

REPORTABLE (44)

PETER NYATHI
v
THE STATE

SUPREME COURT OF ZIMBABWE
GUVAVA JA, MAVANGIRA JA & CHITAKUNYE JA
BULAWAYO, NOVEMBER 16, 2022 & NOVEMBER 18, 2022

N. Sibanda, for the appellant.

T. Muduma, for the respondent.

GUVAVA JA:

1. This is an appeal against the whole judgment of the High Court (court *a quo*), sitting at Bulawayo which convicted the appellant of murder in contravention of s 47(1)(a) of the Criminal Law [Codification and Reform] Act [*Chapter 9:23*](the Code). Subsequent to the conviction, the appellant was sentenced to death. This is an automatic appeal against both the conviction and sentence in terms of s 44(2) (c) of the High Court Act [*Chapter 7:06*]. At the close of submissions, we dismissed the appeal and indicated that our reasons would be availed in due course. I set out hereunder the reasons for this order.

BACKGROUND FACTS

2. On 22 October 2018, the deceased, Sheila Moyo, along with two other women, Lily and Laiza Gumede, left their homes to fetch some firewood in the Esiphaziphazi Mountains. At about 17.00 hours, the three women started heading back towards their homes. When they were about two kilometres away from their homes, they stopped to rest as they were

carrying firewood which was heavy. It was at that time that they first encountered the appellant who passed them going in the opposite direction towards the Esiphaziphazi Mountains. After a short break, the trio proceeded with their journey back home. After another short distance, they again stopped and took a short rest. As they were resting the appellant passed them again and this time he was now walking in the same direction as the three women that is, going towards Cowdray Park Suburb, Bulawayo. Inexplicably, the appellant again reappeared a short time later and this time he was going towards Esiphaziphazi Mountains.

3. Once the women had resumed their journey, the accused again reappeared. This time he forcefully grabbed Lily Gumede by the neck from the back. When the deceased valiantly intervened in order to assist Lily Gumede, the appellant turned his attention towards her and tried to attack her. She ran away going towards the Esiphaziphazi Mountains. The appellant gave chase, caught up with her, and assaulted her with a log on the back of her head. The deceased fell down as a result of the heavy blow. She was then dragged by the heels into a maize field as the appellant continued to assault her until she lost consciousness.
4. It is alleged that, once in the maize field, the accused proceeded to rape the deceased and thereafter fled the scene and hid at a nearby hill. In the meantime, Lily and Laiza Gumede ran towards the nearby houses for help and one, Labion Moyo, then accompanied them back to where the deceased was. They found the deceased bleeding from both her nose and mouth and unconscious. Her face was swollen and there were drag marks leading from the path to the maizefield where she was found. The deceased's undergarments had been removed from her person and left next to her. The deceased was ferried to the

hospital. She succumbed to the injuries from the attack on 24 October 2018 at Mpilo Hospital a mere two days after the incident.

5. A post-mortem report compiled by a doctor was admitted into evidence by consent. He found that the cause of death was intracranial haemorrhage and head injury. He also found that there were indications of physical and sexual assault as there was bruising on her vaginal wall and bruises on her face and head. He concluded that the deceased had been assaulted and raped.
6. On 30 October 2018, the appellant was identified at a police parade amongst eight other male adults by Lily Gumede as the perpetrator of the offence. This followed a police investigation in which the appellant's girlfriend led the police to their home where his blood-stained clothes were recovered. The DNA sample found on his blood-stained pair of jeans and navy blue and grey jacket proved a positive match with the deceased placing the appellant firmly at the scene. However, her vaginal swab was not indicative of any DNA residue belonging to anyone else other than herself. Upon the appellant's arrest he made indications to the police detailing how he had assaulted the deceased.
7. Thereafter, the appellant was formally charged with murder committed in aggravating circumstances and arraigned before the court *a quo*. In his defence outline, the appellant pleaded guilty to a lesser charge of culpable homicide. He admitted assaulting the deceased with a log once on the head. He argued that the reason for such action was that he had been provoked by the deceased who had called him a murderer. The appellant further testified that it was the deceased who struck him on the neck and shoulder first before he dispossessed her of the log and hit her once on the head and she fell down

losing consciousness. He strenuously refuted the rape allegations. He explained that he had reacted in this manner because the deceased had provoked him. He also alleged that he was acting in self-defence as she had attacked him first.

