

REPORTABLE (28)

NICHOLAS NCUBE
v
THE STATE

THE SUPREME COURT OF ZIMBABWE
MALABA DCJ, GOWORA JA & GUVAVA JA
BULAWAYO, MAY 5 & 8 2014

M Petkar, for the appellant

W Mabhaudhi, for the respondent

GUVAVA JA: This is an automatic appeal against the conviction of murder with actual intent to kill and the sentence of death imposed upon the appellant. The appellant was charged with the murder of Kelens Mudimba on 28 December 2012 along a footpath leading from DRC Empumalanga, Hwange to Chibondo Village, Hwange. The appellant was convicted by the High Court of murder with actual intent to kill and sentenced to death.

Mr *Petkar* for the appellant indicated that he had no meaningful submissions to make in respect of the conviction. The concession was properly made.

The facts of the case are these. The appellant was twenty-five years at the time of the commission of the offence. He resided at number 1459 DRC Hwange. The deceased was his common law wife and was aged twenty-two years at the time she met her death. On the day in question, at about 12.00 mid-day the appellant and the deceased had a

misunderstanding as they were walking along a footpath from Chibondo Village to DRC Empumalanga, Hwange. The deceased wanted to terminate their union. An argument ensued and the appellant struck the deceased several times with stones on the side of her head. He also stabbed her with a knife once on the left side of the chest. The deceased died on the spot as a result of the assault. The appellant phoned one Blessing Matshayani, who is married to the deceased's sister. He told Matshayani that he killed the deceased and indicated the place where the body could be found. Mr Matshayani then telephoned the deceased's aunt who in turn advised the deceased's father.

The deceased's father went to the scene and found the deceased lying in a pool of blood. He made a report to the police who attended the scene. John Mutyavaviri, a member of the Zimbabwe Republic Police observed that the deceased's clothes were soaked with blood. Her head was lying in a pool of blood. She had a deep cut on the back of the head. There were other deep cuts behind the right ear, a deep cut between the right ear and the right eye, and a deep cut on the forehead. There was a stab wound on the left side of the chest. The deceased's head had been crushed and depressed inwards. There were numerous blood stained stones near the deceased's head. He recovered a blood stained kitchen knife near the deceased's body. He conveyed the deceased's body to Hwange Colliery Hospital mortuary. On 31 December the deceased was taken to United Bulawayo Hospital for a post mortem examination.

The post mortem examination revealed the following injuries:

- a) A stab wound on the left side of the chest which was 2 cm long and 1 cm wide situated 6 cm from the left nipple and 13 cm from the midline and 13 cm from the clavicle bone;

- b) A compound fracture of the skull on the right frontal parietal region;
- c) All cranial bones were fractured leading to severe brain damage.
- d) Both fractured jaws

It was concluded that she died of brain damage, multiple skull fracture and subarachnoid haemorrhage. It is clear from the injuries that heavy blunt objects were used to crush the deceased's skull. It was also obvious that a sharp object was used to stab the deceased. There can be no doubt that severe force was used to inflict the wounds on the deceased. It is beyond doubt that the stab wound was inflicted whilst the deceased was facing the appellant. Death was clearly intended.

On 28 December 2012 the appellant handed himself over to the police at ZRP Hwange Charge Office. He made a confirmed warned and cautioned statement admitting that he killed the deceased. He indicated that he killed the deceased because she no longer wanted to stay with him as his wife.

On these facts the trial court found the appellant guilty of murder with actual intent to kill. This finding by the court *a quo* cannot be faulted.

With regard to sentence, Mr *Petkar* however, persisted with the argument that the court *a quo* misdirected itself in finding that there were no extenuating circumstances. He submitted that the injuries on the deceased showed that this was a crime committed out of passion.

It is this Court's view that the appellant's attack on the deceased was not motivated by passion but vindictiveness. The manner in which the appellant killed the deceased was vicious and callous. He crushed her head to pulp with stones. The trial court found that the appellant armed himself with a kitchen knife which he used to stab the deceased on the left side of the chest where the heart is located. The court *a quo* correctly disbelieved the appellant's story that the deceased had fallen on the knife. The manner in which he attacked the deceased showed that he believed that if she did not want to live with him as husband and wife she did not deserve to live. On these facts the argument by Mr *Petkar* that the killing of the deceased was out of passion simplifies the seriousness of the offence. In our view the effect of his argument was to diminish the gravity of the offence committed by the appellant. Mr *Mabhaudhi's* submission that the crime was committed out of spite and not passion was appropriate.

In *S v Woods & Anor* 1993 (2) ZLR 258 (S) at 284 A-B GUBBAY CJ stated the following:

“In deciding whether or not extenuating circumstances exist which allow for a sentence other than death, the trial court exercises what is essentially a moral judgment. On appeal, this Court cannot substitute its own view. It may only interfere if persuaded that the conclusion of the trial court could not reasonably have been reached; or where that court had regard to wrong factors, or had mistakenly excluded factors proper to be taken into account, or had in some other way, erred in principle”

The court is unable to find any misdirection on the decision by the court *a quo* that there were no extenuating circumstances in this case.

Accordingly, the appeal is dismissed.

MALABA DCJ: I agree

GOWORA JA: I agree

James, Moyo - Majwabu & Nyoni, appellant's legal practitioners

The National Prosecuting Authority, respondent's legal practitioners