

DISTRIBUTABLE (34)

MICHAEL GOODLUCK NLEYA
v
THE STATE

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

C. Mudenda, for the appellant
A. Munyeriwa, for the respondent

GOWORA JA: The appellant was charged with murder, the allegation being that on 8 October 2010, he unlawfully and intentionally killed Blessed Msebele a 9 year old boy in a bushy area in the Mnyamana area in Plumtree. He pleaded not guilty to the charge.

At the end of the trial he was found guilty of murder with actual intent. No extenuating circumstances were found and accordingly the trial court sentenced him to death. He has appealed against both conviction and sentence.

The essential facts in the case are these. In 2004 Sarah Msebele (Sarah), the mother of the deceased met the appellant in Ndolwane area in Bulilima. She was then employed as a temporary teacher. They fell in love and commenced a relationship. In 2006 the appellant persuaded her to leave employment and join him in South Africa. She agreed and left her employment and started living with him.

In October 2006, on their way to South Africa, the appellant was arrested by the South African authorities at the Beitbridge Border Post on allegations of armed robbery committed in South Africa. He was tried and sentenced to a lengthy term of imprisonment. At the time Sarah was pregnant with appellant's child. She subsequently gave birth to a son in 2007 but the child died two months after birth.

After the death of the child Sarah moved out of the house that she shared with the appellant and got married to another man. The appellant was incensed by what he considered to be her betrayal. He started writing letters to Sarah, full of vitriolic language from Leeuwkop Prison. During the murder trial, Sarah produced a total of nine letters which the appellant wrote to her vowing to punish her for her perceived betrayal. The appellant also accused her of having killed his child in order to enter into the new relationship. In one of the letters he threatened to harm her new husband. He also threatened to harm Sarah's mother whom he accused of using his money and influencing Sarah.

On 1 September 2010, the appellant was released from prison. On 8 October 2010, the appellant went to Butshe Business Centre in the Bulilima District where Phephelani Dube, Sarah's mother has a shop. He was wearing a face mask. The appellant proceeded to the home of Phephelani Dube. He smashed the windows of the bedroom where Phephelani Dube was sleeping with three of her grandchildren one of whom was the deceased. He used a metal rod to strike her on the head demanding money. She gave him ZAR 600 and BWP 300. She was holding on to the door in an effort to prevent him from entering the room. He continued to strike her demanding a cell phone. She gave him the cell phone. He forced his way into the bedroom and called Loveness who is Sarah's younger sister to come out of the room with him. Loveness complied and followed him outside. He told her to give him a cell

phone if she wanted to save her life. She gave him two cell phones one of which he took and smashed on the ground. Shortly thereafter they both returned to the bedroom. The appellant struck Phephelani on her legs causing her to fall. She lost consciousness and sustained a broken leg as a result of the assault.

The appellant then called the deceased by his nickname (Mafana). At the time the deceased was hiding under the bed. The deceased went to the appellant who disappeared with him into the night. Meanwhile Loveness had alerted neighbours on what was happening. A search was mounted for the appellant and the deceased. The deceased's body was found in the morning in the bush about 7 kilometres from home. The body was engulfed by fire. When the fire was put out the skull was found to have been crushed. One of the legs was in pieces.

The post mortem examination revealed the following bodily injuries:

- fractured skull on the parietal region

The body had sustained 90% burns. The examination of the other internal organs was made difficult due to the degree of burns sustained.

In March 2011, the appellant visited his mother Agness Dube. She told him of the murder of the deceased and he confessed that he had killed the deceased and burnt his body. He told her that he had killed the deceased to avenge the death of his son. He also told his mother that Sarah and her mother had squandered his money. He was hurt that Sarah had left him for another man.

During the same period in March the appellant started sending messages to Tsepo Msebele, Sarah's brother claiming a sum of ZAR 80 000, which he alleged Sarah owed him. He also demanded the return of property which he claimed Sarah had kept after leaving him. When the money was not forthcoming he began sending messages threatening that if the money was not paid he would do more harm than he had already done. Tsepo was then resident in South Africa. He, together with his friends effected a citizen's arrest on the appellant. They caused him to be brought to Zimbabwe and handed him over to the police. Upon his arrest the police recovered the sim card from the cell phone which the appellant had taken from Loveness.

