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JAISON CHAVHUNDUKA
v
THE STATE

SUPREME COURT OF ZIMBABWE
GWAUNZA JA, PATEL JA & GUVAVA JA
BULAWAYO, NOVEMBER 25, 2013

V. Majoko, for the appellant
T. Hove, for the respondent

PATEL JA: The appellant in this matter was charged with two separate counts of attempted murder and murder. On the first count, he was alleged to have struck his twenty-two (22) year old wife once on the head with an axe, causing her to sustain a depressed skull fracture of the right temporal region. On the second count, it was alleged that the appellant struck his thirty-one (31) year old sister-in- law twice on the head with an axe, thereby causing her death.

In his warned-and-cautioned statements, he admitted his guilt on both counts. Both statements were subsequently confirmed before a magistrate. However, at his trial, he pleaded not guilty to both counts. His defence was that he was motivated by anger and provocation.

At the end of his trial, the court *a quo* found the appellant guilty on the first count of attempted murder following a concession by his counsel, properly made, that he was so guilty. On the second count of murder, the court rejected his defence of provocation and found him guilty of murder with actual intent. The court did not consider or impose any sentence for the conviction for attempted murder. As for the conviction for murder, the court appears not to have addressed the question of extenuation, but proceeded nonetheless to impose the sentence of death.

It is abundantly clear from the record that the State successfully established the requisite *actus reus* and *mens rea* beyond a reasonable doubt in respect of both counts. Counsel for the appellant and State counsel both duly accepted this position. We fully agree and are unable to find any misdirection by the court *a quo* as regards the convictions for attempted murder as well as for murder with actual intent. The evidence founding conviction on both counts was overwhelming.

Moreover, there was no plausible basis for the appellant's defence of provocation. Whatever fears that the appellant might have entertained concerning his wife's infidelity or promiscuity should have abated once he had been intimate with her a few hours before he attacked her. As for his sister-in-law, the evidence shows that she

actually encouraged his reconciliation with his wife. The attack perpetrated upon her, two days after the attack on his wife, was clearly premeditated and deliberate. There is nothing in the evidence to show that a reasonable person in the circumstances leading to both attacks would have lost his self-control. See *The State* v *Nangani* 1982 (1) ZLR 150 (S) in this regard.

Turning to the question of extenuation in respect of the offence of murder with actual intent, the learned judge *a quo* should have expressly addressed this aspect during the course of the proceedings before him and in his judgment. The record is absolutely silent in this regard. Be that as it may, as was correctly submitted by both counsel on appeal, there are no discernible extenuating circumstances in this case and the court *a quo* cannot be faulted for imposing the death sentence on the evidence before it. There is nothing in the record to show any facts which might be relevant to extenuation, for example, immaturity, intoxication or provocation, which could have had a bearing on the appellant's state of mind in doing what he did and which were sufficiently appreciable to abate his moral blameworthiness. See in this regard the test applied in *Chingaona* v *The State* SC 105/2002. The sentence of death imposed with respect to the second count of murder with actual intent must accordingly be upheld.

As I have already observed earlier, the learned judge *a quo* convicted the appellant on the first count but omitted to impose any sentence for that offence. His omission constitutes a clear misdirection that must be duly rectified. The matter is not purely academic in light of the possibility that the death sentence imposed in relation to the second count might never be brought into effect, either by reason of executive inaction or by virtue of presidential pardon.

In the result, it is the unanimous decision of this Court that the automatic appeal against conviction on both counts and against the sentence of death imposed on the second count be and is hereby dismissed.

It is ordered that the matter be remitted to the court *a quo* for it to hear evidence in mitigation in respect of the conviction for attempted murder and thereafter to determine and impose an appropriate sentence on the first count.

GWAUNZA JA: I agree.

GUVAVA JA: I agree.

Majoko & Majoko, appellant’s legal practitioners

Prosecutor-General’s Office, respondent’s legal practitioners