

REPORTABLE (26)

SAMSON MUTERO
v
THE STATE

SUPREME COURT OF ZIMBABWE
GWAUNZA JA, GOWORA JA & MAVANGIRA AJA
BULAWAYO, AUGUST 3, 2015, & APRIL 3, 2017

P. Mazvuzvu, for the appellant

T. Makoni, for the State

T. Zhuwarara as *amicus curiae*

GOWORA JA: On 28 January 2015, the appellant was arraigned before the High Court sitting at Gweru on a charge of murder as defined in s 47 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*], (the “Criminal Law Code”). The allegations against him were that on 20 September 2013, at Gore Village, Chief Nyamhondo, the appellant had caused the death of Chipochashe Ndlovu, a female juvenile, by forcibly having sexual intercourse with her, and assaulting her all over her body with an unknown object, intending to kill her or realising that there was a real risk or possibility that his conduct might cause her death.

The appellant tendered a plea of not guilty to the charge. He was convicted of murder with actual intent to kill the deceased and was sentenced to death.

The appellant noted an appeal against the sentence of death only. However, in view of the death penalty imposed upon him, in terms of the law an automatic right of appeal lies against both conviction and sentence.

The facts giving rise to the charge against him were as follows. The deceased was a child named Chipochashe Ndlovu. At the time of her death she was aged 3. Her mother, Kudzai Dube, (Kudzai) was appellant's common law wife. At the time of deceased's death, the union was of recent duration. The deceased was not related to the appellant.

It is common cause that the deceased had been under the care of Netsai Dube, (Netsai) her maternal grandmother since her birth. When the mother left to go and live with the appellant she took the child with her. She had not obtained permission and as a result Netsai searched for their whereabouts. She located them after two weeks and took the deceased home where she remained.

A few days before her death, Kudzai begged Netsai to let her take the child for some time. Kudzai claimed that she missed the child. The grandmother agreed reluctantly. Kudzai then left with the deceased.

On the fateful day the appellant indicated to Kudzai that he wanted to take the deceased with him to the bush to fetch firewood. Kudzai refused to allow him to take the deceased. The appellant threatened to assault her. She then agreed reluctantly. The two then left.

An hour later, the appellant returned carrying the deceased on his shoulder. She was unconscious. The appellant placed her in the bedroom hut. The appellant then informed Kudzai that the deceased had suffered an epileptic fit whilst they were in the bush. Kudzai went to check on the deceased. She observed fresh bruises on the deceased's right forehead. There was blood and froth coming out of the child's mouth. She checked for a pulse and found none. She deduced that the child was dead and went to inform her neighbour Makazviita Munengewa of the situation.

The appellant and his brother then transported the deceased to Netsai's homestead. They arrived during the night and placed the child in a hut. Unaware, the following morning Netsai proceeded to her garden from where she was summoned after a short while. On returning home she discovered that the appellant had brought the deceased's body to her homestead the previous evening. The appellant was not present. A report was made to the neighbourhood watch committee who informed the police.

The police attended and advised Netsai to convey the body to the hospital immediately due the state of decomposition that had set in. Netsai decided to clean the body of the deceased before it could be conveyed to the hospital. During the process she observed injuries on the deceased which led her to conclude that the child had been sexually molested.

The appellant was arrested shortly thereafter.

At the hospital, the body of the deceased was examined by Winnie Gumbo a state registered nurse. The nurse observed injuries which also led her to form the opinion that the deceased had been sexually molested.

A few days later, a pathologist, Dr Pesanai, conducted a post mortem examination and compiled a report. The body was swollen due to decomposition. The post mortem examination was unable to establish the exact cause of death. The pathologist was able to amplify the report during the trial. His conclusion was that the cause of death was a laceration to the rectum resulting from the rape and the sodomy.

Both in his defence outline and in the warned and cautioned statement the appellant denied killing the deceased. He also denied having sexually assaulted her.

In his warned and cautioned statement which was confirmed before a magistrate, the appellant stated that he took the deceased to the nearby bush to look for firewood. He sat her on a footpath while he fetched firewood. After a while he observed that she had fallen to the ground. He suspected that she had suffered from epileptic fits. He denied having caused her death.

