, Guideson arrived at the appellant's residence. The appellant was surprised to see the motor vehicle and asked

Guideson several times "if there was nothing fishy about the car". In reply, Guideson laughed and asked why the appellant was so scared. Guideson then gave the car keys to the appellant and invited him to take the vehicle on a test drive around Mufakose. The appellant agreed, and both men got into the vehicle and drove around the township, with the appellant driving. At about 2.30 pm they drove to a village in Zvimba Communal Lands, where Guideson's wife lived. They were there for about an hour and then returned to Mufakose in the evening, with the appellant still driving the vehicle. At about 11 pm they took the vehicle to a guarded car park in Mufakose for safekeeping during the night. They gave the guard at the car park false particulars of the owner of the vehicle.

7. The appellant and Guideson had the deceased's vehicle in their possession for about four days before they were arrested. During that period the vehicle was driven by the appellant most of the time in and around Harare, and would be parked at the guarded car park in the evening. On one occasion the two men could not buy any petrol for the vehicle because they did not have any money. They, therefore, removed two speakers from the front doors of the vehicle and sold them for Z$300.

8. Eventually, Godden, Guideson and the appellant were charged with the murder of the deceased, and with theft of the deceased's motor vehicle, cellphone and other items. They were tried together. At the end of the trial, Godden was found guilty of murder with actual intent and was

sentenced to death. On the theft charge he was found guilty and sentenced to eight years' imprisonment with labour. The appellant and Guideson were found guilty as accessories after the fact to murder, and were each sentenced to twelve years' imprisonment with labour. On the theft charge, they were found guilty and were each sentenced to eight years' imprisonment with labour.

9. Thereafter, Godden and Guideson noted appeals against conviction and sentence, but the appellant appealed against conviction only. Godden's appeal was dismissed by this Court in its entirety, and Guideson passed away before his appeal was heard. It was, therefore, only the appellant's appeal which remained to be heard.

In his heads of argument Mr *Tokwe*, who appeared for the State, conceded that the appellant was wrongly convicted as an accessory after the fact to murder. In our view, that concession was properly made.

In his judgment the learned trial Judge did not consider what constituted an accessory after the fact to murder. Had he done so, he would have realised that there was no evidence before him which established that the appellant was an accessory after the fact to murder.

In *South African Criminal Law and Procedure* Vol I, 3 ed, by J M Burchell, the learned author defines an accessory after the fact at p 332 as follows:

> "An accessory after the fact is someone who unlawfully and intentionally after the completion of the crime associates himself or herself with the commission of the crime by helping the perpetrator or accomplice evade justice.
>
> …
>
> A typical example of an accessory after the fact is someone who does not play a part in the killing of another but who intervenes after the victim's death has resulted and assists the perpetrator by disposing of the corpse or by helping the perpetrator evade justice in some other way."

Applying that definition to the facts of this case, it is quite clear that there was no evidence indicating that the appellant helped Godden evade justice after the deceased's murder. In fact, no such allegation was made against the appellant.

However, the evidence in respect of the theft charge stands on a different footing. In our view, the principles to be applied in determining whether the appellant is guilty of theft were set out by BEADLE CJ in *S v Ushewokunze* 1971 (1) RLR 107 (AD) at 112 A-C as follows:

> "I would consider, therefore, that, if the State shews that an accused, when he received the stolen goods, must have foreseen the real possibility that the goods had been stolen and did not care whether the goods had been stolen or not, that is sufficient to prove guilty knowledge. It is not necessary to go further and decide why the accused did not make inquiries as to the ownership of the goods. If the facts shew that he recklessly received the goods not caring whether or not they were stolen, the crime is proved, provided, of course, that he did not receive them for some lawful purpose, such as returning them to their owner or handing them over to the police."

Applying those principles to the facts of the present case, we were satisfied that when the appellant received the motor vehicle from Guideson he must have

foreseen the real possibility that it had been stolen, and did not care whether it had been stolen or not.

In our view, it is clear from what the appellant said in his warned and cautioned statement that he did not believe Guideson's explanation that the motor vehicle belonged to his (i.e. Guideson's) employer. The appellant said the following:

> "At about 10.30 am Guideson returned home with a cream Nissan Sunny Station Wagon, and I was very surprised because I thought he was lying about the car. I asked him several times if there was nothing fishy about the car and he laughed at me saying why was I so scared. I was not convinced since the car had its original keys and nothing was broken …".

Thereafter, the appellant's behaviour was not the behaviour of an innocent person. For example, whenever he took the vehicle to the guarded car park at Mufakose for safekeeping during the night, he gave the security guard at the car park false particulars of the owner of the vehicle, something an innocent person would not do.

In the circumstances, as theft is a "continuing crime" in the sense that it continues to be committed as long as the thief or his agent is in possession of the stolen property, one who assists such a person in depriving the owner of his property after the original taking is guilty of theft. Accordingly, when the appellant received the stolen vehicle and drove it around Harare he committed theft of that vehicle.

The same applied to the cellphone. Guideson looked for the appellant at Mufakose and found him at a party at about 10.30 pm. He took the appellant aside and

showed him the cellphone. He told the appellant that the cellphone was his, and that he was selling it because he needed some money urgently. He asked the appellant to assist him in finding a buyer. When the appellant told him that it was not possible to find a buyer at that time of night, and that it would be better to look for a buyer on the following day, Guideson said that as he needed the money urgently he was prepared to sell the cellphone at a "give away price of Z$3 500 or Z$3 000". The two men left the party at about 11.15 pm and went to a night club in the city where the appellant sold the cellphone for Z$2 500.

In our view, when the appellant received the cellphone from Guideson in order to look for a buyer, he must have foreseen the real possibility that the cellphone had been stolen, and did not care whether it had been stolen or not. The fact that Guideson, who was employed as a general hand, was selling an expensive cellphone at night, and was prepared to sell it at a "give away" price, should have put the appellant on his guard.

Accordingly, we were satisfied that the appellant was properly found guilty of theft of the deceased's motor vehicle and cellphone. There was no appeal against the sentence of eight years' imprisonment with labour.

It was for these reasons that after hearing both counsel we allowed the appeal in respect of the first count, and dismissed the appeal in respect of the second count.

ZIYAMBI JA: I agree

GARWE JA: I agree

Musunga & Associates, appellant's legal practitioners