

REPORTABLE (16)

BVUMAI MACHENA
v
THE STATE

SUPREME COURT OF ZIMBABWE
CHIDYAUSIKU CJ, GOWORA JA & MUTEMA AJA
BULAWAYO, JULY 28, 2014 & MARCH 30, 2015

S Chamunorwa, for the appellant

T Makoni, for the respondent

MUTEMA AJA: The appellant was arraigned before the High Court sitting at Gweru circuit on 3 November 2004 charged with murder. He was found guilty of murder with actual intent. No extenuating circumstances were found and consequently the court *a quo* sentenced the appellant to death. The appeal is against both conviction and sentence. After hearing argument by both parties we reserved judgment. Herewith is the judgment.

The appellant was 27 years old at the time of commission of the alleged offence, while the deceased was aged 44 years old at the time he met his demise. In the early morning of 2 January 2002 the deceased's son, one Adam Gasura aged 10 years old, was herding cattle when a cow ran through the appellant's crop field to go to a nearby pool to drink water. Adam said

his cow did not graze the appellant's crops but the appellant alleged that it did graze his cotton and groundnut crop. However, the evidence of the investigating officer, Victor Ngoni, who visited the appellant's field with the appellant's brother, Boyson Machena, Constable Kuzipha and the kraal head Mutemarungo, was that he observed cotton plants about 6-7cm in height and no crops were grazed at all. All that was seen was the spoor of one beast near a pool of water. His evidence on this issue was clearly credible. He had no motive to lie against the appellant whose injuries on the neck and finger, which he said were caused by the deceased, he did corroborate.

Following the straying of the cow the appellant approached Adam holding a catapult and Adam ran home leaving the herd. The appellant drove the herd of cattle to the deceased's homestead where he told Adam's elder brother Paul about the cattle incident and stated that he would come back later and discuss the matter with the deceased. Paul then followed the deceased to the field and appraised him about the matter.

At about 1830 hours on the same day the deceased returned home alone and shortly thereafter the appellant arrived at the homestead. The appellant said he met the deceased at the shops and they went to the deceased's homestead together. It is not known why the appellant denied that the two of them arrived at the homestead separately. Whether they arrived together or not is of no moment but from the evidence of Lucia Gasura, Adam and Erica

Bvutiwe, which we accept, coupled with the appellant's earlier promise to return later to see the deceased in connection with the issue, it is not difficult to find that the deceased arrived alone first.

It is common cause that the appellant was offered something to sit on and greetings were exchanged between the two. It does not matter whether the appellant was offered a stool or wheelbarrow to sit on. What transpired during the discourse that ensued is hotly contested. Adam said the appellant stood up during the discourse, which he did not catch, and punched the deceased and the two grappled and both fell down, following which the deceased got up saying he had been stabbed. Lucia Gasura said the appellant accused the deceased of turning his fields into a grazing area which the deceased disputed, laying blame on the children. The appellant then said something to this effect: "What I want to tell you is that either you move from this area or I will have to move away because of your cattle". Whereupon the deceased said: "Uncle, are you here to discuss the issue of cattle having destroyed your crops or you are here for a fight?" The appellant then said: "I can do whatever I want to do to you" and he stood up and the deceased followed suit and exchanged some words. Then the appellant said: "I will kill you" and he punched the deceased. The two then grappled and fell down with the deceased on top. The deceased's wife went to the two, telling them to stop fighting. The deceased got up and the appellant got up also and ran away. The deceased moved towards the fowl run saying he had been stabbed. She held the deceased asking him where he had been stabbed and the two of them fell down and the deceased died on the spot.

The appellant's version, which can be gleaned from his evidence-in-chief which falls on all fours with his confirmed warned and cautioned statement (exhibit 3), is that whilst the two were discussing the issue of stray cattle the deceased insisted that he was not going to herd his cattle because the appellant settled on the grazing area and that he could even kill him for coming to his homestead. The appellant said he had not come there to fight. He got up and bade the deceased's mother farewell, whereupon the deceased picked up a stick and threw it at him but he dodged. The deceased grabbed him, bit him on the cheek and tripped him. He fell to the ground and the deceased sat on his stomach. He tried to hold the deceased by the throat but the deceased bit his middle finger and also struck him on the upper lip and throttled him. Whilst lying there the deceased's Okapi knife fell out of his shirt pocket, landing on his chest. He took it, opened it using his left hand and body and poked it at the deceased's chest thereby stabbing him as indicated on the post mortem report. The deceased stood up and he also got up and ran away, leaving the knife at the scene so that its owners would see it.

