Judgment No. S.C.
Crim. Appeal So.322/83

BEJA GWAKWACHA v THE STATE

,

SUPREME COURT OF ZIMBABWE
HARARE, NOVEMBER 8 & 18, 1983.

M.J. Gillespie, for the appellant M. Werrett, for the respondent

GEORGES CJ: The appellant and the deceased had been married for 23 years and were the parents of ten children. The headman of their village, Meki Sibanda, was unaware of any serious difficulties in their matrimonial life. There must, however, have been problems for shortly before the incident which led to this appeal the appellant had beaten the deceased with a switch as a result of which she had returned to the kraal at which she was living before her marriage, referred to in the proceedings as her maiden kraal.

The deceased came back to the appellant's kraal on the afternoon of the day before her death, but relations between herself and her husband appear not yet to have settled down. There was no conversation that evening but on the following morning as the appellant was about to set out to collect edible worms the deceased told him that her brother would be arriving that day, presumably to discuss the problems which hao lea to her departure. As a result of this information the appellant changed his plans and decided with which to repair their hut and to have a bath in the dam.

After/

After the appellant had set off, the deceased appeared to have decided to visit a neighbouring farm.
She set off with one of her daughters aged about 11 and a friend of the daughter, Hlongo Ncube. The appellant met her on the way and asked the children to go on ahead while he remained behind with the deceased.

The appellant did not wish her to visit the farm. The deceased stated that there were people there who owed her money and it was wise to visit on that particular day since it was *a* pay-day and if she did not collect then the likelihood was that her debtors would have spent their money and would be unable to pay later. He put it to her that her brother was due to arrive and that for that reason she should not go.
Her reply, as set out in the warned and cautioned statement which the appellant gave the next morning, was that he could not keep on forcing her to do what he wanted, and that he should go to look for another woman whom he could force.

The appellant was at that time holding a large knife used for cutting sugar cane, and he struck her many times with it because he was angry. In his own words he later observed that he had injured her, so he decided to finish her off so that she would no longer suffer pain. He did this by slitting her throat.

Thereafter, according to his evidence in Court, the appellant attempted to commit suicide but the makeshift rope which he was using broke. He then changed his clothes, went to the dam to have a wash and set out apparently to report the matter. On the way he met the village headman, Sibanda, in a car, stopped/

stopped him and told him that he had been coming to look for him because he had just killed his wife.
The appellant appeared so normal that Sibanda was at first unbelieving. He asked the appellant where the wife was and the appellant told him that he had killed her in a farming area.

Sibanda parked his car at a homestead nearby, fetched his bicycle, contacted the village policeman and instructed him to go and report the matter.
He followed the appellant who had gone to the pierce where the body lay. The body was covered with leaves which had apparently been placed on it by the appellant

The appellant explained to Sibanda that he ha killed his wife because she. was insisting on going to the farm where she had brewed beer and. where she had left money belonging to her. He had become angry because the deceased had left the house against his advice not to do so. Sibanda was positive that he had given no other explanation for his anger.

At the trial the appellant gave substantially the. same version of events as set out in his warned and cautioned statement, with one significant addition.
He stated that the deceased had told him "The vagina I sell is not yours. It is mine. If you want a wife you can force, go and fetch for yourself a second woman and force her, not me." These words implied that she was engaging in prostitution and although he did not believe it, having regard to their long period of association, the words so angered him that he completely lost his temper and attacked her in the way he did.

The/

The Court a quo held that the appellant's recall of events was so clear that it could not be said that he was so beside himself with anger as not really to know what he was doing. It also held that the words implying that the deceased had been engaging in prostitution had not been used by the deceased. The reasoning was that the appellant would certainly have mentioned it in his statement to the police and in his explanation to Sibanda. It was an afterthought put in at the trial.

The Court a quo held that the appellant was guilty of murder with actual intent and that there were no extenuating circumstances. Accordingly the appellant was sentenced to death.

In his argument before us Mr Gillespie, on behalf of the appellant, stressed that the appellant's detailed account of the sequence of the attack showed variations and that the trial Court erred in finding that it was so consistent as to support the inference that he was clearly aware of what he was doing.

I agree that under cross-examination some variations did appear, but I am not satisfied that those were the result of any lack of clarity as to the sequence of events at the time of the offence.
The indications which he made to the police on the day of the attack were in no way confused. Under cross- examination the sequence in which the blows were struck remained unchanged, though there were changes in locating the particular spot where the deceased happened to have been at the moment when particular blows were struck . A witness, cross-examined in detail on the sequence of events some time after their occurrence
is not unlikely to become uncertain as he searches his recollection to recreate the events. I do not think that this can be taken as an indication of a lack of clarity as to what happened and possible lack of unawa- reness of one's actions at the time of the events as they took place.

Mr Gillespie also contends that the Court a quo was wrong in finding that the taunt as regards prostitution had never been thrown. He points out that the failure to mention the matter in

his statement and to Sibanda could well be explained by his state of mind immediately following the traumatic and unusual events which had just occurred, including his attempted suicide.
As was mentioned in the course of argument, however, it is of some significance that the words used in his statement follow very closely the words given in evidence, save for the addition of the selling of the vagina. It would be strange indeed if this precise recollection *of* the words did not bring back to mind what he now stated in evidence to have been the real sting of the attack.

In those circumstances the Court a quo cannot be said to have been in error in holding that those words were not used and that the cause of the attack was the deceased's persistence in wanting to continue to go to the farm against his expressed desire that she should not do so.

Once the finding of the trial Court on these issues is confirmed it becomes impossible to find extenuating circumstances in this case, much as one may sense intuitively that there is much that may not have been revealed and that there may be circumstances/

circumstances which would make the carrying out of the death sentence inappropriate.

The remarks on sentence by the learned judge a quo show a careful consideration of all the relevant factors: the marriage, the family, the likelihood that a strong bond of affection must have existed, and the fact that the intention to kill may not have arisen until the moment of attack. The Court a quo noted correctly that the provocation was small when compared with the violence of the attack.

Mr Gillespie stressed that it was not merely a matter of the deceased insisting on going to the farm but that implicit in her attitude was a desire to bring the marriage to an end with the advice that he should get a second wife. I am not sure that this was not in fact taken into account by the trial judge. He pointed out that the appellant, in his own way, must-have valued the deceased and that in the conduct of their marriage what she did could have humiliated him and could have made him feel inadequate - matters which in the appellant's social context would have been of grave importance.

Nonetheless the Court's view that this was a matter which could and should have been settled in the traditional ways is in the final analysis indisputable.

Accordingly I agree, with the finding of the Court a quo that the aggravating features of this case far outweigh the extenuating circumstances and that the sentence of death was proper.

I would dismiss the appeal,

BECK JA : I agree.

GUBBAY JA: I agree.

Pro Deo