REPORTABLE (69)

BARON DUBE
v
THE STATE

SUPREME COURT OF ZIMBABWE
GWAUNZA DCJ, CHITAKUNYE JA & MWAYERA JA
BULAWAYO MARCH 21, MARCH 24 & JULY 18, 2022

T. Mpofu with *L. Mudisi*, for the appellant.

K. Ndlovu, for the respondent.

CHITAKUNYE JA: This is an appeal against the whole judgment of the High Court sitting at Bulawayo convicting the appellant of murder in contravention of s 47(1)(b) of the Criminal Law (Codification and Reform) Act, [*Chapter 9:23*]. The appellant was sentenced to 10 years imprisonment.

BACKGROUND

The appellant was arraigned before the High Court facing a charge of murder in contravention of s 47 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] (the code). It was alleged that on 26 September 2018, at Atlas Mine, Esigodini, the appellant shot and killed one Antony Prince Bvundura (the deceased). The State's case was that on the day in question, at approximately 23:00 hrs, the appellant armed himself with two guns; a Voere Rifle, Serial number P 93912/249829 and a Taurus Revolver Serial number QD 579746. The appellant, in the company of a number of people armed with various items such as machetes,

axes, shovels and picks, drove his Toyota Land Cruiser motor vehicle to Atlas Mine where there was a gold rush.

Upon arrival at the mine, the appellant disembarked from his vehicle carrying the two guns. He had the rifle in one hand and a bottle of beer in the other, with the revolver tucked in his trousers by the waist. He ordered the illegal artisanal miners he found on site to leave the site, claiming that the mine belonged to him. The artisanal miners complied and moved out of the pits with their tools. The persons he had brought with him then moved into the pits vacated by the dispersing miners.

The deceased, who was one of the artisanal miners, also moved out of the pits and began making his way off. The State's witness, Mkhulisi Sibanda, one of the artisanal miners ordered to leave, testified that as the artisanal miners (miners) were leaving the site, the appellant got into an argument with one Mncebisi Mguni who had been ordered by the appellant to leave the scene without his tools. Mncebisi was upset at the order to leave his tools behind and started exchanging insults with the appellant. Mncebisi was walking with one Mzingaye and the deceased. It was alleged that amidst that exchange the appellant fired one of his guns in the direction of the three men, probably with the intention of shooting Mncebisi. However, it was the deceased who was shot and killed.

The owner of Atlas mine testified that both the appellant and miners he found at the site were illegal miners he had tried to chase from the mine to no avail.

The appellant pleaded not guilty to the charge and stated that it was not his intention to cause the death of the deceased. He stated that he was employed by Khalanyoni Ranch to

safeguard against vandalism of infrastructure, especially the roads, from illegal artisanal miners. On the night in question, he received information that artisanal miners were digging on a farm road in search of gold. He then drove to the scene with the intention of chasing them away.

The appellant admitted that he was armed with the two guns. He stated that upon arrival at the site, he parked his vehicle facing away from the place where the gold mining was taking place. He disembarked and ordered the illegal miners to vacate but they resisted and started throwing stones and other unidentified objects at him. Sensing danger, he backtracked towards his vehicle. As he was backtracking, he stepped on a stone, slipped and the revolver, which is self-cocking, fell to the ground. He abruptly picked it up and, in the process, it accidentally discharged. At that moment he did not realise that a person had been shot and killed. The appellant further stated that after the miners dispersed, he left the scene. He therefore claimed that he lacked both the intention to discharge the fire arm and the intention to kill the deceased or anyone. He also denied being negligent in anyway.

Upon the production of a post-mortem report and hearing evidence from a police forensic expert, it was common cause that the deceased died from gunshot wounds inflicted by the appellant's gun on the night in question. He was shot on the upper left arm and on the chest resulting in the destruction of the heart.

