

DISTRIBUTABLE (104)

Judgment No. S.C. 39/02
Crim. Appeal No. 254/01

JACK SAKALA v THE STATE

SUPREME COURT OF ZIMBABWE
CHIDYAUSIKU CJ, CHEDA JA & MALABA JA
HARARE, MAY 20, 2002

Miss *E Mushore*, for the appellant

Mrs *F Ziyambi*, for the respondent

CHEDA JA: The appellant was found guilty of murdering his wife, aged nineteen years, and his minor child, aged about nine months, with actual intent.

The trial court found no extenuating circumstances and imposed a sentence of death.

Although the notice of appeal gave grounds of appeal against both conviction and sentence, Miss *Mushore*, who appeared for the appellant, filed heads of appeal against sentence only.

However, two issues were raised for consideration by this Court as extenuating circumstances. These were intoxication and provocation.

INTOXICATION

The appellant said in his evidence that on the day before the murder he

had been drinking scuds and spirits and got so drunk that he does not know what happened regarding the murder.

He says he drank, first with a friend in town, then he drank spirits at his mother's house, and finally more spirits in his room with his wife, the deceased. His sister, Towani Sakala, said she spent the whole day with both the appellant and his wife, and none of them drank any alcohol that day. They left for their room about 9 pm. She said in her life she did know that the appellant drinks alcohol.

When she saw the appellant the following day and asked him about their delay in coming to their mother's house, he appeared normal and answered nicely.

The witnesses who entered the room to retrieve the bodies of the deceased make no mention of any bottles of alcohol in the room. If the appellant's wife had consumed alcohol with him in the room, this would have been mentioned in the relevant part of the post mortem report on her.

The court *a quo* was correct in rejecting the appellant's evidence of intoxication, as no alcohol was consumed by either the appellant or the deceased on the day before the murder.

PROVOCATION

According to the appellant, the issue of his wife having eloped to another man was discussed when she came with her father and it was denied. The appellant says they resolved this issue between themselves after that. The appellant's brother says he noticed that they were getting on well and never heard of them fighting over that issue.

In fact, the appellant himself says he had a good relationship with his wife after the matter was resolved.

Although in his confirmed statements he had said there was a fight with his wife, in his defence outline and in court he said both were drunk when they went to bed and he did not know what had happened.

Even if one were to accept that there may have been some form of provocation or argument, as there seems to be no explanation for the killings, this could be limited only to the appellant's wife. It cannot be extended to the child. The child could never be party to any quarrel between its parents at that age.

The appellant's wife had her throat cut "as deep as severing the cartilage of (the) throat" according to the post mortem report. The same was done to the baby, which was placed on the mother's chest, indicating that the mother was killed first and then the baby. There was certainly no excuse for killing the innocent baby.

The trial court was therefore correct in finding that there were no extenuating circumstances.

Accordingly the appeal against sentence has no merit and it is dismissed.

CHIDYAUSIKU CJ: I agree.

MALABA JA: I agree.

Pro deo