The evidence and probabilities do not support the appellant's version that the deceased was the aggressor. Although it was dusk and visibility no longer very clear, the State witnesses who were present at the scene were adamant that the appellant was the aggressor by punching the deceased first. This evidence, despite coming from the deceased's sister, son and wife, is corroborated by the following: According to the appellant when being cross examined, the deceased was not angry when they met on the evening in question. He could not say what

then angered him subsequently. The appellant was aggrieved and angry earlier in the day when he drove the deceased's cattle to the latter's homestead and left word with Paul Gasura to inform the deceased about the issue and that he would be back in the evening. He indeed returned as promised. Whatever the nature of the verbal exchange that ensued between the two the appellant struck first.

The appellant lied when he said it was the deceased who first threw the meter long stick at him. Firstly, it is improbable that the deceased would throw a meter long stick at the appellant who was two meters away from him. The logical thing would be to strike whilst holding the stick. Things which are inconsistent with human knowledge and experience are properly rated improbable. To further lay bare the appellant's mendacity on the same aspect is the contradiction between what he said in his evidence-in-chief and under cross-examination. In his evidence-in-chief on the aspect, the appellant said the stick was hurled at him when he was standing after bidding farewell and was leaving. However, under cross-examination he proffered two versions, viz the stick was thrown at him from two meters away while he was seated but he dodged it and then stood up and the stick fell in front of him. Again it is not scientifically possible that a stick thrown at one seated from two meters away and is dodged will fall onto the ground in front of the intended target. The other version was that, when the stick was thrown at him from two meters away, he was not facing the deceased but he sat down as the deceased was throwing it. This presupposes that he was on his feet when it was thrown and it also defies belief

how the appellant managed to see and dodge the stick by sitting down when he was not facing the thrower. In view of the foregoing the court is satisfied that the appellant was the aggressor.

Lucia Gasura said the appellant did utter the threat to kill the deceased before attacking him, while the appellant alleged that it was the deceased who uttered the threat to kill. The evidence and probabilities favour the finding that it must have been the appellant who threatened to kill the deceased.

Regarding ownership of the Okapi knife (the murder weapon), the trial court's finding that it belonged to the appellant cannot be faulted. The appellant was the aggrieved party who had promised to return and confront the deceased regarding the cattle issue. The State witnesses who stayed with the deceased did not know him to own an Okapi knife. The appellant's story of how he says the knife ended up in his hand rings hollow. If the knife belonged to the deceased the appellant would have left it at the scene. Contrary to his assertion that he left it at the scene he ran away with it because it was his. Had he left it at the scene it would have been found. It is fanciful to speculate that the deceased's kith and kin hid it in order to conceal the fact that it was the deceased's. It was not engraved that it belonged to the deceased.

Did the appellant harbour actual intent to kill the deceased as found by the trial court? This Court is persuaded on the evidence advanced that this finding is not the correct one.

Mr *Chamunorwa*, for the appellant, submitted that the appropriate verdict on the evidence led should have been either murder with constructive intent or culpable homicide, while Mr *Makoni*, for the respondent, conceded, properly so in the Court's considered view, that the evidence does not sustain a verdict of murder with actual intent but murder with constructive intent and not culpable homicide.

The Court finds that the appellant lied when he said that he used his left hand to stab the deceased. Again it is not consistent with human knowledge and experience that a person lying on his back would stab the left side of his victim's chest who was lying on his stomach using his left hand. Logic and common sense dictate, as the court *a quo* rightly found, that the appellant used his right hand (and he himself said he was not left-handed) to achieve the stab wound on the deceased's right side of the chest as observed by the pathologist in the post mortem report. There was no medical evidence that was led to establish the degree of force used to inflict the injuries observed. Only one stab was effected. The stab was not aimed at a specific part of the anatomy, as this was during a scuffle in which the deceased was having the better of the appellant. Indeed there is evidence of a human bite on the appellant's middle finger as well as bruising of the appellant's neck, occasioned by throttling, which injuries were confirmed by the investigating officer. The appellant desisted from the attack as soon as the deceased got off him and ran away. Had the appellant actually intended to kill the deceased he would have continued stabbing the deceased instead of conducting himself in the manner he did.