8. At the trial, Laiza Gumede outlined in detail what transpired on the day in question and how the appellant attacked the deceased. She denied that he was provoked by the deceased or any one of them. She denied that any of them had called the appellant a murderer.
9. The second state witness, Wilbert Tichaona Tigere, is a detective in the Zimbabwe Republic Police CID Homicide Unit. He testified that he visited the scene and recovered the log that was used in the assault and the deceased's undergarments. He further testified that the appellant's blood-stained clothes had been recovered from his house. He confirmed that the appellant was taken to United Bulawayo Hospital for blood sample extraction. The blood stains on his clothes matched the blood of the deceased.
10. Under cross-examination, the appellant disputed the suggestion that he had raped the deceased after the assault. When probed about who could have been responsible for the rape during the short interval that her companions fled and then returned with one Labion Moyo, he said that he did not know. The appellant accepted that he was at the crime scene and testified that after the offence he hid a short distance away where he remained in observation of the deceased up to the point that her companions returned. He, however, maintained that he did not intend to kill the deceased but only assaulted her after she had called him a murderer.

11. In determining the matter, the court *a quo* found that the post mortem report showed that excessive force had been used to assault the deceased and that the assault led to her death. It also concluded, on the evidence presented, that the deceased had been sexually abused. It also found that the last person to see the deceased alive was the appellant and hence no other person could have possibly had a sexual encounter with her within the limited time frame following the attack. It further reasoned that the appellant could not deny the offence due to the overwhelming evidence against him and that is why he had tendered a plea of guilty to the lesser charge of culpable homicide. In light of those findings, the court *a quo* held that the respondent had succeeded in proving beyond a reasonable doubt that the accused had caused the death of the deceased with actual intent.

12. As regards to sentence, the court *a quo* took into account mitigating factors as submitted by the appellant in which he stated that he had no previous conviction. He stated that he had shown contrition by tendering a plea of guilty to culpable homicide. Nevertheless, the court *a quo* concluded that the appellant's actions reflected a callous, calculative and cruel disposition. The accused had attacked a defenseless woman by striking her on the head. He thereafter ravaged her whilst she lay unconscious. The court thus found that the aggravating factors far outweighed the mitigating ones and held that the only appropriate sentence was the death penalty.

13. This is an automatic appeal to this Court against both the conviction and sentence on the following grounds:

AD CONVICTION

1. The court *a quo* grossly misdirected itself and erred at law in finding the Appellant guilty of murder with actual intent committed in aggravating circumstances.
2. *A fortiori*, the court *a quo* erred at law by completely disregarding the evidence of Peter Nyathi.

3. The court *a quo* grossly misdirected itself in law and fact by making a finding that the Appellant had raped the deceased yet there was no sufficient evidence to prove this finding.

AD SENTENCE

1. The court *a quo* erred in imposing the death penalty, without satisfactorily addressing the alleged aggravating circumstances.
2. A fortiori, the court *a quo* erred and misdirected itself by paying lip service to the mitigatory circumstances.

RELIEF SOUGHT

TAKE FURTHER NOTICE THAT the Appellant seeks the following relief:

1. That the instant appeal succeeds.
2. That the judgment of the court *a quo* is set aside in its entirety and substituted with the following:
 - a. “The Appellant is found guilty of murder with constructive intent.
 - b. The Appellant is sentenced to life in prison.”

