REPORTABLE (43)

DESIRE DEWA
v
THE STATE

IN THE SUPREME COURT OF ZIMBABWE
GWAUNZA JA, GARWE JA & GUVAVA JA
BULAWAYO, JULY 28, 2014 & JULY 30, 2014

P Madzivire, for the Appellant

A Munyeriwa, for the Respondent

GARWE JA: This is an appeal against the sentence of death imposed on the appellant by the High Court sitting on circuit at Gweru.

The facts of this case are as follows. The appellant and the mother of the two deceased children were known to each other. On 21 November 2011, the deceased's mother, one Lydia Mangena, escaped from her thatched house through a back window. This was shortly after 9:00pm. A man had tried to break into her hut and, fearing for her life, she had then jumped out of the hut and, although she was pursued by the man for a distance, managed to escape. She then went and made a report to one Austin Marume, a member of the local neighbourhood watch committee. At about the same time, she noticed that the hut from which she had escaped and in which her two minor children, Pretty Kangausaru, aged six years, and Nigel, aged twenty three months, had been sleeping, was on fire. Together with Austin Marume she ran back to her homestead. She found her uncle having retrieved Pretty

Kangausaru from the inferno. Pretty however had sustained severe burns. The other child Nigel was burnt beyond recognition. Pretty died on the way to Mnere Hospital.

It is common cause that in either case the cause of death was "hypovolaemia 2^0 Burns."

In the court *a quo* the appellant denied being present at Lydia Mangena's homestead on the night in question. He told the court he had left his homestead at about 7:00pm in order to go fishing at a place called Mataga.

What was in issue before the court *a quo* was the identity of the person who set on fire the hut in which the two children had been sleeping.

Lydia Mangenga gave evidence and narrated how she knew the appellant. They had attended the same school years previously. She had then left for Karoi where she continued her education. She had then returned to Mberengwa in 2009 after the death of her father and was staying at her late father's homestead together with the two children.

From August 2011 until shortly before the fateful event, the appellant had approached her and made advances which she turned down. At one stage he even threatened her and showed her his Zimbabwe National Army identity card. Subsequently the appellant had taken her cellular handset. With the help of neighbours the cellular phone was recovered from one Claris Keto. Following the recovery, the appellant had then approached her and assaulted her at the local business centre. The appellant was arrested and placed on remand for having perpetrated the assault on her.

It was her evidence that on the night in question the appellant came to her hut and knocked. On the second knock she asked who it was. The man outside responded that he was Desire Dewa and that he had come to ask for forgiveness for the assault and threats that he had previously issued.

She told the court she knew his voice very well. Thereafter, when she jumped out through the window, she saw the appellant at a distance of about three metres in full moonlight. She was able to see that he was, *inter alia*, wearing his yellow and green T-shirt. Her evidence was that, owing to the moonlight, visibility was so good one could see for a distance of about a hundred metres.

The court *a quo* believed her evidence on identification. It found that she knew his voice very well and that she could not have wrongly identified him. The court also accepted her evidence that the appellant in fact identified himself when she asked who it was. The court *a quo* also believed her evidence that after she jumped out of the hut through the back window, she not only saw the appellant but also identified the yellow and green T-shirt that he was wearing. That the appellant had such a T-shirt was not in dispute.

Abiot Sibanda, a state witness, also gave evidence to the effect that the appellant was at the local bottle store when it closed at 8:00pm. This was contrary to the claim by the appellant that he had left the area at about 7:00pm to go fishing at Mataga.

In my view, the court *a quo* cannot be faulted for coming to the conclusion that the appellant was correctly identified as the person who came to the homestead that night and eventually set the hut on fire. Clearly, the deceased's mother Lydia knew the appellant

very well and there is very little chance that she may have been mistaken in her identification of the appellant as the person who set the hut alight.

The evidence established clearly that the appellant came to the homestead just after 9:00pm on the night in question. The evidence also established that the appellant must have been unhappy when his advances were spurned. Whilst no-one actually saw the appellant torch the hut, the inference from all the facts is irresistible that it must have been him, and no-one else, who had the motive to set the hut on fire.

Appellant's counsel conceded during submissions that the evidence against the appellant was overwhelming and that the conviction was unassailable. In my view the concession was properly made.

On the question of extenuation, the court *a quo* found that the appellant, having been spurned by Lydia, had decided to set on fire the hut in which the children were left sleeping. He was aware that Lydia was staying with the two children and, when Lydia escaped, he would have known that the two young children were inside the hut. It was the finding of the court *a quo* that the appellant set the hut on fire because his advances had been rejected and he decided to get even with Lydia by burning the hut in which her two young children were sleeping.

The court *a quo* found nothing extenuating in the circumstances surrounding the commission of the offence.

I agree with the court *a quo*. This was a sadistic act, perpetrated on two innocent children by the appellant following the realisation that nothing, not even threats, were going to make Lydia change her mind and have an affair with him. The two young children sustained severe burns as a result of which they died. Nigel, the younger of the two, was burnt beyond recognition.

Mr *P. Madzivire*, appellant's counsel, also conceded that this was a callous and gruesome murder and that he was unable to point to any circumstances of extenuation.

I am satisfied that the conviction and sentence were proper. Accordingly, the appeal against both conviction and sentence is dismissed.

GWAUNZA JA: I agree

GUVAVA JA: I agree

Joel Pincus, Konson & Wolhuter, Appellant's Legal Practitioners

The Attorney-General's Office, Respondent's Legal Practitioners