

Judgment No. S.C. 127/99
Crim. Appeal No. 124/98

THE ATTORNEY-GENERAL vs JAMES MASEKO

SUPREME COURT OF ZIMBABWE
GUBBAY CJ, EBRAHIM JA & SANDURA JA
BULAWAYO, NOVEMBER 29 & DECEMBER 8, 1999

J Mhlanga for the appellant

C Nleya, for the respondent

EBRAHIM JA: The respondent (accused) was convicted in the High Court, Bulawayo, of murder with a constructive intent to kill. He was sentenced to five years' imprisonment with labour, of which two years' imprisonment with labour were suspended for five years on conditions of good behaviour.

The Attorney-General has appealed against the sentence on the grounds that the sentence passed was "incompetent and inadequate".

The facts which led to the accused being charged are that the deceased owed him an unknown sum of money for meat sold to the former by the latter on credit. On 10 October 1995 the two met at a local bottle store in Gwanda where they both resided and the respondent demanded his money from the deceased. The deceased gave him a sum of \$10 for the settlement of the debt. Later that same day the two met again and the deceased asked that the respondent return his change from

the \$10. This discussion deteriorated into an argument which resulted in the respondent stabbing the deceased once in the back with a homemade steel knife. The deceased retreated and was called back by the respondent, ostensibly to collect his money, although it is apparent that what the respondent wished to do was to assault the deceased rather than give him any money. Instead of handing over any money the respondent stabbed the deceased once in the chest, as a result of which he died. It was on the basis of these facts that the trial court convicted the respondent of murder with a constructive intent and sentenced him to five years' imprisonment with labour, of which two years' imprisonment with labour were suspended for five years on conditions of good behaviour.

It was clearly incompetent for the learned trial judge *a quo* to sentence the accused in the manner he did.

Section 358(2)(b) of the Criminal Procedure and Evidence Act [Chapter 9:07] provides as follows:

“When a person is convicted by any court of any offence other than an offence specified in the Eighth Schedule, it may -

- (a) ...
- (b) pass sentence, but order the operation of the whole or any part of the sentence to be suspended for a period not exceeding five years on such conditions as the court may specify in the order; ...”. (Emphasis added).

The offences listed in the Eighth Schedule, which disqualify an offender from being dealt with in terms of s 358(2)(b) of the Criminal Code, include the offence of murder, other than murder by a woman of her newly born child.

The learned judge therefore misdirected himself in sentencing the accused in the manner he did.

The Attorney-General has also submitted that the sentence imposed on the accused was, in any event, manifestly lenient. I must agree.

There were a number of aggravating features in the conduct of the accused. The deceased was stabbed twice, once in the back and once in the chest. The second stabbing took place after the accused had called the deceased to come to where he was, on the pretext that he was about to hand over the money the deceased was seeking from him. It is also apparent from the evidence that the accused attempted to conceal the homemade steel knife after he had stabbed the deceased. Having stabbed the deceased in this manner, the accused left him lying on the ground and went off to partake of beer. Even taking into account the fact that the accused was intoxicated to some extent and was somewhat provoked as found in his favour by the trial court, it seems to me that his conduct was highly reprehensible and bordered on him having killed the deceased with an actual intent to do so.

Had it not been for the fact that he had been held in the remand prison for a period of twenty-one months before being brought to trial, a sentence of fifteen years' imprisonment with labour would not be out of place on the facts of this case. The sentence imposed on him by the trial court was manifestly lenient. Counsel representing the accused in this Court has conceded as much.

I take into account his lengthy incarceration before the sentence imposed on him by the trial court, and substitute a sentence of ten years' imprisonment with labour.

GUBBAY CJ: I agree.

SANDURA JA: I agree.

Pro deo, for the respondent