In the defence outline he stated that the deceased had accompanied him to the goat pen within the homestead. She sat on a path whilst he fetched firewood. When he looked at her next, he observed that she was having fits. She was frothing from the mouth and had fallen to the ground. He picked her up and carried her to the homestead where he placed her in one of the huts. She died later on the same day.

The court *a quo* concluded that the appellant had taken the toddler into the bush with him for the sole purpose of killing her.

In coming to this conclusion the court had regard to the evidence of several witnesses who had access to the body before it decomposed.

Amongst the witnesses were the two police officers, Simbarashe Makopa and Freedom Nyamutsamba who attended at the deceased's grandmother's homestead in reaction to a report of rape and murder. They found the deceased's body lying in a bedroom hut. Upon examination of the body, they observed bruises on the right side of the head, the back, the forehead and the abdomen.

The trial court also took into account the evidence of the grandmother, Netsai. She had cleaned the body and had observed that the deceased had bruises on the back and lower abdomen. The body was swollen on both sides of the neck and there was froth coming out of the deceased's mouth and nose. Her genitalia was described by the witness as "open" and there were traces of faeces. From the injuries she observed, Netsai suspected that the deceased might have been sexually abused. Like the other witnesses, she had also observed bruises on deceased's back. The witness discounted the suggestion by the appellant that the deceased had suffered from epileptic fits, and further that she had died from a bout of fits.

In addition, the court had regard to the evidence of the nurse who saw the body upon its delivery at the mortuary after its recovery by the police. This witness testified that the corpse had fresh bruises on the right eye, fresh bruises on each side of the abdomen just above the groin and a fresh bruise at the back. The nurse said the bruises on the abdomen, back and right eye made her conclude that force had been applied to those areas using fingers.

There was also a fresh bruise just between the lumbar and sacral region of the back. An examination of the genital area revealed bruising on the *labia majora* as well as bruises on both sides of the *labia minora*. Although the hymen was intact the nurse was of the opinion that penetration had been effected.

Her evidence was that the deceased had been sexually abused. At the time of these events she had been a nurse for twenty-five years. The trial court found her to be a fair witness with no axe to grind against the appellant.

The court also considered the evidence of Kudzai, the deceased's mother. She confirmed what the appellant stated in his extra-curial statement that he had taken the child to the bush on the pretext that he was going to look for firewood in the bush. The deceased was in good health and had never suffered from epileptic fits. Two hours later the appellant returned. He was carrying the deceased on his shoulder. She was bleeding from the nose. In addition, she was frothing from the mouth. She denied that the deceased suffered from epileptic fits as claimed by the appellant.

The pathologist examined the body of the deceased on 25 September 2013. A period of five days had elapsed from the time of death.

The pathologist observed a small laceration measuring 0.5 cm on the child's genitals. The anus was dilated and there was a laceration inside the rectum itself. The skull plates were open and had separated. Due to decomposition no obvious cause of death was observed. However, the examination showed that the child had been sexually assaulted. There

was penetration of the genitalia which went through the anus causing the laceration in the rectum.

The pathologist candidly admitted that the body was in an advanced state of decomposition. He was unable to discount the effects of decomposition on the body. What was certain however was the fact that the child had been sexually assaulted both through the vagina and the *anus*.

The assault through the *anus* caused the laceration in the rectum which he reported on. His evidence was that the rectum is in the same line with the intestines. These are strong organs capable of expanding. The rectum like the intestines can take more pressure than other organs. Because of the ability to withstand force, the laceration in the rectum could only have come about through the application of force, in this case a rape. As a result, he discounted the possibility of the laceration in the rectum having been caused by decomposition. It was more likely that the cause of the laceration was due to sexual assault.

On these facts the appellant was convicted of murder with actual intent to kill. After a finding that the murder was committed under aggravating circumstances the trial court imposed a sentence of death.

The grounds of appeal are aimed at the sentence. They do not challenge the conviction. Nevertheless, it is appropriate to consider the appropriateness of the conviction before dealing with the appeal against sentence.