The major issue the court *a quo* had to grapple with was whether the gun accidentally discharged or the appellant deliberately pulled the trigger resulting in the fatal shooting. The consequence of either finding was to inform the determination of the appellant's

guilt or otherwise upon consideration of the appropriate legal requirements for the offence charged.

The court *a quo*, upon an analysis of the evidence and the demeanour of those who testified, believed the State's version on the key issues in question. It found the State's witnesses to be credible.

The key witness, Mkhulisi Sibanda, was at the scene and his evidence was that there was no resistance by the miners except for an exchange of insults between Mncebisi and the appellant. This exchange was a result of the appellant's discriminatory order for Mncebisi to leave his tools behind whilst his fellow miners were allowed to take their tools. This was the more probable cause of the deliberate shooting at Mncebisi and his colleagues.

On the other hand, the court *a quo* found the appellant's story to be unbelievable and thus false on the ground, *inter alia*, that the appellant gave contradictory evidence in his defence outline and in his evidence in chief. The court *a quo* noted that in the defence outline the appellant stated that upon ordering the miners to vacate, they attacked him. As a consequence of the attack he backtracked towards his vehicle. In the process he stepped on a stone, slipped and the revolver fell onto the ground. He abruptly picked up the revolver resulting in its accidental discharge. In his evidence in chief, on the other hand, the appellant testified that upon ordering the miners to vacate they did not resist and did not show any signs of violence. He was holding his rifle, a bottle of beer, with the revolver tucked in his trousers by the waist. He did not anticipate any violence and so he moved aside to relieve himself. It was then that he heard some noise and torches were lit. Stones were thrown at him. In a bid to avoid being hit by the stones he retreated. As he was blinded by lights from torches, he

stumbled and fell into a pit. The firearm fell onto rubble which was stony. He immediately tried to retrieve it and it discharged in the process. He did not see where he touched it; all he noted was that the firearm discharged in that process.

The court *a quo* held, *inter alia*, that the appellant recklessly fired the revolver at the three miners, who included Mncebisi, Mzingaye and the deceased. In the circumstances he must have realised that there was a real risk or possibility that his shooting at the trio might cause death. Despite this realisation the appellant proceeded to shoot in the direction of the trio who were going away. It was thus reckless of him to discharge the firearm in the direction of the deceased and his colleagues. The appellant was therefore convicted of murder in contravention of s 47(1) (b) of the code. Consequently, the court sentenced him to 10 years imprisonment.

Aggrieved by the decision of the court *a quo*, the appellant appealed against both conviction and sentence to this Court.

SUBMISSIONS BEFORE THIS COURT

Ad conviction

In motivating the appeal Mr *Mpofu*, for the appellant, submitted that the court *a quo* erred at law by making findings contrary to the evidence placed before it. He submitted that the postmortem report showed that the bullet penetrated from the left yet the evidence before the court *a quo* was that the deceased had been shot whilst fleeing. He averred that if the deceased was shot whilst running away the bullet ought to have penetrated from the back. It was his case that the burden of proof required in a criminal matter is proof beyond reasonable doubt and as such the state ought to have led expert evidence so as to clarify the possibility of

the bullet penetrating from the left in the circumstances. He also submitted that the court *a quo* erred in accepting the State's evidence and rejecting the appellant's evidence. On the finding that the appellant's versions were contradictory Mr *Mpofu* submitted that there was no contradiction at all. The defence outline was skeletal whilst the evidence in chief was the fuller evidence. He thus sought that the appeal ought to succeed.

Per contra, Mr *K. Ndhlovu,* for the respondent, submitted that the evidence which was placed before the court *a quo* ought to be looked at holistically. He submitted that the evidence led established that the appellant was never under attack and did not fall into a pit as he was now contending in his evidence in chief. Counsel further submitted that the appellant's version was proved not to be true. The court *a quo* did not err in convicting the appellant as it did. Counsel also submitted that the court *a quo* made findings of fact and credibility which aspects the appellant has not alleged or shown to be in defiance of logic or inconsistent with the evidence adduced as per the record of proceedings. In fact, nothing has been advanced by the appellant to show that the findings of fact were wrong.

