

THE STATE
versus
NQOBILE SIBANDA

HIGH COURT OF ZIMBABWE
BERE J
HARARE 13 and 17 May 2012

SENTENCE – CRIMINAL TRIAL

ASSESSORS – Mrs S. Shava and Mr N. Nyandoro

Mr R. Tokwe, for the State
Advocate T. Mpofu, for the accused

BERE J: This matter has taken an unusually long period of time to be concluded. It has been a long walk to justice on the part of the accused person and all those involved. Having been convicted of having committed the crime of murder with actual intent by my brother Judge BLACKIE J on 16 July 2002, we were only able to reconvene on 16 November 2010 to deal with the existence or non-existence of extenuating circumstances before sentencing the accused person.

Dealing with the issue of extenuation I feel more inclined to lean on the views of HOLMES J¹ when the learned Judge stated:

“ Extenuating circumstances have more than once been defined by this Court as any facts, bearing on the commission of the crime, which reduce the moral blameworthiness of the accused, as distinct from his legal culpability. In this regard the trial Court has to consider;-

- (a) whether there are any facts which might be relevant to extenuation, such as immaturity, intoxication or provocation (the list is not exhaustive)
- (b) whether such facts, in their cumulative effect probably had a bearing on the accused’s state of mind in doing what he did.
- (c) whether such bearing was sufficiently appreciable to abate the moral blameworthiness of the accused in doing what he did.

¹ . SV Letsolo 1970 (3) SA 476 @ 476 F-H

In deciding (c) the trial court exercises a moral judgment. If its answer is yes, it expresses its opinion that there are extenuating circumstances.”

It is important to emphasise that the enquiry to extenuation is critical in a murder conviction. It is upon the conclusion of this enquiry that the Court is then enjoined to exercise its discretion to either “take the drastic step of ordering” the accused to forfeit his life or to consider some other competent alternation sentence.

It will be noted that after the accused had led evidence in extenuation of sentence the state counsel conceded that indeed extenuating circumstances existed. The Court expressed the view that it was not bound by that concession and the defence appeared to have been ruffled by the position taken by the court. The defence counsel’s contrary view was that once the state had made this concession the Court was “harmstring” from making a finding to the contrary. Counsel could not provide authority to back up his argument. The Court was certainly not impressed by the position blindly adopted by counsel.

The Court’s position which I feel inclined to emphasise is that the Court can never be held hostage by the concession made by the State as happened in this case. There may be so many reasons why the defence and the prosecution may come to any agreement including but not limited to for example, a conspiracy to mislead the court for whatever reason. The Court must not be bound by such concessions and must retain its discretion to arrive at a properly informed or judicious decision taking into account the evidence tabled before it. The final decision must remain the prerogative of the Court.

Coming back to the issue at hand the enquiry on the accused’s mental and emotional state at the time of the offence largely zeroed on two fairly detailed psychiatric reports coupled with the *viva voce* evidence of Dr D. Chibanda and Dr Munyaradzi Madhombiro, two fairly experienced pschiarists.

The evidence presented by the two doctors was quite revealing in assisting the court in its quest to determine the existence or non-existence of extenuating circumstances in this case.

Both psychiatrists examined the accused person on different occasions. Both concluded the accused showed an abnormal E E G (electro encephalogram). Dr Chibanda indicated in his report that the abnormality on the E E G scan suggested Temporal Lobe Epilepsy on the part of the accused. He recorded that on interviewing the accused, the accused revealed to him that he was on occasions having visual and auditory hallucinations associated with a sensation of smelling things. The accused further revealed to the doctor that at one stage before this murder occurred, he was taking steroids to enhance his body building exercises. Dr Chibanda was unable to gather the accused's collateral history to support his psychiatric examination of the accused hence he recommended that a second opinion be obtained from another qualified psychiatrist hence the coming into the picture of Dr Madhombiro.

Dr Madhombiro was able to gather the accused's collateral history from the accused's mother, father and accused's former workmate. The information gathered from the mother was particularly revealing. The doctor recorded that the accused's mother revealed to him that the accused had what appeared like " fits, " medically referred to as 'febrile convulsion' which he reasoned are a precursor to complex partial seizures in adults.

In addition, the accused also told the doctor of his use of anabolic steroids between 1999 and 2000. His examination concluded that the accused suffered from Temporal Lobe Epilepsy.

The court found the following extract from Dr Madhombiro's report to be particularly of assistance.

