

DISTRIBUTABLE (123)  
Judgment No. SC 136/04  
Civil Appeal No. 32/04

**(1) FREDDY NDLOVU (2) NELSON NDLOVU v THE STATE**

SUPREME COURT OF ZIMBABWE  
CHIDYAUŠIKU CJ, ZIYAMBI JA & GWAUNZA JA  
BULAWAYO, NOVEMBER 30 2004 & MAY 19, 2005

*Z Moyo*, for the first appellant

*C Nleya*, for the second appellant

*T Mtetwa*, for the respondent

GWAUNZA JA: The appellants were convicted by the High Court of murder with actual intent, and sentenced to death. They have now appealed to this Court against both their conviction and sentence.

The facts of the matter are as follows:

On the night of November 26, 1999, the deceased, a twenty three year old student at the National University of Science and Technology, was drinking beer at Flamingo Nightclub in Bulawayo. He was in the company of Brenda Ncube, who worked as a cleaner at the nightclub. Having agreed to spend the night together, the deceased and Brenda left the night club around 02.00 a.m. While walking along a footpath, the two were confronted by two people – assailants – who pounced on the deceased. In the attack that ensued, the deceased was overpowered and fell to the ground. He was robbed of the belt he was wearing, and some \$150 00 in cash. He was also struck on the head with a blunt

instrument and suffered fatal injuries described in the post mortem report as brain damage, skull fracture and head injury.

Brenda fled the scene of the attack as soon as the assailants appeared. She went back to the nightclub and reported what had happened. This led to the arrest of the appellants and the late Roy Mguni on suspicion of the murder of the deceased. It was alleged the three had been at the Flamingo Nightclub at the same time as the deceased and Brenda. It was alleged further that they had not only observed the deceased buying Brenda some beer, but also that they, together with other patrons, had overheard Brenda mentioning that she was going to spend the night with the deceased.

The learned trial judge noted in his judgment that the appellants had not disputed the evidence of one Busiwork Tawanda that he had been in the company of the two appellants at the nightclub earlier on the night the deceased was killed. Nor had they disputed the evidence that the two appellants had left the nightclub soon after the deceased and Brenda.

After their arrests the appellants recorded warned and cautioned statements which were confirmed by a magistrate the following day. Neither of them indicated the statements had not been made freely and voluntarily. In his warned and cautioned statement the second appellant stated as follows: -

"I admit the charge of killing Louis Chomuseke. I left Flamingo Night Club in the company of Freddy and Roy to follow behind the deceased, after we had gathered from Brenda that he had money on him. We were following after him with the intention of robbing him of the money. Freddy picked up two stones with which he hit the deceased... He hit him on the head and the person fell down. Freddy immediately searched him and at the same time Roy stabbed him and removed a black belt from him and handed it to me as well as some money and I took possession of them. While all this was taking place I was watching that there were no people approaching. We left there and ran into town. When we later checked we discovered that we had taken \$150 from him".

The first appellant, Freddy Ndlovu, effectively abandoned his appeal. It was submitted on his behalf, by his counsel, that he had no meaningful submissions to make, since there seemed to be strong evidence linking him to the offence. It was also submitted in relation to the sentence passed against him that it was appropriate, given the fact that the murder in question was committed in the course of a robbery.

This concession in my view is properly made. Even though the first appellant denied in his oral evidence that he was at Flamingo Nightclub on the night in question, there was strong evidence linking him to the offence.

Firstly the State's only witness, Brenda (who as a suspected unconvicted accomplice, was properly cautioned) averred that she had seen the first appellant twice that night, firstly at the nightclub while in the company of Busiwork Tawanda, and later at the scene of the murder. It was her evidence that just before she fled the scene, the first appellant had just picked up two stones and was threatening to hit both her and the deceased with them. He had also shouted a warning to her not to report what she had seen. The court *a quo* found Brenda to be a fair witness who did not exaggerate facts. The learned judge pointed out, as evidence of this, that if Brenda had been dishonest and determined to incriminate the first appellant at all costs, she would have informed the court that she had seen him not only pick up the stones, but hit the deceased as well.