Regarding the issue of intention, Counsel submitted that the evidence showed that whilst the appellant may have intended the shot for Mncebisi whom he was exchanging insults with, he must have been aware of the real risk or possibility of shooting any other person, including the deceased who was close to Mncebisi as the trio were moving away. The appellant would have been aware of the risk or possibility of hitting the deceased but he nevertheless proceeded to discharge the revolver in the direction of the trio. In the circumstances he intended the consequences that came as a result of his conduct.

APPLICATION OF THE LAW TO THE FACTS

Although the appeal raises several grounds of appeal there is only one issue for determination that is whether the court *a quo* erred in convicting the appellant from the evidence adduced.

Section 47(1) (b) of the code under which the appellant was convicted states that: -

> "(1) Any person who causes the death of another person–
> (*a*) …...
>
> (*b*) realising that there is a real risk or possibility that his or her conduct may cause death, and continues to engage in that conduct despite the risk or possibility; shall be guilty of murder.

The test for ascertaining the state of mind under para (b) is provided for in *s* 15 of the code as follows: -

> "(1) Where realisation of a real risk or possibility is an element of any crime, the test is subjective and consists of the following two components–
> (*a*) a component of awareness, that is, whether or not the person whose conduct is in issue realised that there was a risk or possibility, other than a remote risk or possibility, that–
> (i) his or her conduct might give rise to the relevant consequence; or
> (ii) the relevant fact or circumstance existed when he or she engaged in the conduct; and
> (*b*) a component of recklessness, that is, whether, despite realising the risk or possibility referred to in paragraph (*a*), the person whose conduct is in issue continued to engage in that conduct."

In instances where death is not of the targeted person s 57 of the code provides that:

> "If any person-

a) does or omits to do anything in relation to another person which, if it caused that other person's death, would constitute murder, infanticide or culpable homicide; and
b) by the conduct referred to in paragraph (a), causes the death of someone other than his or her intended victim;

he or she shall be guilty of the following crimes-

(i) …
(ii) in respect of the person whose death he or she has actually caused-
  (a) murder or infanticide, as the case may be, if he or she realised that his or her conduct involved a real risk or possibility of causing the death of someone other than his intended victim; or
  (b) culpable homicide, if the requisites of that crime are satisfied."

One would, therefore, not escape liability simply because they ended up killing the wrong person. What is of importance is to ascertain if all the essential elements have been proved beyond a reasonable doubt irrespective of the identity of the victim.

It is trite that there are four basic essential elements that must be proved to sustain a conviction of murder. These are: - (i) causing death of (ii) another human being; (iii) unlawfully; and (iv) intentionally.

The first three essential elements were accepted as common cause. The appellant caused the death of the deceased and this was unlawful as there was no lawful justification for it. The contentious issue was on whether the appellant had the requisite intention to cause the death. It is in this respect that at the end of the trial the court *a quo* found that the appellant was reckless in that despite the realisation that there was a real risk or possibility of causing death by discharging a lethal firearm in the direction of the trio (Mncebisi, the deceased and Mzingaye) he, nevertheless, proceeded to discharge the firearm in that direction. He thus intended the resultant consequence. He is therefore guilty in terms of s 47(1) (b) of the code. This appeal is essentially premised on that finding.

The appeal mainly challenged the findings of fact made by the court *a quo* and the findings on credibility. In *S v Mlambo* 1994 (2) ZLR 410 (S) p 413, GUBBAY CJ stated that:

> "The assessment of the credibility of a witness is *par excellence* the province of the trial court and ought not to be disregarded by an appellate court unless satisfied that it defies reason and common sense."