SUBMISSIONS BEFORE THIS COURT

14. Mr *Sibanda*, for the appellant, submitted that from the evidence on record, it was only proved that the appellant had assaulted the deceased and there was no intent to kill. He argued that the evidence adduced pointed to an altercation between the appellant and the deceased. He maintained that the appellant was aiming for the shoulder when he struck the back of the deceased’s head. He further submitted that the scientific evidence introduced a new element to the case. He submitted that the scrapings under the deceased’s finger nails introduced the possibility of a third party being at the scene as they did not match the appellant. He also disputed that it was the appellant who moved the body of the deceased into the maize field. Critically, he further submitted that the vaginal swab did not match with the appellant’s fluid thereby indicating that he did not rape the deceased. He thus insisted that the DNA sample was not consistent with the allegations of rape.
15. Per *contra*, Mr *Muduma* for the respondent, submitted that the conviction could not be faulted as the evidence was overwhelming and pointed to the appellant’s guilt. He invited

the court to consider that the appellant accepted being at the scene and striking the deceased but merely disputes raping the deceased. He contended that after striking the deceased she lost consciousness and the only person who could have moved her was the appellant. He further asserted that the inference of rape could only be made against the appellant. Mr *Muduma* relied on the post mortem report as evidence of the rape incident together with the fact that her undergarment had been removed. Finally, he asked the court to take into account that the appellant was the last person to have seen the deceased alive. He submitted that following the appellant's encounter with the deceased when he assaulted her, he thereafter watched over her from a distance until her friends returned with help. On sentence, he submitted that it was justified on the basis that the finding by the court that deceased was indeed raped meant that the criteria for aggravating circumstances had been met.

WHETHER OR NOT THE CONVICTION WAS PROPER

16. Regarding the conviction, I am satisfied that the court *a quo*'s determination was in accordance with both the law and established jurisprudence on murder in contravention of s 47 (1) (a) of the Code. The appellant's only defence was that he erroneously struck the deceased on the head when he intended to aim for her shoulder. It is not in dispute that he assaulted her with a heavy log when she was running away from him. That he would have been aiming specifically for the shoulder and not the head is highly improbable in these circumstances. At the very least he ought to have foreseen the possibility of striking her on the head and causing her death.

17. The requirements for a court finding a person guilty of murder were set out in the case of *Dube v The State* SC 83/22 at page 8 wherein the following was held:

“It is trite that there are four basic essential elements that must be proved to sustain a conviction of murder. These are: - (i) causing death of (ii) another human being; (iii) unlawfully; and (iv) intentionally.”

On the facts of this case the requirements set out in para (i) to (iii) above are common cause. The only issue for determination relates to the intention of the appellant which is under paragraph (iv). In *S v Mugwanda* 2002 (1) ZLR 574 @ 581 D-E, the late CHIDYAU SIKU CJ posited the following regarding the question of intent in a murder:

“On the basis of the above authorities, it follows that for a trial court to return a verdict of murder with actual intent it must be satisfied beyond a reasonable doubt that:

- (a) either the accused desired to bring about the death of his victim and succeeded in completing his purpose; or
- (b) while pursuing another objective foresees the death of his victim as a substantially certain result of that activity and proceeds regardless.”

The evidence shows that the appellant attacked the deceased with a log which was 85 cm long. Although the record does not disclose its weight, a log that size would have been heavy. The post-mortem report reflects that the deceased was viciously attacked. She had a bruised swollen head and face. She also had a big, deep cut on her lip which required a suturing. The finding by the doctor was that the deceased died of intracranial haemorrhage and head injury. The wounds to the face completely destroy the appellant’s defence that he intended to strike her on the shoulder but missed. This was a vicious attack on a defenceless woman. From the injuries outlined above there was a clear intention to cause the deceased’s death.

18. It should also be noted that the appellant was clearly scouting out his victim in this case. The record reflects that the appellant appeared before the three women no less than three times before he decided to attack them. Clearly this was a premeditated attack. The appellant determined the precise moment that he wanted to attack his victim. The court *a quo*’s determination that the appellant’s conduct met the threshold for murder with actual intent cannot be faulted. The post-mortem report also reflects that the deceased

was raped as there was bruising to the introitus and the vaginal wall. The doctor also found “copious amounts of thick seminal fluid-like substance” in her vagina reflecting that she had had sexual intercourse just before she died. Admittedly the evidence from the samples obtained did not implicate the appellant, however, this could have been due to a number of factors that detracted from a positive result such as, when the samples were extracted and how they were preserved until they were taken to the laboratory for analysis.