Secondly the second appellant as the court *a quo* correctly found, filled the gaps in Brenda's evidence. In his warned and cautioned statement, the second appellant asserted that the first appellant had hit the deceased on the head with two stones that he had picked up, resulting in his (deceased) falling to

the ground. According to the statement, the first appellant had then proceeded to search the deceased and remove the belt he was wearing, which he had handed to the second appellant as his share of the loot.

Thirdly and most importantly, Busiwork Tawanda corroborated Brenda's evidence that it was in his company that the two appellants were drinking before the latter two left to follow Brenda and the deceased upon their departure from the nightclub. As already pointed out the first appellant did not dispute Busiwork's evidence.

The court *a quo* also properly dealt with the question of Brenda's positive identification of the first appellant both at the scene of the murder and at an identification parade. At the scene of the crime, it was her evidence that she recognised the first appellant by his clothes and his voice when he shouted a warning to her as she fled the scene, not to report the matter to the police. At the identification parade, Brenda's evidence was that she was able to identify him since she had known him for about a year. For the first nine or so months of that year, she averred, she had observed but not spoken to him. She had, however, in the last three months, occasionally spoken to him.

Concerning identification, counsel for the State properly cited *S v Nkomo* 1989(3) ZLR 117 SC as an appropriate authority. It is noted in the headnote of that case that:-

Broadly speaking, good identification does not need corroboration or support, but bad identification does. Examples of good identification includes cases where the witness has observed the accused over a lengthy period or many times or where the accused was well-known to the witness.

In *casu*, Brenda's identification, though good in itself, was corroborated by the evidence of Busiwork and that of the second appellant. Thus the first appellant's active participation in the crime was left in no doubt. In addition to this, the first appellant did not help his case when he failed to produce evidence supporting the *alibi* that he came up with for the first time at the trial. His one witness failed to confirm that the first appellant had been at his rural home in Filabusi, on the day the crime was committed.

Taking all this into account, I am satisfied the State proved beyond reasonable doubt that the first appellant hit the deceased on the head with stones, resulting in his death. The State also proved the fatal attack was perpetrated in the course of a robbery.

In the result, I find that the first appellant was properly convicted of, and sentenced for, murder with actual intent.

The second appellant Nelson Ndlovu, sought at the trial to dissociate himself from his confirmed warned and cautioned statement. It is pertinent to note that in that statement, the second appellant not only placed himself at the scene of the crime, he also attributed to himself a participating role in its perpetration. His evidence on the first appellant's role in the murder of the deceased smartly complemented that of Brenda. That he mentioned the deceased co-accused, Roy Mguni, as having stabbed the deceased when no evidence of such stabbing was observed on the body, could, as found by the court *a quo*, have resulted from a mistaken belief as to the exact role played by Roy Mguni. It could also be evidence of the collusion by the three, to murder the deceased by whatever violent means possible, in order to facilitate the robbery.

The court *a quo* in my view correctly rejected the second appellant's evidence that he had not made the statement freely and voluntarily.

He was questioned closely by the court on why he had not told the magistrate who confirmed the statement, that he had been induced through violence by the police, to make the statement. This was particularly so since, on his evidence, he had appeared before the confirming magistrate visibly in great pain from the supposed assault by the police. The second appellant's response to the questioning was muddled, confused and bereft of credibility, a circumstance that cast serious doubt on the veracity of his evidence

Despite it being a confirmed warned and cautioned statement, the court *a quo* nevertheless took the precaution of calling the police detail who was alleged to have assaulted the second appellant. The police officer, Inspector Tsunda, denied that the second appellant had been assaulted as a way of forcing him to make the statement in question. Counsel for the respondent cited a number of authorities concerning the approach to adopt when dealing with confessions. In *S v Tsorayi* 1985 (1) ZLR 138 (HC) at page 142 the learned judge quoted with approval a passage from *R v Sylees* (1913) 8 Cr App R 233 at 236 as follows:

"... the first question you ask when examining the confession of a man is, is there anything outside it to show it was true? Is it corroborated? Are the statements made in fact true? Is it consistent with other facts which have been ascertained and which, in this case, (are) proved before us?"

