

MHLUPHEKI NGWENYA
v
THE STATE

SUPREME COURT OF ZIMBABWE
ZIYAMBI JA, GARWE JA, & NDOU AJA
BULAWAYO, JULY 30, 2012

S Chivaura, for the appellant

T Makoni, for the respondent

ZIYAMBI JA: The appellant was charged in the High Court, Bulawayo with the murder of Sheron Ngwenya. He pleaded not guilty but was convicted of murder with actual intent and, no extenuating circumstances having been found was sentenced to death.

The court *a quo* found that prior to the day in question the appellant had threatened to throw the deceased onto the ground and that one Regina Gumbo had intervened and rescued the deceased. The court also found that on another occasion the appellant had threatened to cut Irene Dube the deceased mother's pubic hair and take it to a n'anga; that he often assaulted her and threatened to kill her, and that he slept with knives under his pillow. As a result she would abscond and the intermediary would intervene. At the time of commission of this offence she had gone back to her parents' home with the deceased.

On the day in question Irene had gone into town with her father leaving the deceased in the company of her sister Emmy Dube.

The appellant, for some unexplained reason did not go to work on that day. At about 5pm, he went to Irene Dube's parents' home and asked Emmy Dube for the deceased's clothes and took the deceased to his house at Mbuyazwe Primary School in the same compound. There he was observed by Max Ncube to be writing a note tears on the cheeks. The appellant told the witness that he was going to kill himself and the deceased and that the note he had left was to that effect. The appellant immediately left the house holding Sheron and proceeded to a bushy area, sharpened his knife and slit the throat of the deceased. When a search team approached the area where he was with Sheron, the appellant was heard to say "I am here". The team ran in the direction of the voice and found the appellant who said to them that he had killed his blood and was going to kill himself. There was blood on his clothes and hands. He then pointed to a spot where the body of Sheron was lying and showed them a cut on his neck. He then ran away. The appellant was later arrested and made a warned and cautioned statement in which he said that he had found the deceased without.... and that he was hurt by this and decided to kill her and himself. He said that the deceased fell asleep and he slit her throat and thereafter cut himself on the neck.

The post mortem report established that the cause of the death was severe haemorrhage due to a cut neck. The appellant was examined on two occasions by a forensic Psychiatrist at [Ingutsheni Prison] Mhlondolozi Special Institution. It was the opinion of the Forensic Psychiatrist that there was no evidence that at the time of the commission of the offence the appellant was suffering from mental disorder and that the appellant knew what he was doing.

The court *a quo* concluded that while his behaviour might have been strange and would in the absence of an explanation suggest mental illness, he was satisfied on the evidence of the Forensic Psychiatrist that the appellant was fully responsible for his actions. The court found further that the appellant had harboured the intention of killing the deceased and that when he killed the deceased he simply completed his purpose. It was on that basis that the court returned a verdict of murder with actual intent.

With regard to extenuation the court found that the suggestion that the appellant was provoked into the commission by his wife was untenable. It found that the commission of the offence had been planned and found no extenuating circumstances.

Before us the appellant in *S v Gambanga* attacked the finding of the court *a quo* on the basis that the court should have found that the appellant suffered from diminished responsibility which operated to reduce his moral blameworthiness and urged us to alter the verdict to one of culpable homicide.

The State on the other hand submitted that this was a cold blooded murder committed by the appellant who vented his fury against his wife on the deceased and that the court was correct firstly in finding the appellant guilty of murder with actual intent and secondly in finding that there were no extenuating circumstances.

The issue before us is whether the appellant was labouring under some form of diminished responsibility at the time of the commission of the offence. It is not in dispute that the Forensic Psychiatrist concluded that there was no evidence of mental illness or disorder and that the appellant appreciated what he was doing at the time.

The evidence on record clearly shows that the appellant conducted himself in a bizarre manner over a period of time. He had in their quarrels threatened to cut his wife's pubic hair, and armpit hair and to take it to a n'anga in Bulawayo in order to cause her harm. On the day in question the witness who saw the appellant immediately after the murder remarked he appeared mentally disturbed.

This Court has on several occasions pronounced the correct approach in such cases. In *Gabanga v S* SC 32/98.

This Court accepted that DR is a condition falling short of mental disorder but such would require a special verdict into the Mental Health Act. DR serves not to reduce the offence of murder to culpable homicide simply to reduce his moral responsibility and therefore affects the question of sentence.

In *Mushiwa v The State* SC-198-94 this Court MUCHECHETERE JA quoted with approval remarks by McNALLY JA in *Sibanda v State* SC-137-93:

“Now it is true that the *onus* of proof of extenuating circumstances is on the defence. But I think, with great respect, that judicial officers not infrequently forget that actions speak louder than words. The very facts of the case can give mute testimony of extenuation, often in spite of the accused person's efforts to lie his way out of trouble, or to explain what he is really unable to explain, even to himself.

In other words, what the accused person actually did will often show, on a balance of probabilities, that he was at the time in a state of diminished responsibility, if not a state of certifiable insanity.

The facts of this case are a good example. The learned judge in effect said: “I do not believe your explanation that you were attacked. I do not believe that you had any reason to be angry. Therefore I reject your explanation. Therefore you have not proved extenuating circumstances”.

That approach leaves unanswered the vital question: “What, then, is the explanation for the appellant’s conduct?”. The answer is: “On a balance of probabilities he was in a state of diminished responsibility”. That is the most probable explanation for conduct which is otherwise inexplicable.

What normal person is going to wobble his bicycle all over the road, and then get so incensed with the people who remonstrate with him for almost running them down that he kills one of them? What normal person is going to imagine that two young men and a woman are attacking him, when the court rightly believed them that they were doing no such thing?

The answer must be: “On the probabilities such behaviour is not normal or rational. The appellant was therefore probably, whether because of drink or drugs or mental or emotional upset, in a state which can conveniently be called a state of diminished responsibility”.

On the facts of this case, the court is clear that the actions are explicable. As the court *a quo* found there was a history of acrimony between the appellant and his wife and the deceased. He had previously threatened to harm the deceased. He clearly had an axe to grind with the deceased’s mother and the probabilities are that he killed the deceased in order to get even with his wife.

Whilst his conduct may have been strange it is clear that it was actuated by the bitterness which he harboured towards his wife. The deceased was used as a pawn in the process and was callously murdered.

Accordingly, it is the unanimous view of this Court that there is no basis on which the finding of the court *a quo* that there are no extenuating circumstances can be impugned. The appeal must accordingly fail and it is hereby dismissed.

GARWE JA: I agree

NDOU AJA: I agree

Dube-Banda, Nzarayapenga & Partners, appellant's legal practitioners

Attorney General's Office, for the state