

Judgment No S.C. 105\2002  
Crim. Appeal No 207\2001

ROBERT CHINGAONA v THE STATE

SUPREME COURT OF ZIMBABWE  
SANDURA JA, ZIYAMBI JA & MALABA JA  
HARARE NOVEMBER 11, 2002

*E.V. Shumba*, for the appellant

*N.J. Mushangwe*, for the respondent

SANDURA JA: The appellant was charged with murder, the allegation being that on 9 February 1999 and at or near the Hurungwe District Council offices he and another person called Lovemore Dickson (“Lovemore”) unlawfully and intentionally killed Mike Nyadzamba (“the deceased”), a taxi driver. He pleaded not guilty but was convicted and sentenced to death. He appealed against the conviction and sentence.

After hearing counsel for the appellant, and without calling upon counsel for the respondent to address us, we dismissed the appeal in its entirety and indicated that the reasons for that decision would be handed down in due course. I now set them out.

The relevant facts are as follows. The deceased was a taxi driver. At about 8.30 pm on 9 February 1999 the taxi driven by the deceased was hired by two men. About an hour later, a passer-by found the taxi stationary in the middle of the road near the Hurungwe District Council offices with its headlights on. As he approached the taxi he heard someone in a nearby field saying “give me my four hundred dollars”. Suspecting that a robbery was taking or had taken place, he reported the matter to a nearby police station.

The police immediately proceeded to the scene and, as they approached the taxi, heard a sound which indicated that some people were running away from the scene. Thereafter, they found the deceased’s body about fifteen metres away from the vehicle. It was lying in a pool of blood and had a nylon rope tied around the neck. Close to the body was a blood stained wallet which was empty. A constable in the Zimbabwe Republic Police then guarded the scene until the following morning when some members of the Criminal Investigation Department (“the C.I.D.”) arrived and took over the investigations.

About five metres away from the deceased’s body, a member of the C.I.D. found a sharp blood stained metal rod. In addition, he found a screwdriver some three metres away from the body.

He then searched the motor vehicle and found the following items:

1. A black bag containing, *inter alia*, an Old Mutual green folder bearing National Registration number 71-088798 G 71;

2. A satchel containing, *inter alia*, a padlock key; and
3. Two pairs of men's shoes.

The ignition key for the vehicle was missing. However, a trail of blood was observed from the driver's seat to the spot where the deceased's body was found. The deceased had been stabbed three times in the chest and upper part of his body.

After the search, the deceased's body was conveyed to the Karoi Hospital mortuary.

Subsequently, as a result of enquiries the police established that the National Registration number inscribed on the Old Mutual folder found in the black bag recovered from the taxi was that of Midnight Kamba ("Kamba") of Nyandoro Village in Guruve district. They located Kamba who identified the black bag and one of the pairs of shoes found in the taxi as the property of his uncle, the appellant. He added that he had given the Old Mutual folder to the appellant in August 1996.

Thereafter, the police arrested the appellant and Lovemore at Makisi Village in Hurungwe district. When questioned, both men denied the murder allegation. However, when the police searched the appellant they found him in possession of two keys, one of which later turned out to be the ignition key for the taxi. The two men were then taken to Karoi police station for further questioning.

At the police station the two men made warned and cautioned statements in which they admitted killing the deceased. Thereafter, they made detailed indications of what happened from the time they hired the taxi to the time they killed the deceased. The warned and cautioned statements as well as the indications were later confirmed by a provincial magistrate.

The appellant and his accomplice subsequently appeared in the High Court for trial and were found guilty of murder with actual intent. Extenuating circumstances were found in respect of Lovemore and he was sentenced to seventeen years' imprisonment with labour. However, with regard to the appellant the trial court found that no extenuating circumstances existed and sentenced him to death.

Ms *Shumba*, who appeared for the appellant, was unable to make any meaningful submissions on behalf of the appellant. In her heads of argument she averred “that the sole purpose of hiring the taxi was to facilitate the robbery of the said taxi.” However, the difficulty in which she found herself was understandable because the evidence against the appellant was overwhelming.

