

JABULANI NKOMO
v
THE STATE

SUPREME COURT OF ZIMBABWE
ZIYAMBI JA, GARWE JA, & NDOU AJA
BULAWAYO, JULY 30, 2012

C Mudenda, for the appellant

L Maunze, for the state

ZIYAMBI JA: The appellant was charged with murder on 8 November 2002 of one Cephas Ncube. He pleaded “Not Guilty” to the charge but “Guilty of Culpable Homicide”. The trial court found him guilty of murder with an actual intent to kill and, having found no extenuating circumstances, sentenced the appellant to death.

The appellant now appeals against both the conviction and the sentence.

The two grounds of appeal raised were that the trial court ought to have returned a verdict of guilty of murder with constructive intend and the court *a quo* ought to have found extenuating circumstances.

The State led evidence from the deceased’s wife Sithabile Ncube. This evidence was undisputed and was to the following effect.

The appellant is her brother's son. On the evening in question there was an altercation between the appellant and one Mandla Dube who is her son. When Sithabile, her husband, the deceased and the rest of her family were about to retire, Mandla Dube passed by the homestead and advised her that when passing the appellant's homestead he had heard the appellant's wife saying "unpalatable things" about him. She advised him to ignore the appellant. Later on she and the deceased heard the appellant's mother calling out that the appellant was killing Mandla. She went outside to a spot where she had made a fire and stood there with the deceased. Mandla then came running past them from the direction of the appellant's mother's home. At the same time she heard the appellant calling out words to the effect "I am killing someone and I will eat someone". The appellant approached them carrying two spears and entered their homestead. The deceased asked "What is happening my father-in-law?" addressing the appellant. Without responding to the deceased the appellant walked straight up to him while the witness's children were yelling: "It is our father, it is our father", and stabbed the deceased with a spear. The deceased had said nothing more than the reported words nor was he armed. He was stabbed on the chest, fell down and subsequently died. By the time the neighbours came the deceased was dead.

Lenard Ngwenya is a neighbour of both the appellant and the deceased. On the evening in question he received a report from the appellant's mother who requested him to intervene as the appellant was assaulting Mandla. When he arrived at the scene the appellant stopped assaulting Mandla who got up and ran away. The witness followed in the direction that Mandla had taken followed by the appellant. As he walked on he heard the sound of metal being knocked together and the appellant saying: "Today I am going to kill someone". The appellant was then running towards Mandla's homestead. Thereafter within a short time he heard the voices of children calling out "This is our father, this is our father".

He then heard them saying “You have killed our father”. He turned around and went to the deceased’s homestead and discovered that the deceased had been stabbed to death. He saw no axe at the scene. The evidence of both witnesses was not discredited by the defence and was accepted by the court.

The doctor who performed the post mortem found that the stab wound was 20 centimetres deep and that it fractured the second and third rib. It went 5cm into the lungs. The cause of death was pneumothorax caused by the stab wound to the chest. It was the doctor’s opinion that severe force had been used to inflict the fatal injury.

The appellant’s defence was that when Mandla Dube fled towards his home, he feared that he was armed and he therefore armed himself with two spears and pursued him. When he arrived at deceased’s home (which was also Mandla’s home) the deceased took an axe and struck him on the face near the left eye and on the right arm near the elbow. He stabbed the deceased once “out of provocation and acting in self-defence”.

The court *a quo* found this evidence of the appellant to be untruthful and indeed it was conceded by the appellant’s legal practitioner that there was no evidence to that effect. The defence of provocation and self-defence were therefore rejected by the court *a quo*. The Court found that the appellant stabbed the deceased unarmed and who posed no threat to the appellant. The appellant, though warned by the children that it was their father before him, went on to stab him. The court’s finding that the appellant intended to kill the deceased and achieved that purpose was unassailable. Indeed it was conceded by the appellant’s legal practitioner that the defences of provocation and self-defence were not proved.

We find no misdirection by the trial court in its assessment of the evidence or in the verdict which it returned.

The appeal against conviction is therefore without merit.

Counsel for the appellant in the court *a quo* could find no factors which would amount to extenuating circumstances and the trial court found none.

It was submitted before us that the court *a quo* ought to have taken into account that the appellant acted in anger and that subjectively his state of mind was one of diminished responsibility which could provide extenuating circumstances. However the trial court found the murder of the deceased to be entirely unprovoked. The appellant knew that he was killing the deceased and not Mandla. Having said he was going to kill someone he persisted in his wicked purpose and delivered with severe force the blow which killed the deceased almost instantly.

Not only was there a concession that no extenuating circumstances exist but we find no misdirection by the court *a quo* in arriving at the conclusion that there were no extenuating circumstances.

Accordingly the appeal is dismissed in its entirety.

GARWE JA: I agree

NDOU AJA: I agree

Messers Mudenda Attorneys, appellant's legal practitioners

Attorney General's Office, for the respondent