On behalf of the appellant, Mr *Muzvuzvu* submitted that the circumstances surrounding the commission of the offence were such that it was difficult to challenge the appellant's conviction on the charge of murder with actual intent to kill. He set out for the benefit of the court those factors which in his opinion confirmed the correctness of the finding of guilt of murder with actual intent by the trial court.

He said that the appellant floundered when asked to give a reason why he wanted a three-year-old minor to assist him in fetching firewood. Protests from the deceased's mother against the proposal were met with threats of physical assault from the appellant. When the appellant returned with the deceased he made no attempt to get any sort of help for the deceased even though he claimed that she was unconscious and not dead. This belied his assertion that she had suffered epileptic fits when he took her to the bush to fetch firewood. He then proceeded to prepare food for himself in the same hut that he had placed her. He was completely unmoved by the lifeless body of the deceased and he proceeded to eat in the same hut.

The trial court concluded that the appellant intended to kill the deceased. The finding by the trial court as to intent was to the effect that the appellant desired to kill the deceased. This form of *mens rea* is what is commonly referred to as *dolus directus*. In his book, *Principles of Criminal Law* 5th ed p 350, the learned author, Jonathan Burchell defines *dolus directus* as follows:

“This is intention in its ordinary grammatical sense: the accused meant to perpetrate the prohibited conduct or to bring about the criminal consequence. This type of intention will be present where the accused's aim and object was to perpetrate the unlawful conduct or to cause the consequence even though the chance of it was small.”

The question whether the appellant killed her with actual intent is a factual one. The determination of the issue of *mens rea* must relate to the facts surrounding the commission of the offence with which the appellant was charged and convicted.

The evidence against the appellant is largely circumstantial. From the evidence, she had been brutalised. She had also been sexually abused. She died from injuries as a result of the sexual abuse. He was, on his own admission, the last person to see her alive. He admitted in his warned and cautioned statement that when he returned home with her she was unconscious. When he took her from her mother she was walking on her own two feet. The only inference is that he was the one who abused her sexually resulting in the state that she was in upon their return to the homestead.

The issue for determination therefore is whether or not the court *a quo* was correct in its conclusion that the only possible inference in the circumstances of this case is that the appellant killed the deceased with an actual intent to kill her.

The test on inferential reasoning was set by WATERMEYER JA in *R v Blom* 1939 AD 188. It was stated therein that there are two cardinal rules of logic in such enquiry. At pp202-3, the learned jurist said the following:

“In reasoning by inference there are two cardinal rules of logic which cannot be ignored:

- (1) The inference sought to be drawn must be consistent with all the proved facts. If it is not, the inference cannot be drawn.
- (2) The proved facts should be such that they exclude every reasonable inference from them save the one sought to be drawn. If they do not exclude other reasonable inferences, then there must be a doubt whether the inference sought to be drawn is correct”

In this case the proven facts are the following. The deceased's body was in such an advanced state of decomposition that the pathologist was unable to establish the exact cause of death. As a result, the post-mortem report is silent as to the actual cause of death. However, the tenor of the evidence of the witnesses who saw the deceased shortly after the appellant brought her home from the bush bears testimony to the application of force to her body as well as her private parts. In view of the evidence of the pathologist that the proximate cause of death was the laceration to the rectum, the question before the court is whether, by raping the deceased in the manner described by the pathologist, the appellant meant to perpetrate the prohibited conduct or bring about the criminal consequence. The prohibited conduct in this case is the murder of the deceased by the appellant. Did he mean to cause her death in acting as he did?