"INDICATIONS OF TEMPORAL LOBE EPILEPSY IN THE ACCUSED"

16. Accused is an adult of 32 years of age. When the accused was young, he was reported to have had what appeared like "fits" medically known as febrile convulsions. These are a precursor to COMPLEX PARTIAL seizures in adults.

17. Accused admits using drugs, anabolic steroids between 1999 and 2000. I reiterate that often patients with temporal lobe epilepsy often abuse drugs as an unconscious form of medication to fight sublime depression.

18. In this case, the condition could have been worsened by the stress that the accused was going through as he genuinely believed that he was being falsely implicated to be responsible for the pregnancy of the deceased and this could have definitely triggered the seizure.

19. I aver that it is my opinion that any one of these factors may have triggered temporal lobe epileptic seizures on the day the accused stabbed the deceased.”².

There was no evidence led to try and controvert the medical evidence which tended to show some form of diminished responsibility on the part of the accused at the time he committed the offence.

If anything, the reckless manner in which he used the knife would seem to suggest that something had gone terribly wrong with the him.

The Court fully appreciates that the psychiatric examinations were only conducted almost 9 years after the murder itself and the results of such an examination may not accurately portray the state of the accused’s mind at the time of the murder itself. We have agonized over this as a Court but concluded that we grant the accused person the benefit of doubt and accept that at the time the behaviour of the accused must have been triggered by Temporal Lobe Epilepsy.

At the time of this offence the accused was aged 21 years and a youth leader in his church and his parents appear to have been active members of the church. Youthfulness as a factor in extenuation has not escaped our minds. The responsibility associated with the accused being a youth leader and the usual high expectations from the church must have weighed heavily against the accused person when he had to deal with the pregnancy of the deceased.

The stress and anxiety which the accused person as a 21 year old must have gone through at the time cannot be overemphasized.

The immaturity and desperation on the part of the accused person manifested itself in the manner in which he sought to get himself out of this mess. He sought to take the pregnant deceased to her former boyfriend to try and resolve the pregnancy of the deceased. How that would work out remains anybody’s guess but in our view it

² . Dr Madhombiro’s medical report compiled on 3rd November 2010.

demonstrates irrational behaviour which cannot be separated from the accused's youthfulness at the time.

Cumulatively we are unanimously agreed that the accused's mental state (as explained by the two psychiatrists) and the youthfulness and how he sought to extricate himself out of the mess he had himself created must amount to extenuating circumstances which tend to reduce the accused's moral blameworthiness as distinct from his legal culpability.

Sentence

Some jurists have commented that sentencing is the blind end of justice. There is no mathematical formula which the Court has to lean on in coming out with what it perceives to be an appropriate sentence. At the end of the day it is no more than a value judgment leaning heavily on the factors in both mitigation and aggravation.

In mitigation we have considered that at the time of this offence the accused was barely 21 years old and as already highlighted there was an element of immaturity on his part.

The responsibilities that the accused carried and the subsequent pregnancy of the deceased must have weighed heavily against the accused. The evidence of the two psychiatrists suggest that the accused suffered from some form of diminished responsibility.

The confession that the accused made, though in the aftermath of his conviction, does in our view show remorse on his part. We comment the accused for that as we believe it has laid to rest many unanswered questions surrounding the death of the deceased.

The accused is being sentenced 10 years after conviction. It is a record time. However we have not lost sight of the fact that the accused also contributed to the delay by among other things mounting a Supreme Court application to assert his liberty when he knew very well that he had committed the offence.

In aggravation we find it particularly significant that despite the accused being fully aware that he had committed this offence he demonstrated a stout effort to lie his way out of trouble. The accused crafted a defence that sought to lay the blame for the murder on an innocent person, the deceased's former boyfriend and in so doing further delayed the finalization of this case.

It is aggravatory that the accused murdered the deceased in a desperate effort to avoid responsibility for the pregnancy that he had caused her.

Not only did the accused murder the deceased but also the unborn innocent life that was between 10-12 weeks old.

The murder itself was premeditated and callous. The post mortem external examination conducted on the deceased revealed that the deceased had multiple stab wounds-five stab convex shaped wounds on the front part of the body, three wounds on the neck, 4th wound above the collar bone and 5th below and at the rib cage.

We have no doubt that if the accused had been sentenced immediately after conviction, the sentence would have been probably more severe than it will be now.

Having considered all the submissions made on behalf of the accused and against him. We believe a term of 15 years imprisonment would be appropriate.

The accused is accordingly sentenced to undergo 15 years imprisonment

The Attorney General's Criminal Division, for the state.

Gill, Godlonton & Gerrans, legal practitioners, for the accused.