However, looking at the part of the body the single stab landed, it is undoubted that the chest is a vulnerable part of the human body and it houses vital organs. The cause of death is stated in the post mortem report as haemothorax due to penetrating stab wound through the third costal cartilage. The doctor noted a 3,5cm laceration on the left side of the sternum, broken third costal cartilage and laceration through the second and third intercostal space with lungs exposed and deeper laceration through upper lobe of left lung with haemothorax. In order to achieve injuries of such a nature the appellant no doubt must have employed considerable force. This, coupled with the nature of the weapon used and the part of the anatomy the Okapi knife stabbed, leads to an inescapable inference that when the appellant stabbed the deceased in the manner he did he must have foreseen the real possibility of causing the deceased's death and was reckless as to whether or not such an eventuality ensued. The Court therefore concludes that that the appellant had constructive intent to kill and not actual intent.

In considering the existence or otherwise of extenuating circumstances, the court *a quo* proceeded on the basis that the appellant had actual intent and found no extenuating circumstances. Constructive intent on its own or together with other factors can constitute extenuation. It therefore follows that the court *a quo* misdirected itself on the issue of extenuation. In the light of this misdirection, this Court is at large on the issue of extenuation and an appropriate sentence in this matter.

An extenuating circumstance is a fact associated with the crime which serves in the minds of reasonable persons to diminish, morally albeit not legally, the degree of the accused's guilt. In considering the existence or otherwise of such a circumstance, no factor, not too remote or too faintly or indirectly related to the commission of the crime, which bears upon the accused's moral blameworthiness in committing it, can be ruled out.

In the instant case, the concession by the somewhat inexperienced defence counsel should not have been taken as decisive regarding non-existence of extenuation. The learned trial judge did not give any judgment pertaining to non-existence of extenuating circumstances. In *S v Mlambo* 1992 (2) ZLR 156 (SC) this Court exhorted trial judges to always give a proper judgment on the issue of extenuating circumstances even in the face of a concession by a defence counsel, by considering the whole background of the case balancing the mitigatory against the aggravatory features in order to arrive at a reasoned conclusion.

Considering all the material factors connected to the commission of the offence *in casu* it is common cause that only one stab wound was delivered without the appellant aiming particularly at a specific part of the deceased's body during a scuffle. The deceased was on top of the appellant having bitten his middle finger. The deceased was having the better of the appellant. No medical evidence was led to establish the degree of force used in wielding the

knife. The appellant desisted and ran away as soon as the deceased got off him. Despite the absence of provocation or self-defence, the factors adumbrated above have sufficient probative value to amount to extenuating circumstances. In the result the Court finds that extenuating circumstances are present in this case.

The appellant, it is already known from the record, is a first offender. He has been in custody on death row for almost ten years from 3 November 2004. The mental anguish he has gone through is immeasurable.

However, the crime of which he stands convicted of is grave. Human life, a husband and breadwinner were unnecessarily lost over a petty dispute. The appellant was the aggressor. A dangerous weapon was used to inflict the ghastly injuries which caused the deceased to die. He died a painful death. The Court is gravely disturbed by the prevalence of murders perpetrated over very petty issues through the use of the Okapi knife. It should be impressed upon the citizenry that violence can never resolve disputes. The sanctity of human life must always be upheld. This message should be sent via the imposition, *in casu*, of a lengthy period of imprisonment.

In the result, the appeal against both conviction and sentence succeeds to the following extent:

1. The verdict of the court *a quo* of guilty of murder with actual intent is altered to read –

“The accused is found guilty of murder with constructive intent.”

2. Having found extenuating circumstances, the sentence of death imposed by the court *a quo* is set aside and substituted with one which reads -

“The accused is sentenced to twenty years’ imprisonment.”

CHIDYAUSIKU CJ

I agree

GOWORA JA

I agree

Calderwood, Bryce Hendrie and Partners, appellant’s legal practitioners

The National Prosecuting Authority, respondent’s legal practitioners