REPORTABLE (133)
Judgment No SC 146/04
Crim. Appeal No 260/04

WITNESS SILULI v THE STATE

SUPREME COURT OF ZIMBABWE
CHIDYAUSIKU CJ, MALABA JA & GWAUNZA JA
BULAWAYO NOVEMBER 30 2004 & SEPTEMBER 6, 2005

A. Masawi, for the appellant

A.V. Mabande, for the respondent

CHIDYAUSIKU CJ: The appellant in this case was charged with murder. He pleaded not guilty but was found guilty. He was convicted of murder with constructive intent and sentenced to death, the trial court having found that there were no extenuating circumstances. The appellant appeals to this Court against both conviction and sentence.

There is no challenge to the facts found by the court *a* quo which are briefly as follows. The deceased and the appellant were relatives and they both were lovers of one Nakai Zhou ("hereinafter referred to as Nakai"). Nakai was also related to both the appellant and the deceased through marriage. The deceased was her husband's nephew while the appellant was her husband's elder brother's son. She had sexual relations with both men.

Nakai was present when the appellant fatally assaulted the deceased and her account of what transpired was accepted as correct by the court *a quo*. Her account of what occurred is briefly as follows.

On 4 September 2001 at around 8 o'clock the appellant visited Nakai at her huts. He asked her to assist him in the brewing of beer at his homestead. She replied that she could not immediately assist him as she was about to retire to bed because she was exhausted. She also said that the appellant requested to have sexual intercourse with her

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which request she turned down because she was exhausted. Nakai asked the appellant to stay for a while to allow his aunt a chance to finish bathing. She then left the appellant seated by the kitchen hut and she retired to bed in her bedroom hut. She bade him farewell and assumed that he would leave shortly.

Shortly thereafter the deceased arrived and at that time Nakai had retired to bed in her bedroom hut. Upon the deceased knocking on her door she went out and sat with him on a flat rock behind her bedroom hut. The deceased began fondling her breasts and buttocks. While this was happening she looked in the direction of the kitchen and saw a person moving towards her kitchen hut. She invited the deceased to go and find out what was happening. When she saw the figure moving in the direction of her kitchen hut she called "Who is it?" but no one responded. She proceeded with the deceased to the kitchen hut to check as to what or who had made the movements. The deceased was walking in front of her and got to the kitchen hut and opened the door. Upon opening the door the deceased struck a match and exclaimed "Ah, but it is you Uncle Takunda".

She saw the deceased fall down immediately after uttering the above words and the appellant came out of the kitchen hut running. She gave chase and caught up with the appellant and invited him to return to the kitchen hut. She then nursed the deceased whom she found conscious and sitting on a rock by washing and rinsing his head with water in the presence of the appellant. She heard the deceased remark "You have injured me". The deceased rose from his seat and proceeded to his home. Likewise the appellant left.

It is common cause that the appellant struck the deceased on the head with a pestle that was produced in court as Exhibit 5 and that the pestle belonged to Nakai.

The condition of the deceased deteriorated and he passed away on 15 September 2001 some ten days after the assault. It is common cause that the deceased died as a result of the assault by the appellant. The appellant was thereafter charged with murder and arraigned accordingly.

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According to the medical report the deceased died of subarachnoid haemorrhage, skull fracture and head injury. There is no indication in the medical report or on any other evidence the degree of force used by the appellant to inflict the injuries sustained by the deceased.

The appellant, at his trial, raised the defence of self-defence and provocation. Both defences were rejected by the court *a quo*. The appellant was found to be an unreliable witness as he gave different, and at times, conflicting accounts of the altercation he said he had with the deceased. The court found Nakai to be a reliable witness. This assessment of the two witnesses by the court cannot be faulted. Indeed it has not been challenged by the appellant.

As I have said Ms *Masawi*, for the appellant, did not seek to challenge the trial court's conclusion that Nakai was a credible witness and that her account of the events correctly reflect what transpired. She, however, submitted as against conviction that on the evidence accepted by the court *a quo* the proper verdict should have been one of culpable homicide as opposed to murder with constructive intent. In particular, in paragraph 13 and 14 of her Heads of Argument she made the following submission:-

> "13. Looking at the totality of the State evidence it is clear that in fact the State did not prove beyond reasonable doubt that the appellant deliberately committed an act which he appreciated might result in the death of the deceased and acted reckless as to whether such death resulted or not. The court found so but there was no basis for such finding on the evidence.
>
> 14. There was no justification in finding that the State has proved constructive intent beyond reasonable doubt. The most that can be said having regard to the circumstances discussed above and having regard to the weapon used and that only one blow struck is that objectively the appellant ought to have foreseen the reasonable possibility of the resultant death.
>
> In the circumstances, the verdict should be one of guilty of culpable homicide as the conviction of murder cannot stand on the facts before this court. The mental element which accompanies the killing is a vital issue and this has to be discerned from evidence of the circumstances of the killing."