In *R v Kewelram* 1922 A.D 213, the court had to consider whether an accused person charged with setting fire to his stock in order to defraud an insurance company had been properly convicted of arson by a jury in relation to the store in which the stock was. The building itself belonged to someone else. At p 216 INNES C.J. resolved the question in this manner:

“The jury were satisfied that the accused must have realised the consequences of his action. Realising that the fire must spread from the stock to the building, he, for his own fraudulent purposes, set fire to the stock. Under these circumstances the inference of a wrongful intention to burn the store was amply justified. Nor did I understand that Mr *Hoexter* seriously disputed that proposition. He contended that although an intention to burn the store might be implied, it did not follow that there was an intention to injure the owner. The latter, it was suggested, might have been over-insured and the intentions might have been to benefit him. But motive in most cases can be gathered from action. And the wrongful and deliberate setting fire to the building of another is an act from which it is legitimate to deduce an intention to injure that other. Such a deduction is founded upon a knowledge of human nature and of the ordinary course of human affairs. The inference may be disproved by the wrongdoer; but unless disproved it stands.”

In *R v Mashanga* 1923 AD 11, INNES CJ, affirmed the approach of the court in Kewelram (*supra*) in the following terms:

“Now to constitute the crime of malicious injury to property, malice is a necessary element. But by that is meant legal malice, not necessarily personal spite against the owner of the injured property. All that is necessary in our law to the constitution of the crime is an intentional wrongful injury to the property of another. Upon proof of the wrongful intention the Court will presume malice; that presumption may be rebutted, but until displaced it stands. As Mr Fischer said, the matter has really been concluded by our decision in *Rex v Kewelram* (1922, A.D. 213). It was there laid down that to support an indictment it was not necessary for the Crown to establish the existence of a specific intention to injure the owner of the property, but that such intention could be inferred from the realisation of the fact that the burning of stock in a building would result in the burning of the building.”

The evidence on the injuries observed on the body of the deceased paints a horrific picture of the agony that the appellant put the deceased through.

The deceased was aged 3. She was virtually a baby. She should not, by any stretch of the imagination, have been considered an object of sexual desire. She walked from the homestead but returned lifeless, a mere hour later. She was on the appellant’s shoulder. She was bleeding from the nose and had froth coming out of her mouth. In the absence of a pre-existing condition, the nose bleed was most probably caused by the application of force to that part of her face causing the nose to bleed.

The nurse who admitted the deceased’s body observed fresh bruises on the right eye. There was also bruising on each side of the abdomen. The grandmother observed swellings on both sides of her neck. In my view, the injuries point to the application of force around her throat resulting in her frothing from the mouth. Taken together, these injuries suggest that the deceased was lying with her face on the ground. In order for the appellant to perpetrate the rape *per anum* the deceased would have to be lying on her stomach.

Both witnesses described bruising on the back. The open *genitalia* which had faeces confirms that she was raped and further that after sodomising her at some point he perpetrated a frontal assault leaving faeces in the *genitalia*. From the bruises and injuries observed on the body, it was the conclusion of the pathologist that the deceased had been sexually abused both per *vaginum* and *anum*. As a result of the sexual abuse there was a laceration in the rectum. A laceration of this nature would cause bleeding which could be fatal. She died as a result of the assault.

The evidence on the sexual assault leads one to conclude that the appellant intended to rape and assault the deceased. In order to give effect to his intent, the appellant took her to the mountains against the will of her mother. He subjected her to such a vicious sexual assault that he tore her insides causing her to die from the injuries inflicted from the assault.

Given the age of the deceased and her body size, it can be said that the death of the deceased was the appellant's aim and object. He could not give a reason why he wanted a three-year-old juvenile to accompany him to the bush to fetch firewood. When her mother indicated her unwillingness for the child to accompany him he threatened her with physical assault. He kept her in the bush for two hours only to return with her lifeless body on his shoulder. He callously laid her body in the kitchen hut where he proceeded to prepare food for himself and eat it. He made no attempt to obtain medical assistance for her, even from the child's own mother. He then surreptitiously conveyed her to her grandmother's homestead for burial during the night. He made no effort to advise the grandmother of the child's passing. It is also common cause that he and Kudzai had previously taken the deceased away from the grandmother's home without permission. The grandmother was only able to locate her after two weeks.

