

(1) NJABULO TSHUMA (2) VUSA MUGOBO NDLOVU
v
THE STATE

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

N Siphuma, for the first appellant

S Shenje, for the second appellant

T Hove, for the respondent

MALABA DCJ: On 19 March 2013 the appellants were found guilty of the murder of Timothy Mugobo with actual intent to kill him. The High Court found no extenuating circumstances that reduced the appellant's degree of moral blameworthiness and sentenced them to death. The appeal to this court against both conviction and sentence of death is by operation of the law automatic.

Mr *Siphuma* for the first appellant indicated that he had no meaningful submissions to make against conviction and sentence. He indicated that the facts surrounding the commission of the offence were largely common cause. They supported the decision of the court *a quo* on conviction and sentence. Mr *Shenje* for the second appellant had suggested in the heads of argument that the appellants acted out of provocation because the deceased had set their properties on fire. During the hearing he abandoned the submission and conceded that the facts

found by the High Court supported the decision that the appellants committed murder with actual intent to kill.

The facts are common cause. The deceased was the elder brother to the second appellant. The first appellant is the second appellant's nephew. He has his own homestead near that of the second appellant's parents. Sometime in 2008 the deceased set on fire the first appellant's hut. He also burnt a hut at his grand parents' homestead which had the second appellant's movable property. The deceased was convicted of arson and sentenced to four years imprisonment. He came out of prison on 16 July 2012.

On 17 July 2012 people gathered at the second appellant's father's homestead for a traditional ceremony. The deceased arrived at the homestead. A few minutes later the first appellant also arrived at the homestead. The actual ritual took place at about 8.30a.m. After the ritual, the deceased left the homestead. As the deceased was a distance from the homestead, the appellants started running after him. They were armed with axes.

The first appellant was armed with an axe, the blade of which was 20cm long and 10cm wide. The length of the handle was 66cm whilst the whole axe weighed 1.3kg. The second appellant was armed with an axe, the blade of which was 13.5cm long and 5cm wide. The length of the handle was 40cm. The whole axe weighed 360 grams.

The appellants were seen by the first appellant's mother running after the deceased. She alerted Siambule Ndebele who followed them. Siambule met the appellants on

the way. The first appellant threw his axe away. Siambule did not talk to the appellants. He proceeded in the direction they had come from and found the deceased lying dead in a pool of blood.

What had happened is that upon catching up with the deceased, the appellants attacked him. He was armed with a catapult. It appears that as the deceased ran, the second appellant struck him on the right side of the face with his axe. The deceased ran a few metres. He was powerless and fell to the ground. The second appellant delivered a second blow with the axe on the right side of the face. The first appellant delivered a third blow on the right side of the deceased's face.

The post-mortem examination revealed that the deceased sustained the following bodily injuries:

- (a) 12cm long and 2cm wide and 3cm deep wound with fractures running just below the right eye starting near the right ear and ending at nasal bridge (nose). The underlying facial bones were severely fractured.
- (b) Starting from the starting point of wound (a) above there was a 5cm long, 1.5cm wide and 2.5cm deep wound running obliquely downwards across the right maxillary region (cheek bone) to a point below the nose. There were fractures of the bones associated with the wound.
- (c) There was a 5cm long and 2cm wide wound running along the lower jaw to the chin.

The cause of death was found to be hypoxia and multiple facial fractures. The injuries were intentionally inflicted on the deceased by the appellants acting in common purpose to kill him. There is no doubt that the appellants used severe force to inflict the fatal injuries. The finding by court *a quo* that the appellants wanted to kill the deceased cannot be faulted. It is supported by the facts found proved. The facts show that the appellants armed themselves with axes which they intended to use on the deceased. They were not in the position of people in possession of axes for innocent purposes.

The appellants armed themselves with the dangerous weapons for the specific purpose of hurting the deceased until they caught up with him to execute their intentions. The deceased was struck from behind on the right side of the face. When he fell a few metres from the first blow the appellants ensured that they left him dead. They knew he was alive at that point in time. They nonetheless delivered further severe blows on the deceased. He died on the spot. These facts prove nothing but murder with actual intent to kill the deceased. It matters not whether the appellants did what they did to revenge the burning of their property by the deceased.

The legal practitioners who represented the appellants at the trial submitted that there were no extenuating circumstances to justify the imposition of a sentence other than the death sentence. That was also the view taken by State counsel. In holding that there were no extenuating circumstances, the learned Judge said:

“This was murder which was committed on a defenceless victim. He had been released from prison where he had repaid his relative and society. All the accused should have done if they were still aggrieved was to have the matter discussed at the local level. They had gathered there in order to commemorate their grandfather’s death.”

There were lawful channels open to the appellants through which they could have expressed their grievances over the actions of the deceased and sought compensation for the property burnt. The fact that they put the life of the deceased at the same level as the property burnt in the fire shows the callousness with which they regarded the deceased's life.

Accordingly, the appeal is dismissed.

GOWORA JA: I agree

GUVAVA JA: I agree

Sansole and Senda, first respondent's legal practitioners

Shenje and Company, second appellant's legal practitioners

The National Prosecuting Authority, respondent's legal practitioners