In a detailed and confirmed warned and cautioned statement, the appellant narrated his relationship with Sarah, and the events leading to the murder of the deceased. He also revealed the motive for the murder of the deceased. He gave a graphic description of the murder. This is what he said:

"I then took Blessing and went with him to the bush. I also took one phone with a Botswana sim card. I found a steel rod and took it with me. When I got to the bush I asked him whether he knew me? At first he said he did not know me, I said don't you know Michael; he said he knows me but he last saw me some time ago. I said Sarah did not tell you that I was in prison? He said she told him, before I killed him I said these words - God will forgive me. I assaulted him on the head and at the back of the neck, he then fell down. I assaulted him again, I repeated again and he died. I fetched firewood and made a fire and threw him into the fire so that there would be no evidence. I put a lot of firewood. I burnt him myself and left the place and went to Tsholotsho and stayed three days. I then went to Bulawayo and stayed three days in Gwabalanda."

Before the trial court the appellant denied having killed the deceased. He denied being in Zimbabwe during the relevant period. He alleged that he was in Mozambique. He also denied being the author of the letters in which threats were made to Sarah.

The court *a quo* did not believe him and rejected his alleged defence of alibi.

The court also concluded that he had written the letters and after a careful analysis of the evidence it found that it had always been his wish and desire to kill and that he had accomplished what he set out to do. The court said:

“The letters were full of obscenities, but there is a common thread that runs through them, that is the accused was bitter about being rejected and his desire to cause harm to Sarah Msebele and her family was clearly manifest in the letters. He was also bitter with Sarah’s mother, whom he accused of influencing her. He clearly manifested through his letters the desire to inflict more pain and suffering on Sarah and her whole family than what he himself alleges to have suffered at the hands of Sarah. This he said he would do as soon as he was out of prison. He mentioned in some of the letters that he was about to be released from prison and would be fulfilling his desires and wishes.”

Accordingly the court returned a verdict of guilty of murder with actual intent to kill.

Miss *Mudenda* on behalf of the appellant was constrained to concede that the appellant had not proved the defence of alibi. She also conceded that on the evidence the court had come to a proper conclusion as regards conviction. In our view the concession was proper.

The evidence against the appellant was overwhelming. The letters showed the motive for the killing of the deceased. As the trial court correctly found, the appellant was very bitter that the child that Sarah had given birth to had died and that soon thereafter she had married another man. He was unhappy at the thought that whilst he languished in prison she appeared to be unconcerned about him despite all that he alleged he had done for her and her mother. As a result, he kept warning her to make amends, leave her new husband or face the consequences.

The finding by the court *a quo* of guilt of murder with actual intent to kill cannot be faulted.

After finding that there were no extenuating circumstances, the trial court sentenced the appellant to death.

On the question of sentence Miss *Mudenda* was unable to point any misdirection by the court *a quo*. The concession that the court found no extenuation is proper.

As submitted by Miss *Munyeriwa* the appellant perpetrated a cold blooded murder of an innocent child merely because his mother had stopped loving him. The evidence established that he was an evil man who killed a young boy in a callous and merciless manner. The deceased was subjected to a brutal attack. The appellant struck the deceased three times on the head with a steel rod crushing the skull and broke one of his legs to pieces. Thereafter he burnt the body of the deceased beyond recognition in an effort to destroy evidence of his heinous deed.

The murder of the deceased was a premeditated revenge killing and there was nothing that could be said in the appellant's favour. He was undeserving of mercy and a lesser sentence would not have met the justice of the case. The finding by the court *a quo* that there were no extenuating circumstances was the only appropriate conclusion.

The appeal is devoid of merit and is dismissed.

MALABA DCJ: I agree

GUVAVA JA: I agree

Messrs Mudenda Attorneys, appellant's legal practitioners.

The Attorney General's Office, respondent's legal practitioners.