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In convicting the appellant of murder with constructive intent the learned judge in the court *a quo* reasoned as follows:-

> "The State has in our view proved beyond reasonable doubt that the accused unlawfully attacked the deceased with exhibit 5. In perpetrating this attack it is clear that although he did not desire death he foresaw the possibility of causing death to the deceased by virtue of the fact that he used this pestle on the head while deceased was in a crouching position. Despite this possibility he continued to assault the deceased in the manner he did thus resulting in his death. The accused is accordingly found guilty of murder with constructive intent."

In the course of the trial and in response to questions by the court the appellant gave the following evidence:-

"MR JUSTICE CHEDA

Q. Can you confirm that you were not drunk this evening?

A. I was not drunk.

Q. You were not angry with anybody?

A. No, I was not angry.

Q. You appreciated what you were doing, that is …

A. I remember everything, I knew …

Q. Sorry I remember?

Q. I remember everything. I knew what I was doing.

Q. Looking at exhibit 5 it is a fairly heavy log, you agree?

A. Yes.

Q. You appreciate that when you were holding it standing and hitting someone who was crouching on the ground was likely to injure him? Do you realise that?

A. I admit.

Q. You are familiar with time. Is it not?

A. I can estimate that it is such a time.

Q. From the time when Nakai told you to wait because Mai Nashe was taking a bath outside and at the time when you heard the voices outside how many minutes do you think lapsed?

A. About fifteen to twenty minutes thereabout."

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The above evidence establishes that the appellant was fully appreciative of the nature of his conduct, namely, that he could cause the deceased serious harm. Were it not for this admission I would have been persuaded by Ms *Masawi's* submission. Only one blow was struck with a pestle. The degree of force used has not been established. The deceased died some ten days after the assault. On these facts alone I entertain some doubt that the appellant must have foreseen the possibility of death ensuing. The admission by the appellant that he was fully aware of the risk involved in the assault removes that doubt.

I will, therefore, dismiss the appeal against conviction on that basis.

Turning to the question of sentence. The court *a* quo found no extenuating circumstances and imposed the death sentence. In its finding that there were no extenuating circumstances the court *a quo* reasoned as follows:-

> "We have taken into account all the submissions made by both State and Defence counsels. Mr Nyamukomba has urged the Court to find that the fact that accused cooperated with the police should be regarded as extenuation. The State counsel however concedes but however extends that argument further that it should not only and there but one must also take into account the state of the mind of the accused during the commission of the crime.
>
> The Court agrees with that because almost all accused persons that are caught red handed as it were they cooperate with the police because they have no alternative. Most importantly I am of the view that the fact that one has cooperated with the police should not on its own be regarded as enough to stand as extenuating. The case should be viewed in totality with all other relevant factors namely the accused's state of mind at the time of the commission of the murder and also whether he was drunk, provoked or was acting in some legally acceptable defence. And above all whether there was any danger to his life or limb at the time this was committed.
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> The Court therefore finds that there are no extenuating circumstances in this case."

The court *a quo* found the appellant guilty of murder with constructive intent. It is clear from the above remarks of the learned trial judge that in considering extenuation the court *a quo* attached very little weight to constructive intent as a factor of extenuation. In this regard the court merely remarked that it had considered the submissions of counsel and counsel had submitted that the constructive intent be considered as extenuation. The court should have carefully weighed this factor against the aggravating features of this case

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before arriving at its conclusion on extenuation. The correct approach to extenuation when a court has found the accused guilty of murder with constructive intent was set out by BEADLE CJ (as he then was) in *R v Mharadzo* 1966 ZLR 240 at 241G-I. The learned CHIEF JUSTICE had this to say:-

> "Where, on the evidence it is possible to do so, I would, with respect, suggest that it is desirable for trial courts to make a positive finding on the precise state of mind of the accused, before determining the question of whether or not extenuating circumstances exist, because here this question of the actual state of mind of the accused is, I think, a factor of considerable importance. I do not wish it to be inferred from this that, where the court finds that only a constructive intent to kill is proved, that the court must necessarily find that this is a circumstance of extenuation, but I do suggest that, where only a constructive intent to kill is proved, the court will examine the other features of the case very carefully indeed before rejecting a plea that the offence was committed in extenuating circumstances."

The trial court did make a specific finding on the question of constructive intent. What the court failed to do was to weigh this factor carefully with other factors of the case before concluding that extenuating circumstances did not exist and passing the death sentence.

The correct approach for a trial court is aptly summarised in the headnote in *Mharadzo's* case, *supra*, which reads as follows:-

> "That where, on a charge or murder, only a constructive intent to kill is proved, the court should examine the other features of the case very carefully indeed before rejecting a plea that the offence was committed in extenuating circumstances."