19. It cannot be said that the physical examination by the doctor as reflected in the post-mortem report is extinguished by the evidence which emanated from the vaginal swab. It is evident that the swab test did not rebut the allegation of rape but rather merely failed to provide any indication of the appellant’s residue. Thus, the swab test on its own cannot be used to rebut the allegation of rape. The evidence in the post-mortem report left no doubt that there had been sexual interference. It should also be borne in mind that the deceased’s undergarment was removed and found at her side which was also highly suggestive of rape.
20. From the appellant’s own evidence, it was apparent that he remained watching the deceased from a distance until the return of the rescue party. He accepted that no one else went to the scene. Thus, it could only have been the appellant who raped the deceased. Thus, the court *a quo* did not *err* in finding that the appellant intended to murder and rape the deceased. Accordingly, the conviction is hereby confirmed.

WHETHER OR NOT THE SENTENCE WAS APPROPRIATE

21. The death penalty was imposed by the court *a quo* after the appellant was found to have committed murder in aggravating circumstances. The court *a quo* found that the deceased

had been raped by the appellant. Clearly, when one has regard to the other evidence presented before the court the court *a quo*, it cannot be faulted for imposing the death penalty on the appellant.

22. It is trite that the court *a quo* has discretion on whether or not to impose the death penalty. The Code provides the circumstances which must be considered by a court when imposing a sentence after a conviction of murder. Section 47 (2) provides:

“In determining an appropriate sentence to be imposed upon a person convicted of murder, and without limitation on any other factors or circumstances which a court may take into account, a court shall regard it as an aggravating circumstance if—

- (a) the murder was committed by the accused in the course of, or in connection with, or as the result of, the commission of any one or more of the following crimes, or of any act constituting an essential element of any such crime (whether or not the accused was also charged with or convicted of such crime)—
- (i) an act of insurgency, banditry, sabotage or terrorism; or
 - (ii) the rape or other sexual assault of the victim; or**
 - (iii) kidnapping or illegal detention, robbery, hijacking, piracy or escaping from lawful custody; or
 - (iv) unlawful entry into a dwelling house, or malicious damage to property if the property in question was a dwelling house and the damage was effected by the use of fire or explosives.” (underling is my own)

In this case, the court *a quo*, in convicting the appellant with murder also found that he had raped the deceased. As can be noted in s 47 (2) (a) (ii) above this is considered an aggravating factor. Although the Constitution of Zimbabwe protects the right to life, the appellant’s particular circumstances are not protected under s 48 of the Constitution.

23. It should be noted that the principles regarding sentencing established in the case of *S v de Jager & Anor* 1965 (2) SA 616 (A) at 628-9 are apposite. The Court held the following:

“It would not appear to be sufficiently realised that a court of appeal does not have a general discretion to ameliorate the sentences of the trial courts. The matter is governed by principle. It is the trial court which had the discretion, and a court of appeal cannot interfere unless the discretion was not judicially exercised, that is to

say, unless the sentence is vitiated by irregularity or misdirection or is so severe that no reasonable court could have imposed it. In this latter regard, an accepted test is whether the sentence induces a sense of shock, that is to say, if there is a striking disparity between the sentence passed and that which the court of appeal would have imposed. It should therefore be recognised that appellate jurisdiction to interfere with punishment is not discretionary but, on the contrary, is very limited.”

Once the allegation of rape was proved beyond a reasonable doubt, it was correctly found that the murder was committed in aggravating circumstances. Thus, there is absolutely no merit to the appellant’s appeal against the sentence.

DISPOSITION

24. The appellant has failed to show that there was any misdirection in the court *a quo*’s determination regarding his conviction for murder. The appellant has also failed to show that the court *a quo* erred in the exercise of its discretion in sentencing him to the penalty of death. Indeed, before the court *a quo* counsel for the appellant correctly conceded that the mitigating circumstances could not outweigh the aggravating circumstances of the case. This Court finds no basis for interfering with the judgment of the court *a quo*.

25. It was for the above reasons that the following order was issued:

“The appeal against both conviction and sentence be and is hereby dismissed.”

MAVANGIRA JA: I agree

CHITAKUNYE JA : I agree

Tanaka Law Chambers, appellant’s legal practitioners

Prosecutor General’s Office, respondent’s legal practitioners