

REPORTABLE (18)

Judgment No. SC. 24/05
Crim. Appeal No. 337/04

GOLIATH DIZA NYAMBO v THE STATE

SUPREME COURT OF ZIMBABWE
SANDURA JA, CHEDA JA & GWAUNZA JA
HARARE, MAY 19 & JUNE 23, 2005

F M Katsande, for the appellant

V Shava, for the respondent

CHEDA JA: The appellant was convicted of murder with actual intent by the High Court in Harare. The court found that there were no extenuating circumstances and sentenced him to death on 10 October 1994.

On 20 October 1994 he noted an appeal against the sentence, by completing the relevant form (“the prison form”) provided by the Prisons Department which is for noting an appeal in person from prison.

It is not clear what happened to the record and the notice of appeal. The appellant submitted, and I have no reason to doubt, that the record and the notice of appeal did not reach the registrar of the Supreme Court until ten years and twenty-three days later.

The State accepted that the appeal was noted, but could not explain what happened thereafter. The form on which the appellant noted the appeal is addressed to the registrars of the High Court and the Supreme Court. There is nothing to show that it is intended for the Attorney-General as well. The same applies to the accompanying letter from the Department of Prisons. It is addressed to the registrar of the Supreme Court, but it is not copied to the Attorney-General. In order to ensure that the Attorney-General is made aware of such an appeal, the prison form should be copied to the Attorney-General's Office so that he is informed about the appeal as soon as it is noted.

Mr *Katsande*, for the appellant, conceded that there were no extenuating circumstances. The appellant has now approached this Court with an argument that this Court should now deal with the delay in hearing his appeal as a violation of his fundamental rights in terms of the Constitution of Zimbabwe, and that this Court should commute his sentence to life imprisonment.

The appellant submitted that the matter be heard by this Court sitting as a constitutional court. He cited the following cases which he claimed supported his case – *Simplicio Njerere and Anor v S* SC 170/93 and *Catholic Commission for Justice and Peace in Zimbabwe v Attorney-General and Ors* 1993 (1) ZLR 242 (S).

Mr *Katsande*, for the appellant, suggested that the Supreme Court should refer the matter to the Constitutional Court to determine the issue of the delay in bringing the matter on appeal. He submitted that the delay of ten years before the

execution of the death penalty amounted to a violation of the appellant's fundamental rights, and that it should be commuted to life imprisonment.

This argument is based on the decision in *Catholic Commission for Justice and Peace in Zimbabwe v Attorney-General and Ors supra*, where the Supreme Court set aside the sentences of death and substituted them with life imprisonment. The appeal was decided in June 1993.

However, subsequent to that judgment, in November of that year, Parliament enacted the Constitution of Zimbabwe Amendment (No. 13) Act, 9 of 1993 ("the Amendment Act"), which provided as follows in s 2:

"2. Section 15 of the Constitution is amended by the insertion after subsection (4) of the following subsections –

'(5) Delay in the execution of a sentence of death, imposed upon a person in respect of a criminal offence of which he has been convicted, shall not be held to be a contravention of subsection (1).

(6) A person upon whom any sentence has been imposed by a competent court, whether before, on or after the date of commencement of the Constitution of Zimbabwe Amendment (No. 13) Act 1993, in respect of a criminal offence of which he has been convicted, shall not be entitled to a stay, alteration or remission of sentence on the ground that, since the sentence was imposed, there has been a contravention of subsection (1)."

The appellant committed the crime of which he was convicted in July 1993. Sentence was passed on 13 October 1993. In view of the provisions of the Amendment Act, the appellant is therefore not entitled to the relief he is seeking.

Accordingly the application to have the Constitutional Court determine whether the delay in his execution violates his fundamental rights cannot be granted.

Having conceded the non-existence of extenuating circumstances, Mr *Katsande* did not make any submissions on the merits of the sentence imposed. His attitude is understandable.

The appellant raped a twelve year old girl. Once she indicated that she recognised him, he chopped her on the head with an axe on the left ear and on the back of the head. It was a brutal murder of a young girl. According to his warned and cautioned statement, he left her body in the bush and proceeded to cut firewood before returning to the compound where he lived.

In the circumstances, the trial court was justified in holding that there were no extenuating circumstances. Accordingly, there is no basis on which to interfere with the death sentence that was imposed. The sentence will stand.

The application to have the matter referred to a Constitutional Court is dismissed. The appeal against sentence is also dismissed.

The registrar of the Supreme Court is directed to bring this judgment to the attention of the Commissioner of Prisons so that the form on which prisoners note appeals in person can be copied to the Attorney-General's Office.

SANDURA JA: I agree.

GWAUNZA JA: I agree.

Pro deo