Firstly, there was the evidence of a confirmed warned and cautioned statement and indications made by the appellant. In the warned and cautioned statement the appellant said:-

“On the 9<sup>th</sup> February, 1999 I went to Karoi with Lovemore Dickson who wanted to buy a part (for) his T.V. So we did not have enough money. We were left with insufficient bus fare to Tengwe. We asked for money from a certain friend who then advised us to hire a taxi to our destination. We got a taxi which took us to Tengwe. On arrival the taxi driver said he wanted money which we did not have and said if we did not give him the money he

was going to attack us with his weapon and cause our arrest. We wanted to run away and he held me back intending to stab me with his screwdriver. So that is when we attacked him, stabbed him and ran away when we heard some noise from people who were coming towards us. We then went home.

1. Question: At what stage did you tie the deceased with a rope.  
Answer: We strangled him when we heard people coming, fearing that he would cry out.
2. Question: What made you remove deceased from his vehicle?  
Answer: Deceased got out of his vehicle on his own the moment we tried to run away from him leaving our bags and shoes.
3. Question: Where did you get the weapons you used to stab deceased?  
Answer: One of the weapons we used was a steel knife for Lovemore which he had. The other one is a screwdriver for the deceased which he had removed from under his seat.
4. Question: Where did you put the vehicle key?  
Answer: We snatched the car keys from his hands and took them to our home.”

In the court *a quo* the admissibility of the warned and cautioned statement was challenged by the appellant who alleged that after his arrest he was assaulted by the police and forced to sign a statement which had already been prepared by them. He added that when he appeared before the provincial magistrate for the confirmation of the statement he informed him that he had been assaulted and showed him the injuries which he had sustained. These allegations were denied by the provincial magistrate when he testified.

After carefully considering the appellant's evidence, Lovemore's evidence and the evidence given by the provincial magistrate, the learned trial judge said:-

“The testimony of the accused in this respect has the hallmarks of fabrication, exaggeration and falsehood. In the result, this court accepts that the accused persons made the statements ... freely and voluntarily without any undue influence.”

In my view, that conclusion is unassailable, having regard to the evidence led at the trial. It is highly improbable that the police would have made up such a statement for the appellant.

Secondly, there was the evidence that the ignition key for the taxi was found in the appellant's possession. Although the appellant denied that he was found in possession of the key, the denial had no substance and the learned judge correctly rejected it. In fact, the appellant said that he was not searched by the police when they arrested him at Makisi Village, which is hardly likely.

Finally, there was Kamba's evidence that the black bag and the pair of brown shoes found in the taxi belonged to the appellant. In the black bag was found the Old Mutual folder which Kamba said he had given to the appellant in 1996. The learned judge found, correctly in my view, that Kamba was a credible witness who found it rather difficult to testify against the appellant who is his uncle.

In the circumstances, the appellant's guilt was proved beyond reasonable doubt.

With regard to the court's finding that there were no extenuating circumstances in respect of the appellant in this case, it is important to bear in mind what constitutes extenuating circumstances. In *S v Letsolo* 1970 (3) SA 476 (AD) at 476F-H, HOLMES JA had this to say on extenuating circumstances:-

“Extenuating circumstances have more than once been defined by this Court as any facts, bearing on the commission of the crime, which reduce the moral blameworthiness of the accused, as distinct from his legal culpability. In this regard a trial court has to consider –

- (a) whether there are any facts which might be relevant to extenuation, such as immaturity, intoxication or provocation (the list is not exhaustive);
- (b) whether such facts, in their cumulative effect, probably had a bearing on the accused's state of mind in doing what he did;
- (c) whether such bearing was sufficiently appreciable to abate the moral blameworthiness of the accused in doing what he did.

In deciding (c) the trial court exercises a moral judgment. If its answer is yes, it expresses its opinion that there are extenuating circumstances.”

Applying that text to the facts of the present case, the finding by the trial court is unassailable. The court found that in respect of Lovemore there were extenuating circumstances. These were that at the time of the commission of the offence he was about eighteen years of age, and that generally he appeared to be an immature person with a low intellect. However, this did not apply to the appellant who, at the time of the commission of the offence, was about twenty-eight years old and had had four years of secondary education.

In any event, sight should not be lost of the fact that this was a murder in the course of a robbery. As GUBBAY CJ said in *S v Sibanda* 1992 (2) ZLR 438 (S) at 443F:-

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

In the circumstances, the appeal was devoid of merit and had to be dismissed in its entirety.

ZIYAMBI JA: I agree

MALABA JA: I agree

*Pro Deo*