In my view, there is substance in the submission made for the respondent that ample corroboration of the second appellant's confession was to be found in the evidence of Brenda and Busiwork, as well as the postmortem report. The second appellant confirmed Brenda's evidence that she and the deceased left the nightclub first, leaving Busiwork in the company of his drinking companions, the appellants. Busiwork averred his companions had followed soon afterwards. The postmortem report gave the cause of death as skull fracture caused by a blunt instrument, something that is consistent with the second appellant's

assertion that stones had been used to hit the deceased on the head. Other corroboration is to be found in Brenda's evidence, completed by the second appellant's, that the first appellant had picked up stones and hit the deceased with them on the head.

In addition to this was the evidence concerning the belt that the deceased was wearing on the day he was killed. The deceased's body was found with no belt on. Ackim Garikayi told the court *a quo* that the second appellant had given him a black male belt to sell on his behalf. He had duly done so. In his confession the second appellant said he had been handed the deceased's belt as part of his share of the loot. Clearly, therefore the second appellant's confession was corroborated in material respects by other evidence.

The court *a quo* in my view correctly, also considered the fact that the second appellant's confession was consistent with other facts which had been ascertained. He was at the nightclub and in the company of his two co-accused and Busiwork. Together with the former he had followed the deceased and Brenda and was at the scene of the crime.

The court *a quo* was also correct in its finding that the second appellant's warned and cautioned statement contained details that only he would have known. It is an established principle of law<sup>1</sup> that if an accused mentions in his confession facts the knowledge of which could only have come to him by being connected to with the crime, the mentioning of such facts would be regarded as strong evidence of the genuineness of the confession. In *casu*, the deceased's body was found with no belt on it. The second appellant stated in his warned and cautioned statement that the belt had been removed from the deceased's body and given to him. He could not have known of the missing belt

unless he had been at the scene of the murder and had personal knowledge of the circumstances surrounding its loss. The second appellant's warned and cautioned statement was coherent, properly sequenced, and filled gaps in Brenda's evidence. There is merit in the respondent's submission that he had been able to relate the true events because he had participated in them by occupying the strategic position of sentinel while his colleagues committed the offence. He clearly acted in common purpose with them.

All in all, I am satisfied the court *a quo* properly accepted the second appellant's confession as a true version of what happened on that day.

The second appellant sought to raise what the court *a quo* correctly found to be a false *alibi*. For the first time, in Court, he mentioned having had a tooth extracted on the day before the murder, and spending the whole of the following day at home. He failed to explain why he had not informed the police, and his lawyer, of what would have been a very strong defence. This evidence in addition to having clearly been an after-thought, was effectively discredited by the evidence of Brenda and Busiwork, which he did not dispute. He was at the nightclub on the night in question, he followed Brenda and the deceased and he stood guard while his co-accused, with whom he was acting in common purpose, killed the deceased in order to rob him. He was given a share of the loot. His conviction in my view was properly arrived at.

The court *a quo* found no extenuating circumstances in the case. I am satisfied this finding is sound.

The appellants set out to rob the deceased, because they believed he had money. Robbery by its nature entails the use of violence on the victim.

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<sup>1</sup> See *R v Sambo* 1964 RLR 565

The use of stones in hitting the deceased on a vulnerable part of his body, and with such force as to cause almost instant death, is suggestive of a clear intention to kill. As correctly argued for the State, had death not been intended, the appellants, who could easily have overpowered the deceased, since they outnumbered him, could have robbed him without assaulting him. The inference is also inescapable, that the appellants murdered the deceased in the manner they did, in order to eliminate the possibility of identification.

That they killed in order to rob suggests a total disregard of and lack of respect for, human life.

I am satisfied the court *a quo* properly convicted them of murder with actual intent and sentenced them accordingly. The appeal is without merit and is accordingly dismissed.

CHIDYAUSIKU CJ: I agree.

ZIYAMBI JA: I agree.

*Bulawayo Legal Projects Centre*, first appellant's legal practitioners

*Sansole & Senda*, second appellant's legal practitioners

*Attorney-General's Office*, respondent's legal practitioners