In discussing circumstances under which an appellate court may interfere with the findings of credibility of a witness by a lower court in *Gumbura v The State* SC 78-14 p7 PATEL JA *(*as he then was*)* stated as follows:

> "As regards the credibility of witnesses, the general rule is that an appellate court **should ordinarily be loth to disturb findings which depend on credibility**. However, as was observed in *Santam BPK v Biddulph* (2004) 2 All SA 23 (SCA), a court of appeal **will interfere where such findings are plainly wrong. Thus,** the advantages which a trial court enjoys should not be overemphasised. Moreover, findings of credibility must be considered **in the light of proven facts and probabilities**."(my emphasis)

I am of the view that in the present case there is no basis for interfering with the court *a quo*'s findings on credibility of State witnesses. The evidence on record tends to support such findings. The court *a quo* believed the evidence of the State witnesses and found that the defence given by the appellant in the court *a quo* had irreconcilable contradictions and inconsistencies. The crux of the appellant's defence was based on his version of events that the firearm accidentally discharged. The irreconcilable contradictions and inconsistencies regarding how the firearm discharged was thus fatal to his case. As already noted above, the appellant's defence outline was to the effect that upon arrival at the scene and ordering the miners to vacate, they resisted by attacking him from the onset. Sensing danger he backtracked towards his vehicle, stepped on a stone, slipped and the firearm fell down. As he was in the process of picking up the firearm it accidentally discharged thereby shooting and killing the deceased person. In the evidence in chief, he testified that upon arrival he ordered the miners to vacate and there was no resistance. The situation was such that he did not anticipate any

violence. He then went aside to relieve himself. It was at that juncture that he then heard some noise. Stones and other objects were now being thrown at him. He retreated towards his vehicle and, in the process as he was blinded by light from torches, he stumbled and fell into a pit that was knee deep. The firearm fell onto a rubble which was 'stoney'. He immediately tried to pick it up and it accidentally discharged.

The submission by Mr *Mpofu* that there are no contradictions but that the appellant gave a skeleton defence in the defence outline which was later developed in the evidence in chief lacks merit. The purpose of a defence outline is to inform the State and the court about the nature of the defence that one intends to adopt as well as to define the issues between the State and the defence. This principle was emphasised in the case of *S v Hitschmann SC 2-07 p5*:

> "The purpose of a defence outline is, basically, to provide an accused person with the opportunity to explain his attitude in relation to the charge he is facing, or to indicate the basis of his defence."

See also *Magodo v The State* SC 25-03 and *s* 66(6) (b) of the Criminal Procedure and Evidence Act, [*Chapter 9:07*]

In *casu*, the defence outline was clear that there was resistance from the onset upon ordering the miners to vacate. In terms of his evidence in chief there was no resistance at the onset; resistance only arose after he had gone aside to relieve himself.

This latter version by the appellant on the initial reaction of the miners is consistent with the State's evidence that there was no resistance at the outset from the miners upon being ordered to vacate. It thus corroborates the State's evidence on this aspect. Mkhulisi testified

that after the appellant ordered the miners to vacate, they complied. He also stated that the contention only arose when Mncebisi was ordered to leave his tools in the shafts. That is when Mncebisi started arguing with the appellant in an attempt to retrieve his tools. Unable to retrieve his tools, Mncebisi began making his way off exchanging insults with the appellant. It was the witness's testimony that this exchange of insults was probably what caused the appellant to shoot in Mncebisi's direction, who was in the company of the deceased and Mzingaye. The witness testified that as the gunshot was fired during the exchange of unpalatable words between the appellant and Mncebisi, it was most probably intended for Mncebisi but it missed him and landed on the deceased. Upon examining the events, the exchange of unpalatable words may indeed have been the cause for the shooting and since this exchange was between these two protagonists the shot could have been aimed at Mncebisi. The court *a quo* cannot be faulted for accepting this witness' evidence as credible.

