

DISTRIBUTABLE (136)
Judgment No. SC. 150/04
Crim. Appeal No. 124/04

PINIEL MURIJO v THE STATE

SUPREME COURT OF ZIMBABWE
CHIDYAUSSIKU CJ, MALABA JA & GWAUNZA JA
BULAWAYO, NOVEMBER 30, 2004 & SEPTEMBER 22, 2005

N Mashayamombe, for the appellant

M Cheda, for the respondent

MALABA JA: The appellant was charged with two counts of murder and armed robbery. The murder charge alleged that on 3 March 1999 at Murerezi Secondary School in Mberengwa the appellant unlawfully and intentionally killed one Rufaro Shabane. He pleaded not guilty to murder, but offered a plea of guilty to the armed robbery charge. After a full trial, the appellant was convicted by the High Court of murder with constructive intent to kill. As this was a murder in the course of a robbery, and no extenuating circumstances having been found, the appellant was sentenced to death.

In the appeal against conviction and the death sentence, *Mr Mashayamombe*, who appeared for the appellant, indicated that he had no meaningful submissions to make.

The facts were largely common cause. The appellant and one Godfrey Chimwala ("Chimwala"), who died before the commencement of trial in the High Court, hatched a plan to rob Murerezi Secondary School ("the school") of money. On 3 March 1999 they proceeded to the school, armed with a shotgun, serial no. 1410419. On reaching the perimeter fence of the school, Chimwala

created a hole in it through which they gained entry into the school at 4 am. They proceeded to the headmaster's house where Chimwala opened a window. The appellant, who was armed with the firearm, entered the house first and opened the door from inside for his accomplice to get into the house.

Once in the house, they woke up the headmaster's wife, Charity Shumba ("Charity"). On realising that there were intruders in the house, one of the occupants escaped unnoticed and alerted other teachers at the school. Meanwhile the appellant and Chimwala ordered Charity to lead them to the bursar's house. As they reached the house, other teachers had come out of their houses. The deceased and two others were standing outside his house.

Charity was ordered by the appellant to knock at the window to the bursar's bedroom. As she did so Chimwala, who was now holding the firearm, shouted at the teachers, ordering them to go back into their houses lest they be killed. As he shouted at the teachers Chimwala fired a shot in the direction of the deceased and the other two teachers. The shot hit the deceased on the left side of the head. He died from a gunshot wound and brain infection.

Upon hearing the sound of a gunshot, the bursar's roommate opened the window and the appellant jumped into the bedroom. He ordered the bursar to take the keys to the strong room where the safe with money was kept. She did as ordered. The bursar and Charity were force-marched to the administrative block, where the bursar was forced to open the strong room and safe. The appellant and Chimwala took \$8 000 from the safe. They also stole two bicycles and rode away. The appellant received \$2 000 of the stolen money.

The appellant had sought to suggest in evidence at the trial that when the fatal shot was fired by Chimwala, he was already in the bursar's house.

The learned judge rejected his evidence and accepted that of the bursar and Charity, to the effect that the appellant was standing outside the house at the time the deceased was shot by Chimwala.

The learned judge also held on the evidence that the appellant foresaw the possibility of the firearm being used with fatal consequences in the course of the robbery to prevent any interference with the execution of their criminal plan to rob the school of money. The fact that the appellant had not himself pulled the trigger was no defence to the charge.

In *Dube and Anor v S S-245-96 McNALLY* JA said:

“We have said time and again that to carry a firearm on a robbery expedition is to run the risk that someone will be killed. If someone is killed then, generally speaking, the one who fires the shot, and those of his colleagues who know he is armed and who do not actively dissociate themselves from the killing are guilty of murder and whether the intent is actual or constructive are likely to be sentenced to death.”

The appellant and Chimwala acted together in the furtherance of a common purpose to commit a robbery and the use of the firearm, which the appellant knew was in the hands of his accomplice, was foreseen by him as a real possibility. See *S v Khombani and Anor* 1963 (4) SA 87; *Zumane and Anor v S S-32-01*; and *Ngulube and Anor v S S-112-93*.

I would dismiss the appeal against conviction.

In a closely reasoned judgment, the learned judge examined all the factors of extenuation suggested on behalf of the appellant and applied the correct principles of law before coming to the only conclusion open to him in the circumstances, that there were no extenuating circumstances justifying the imposition of a sentence other than the death penalty. This was a murder in the

course of a robbery. In *S v Sibanda* 1992 (2) ZLR 438 (S) GUBBAY CJ at 443 G-H said:

“Warnings have frequently been given that in the absence of weighty extenuating circumstances, a murder in the course of a robbery will attract a death penalty. This is because, as observed in *S v Ndlovu* S-34-85 (unreported):

‘... it is the duty of the court to protect members of the public against this type of offence which has become disturbingly prevalent. People must feel that it is possible for them to enjoy the sanctity of their homes, to attend to their business premises, or to go abroad without being subjected to unlawful interference and attack.’”

In this case the court *a quo* found that the appellant was an active participant in the execution of the criminal plan to rob the school of money and that the only thing he did not do which could only be done by one person at a time was to pull the trigger and fire the shot that killed the deceased. His moral blameworthiness was considered so high that the death penalty was found to be appropriate. It is impossible to hold that the court *a quo* was wrong in taking that view of the facts.

There is no merit in the appeal. It is dismissed.

CHIDYAUSIKU CJ: I agree.

GWAUNZA JA: I agree.

Pro deo