Judgment No. SC 22/05

Criminal Appeal No. 127/03

PFUNGWA MAMVURA v THE STATE

SUPREME COURT OF ZIMBABWE
ZIYAMBI JA, MALABA JA & GWAUNZA JA
HARARE, FEBRUARY 3 & JUNE 20, 2005

M E Motsi, for the appellant

V Shava, for the respondent

ZIYAMBI JA: The appellant was convicted by the High Court of the murder of his wife and, extenuating circumstances having been found, was sentenced to undergo a term of 25 years imprisonment. He now appeals, with leave of that court, against the sentence on the grounds that it is so severe as to induce a sense of shock.

Briefly the facts of the matter are that the appellant returned from a beer drink and enquired from the deceased, who was his senior wife, about his axe. On being told by the deceased that the axe had been borrowed, the appellant slapped her

and then plucked two switches from nearby gum trees with which he assaulted her until they broke. He then picked up a mattock handle and, after remarking that he was going to "finish (her) off" struck her on her arms and legs until that also broke. Finally he went outside and picked up a pestle with which he delivered numerous blows to her chest.

The deceased died the same night of the injuries sustained. She was 20 years old. The doctor who performed the post-mortem examination noted multiple bruises on the front chest wall, the neck, the back and both legs. There was also a wound, 5 cm in diameter, on one leg. There were multiple bruises on her forehead. There was epidural haematoma on both the back and front of her head. Her left arm was fractured. Her brain was contused and the cerebral vessels ruptured. The lungs were contused. He found the cause of death to be severe head injury secondary to assault.

The court *a quo* found that these injuries were the result of a sustained and brutal assault on the deceased and found the appellant guilty of murder with an actual intent to kill. The evidence supports this finding. There is no appeal against the verdict.

Extenuating circumstances were found to exist by reason of his age and the fact that the appellant was said to have been at a beer drink earlier that day although, before the court, there was no evidence of drunkenness or that the appellants' faculties were in any way impaired by the intake of alcohol and it was never part of the appellant's

case that he had consumed alcohol. In passing sentence the learned Judge expressed the view, which is supported by the evidence on record, that the appellant had escaped the death sentence by a narrow margin.

It was submitted on behalf of the appellant that a sentence of 20 years would have been appropriate in the circumstances.

Sentence is within the discretion of the trial court. An appellate court will normally not interfere with the sentence imposed by the trial court unless the sentence is so manifestly excessive as to induce a sense of shock or unless it is vitiated by irregularity or misdirection by the trial court. No misdirection has been alleged nor is there any apparent on the record. In view of the brutal nature of the assault on the deceased, the sentence does not, in our view, induce a sense of shock.

In addition, no submissions have been advanced as to why the sentence should be reduced from 25 to 20 years. It is not for this Court to interfere with a sentence passed by a court of first instance merely because it might have imposed a different sentence. See *Alfrenzi Nhumwa v The State* S C 40/88 where at p 5 of the cyclostyled judgment KORSAH JA said:-

> "It is not for the Court of Appeal to interfere with the discretion of the sentencing court merely on the ground that it might have passed a sentence somewhat different from that imposed. If the sentence imposed complies with the relevant principles, even if it is severer than one that the Court would have imposed, sitting as a court of first instance, this Court will not interfere with the discretion of the sentencing court. *S v Anderson* 1964 (3) SA 494 (AD); and S v de Jager & Anor

1965 (2) SA 616 (AD) at 628 and 629 where HOLMES JA said:-

> 'It would not appear to be sufficiently realised that a court of appeal does not have a general discretion to ameliorate the sentences of trial courts. The matter is governed by principle. It is the trial court which has the discretion, and a court of appeal cannot interfere unless the discretion was not judicially exercised, that is to say unless the sentence is vitiated by irregularity or misdirection or is so severe that no reasonable court could have imposed it. In this latter regard an accepted test is whether the sentence induces a sense of shock, that is to say if there is a striking disparity between the sentence passed and that which the court of appeal would have imposed. It should therefore be recognised that appellate jurisdiction to interfere with punishment is not discretionary but, on the contrary, is very limited.'"

In the result, no valid grounds have been established which would justify an interference by this Court with the sentence imposed by the court *a quo*.

The appeal is accordingly dismissed.

MALABA JA: I agree.

GWAUNZA JA: I agree.

Takaidza & Partners, appellant's legal practitioners

Attorney General's Office, respondent's legal practitioners