Further improbabilities were also noted in the appellant's evidence. The appellant testified that when he arrived at the scene, he parked his vehicle with lights facing away from the direction of the miners. Such parking would not have enabled the miners to see that he was armed. This version of events was held to be highly improbable. It is highly unlikely that the appellant would go to the scene to assess the damage being done to the road and park the car with the lights facing away from the very damage he was there to assess. It is therefore more believable that the lights were facing the miners as was testified to by Mkhulisi.

Further, I find merit in the court *a quo*'s finding that the appellant parked the vehicle with lights facing the miners, because Mkhulisi was able to see that the appellant was armed with two firearms; a rifle in his hand and a revolver tucked in his trousers by the waist. The appellant accepted that Mkhulisi saw the firearms. At about 23.00 hours at night, the

witness could not possibly have seen the revolver if there was no light. It is therefore difficult to believe that the miners, armed with digging tools only would have dared attack the appellant who was visibly armed with two lethal firearms. It would have been a 'suicide mission' as the court *a quo* so eloquently put it.

The evidence by the appellant that the revolver fell down when he slipped or fell into a pit was rejected by the court *a quo* in preference to the State's evidence that the firearm did not drop down and the appellant did not fall at all. It was not disputed that when given the opportunity to make indications at the scene, the appellant declined. The indication could have helped in establishing the place where he alleged the firearm dropped to the ground and the pit he fell into as well as the stones allegedly thrown at him by the miners.

Another improbability noted from the appellant's evidence is that he could not explain how the firearm that discharged as he was picking it up from the ground would have discharged at such an angle or trajectory as to hit the deceased on the upper part of the body since the deceased was on his feet. Equally he could not explain how after he fell into a pit, as per his second version, the bullet from a firearm he was picking therefrom would strike deceased in the upper part of the body. The failure to explain how the bullet could have hit the deceased on the upper part of the body when the appellant was picking it from the ground or the pit leaves the State's evidence that the appellant deliberately fired the firearm in the direction of Mncebisi as the only plausible or credible explanation. The conclusion that there was no accidental discharge cannot, in the circumstances, be faulted.

The inconsistencies and improbabilities evident from the appellant's testimony are such that his version cannot be true. As a result, the court *a quo* cannot be faulted for believing

the respondent's version of events of what transpired on the fateful day over the appellant's version.

The conclusion that the appellant was reckless in firing the firearm in the direction of Mncebisi and others in his company is sound. The circumstances were such that he ought to have realised that there was a real risk or possibility of hitting someone and thus causing their death. Despite that realisation he proceeded to discharge the lethal firearm towards Mncebisi and company.

I therefore find that there is nothing warranting this Court's interference with the verdict of the court *a quo*.

Ad sentence

Though the appellant raised one ground of appeal against sentence, this ground was not persisted with. Counsel for the appellant submitted that he had difficulties in formulating any argument against the sentence imposed.

The respondent's position was that the sentence was appropriate considering the circumstances of the case.

It is trite that the issue of an appropriate sentence is within the discretion of the trial court. An appellate court will not lightly interfere with the sentence of the trial court unless it is established that the discretion was not judiciously exercised; that is, the sentence is vitiated by irregularity or misdirection or is so severe as to induce a sense of shock. *S v Mundowa* 1998(2) ZLR 392 at 395B-E

It is clear that nothing has been placed before this Court warranting interference with the sentence imposed by the court *a quo*.

DISPOSITION

The appellant lamentably failed to show that the court *a quo* erred in its assessment of the evidence placed before it and in convicting the appellant as it did. Equally the sentence was not shown to be inappropriate in the circumstances. The entire appeal has no merit.

Accordingly, the appeal against both conviction and sentence is hereby dismissed.

GWAUNZA DCJ: I agree

MWAYERA JA: I agree

Mutendi Mudisi & Shumba, appellants' legal practitioners

National Prosecuting Authority, respondent's legal practitioners