

ABEL SIBANDA
v
THE STATE

SUPREME COURT OF ZIMBABWE
GWAUNZA JA, PATEL JA & GUVAVA JA
BULAWAYO, NOVEMBER 26 & 27, 2013

Ms *N Moyo*, for the appellant

Ms *N Ngwenya*, for the respondent

GUVAVA JA: This is an automatic appeal against the conviction for murder with actual intent and sentence of death imposed by the High Court Bulawayo, sitting as a Circuit Court in Hwange on 23 November 2012. The appellant was charged with the murder of the deceased, it being alleged that on 12 October 2011 and at Mabale grazing lands the appellant did wrongfully, unlawfully and intentionally kill Virginia Mukandla a female adult in her lifetime therebeing.

The facts that gave rise to this matter may be summarised as follows. The appellant was employed as a herdboy by the deceased and her husband. At the relevant time the appellant was aged thirty-one (31) and the deceased was twenty-nine (29) years old. On 12 October 2011 at about 0600hrs, the appellant approached the deceased's husband and asked him to accompany him to fetch some firewood. The deceased's husband was unwell and the deceased offered to go in his stead. They then left in an ox drawn scotch cart.

At about 1300hrs, the deceased's husband noticed that the dog that had accompanied the deceased and the appellant had returned to their homestead without the two. He decided to ask their neighbour, a Mr Matthew Moyo, to follow the appellant and the deceased. Mr Moyo followed the tracks that had been made by the scotch cart which had been used by the appellant and the deceased. When he arrived at the scene he found the scotch cart and oxen tied to a tree. Upon further investigation he saw the deceased lying face down in a pool of blood. She had a deep cut on the back of her neck and she was dead. The appellant was not at the scene. He returned home with the news and a report was made to the police.

The appellant was subsequently apprehended by one Clifford Ncube and other game rangers in the National Parks area on suspicion that he was poaching. When the appellant was questioned by Mr Ncube, he told him that he was on his way to Tsholotsho to visit his wife. Mr Ncube advised him that he was lost and suggested that they should go to the National Parks Main Camp where he would get transport to Tsholotsho. The appellant tried to run away but was apprehended by Mr Ncube and his colleagues and taken to the National Parks Main Camp. They discovered that the police were hunting for him in connection with the death of the deceased and he was subsequently arrested.

A post mortem report, prepared by Doctor Sanganai Pesanai, a registered medical practitioner at United Bulawayo Hospitals was produced at the trial of the appellant. He observed that the deceased, who was about thirty weeks pregnant, had a laceration at the back of her neck. He found that the cause of death was cervical spine fracture due to assault.

Upon his arrest the appellant stated in his warned and cautioned statement that he was cutting some firewood near the place where the deceased was sitting. He missed the

wood and the axe struck the deceased on the back of her head. In his evidence in chief he explained that the axe he was using slipped from his hand and accidentally struck the deceased.

The court *a quo* disbelieved the appellant and found that he had deliberately attacked the deceased with the axe. It found him guilty of murder with actual intent.

It was the unanimous view of this Court that the court *a quo* had misdirected itself, in finding on these facts, that the appellant had deliberately killed the deceased. The court *a quo* found that the only inference that could be drawn from the appellant's explanation on how the deceased came to be struck by the axe together with his conduct of running away from the scene was that he was guilty of murder with actual intent.

At the hearing, the appellant's counsel submitted that the finding by the court that the appellant had intentionally killed the deceased was not the only inference that could be drawn from the facts of the case. Ms Moyo referred the court to the case of *R v Blom* 1939 AD 188, where the Court set out two cardinal rules which must be taken into account when dealing with circumstantial evidence. The first rule is that the inference sought to be drawn must be consistent with all the proved facts, and the second is that the proved facts should be such that they exclude every reasonable inference from them save the one sought to be drawn.

In the present case it is our view that the inference that the appellant deliberately attacked the deceased is not the only inference that can be drawn from the proven facts. Firstly there was no evidence placed before the court of any motive for the appellant to want to kill the deceased. Secondly, it was not in dispute that on the day in question the

arrangement was that the appellant would go to collect firewood with the deceased's husband. It was only because the latter was unwell that the deceased offered to go with him. Thus the decision that the deceased accompany the appellant was made on the spur of the moment. Thirdly, from the evidence of the deceased's husband there was no bad blood between the appellant and the deceased and finally the evidence of the police details did not state that there was any evidence of a struggle at the scene.

The court *a quo* found that the fact that the appellant fled from the scene instead of going to make a report about what had happened was indicative of his guilt. If indeed the deceased was struck with the axe in the manner described by the appellant (and there is no contrary explanation on the record) then his explanation that he ran away because he was so shocked by what had happened is in our view plausible.

However there can be no doubt, even accepting the appellants own evidence, that chopping firewood in such close proximity to the deceased was indeed negligent. It should have been reasonably foreseeable to an ordinary man that an accident with an axe could occur. The angle that the appellant described as the one used to chop the firewood could easily have caused injury to a person who was so close to where the firewood was being chopped. In our view, the fact that there were no freshly chopped pieces of firewood at the scene would not necessarily mean that the appellant set out to attack the deceased. It could very well have been that the deceased was struck with the very first attempt by the appellant to chop the firewood. As there was no eye witness to the offence the appellant must be given the benefit of the doubt.

Ms Ngwenya, for the State, conceded that on the facts, the court *a quo* should have returned a verdict of culpable homicide. In our view this concession was properly

made. As indicated below we proceeded to set aside the conviction and sentence imposed by the court *a quo*. Having substituted the conviction of murder with that for culpable homicide, we then invited argument in mitigation before passing sentence.

In assessing sentence the court took into account everything that was said on the appellant's behalf in mitigation. It considered that he is a contrite thirty-three (33) year old first offender who is married with a five (5) year old child. He is the sole bread winner and his family is wholly dependent on him. The appellant spent a year in prison prior to his trial and another year after he was convicted by the court *a quo* whilst waiting for the appeal to be heard.

However, in our view, despite the mitigatory factors the appellant's degree of blameworthiness is high and calls for an effective term of imprisonment. A young woman, in her prime, lost her life and that of her unborn child due to the negligence of the appellant. It is the duty of this Court to mark its abhorrence of such conduct and uphold the sanctity of human life.

In the result, the appeal succeeds partially and it is ordered as follows:

1. The conviction and sentence of the appellant for murder with actual intent are hereby set aside.
2. The appellant is hereby found guilty of culpable homicide.
3. The appellant is sentenced to six (6) years imprisonment, of which two (2) years are suspended for a period of five (5) years on condition that he is not during that period convicted of an offence involving the unlawful death of another person and for which he is sentenced to a term of imprisonment without the option of a fine

GWAUNZA JA: I agree

PATEL JA: I agree

S K M Sibanda & Partners, appellant's legal practitioners

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