A wrongdoer is presumed to have intended the natural consequences of his actions. In view of her age, her small body and the manner in which he perpetrated the sexual assault on her, it is clear that the appellant contemplated and foresaw that the deceased would sustain serious injuries that would have irreparably and extensively damaged her small undeveloped body. It must have been in his contemplation that her pubescent body could not withstand such an assault and that serious harm would be occasioned to her from the assault. As a consequence, he must be presumed to have intended to cause her death. The only inference is that he abused her sexually and that he foresaw her death from the assault. Given the proven facts, it is inevitable to conclude that in the eyes of the law he intended to kill her and he in fact desired her death. I am satisfied, on these facts, that the appellant was properly convicted of murder with an actual intent to kill the deceased.

The appellant was charged and convicted in terms of s 47 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*], (the “Criminal Code”). That section, which has since been amended to accord with the Constitution, provided as follows:

47 Murder

- (1) Any person who causes the death of another person
 - (a) intending to kill the other person; or
 - (b) realising that there is a real risk or possibility that his or her conduct may cause death, and continues to engage in that conduct despite the risk or possibility;shall be guilty of murder.

- (2) Subject to s 337 of the Criminal Procedure and Evidence Act [*Chapter 9:07*], a person convicted of murder shall be sentenced to death unless;
 - (a) the convicted person is under the age of eighteen years at the time of the commission of the crime; or
 - (b) the court is of the opinion that there are extenuating circumstances;
in which event the convicted person shall be liable to imprisonment for life or any shorter period.

On a proper and literal construction, s 47(2) as it was prior to the amendment, requires that a person convicted of murder be sentenced to death in terms of s 337 of the Criminal Procedure and Evidence Act, [*Chapter 9:07*], (the “CP&E Act”). Therefore, a court which convicts an accused person of murder must have regard to the provisions of s 337 to pass a sentence that is in accordance with the law.

In turn, as at the date that the appellant was convicted and sentenced, s 337 read in relevant part:

“337 Sentence of death for murder

Subject to section *three hundred and thirty-eight*, the High Court—

(a) shall pass sentence of death upon an offender convicted by it of murder:

Provided that, if the High Court is of the opinion that there are extenuating circumstances or if the offender is a woman convicted of the murder of her newly-born child, the court may impose

(a) a sentence of imprisonment for life; or

(b) any sentence other than the death sentence or imprisonment for life, if the court considers such a sentence appropriate in all the circumstances of the case.”

In *casu*, having found the appellant guilty of murder with actual intent, the trial court invited counsel for the defence and the state to address it in relation to the question of sentence. The record reveals that counsel premised their addresses on the provisions of s 48 of the Constitution of Zimbabwe Amendment (No. 20) 2013. It is common cause that both counsel related their respective addresses to the question of whether or not the murder of which the appellant had been convicted had been committed in aggravating circumstances. Neither made reference to s 47(2) of the Criminal Code or s 337 of the CP&E Act.

Consequently, in passing sentence, the trial court invoked s 48(2) of the Constitution. As prayed by the State counsel, the trial court exercised its discretion under s 48(2) on the issue of aggravating circumstances. The court was unable to find anything that

would justify the imposition of a sentence other than death. It imposed the death penalty upon the appellant.

At the hearing of the appeal this court enquired from the legal representative of the appellant and the state as to the appropriateness of the sentence. The question bedeviling the court was whether or not a trial court can impose a death sentence on a person convicted of murder with actual intent without reference to s 337 of the CP&E Act. Neither counsel was in a position to assist. We are indebted to Mr *Zhuwarara* who successfully applied to assist the court as an *amicus curia*. He filed detailed submissions on the question posed.

It is not in dispute that s 337 constitutes part of the law of this country. Section 10 of the 6th Schedule of our Constitution has specifically provided for the continuation and efficacy of all laws in existence at the date of promulgation of the Constitution. It seems to me that the trial court was aware that the provisions of s 337 were in conflict and inconsistent with s 48 of the Constitution. This section read as follows:

2 Supremacy of Constitution

- (1) This Constitution is the supreme law of Zimbabwe and any law, practice, custom or conduct inconsistent with it is invalid to the extent of the inconsistency.
- (2) The obligations imposed by this Constitution are binding on every person, natural or juristic, including the State and all executive, legislative and judicial institutions and agencies of government at every level, and must be fulfilled by them.

