

CLOUDIUS MUTAWO
v
THE STATE

SUPREME COURT OF ZIMBABWE
MALABA DCJ, GOWORA JA & GUVAVA JA
BULAWAYO, MAY 5 & 8, 2014

S Mguni, for the appellant

S Ndlovu, for the respondent

MALABA DCJ: On 29 September 2004, the High Court found the appellant guilty of murder with actual intent to kill. The court *a quo* did not find extenuating circumstances and sentenced the appellant to death. The appeal against conviction and sentence is by operation of law automatic.

The legal practitioner who represented the appellant at the trial submitted that he could not advance any facts as extenuating the appellant's moral blameworthiness. Mr *Mguni* who represented the appellant on appeal also indicated that he could not advance argument on facts which could be said to have extenuated the appellant's moral blameworthiness.

The facts on which the High Court found the appellant guilty of murder with actual intent to kill and sentenced him to death are common cause.

The appellant was aged 19 years at the time of the commission of the offence. The deceased was his father. He was aged 71 years. They lived together at Maushe village under Chief Njelele in Gokwe.

The appellant knew that his father had sold a beast belonging to his aunt for Z\$14 000. He knew that on 3 November 2001 the deceased would leave home at 0100 hours to catch a bus to Bulawayo to deliver the money to the owner of the beast.

The deceased left his homestead at 0100 hours to walk 15km to the bus stop. Little did the deceased know that the appellant was following him as he walked along the footpath that night.

The appellant had decided to attack the deceased and rob him of the money he had on him. He armed himself with an axe and stalked his father for three kilometers before he pounced on him and struck a severe blow with the axe on the centre (parietal region) of the head. The deceased fell to the ground and the appellant delivered further blows on the deceased's head.

When the deceased was rendered unconscious, the appellant searched his pocket and took Z\$5 400 before disappearing into the bush. The appellant hid the axe in the bush. The axe weighed 1.350kg. Its blade was 12.5cm long and 8cm wide. When he got home he hid the money in the grass thatch in his bedroom.

The deceased did not die on the spot where the appellant attacked him. He remained there spot until 11a.m. when he was found by two young girls who were on their way to the bus stop. The deceased died at his home that afternoon. He had been taken there in a scotch cart by his brother.

The post-mortem examination revealed that the deceased suffered the following bodily injuries:

- (a) A compound fracture on the left parietal (centre) region of the skull.
- (b) An open fracture on the left parietal region of the skull about 7 cm wide.
- (c) A depressed fracture on the left parietal region of the skull about 4 cm long.
- (d) A puncture wound on the right parietal region of the head about 3cm wide.
- (e) Bruises on the left and right forearms.

The injuries on the head were delivered with severe force. They caused the deceased's death. The appellant said he could not tell with which side of the axe he struck the deceased's head. It is clear from the nature of the injuries that he used both the sharp edge of the blade and the back of the axe.

In the morning of 4 November 2001 the appellant joined a group of locals who followed the foot prints of the assailant from the scene of the crime. When the foot prints ended at his homestead suspicion grew that the appellant was the killer. He confessed to relatives who gathered to ask him about the death of his father. The appellant voluntarily indicated to the police where he had hidden the axe used to kill the deceased. He also indicated where he had hidden the money he took from the deceased's jacket pocket.

At the trial the appellant suggested that he was in the company of the deceased escorting him to the bus stop. He said he struck the deceased with the axe on the head because the deceased had struck him with metal rods which were wrapped in a paper. The reason for the alleged assault by the deceased was that he had refused to plough the fields with Tinashe Nyandoro. On the money, the appellant said that when the deceased lay on the ground injured, he told him to take the money from the jacket pocket and give it to his sister.

The court *a quo* rejected the appellant's story as a fabrication. The appellant had not mentioned Tinashe Nyandoro in the confirmed warned and cautioned statement recorded four days after the incident. He could not say why he was armed with the axe if he was escorting the deceased to the bus stop. He could not say where on the body the deceased struck him with the metal rods. The alleged metal rods were never found. As the appellant admitted that after the deceased was felled by his blows on the centre of the head with the axe, he was rendered powerless the metal rods would have been found at the scene by the two young girls who found

the deceased lying on his back. Under cross-examination the appellant said that the deceased told him to take the money to use as bus fare to go to his sister.

The trial court found as a fact that the appellant robbed the deceased of his money. It also found that he assaulted the deceased with actual intent to kill him. Mr *Mguni* for the appellant indicated that he was unable to point at any misdirection by the court *a quo* in its decision on the guilt of the appellant.

Perusal of the record of proceedings shows that the learned Judge carefully considered all the evidence and argument presented to the court. He evaluated the credibility of the witnesses and came to the conclusion that the State had proved beyond reasonable doubt that the appellant committed murder with actual intent to kill and robbery.

Mr *Mguni* also indicated that he was unable to point at any misdirection on the part of the court *a quo* in deciding that there were no extenuating circumstances justifying the imposition of a sentence other than death. The court *a quo* adopted the two pronged approach. The learned Judge considered the mitigating factors and weighed them against those which aggravated the appellant's moral blameworthiness. See *The State v Phinias* 1973(1) RLR 260. *The State v Jaure* 2001(2) ZLR 393(H).

The learned Judge took into account the fact that the appellant was aged 19 years at the time of the commission of the offence. He was aware of the principle that youthfulness is ordinarily regarded as an extenuating circumstance provided the acts committed are consistent

with immaturity. The learned Judge came to the conclusion that aggravating factors far outweighed mitigating features.

He said:

“This was a brutal attack on the head using a big axe on a 71 year old defenceless man. Several blows were aimed and landed on the head. The motive was robbery. After the assault the accused took the cash and left the deceased seriously injured, bleeding and unable to walk on account of the injuries. This was a planned robbery and attack on his father in the early hours of the morning.”

The careful planning and the resolve to attack his own father in the manner he did for money and leaving him for dead are factors which show that the actions of the appellant were not consistent with youthfulness. There has to be very strong mitigating factors for a person who commits murder in the course of robbery to escape the death penalty. The robbery always aggravates the accused’s moral blameworthiness. Not only is the violence perpetrated to overcome resistance to the taking of the deceased’s property, the deceased is often beaten to death to avoid identification and detection of the crime.

The decision by the trial court that there were no extenuating circumstances cannot be faulted.

The appeal against conviction and sentence is dismissed.

GOWORA JA: I agree

GUVAVA JA: I agree

Mabhikwa, Hikwa and Nyathi, appellant's legal practitioners

The National Prosecuting Authority, respondent's legal Practitioners