

Judgment No. S.C. 128/83
Crim. Appeal No. 248/83

GODFREY SIMBI v THE STATE

SUPREME COURT OF ZIMBABWE,
GEORGES, CJ. GUBBAY. JA & WADDINGTON, A JA,
HARARE, NOVEMBER 8, 1983.

K.J. Van Huyssteen, for the appellant

Mr Werrett, for the respondent

GEORGES CJ: This matter has already come on appeal before the Supreme Court and in a judgment delivered on 9 August 1982 the Court dismissed the appellant's appeal against a conviction, but ruled that there was need to have a further investigation into the appellant's age at the date of committing the offence before coming to a conclusion as to whether or not the death penalty should have been imposed. Accordingly the sentence of death which was passed on the appellant was quashed and the matter was remitted to the trial Court for the hearing of further evidence on the appellant's age.

The facts of the case appear in the earlier judgment (Supreme Court Judgment No 118/82) and need not be repeated, but in brief the appellant, who held political office in an area which included Bindura, deliberately shot and killed the deceased, the manager of an Inn, because the deceased; had proved unco-operative in settling a dispute between his workmen and himself.

The issue of the appellant's age had only been raised at the trial at the very end when it was alleged that the appellant had been born on 24 June 1964. Up until that moment it had been the case that his date of birth was 24 June 1962.

The Criminal Procedure and Evidence Act s 314(1) provides that a sentence of death shall not be passed on anyone under the age of sixteen years, but it is not challenged in this case that the youth of an offender is an extenuating circumstance to be taken into account in arriving at a decision as to whether or not the death penalty should be imposed

At the resumed hearing there was evidence from a dentist, Dr Ibos, who was no longer in the country and whose affidavit was produced. There was also oral evidence from another dentist, Dr Mahomva, and from a pathologist, Dr Purohit.

It is conceded that Dr Purohit's evidence was the most comprehensive because it relied not only on clinical and dental evidence but also on radiological examination of the appellant to determine the extent of ossification of various joints of his body. Dr Purohit had considerable experience conducting such tests, having done over 20 000 of them in India. His experience in Africa was not as extensive but he had no reason to think that regional variations would have been of particular significance.

Dr Purohit's finding was that the appellant was not less than 20 years on the date of his examination which was 10 March 1983 and not more than 21. This would have made the appellant between 17 and 18 on the date of the offence.

The dentist, Dr Mahomva, carried out a dental examination on 10 March 1983 and concluded that the age of the appellant was 20 years but was willing to concede a margin of error, putting him between 19 and 21.

Dr Ibos' opinion set out in his affidavit, which was based on a dental examination and which was conducted on 2 August 1982, was that the appellant was between 17 and 19 years of age at that date, which would have meant that he would have been born between 1963 and 1965, making him somewhat over 16 years and 4 months on the date of the offence.

There was also evidence from the appellant's father that the appellant was born in 1964, but that evidence was clearly unsatisfactory. It was

based on the fact that the child had been born at a particular station where the appellant's father then worked as a head teacher, but he had been at that station between 1961 and 1964 so that in fact the appellant could have been born there in 1962. The father insisted that it was in his last year that the child was born. When cross-examined, however, on the appellant's progress in school it was clear that the year 1964 could not have been correct. Had the appellant been born in 1964 he would have gone through primary school in four or five years instead of the normal seven, and the father of the appellant could not give a satisfactory explanation for this. The appellant's mother could take the matter no further.

It appeared from the father's evidence that he had obtained a birth certificate for the appellant when he reached Standard Seven. He made no effort to produce that birth certificate though clearly there would have been little difficulty in obtaining a copy of it had he wished to do so.

Having reviewed the evidence, the Court *a quo* concluded that the appellant was born between 10 March 1962 and 10 March 1963. This was also in accord with Dr Mahomva's evidence.

The new evidence as to the appellant's age did not, in the view of the Court *a quo*, introduce any new factor into the situation as it had been assessed at the date of the original hearing.

Mr Van Huyssteen frankly conceded that the thrust of his argument was such that, although the Criminal Procedure and Evidence Act fixed the age at which the death penalty could be imposed as 16, the Court should in an exercise of judicial activism not impose the death sentence on anyone who was arguably below 18 at the time of the commission of the offence because that was the age more generally fixed as making an offender liable to be sentenced to death. I am unable to accede to that view.

The Court *a quo* found that the appellant behaved like an adult. Mr Van Huyssteen complained that this is a vague and ill-defined phrase. But its use has been hallowed by time and it does appear to me to

have some content. The evidence revealed that the appellant was the leader of a group of three, the other two of whom were older in years than he was, but nonetheless deferred to him and executed his orders.

He was clearly a person who carried much responsibility.

He was political commissar for the area which included Bindura. He undertook the settlement of disputes of whatever kind which arose and indeed this was the reason for his involvement in this particular matter.

One is left again with the impression that the appellant was a person capable of shouldering responsibility and capable of effectively discharging it.

These are, I would think, the hallmarks of adulthood. Terrible as may have been his conduct on that day it does not appear to me to have been caused by immaturity. He may to some extent have been a victim of the social circumstances of the time but he was certainly not behaving like a child.

Accordingly I find no reason to disturb the assessment made by the Court a quo that this was a case in which there were no extenuating circumstances, and accordingly I would dismiss the appeal.

GUBBAY JA: I agree.

WADDINGTON AJA: I agree,

Sawyer & Mkushi, Pro Deo, appellant's legal representative