

ZIBUSISO NDHLOVU
v
THE STATE

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

S Nguni, for the appellant

M Makoni, for the respondent

ZIYAMBI JA: This is an appeal against a judgment of the High Court which found the appellant guilty of murder with actual intent and imposed the death sentence.

The appeal is against both conviction and sentence.

The facts are largely common cause. On 27 August 2011 the appellant proceeded to the deceased's home where he offered his three buckets of maize in order to settle a debt. The deceased then left with the appellant in order to collect the maize.

On arrival at the appellant's home, he invited the deceased and he requested one Austin Moyo who was also in a hut at the homestead to turn up the volume of his radio. Thereafter, the appellant entered the house and demanded to have sexual intercourse with the deceased who refused. Using force and threats, he caused the deceased to submit and while he was in the process the deceased requested to stop. When he would not she grabbed and applied pressure to his testicles. The appellant then took an okapi knife which was lying nearby and which he had earlier used to slit the deceased's panties, and stabbed the deceased

three times on the head and once on the left – after which he throttled her using both hands. Thereafter, realising the deceased was dead he placed the body under a bed and fled. On 30 August 2011 he surrendered to the police and was then arrested.

A post mortem examination revealed that the deceased had sustained head lineal bruises on the left side of the neck, bruising on the left face and swollen right eye. The internal examination showed scalp haematoma on the right parietal and frontal region of the skull and sub-arachnoid haemorrhage on the right side of the brain. In the doctors opinion the cause of death was sub arachnoid, head injury and assault.

In the court *a quo* the appellant raised the defences of intoxication and self-defence. It was the appellant's that he had consumed 3 pints of Black Label beer and had shared one litre of what he termed hot stuff with a friend as from about 10am that morning.

The court, after analysing the evidence that the appellant was at the time of the offence in complete control of his faculties and knew what he was doing in particular, he related how he had gone to the deceased's house and persuaded her to accompany him to collect the maize. He had wheeled his bicycle through the deceased's neighbour's homestead without difficulty. He was not seen staggering or falling at anytime. The court also found that he carefully isolated the deceased and directed Austin Moyo to turn up the volume of the radio before he pounced on the deceased.

Regarding defence of self-defence the court *a quo* found that in fact it was the appellant who had attacked the deceased and raped her and that the deceased had grabbed

hold of the testicles in order to defend herself. Indeed the defence counsel conceded in the court *a quo* that the defence of self-defence was not available to the appellant in these circumstances.

The court was satisfied that by stabbing the deceased three times with the okapi knife and thereafter throttling her, the appellant was guilty of murder with an actual intent to kill.

The court considered the question of extenuating circumstances and having found none and sentenced the appellant to death.

In the appeal before us Mr *Mguni* submitted that the court *a quo* should have returned a verdict of guilty of murder with actual intent as the appellant had been only to rape and not to kill the deceased although admittedly he had acted recklessly in the circumstances.

Having considered submission by both sides we are of the view that the court *a quo* was correct in coming to the conclusion that it did. Clearly the appellant's action exhibited an intention to bring about the deceased.

Accordingly the appeal against conviction must fail.

Regarding the question of extenuation, [this was a murder committed during the course of rape] We find no misdirection on the part of the court *a quo* in its finding that alcohol played no part in the commission of the offence.

The court *a quo* in dealing with this issue said the following,

“In this case there is no evidence that the accused’s vision or conduct was affected by intoxication liquor. His conduct before, during and after the commission of the offence clearly shows that he was not so drunk as to be affected by alcohol. He was walking normally and was not staggering when he collected the deceased. He lured the deceased and manipulated her to agree to go to his homestead. He told one Hloniphani Nkomo to take a walk. He then told Austin to turn up the volume of his radio. Once he had carefully isolated the deceased and realized that she was vulnerable. He proceeded to rape her. The manner he cut the deceased’s panties with a knife shows the determination which accused had to achieve his purpose.

A murder which is committed in the course of a rape is akin to murder committed in the course of robbery.

We find that alcohol played no part at all in the conduct of the accused. He was not intoxicated to such an extent as to be incapable of realizing the consequences of his action.

We are satisfied that on the evidence presented to us, there are no extenuating circumstances surrounding the commission”.

We are in agreement with those remarks.

In the circumstances the appeal must fail and it is accordingly dismissed.

GARWE JA: I agree

NDOU AJA: I agree

Hwalima, Moyo & Associates, appellant's legal practitioners

Attorney General's Office, for the respondent's legal practitioners