

DISTRIBUTABLE (57)

Judgment No. SC 65/02
Crim. Appeal No. 252/01

JACK NYATHI v THE STATE

SUPREME COURT OF ZIMBABWE
CHIDYAUŠIKU CJ, CHEDA JA & GWAUNZA AJA
BULAWAYO, JULY 25 & SEPTEMBER 9, 2002

J Dhlamini, for the appellant

Mrs M Cheda, for the respondent

CHEDA JA: When the appellant was charged with murder in the High Court, his response was: “I do not deny the charge. I am admitting the charge.” As is the practice in a murder trial, a plea of “Not Guilty” was entered.

The evidence led showed that the appellant had been told by the deceased, who was his former girlfriend, that she was no longer interested in him and that she had a new boyfriend.

On the day in question, the appellant had packed his personal property and was also seen sharpening an axe nearby. He later approached the deceased and started touching her and playing with her. The deceased showed no interest in this and was shouting at him to stop doing that. The appellant was heard to say: “Oh! You say I have got Aids”. The appellant then left her and went to where he had left the axe on the ground. He picked up the axe and, according to the witness, without

any further talk, struck the deceased on the head. The blow knocked the deceased to the ground. The appellant struck a second blow with the axe. While she was still on the ground the appellant picked up a metal pipe and hit her on the head. At that stage the witness left to go and make a report. She said the appellant and the deceased had been fighting for a week over the other boyfriend.

Most of this evidence is not disputed by the appellant. He confirms it in his confirmed statement, but says his reason for the attack on the deceased was because he asked her to restore his virility as they had separated, and her response was: "That is your problem, you will have to deal with it yourself". He said this made him very angry and he ended up taking an axe and striking her on the head.

He was asked to explain his allegation that when he met other women he had no erection. It turned out that he had never tried to have sexual intercourse with any other woman and this was therefore a false allegation. Further to that, the witness, Sinini Moyo ("Sinini"), did not hear the appellant saying the above to the deceased. In his own evidence the appellant says Sinini was sitting on a stool by their side.

Asked what had angered him the appellant said it was because she had caused him to be incapable of penile erection. Asked: "Is that all?", he answered: "Yes, that is all".

Questioned further under cross-examination, he said:

"What happens is that I do have an erection, but if I sleep with other women I do have an erection but it is short-lived so

that means my erection will persist as long as I am having sexual intercourse with the deceased, only with the deceased.”

Later on he said he did not try to have sexual intercourse with other women.

At the end of the trial the court found him guilty of murder with actual intent and sentenced him to death.

Mr *Dhlamini* argued that there were extenuating circumstances and cited the case of *Dehwe v S S-139-87*, wherein McNALLY JA said:

“Because murder, more than any other crime, involves human passions whose operation may give rise to circumstances of extenuation, it is vitally important before a decision on extenuation is made that the court has some impression of the motives and relationships which led to the killing.”

In *Dehwe's* case no oral evidence had been led, only documentary evidence.

In this case, evidence was led from the appellant himself and he was given an opportunity to explain his reasons for the killing. He gave a reason which was false, as he later admitted that he had never really tried to have sexual intercourse with another woman. As such, the suggestion that the murder had its origins in witchcraft or use of supernatural powers, and that he believed that the deceased was a witch who had by supernatural powers caused his lack of penetration, is not true.

The fact that she did not make a clear denial does not mean she was admitting either, if this was ever said. However, the evidence of Sinini is that this was never said to the deceased.

The fact that the appellant went to touch and play with the unwilling

deceased clearly shows that the appellant was bent on provoking some form of reaction from the deceased before he could attack her. Once he got the opportunity, he took the axe and attacked her.

In the circumstances, the trial court was correct in finding that there were no extenuating circumstances.

The appeal has no merit and it is therefore dismissed.

CHIDYAUSIKU CJ: I agree.

GWAUNZA AJA: I agree.

Pro deo