Mharadzo's case, *supra*, was followed in *The State v Jacob* 1981 ZLR 1 wherein the court held:-

> "There are two permissible approaches to the assessment of extenuating circumstances in murder cases: the first is to make a finding that extenuating circumstances exist if there are any mitigating features in the case, and then to decide whether, notwithstanding that finding, the aggravating features necessitate the imposition of the death sentence; the second approach involves balancing at the outset the mitigating against the aggravating features and, depending on the result, finding that extenuating circumstances exist or imposing the death sentence. Both

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approaches involve a careful weighing up of the mitigating factors against the aggravating factors and the passing of the death sentence only if the latter outweigh the former.

The finding of a constructive intent to kill in a murder case will not necessarily lead to an overall finding, once the weighing-up process has been completed, that there are extenuating circumstances justifying a sentence other than death, but it is a factor which must be put in the credit side in the accused's favour in that weighing-up process."

Similarly in *S v Sigwahla* 1967 (4) SA 566 (AD) at 571E, HOLMES JA had this to say:-

"There is a further factor. More than four years ago in *R v Mini* 1963 (3) SA 188 (AD) at page 192A, I raised the question whether, depending on the circumstances, the moral blameworthiness of an accused is not reduced if the murder is committed with legal intention to kill known as *dolus eventualis*, as distinct from intention where the will is directed to the brining about of death (*dolus directus.* The suggestion, then novel, attracted favourable comment in 1963 *South African Law Journal,* page 467 at page 468, and 1964 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg,* page 71; and it was applied in *S v Arnold*, 1965 (2) SA 215 (C) at pages 219C *et seq*; and was mentioned by this Court in *S v Manyathi, supra*, at pages 438C *et seq*. Furthermore, the Appellate Division of Rhodesia recently applied much the same reasoning; see *R v Mharadzo* 1966 (2) SA 702 (R AD) at pages 703C-D and 704A. Accordingly it now seems appropriate to say:

(a) Trial Courts, in their *conspectus* of possible extenuating circumstances, should not overlook the fact (if it be such) that it is a case of *dolus eventualis*.

(b) While it cannot be said that this factor must necessarily be an extenuating circumstances, in many cases it may well be so either alone or together with other features, depending on the particular facts of the case."

The effect of the above authorities is that constructive intent on its own, or together with other factors, can constitute extenuating circumstances and that before arriving at a conclusion the court is enjoined to carefully balance the mitigating features and aggravating features. This the court did not do in the present case. The trial court's misdirection leaves this Court with two options. Either to remit the matter for sentencing *de novo* or, for this Court to pass sentence itself. The latter is the more common practice; see *Mharadzo's* case, *supra*.

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The Court, in this case, will follow the more common practice and assess the sentence itself. The court *a quo* held that this was a gratuitous murder devoid of any motive. I do not agree with this conclusion. The evidence of the State witness, Nakai, clearly establishes facts from which the inescapable inference is that this was a crime of passion. It is common cause that Nakai was having an intimate relationship with both the deceased and the appellant. Shortly before the assault the deceased was fondling Nakai's breasts and bottom most probably in preparation of being intimate. The probabilities are that the appellant saw this and must have been piqued by it and felt jealous. A short while earlier the appellant was denied similar favours by Nakai who was his lover. This must have exacerbated the appellant's sense of grievance. While this cannot, in any way, justify the appellant's assault on the deceased it certainly provides a motive for the assault. This was a crime of passion and not a motiveless assault. The assault itself was not particularly brutal. Only one blow was struck. There is no evidence on the severity of the force used to inflict the injuries sustained by the deceased. One can only infer from the post-mortem report's description of the injury and the fact that the deceased died about ten days after the assault, that the degree of force used in striking the deceased with a pestle was moderate to severe.

On the other hand the only aggravating feature is that the offence led to the death of the deceased and violated the sanctity of life. An innocent man was killed for no good reason.

Given the above factors I am satisfied that this is not a proper case for the imposition of the death sentence.

The trial court should have found that extenuating circumstances justifying the court imposing a sentence other than a death sentence existed in the form of the constructive intent and the fact that only one blow was struck when the appellant, in a fit of jealousy, saw his lover about to be intimate with another man.

In the circumstances I would allow the appeal against the death sentence. Other than this I am satisfied that the appellant committed a very serious offence that led to

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the loss of an innocent life. There is no doubt that a lengthy period of imprisonment is called for in this case. In my view, the justice of this case can be met by sentencing the appellant to a term of 13 years' imprisonment with labour.

The appeal against conviction is dismissed but the appeal against sentence is allowed to the extent that the sentence of death is altered to 13 years' imprisonment with labour.

MALABA JA: I agree.

GWAUNZA JA: I agree.

Pro Deo

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