

BYRON LUKA NGWENYA
v
THE STATE

SUPREME COURT OF ZIMBABWE
MALABA DCJ, GARWE JA & GOWORA JA
BULAWAYO, MARCH 25, 2013

Mrs *J Magosvongo*, for the appellant

L Mawuridze, for the respondent

MALABA DCJ: This is an automatic appeal against conviction and sentence of death for murder with actual intent to kill. The court *a quo* found that there were no extenuating circumstances and consequently imposed the death sentence.

The facts are these. The appellant who was 47 years old at the time of the commission of the offence and deceased LIFAQANA MKANDLA were cousins. They lived in Makhekhe village Gomora area in Lupane.

On 7 July 2002 at about 1400 hours the appellant summoned the deceased to his homestead. The appellant suspected that the deceased and his younger wife SETTY SIBANDA were having an affair. The deceased came in the company of his younger brother NKOSILATHI.

They all had lunch after which the appellant invited his younger wife and the deceased into his bedroom. In the bedroom the appellant had an axe. The appellant asked for money from the deceased who retorted saying that he had given him money on previous occasions which had not been paid. Setty weighed in saying that they owed the deceased money and other items. She suggested to the appellant that it was unwise to continue borrowing money from the deceased. This did not go down well with the appellant. The appellant then accused Setty of supporting the deceased because they were having an affair. The two denied the allegation.

The appellant got infuriated by their denial and picked the axe. He demanded that the deceased should confess to the affair before he killed one of them. The appellant attempted to strike Setty with the axe before she ran out of the bedroom. The deceased caught hold of the axe giving rise to a wrestle for control of the axe. As the two wrestled out of the bedroom Nkosilathi snatched the axe from them.

The deceased went and sat by a tree pleading his innocence and asking that the matter be referred to the police or the kraal head. As the deceased was about to leave the homestead the appellant ran to his senior wife's bedroom whence he armed himself with an axe and a knife. He swore that he had resolved that morning to kill someone by 3pm.

The appellant met deceased as he was walking in the direction of his homestead. Accusing the deceased once more of sleeping with his wife, the appellant stabbed him once on the chest by the heart. The deceased ran for about 100 metres before he collapsed and died.

The post-mortem report showed that the deceased sustained the following injuries. A 5cm wide stab wound in the right second intercostal space between the first and second ribs near the chest bone (sternum) about 2 cm from the mid line. The wound passed through the chest wall muscles and broke the right second rib end. The wound passed the right atrium (upper chamber of the heart) making a 4cm hole on the front. The total distance travelled by the blade was 9cm. Severe force was used to inflict the fatal wound.

At the trial the appellant alleged that the deceased first tried to strike him with the axe in the bedroom which he said the deceased got from Setty. He said after blocking the blow Nkosilathu took the axe from the deceased. According to the appellant the deceased struck him with clenched fists before he stabbed him. He said he tried to stab the deceased on the arm but missed and stabbed him on the chest.

The court *a quo* found the state witnesses credible and rejected the version of the appellant of acting in self defence. The unanimous view of the court is that the court *a quo* was correct. There is no basis on which the finding of the court *a quo* can be impugned.

The court *a quo* found that the allegation that the deceased was having an affair with Setty had no substance. It was highly improbable that the appellant would have had lunch with the deceased and his brother and thereafter proceeds to ask for money from the deceased if the appellant believed that the deceased was having an affair with his wife.

On the issue of acting in self defence the court *a quo* found that the appellant was the aggressor and that the deceased posed no threat to him. In fact apart from the allegations in the defence outline there was no evidence that the deceased ever armed himself

to attack the appellant. The fact that the blow was directed at the upper part of the body suggests that the attack was sudden and the deceased was unprepared to defend himself.

On these facts, Mrs *Magosvongo* for the appellant correctly conceded that the verdict of guilt of murder with actual intent to kill was unassailable. The court agrees with her. Mrs *Magosvongo* also conceded that the court *a quo*'s finding that there were no extenuating circumstances is correct. The facts show that the appellant premeditated the assault on the deceased. He had entertained an irrational belief that there was a love affair between the deceased and Setty.

The rest of the factors considered by the court *a quo* are aggravating circumstances. There was no misdirection on the part of the court *a quo*.

The appeal is dismissed.

GARWE JA: I agree

GOWORA JA: I agree

Danziger & Partners, appellant's legal practitioners

Attorney-General's Office, respondent's legal practitioners