48 Right to life

- (1) Every person has the right to life.
- (2) A law may permit the death penalty to be imposed only on a person convicted of murder committed in aggravating circumstances, and—
 - (a) the law must permit the court a discretion whether or not to impose the penalty;
 - (b) the penalty may be carried out only in accordance with a final judgment of a competent court;
 - (c) the penalty must not be imposed on a person—
 - (i) who was less than twenty-one years old when the offence was committed; or
 - (ii) who is more than seventy years old;
 - (d) the penalty must not be imposed or carried out on a woman; and
 - (e) the person sentenced must have a right to seek pardon or commutation of the penalty from the President.
- (3) An Act of Parliament must protect the lives of unborn children, and that Act must provide that pregnancy may be terminated only in accordance with that law.

The Constitution is the supreme law in Zimbabwe land and all laws and legislative instruments must be construed in such a way as to give efficacy to the provisions of the Constitution. The Constitution requires that the death penalty may be imposed upon a person convicted of murder committed under aggravating circumstances in terms of a law. However, *per contra*, the CP&E Act provides for the death penalty unless there are extenuating circumstances surrounding the commission of the offence. This clearly is in conflict with the provisions of s 48 (2). In addition, there are a number of inconsistencies apparent in the Constitution and s 337. These are the following. The Constitution provides that the court has a discretion as to whether or to impose a death penalty, s 337 is peremptory in its terms, in that a court which is unable to find factors of extenuation must impose the death penalty. The Constitution provides that no court may impose a penalty of death upon a woman convicted of murder whereas in terms of s 337 only a pregnant woman is exempted from the imposition of the death penalty.

It is clear that s 47 of the Criminal Law Code and s 337 of the CP&E Act are inconsistent with s 48(2). When regard is had to the provisions of s 2(2) of the Constitution a court which convicts an accused person of murder can only sentence such an accused person to death in terms of a law which provides for a murder committed in aggravating circumstances.

It is common cause that as at 30 January 2015 when the appellant was sentenced no such law was in place. Although the trial court made no reference to s 337 it was correct in accepting that in view of its inconsistency with s 48 of the Constitution, s 337 was invalid and therefore could not be given effect to. The trial court sought to rely on s 48(2) of the Constitution to pass the sentence of death. In my view the court was wrong in simply ignoring

the section, it should have made mention of the offending provision and given its reasons as to why it would not sentence the appellant in accordance with the same.

The court *a quo* however completely overlooked the section and went on to sentence the appellant in terms of s 48(2) of the Constitution. The court was clearly in error as s 48 of the Constitution is not an operative provision for purposes of sentencing. It does not specify what sentence the court may pass upon a person convicted of murder. It is a section which defines and sets out out fundamental rights of a person convicted of murder.

In addition, and most fundamentally, s 48(2) requires that the death penalty be provided for in a law permitting a court to pass sentence for a murder committed in aggravating circumstances. Therefore, it stands to reason that s 48 is not such law. In my view, it is an enabling provision for the promulgation of the necessary law. In the absence of the contemplated law therefore the trial court could not pass a sentence of death. To do so would be a violation of s 48(2).

Parliament has now complied with the provisions of s 48(2). The General Laws Amendment Act 3 of 2016 has made provision for the amendment of s 47 of the Criminal Law Code.

Consequently, in so far as the trial court ignored the provisions of s 377 of the CP&E Act in its consideration of the appropriate sentence, the sentence it passed was invalid. The sentence was passed outside the law and cannot stand. The sentence therefore is set aside and the matter is hereby remitted to the trial court for the same to consider sentence in terms of the law.

Accordingly, it is ordered as follows:

1. The conviction of the appellant on a charge of murder with actual intent is upheld.
2. The appeal against sentence is allowed.
3. The sentence of death is set aside and the matter is remitted to the same court for consideration of and the passing of an appropriate sentence in terms of the law.

GWAUNZA JA I agree

MAVANGIRA AJA I agree

Muzvuzvu & Mguni Law Chambers, appellant's legal practitioners

National Prosecuting Authority, respondent's legal practitioners