

DISTRIBUTABLE (135)  
Judgment No. SC. 149/04  
Crim. Appeal No. 121/04

**MORGEN NCUBE v THE STATE**

SUPREME COURT OF ZIMBABWE  
CHIDYAUSSIKU CJ, MALABA JA & ZIYAMBI JA  
BULAWAYO, NOVEMBER 29, 2004 & SEPTEMBER 22, 2005

*L Nkomo*, for the appellant

*P A Mpfu*, for the respondent

MALABA JA: On 18 May 2000 the appellant was convicted by the High Court of murder with actual intent to kill. No extenuating circumstances having been found, the sentence of death was imposed on him.

In the appeal against both conviction and sentence, State counsel conceded that the court *a quo* misdirected itself when it found on the evidence that the appellant's state of mind at the time he killed the deceased was an actual intent to kill as opposed to a constructive intent to kill. He also conceded that there were extenuating circumstances, making the decision by the court *a quo* to sentence the appellant to death a misdirection.

The facts of the case are these. The appellant and Ivene Mlalazi ("Ivene") were employed at Cummings Farm in Esigodini as security guards. Ivene was also responsible for buying gold on behalf of his employer from gold panners operating on the farm. The deceased was one such gold panner who occasionally sold his gold at Cummings Farm.

On 18 March 1999 the deceased approached the appellant and Ivene at their office intending to sell what he believed was gold. He had in his possession two samples of ore that were tested. One sample was found not to contain gold. The appellant immediately accused the deceased of deliberately attempting to defraud them of their employer's money by misrepresenting the ore as gold.

It appears from the evidence that some time before this incident the appellant had been assaulted by a group of gold panners on the farm. Although the deceased had been present at the place where the appellant was assaulted, he had not taken part in the assault.

Whilst accusing him of attempting to defraud them, the appellant handcuffed the deceased and stripped him of his trousers before leg-ironing him. He attempted to strike the deceased with a knobkerrie but Ivene intervened and took the weapon from him. The appellant picked up a brick but was disarmed by Ivene before he could throw it at the deceased. Ivene also restrained the appellant from getting hold of a shotgun to shoot the deceased. Undeterred the appellant went out of the office, only to return armed with a sjambok which he then used to strike the deceased several times on the body and head over a long period of time until the latter was rendered physically weak. The sjambok used was 71 cm and weighed 180 grams.

As he assaulted the deceased the appellant announced that he was taking revenge for the assault perpetrated on him by the gold panners, accusing the deceased of having taken part in the assault. He also uttered words to the effect that if he did not kill the deceased he would leave him sexually impotent. As he made those pronouncements, the appellant directed blows at the deceased's private parts.

The deceased complained of feeling dizzy. He was no longer able to stand on his own. The appellant and Ivene put him in a storeroom and left him there. He died that night of a scalp haematoma. When they saw the deceased's dead body the following morning, the appellant and Ivene conveyed it in a wheelbarrow to the banks of Umzingwane River where they buried it in a burrow. The body of the deceased was exhumed in a decomposed state on 22 March 1999 on indications made by the appellant after his arrest.

The court *a quo* held on these facts that the appellant had an actual intent to kill the deceased.

It appears from the facts that an actual intent to kill was not the only inference that could reasonably be drawn from all the circumstances. The learned judge inferred the fact of actual intent to kill the deceased from the evidence that the appellant tried to strike the deceased with a knobkerrie and a brick, and wanted to shoot him with a shotgun before he was disarmed by Ivene on each occasion. Whilst such actions were evidence of an intention to assault the deceased, they provided no basis for an inference of an actual intent to kill the deceased.

The deceased was still alive at the time the assault on him ceased. The evidence did not suggest that the appellant stopped assaulting the deceased because he realised that death was an inevitable and imminent consequence of his actions. Leaving the deceased alive is not itself evidence, of course, that the appellant did not have an actual intent to kill the deceased. It must be considered in the light of all the other circumstances of the case in the determination of the fact of his state of mind. The evidence of the utterance that if he did not kill the deceased he would render him sexually impotent and that

they had decided to have him charged with attempted fraud the following day militated against a finding of an actual intent to kill the deceased.

A person may, of course, still be guilty of murder with actual intent to kill even if death did not result immediately from his assault as long as the facts show beyond reasonable doubt that his unwavering intention was to bring about the deceased's death. Where, as here, the evidence proved that at the time he assaulted the deceased the accused entertained the possibility of leaving him alive, death is a possibility in his mind but not the only desired object.

The statement by the appellant that if he did not kill the deceased he would render him sexually impotent clearly showed that the possibility of the death of the deceased resulting from the assault did occupy the appellant's mind. In my view, State counsel properly conceded the fact that a consideration of all the circumstances of the case supported a finding that the appellant was guilty of murder with constructive intent to kill.

The appeal against conviction succeeds. The court *a quo's* decision is altered to one of guilty of murder with constructive intent to kill the deceased.

A finding of constructive intent to kill may, in addition to other factors, constitute an extenuating circumstance. What seems to have provoked anger in the appellant was the belief that the deceased had deliberately attempted to sell what was not gold to them, thereby undermining their authority as security guards on the farm. The appellant nonetheless committed a serious offence deserving of a severe punishment. The assault on the deceased was vicious and prolonged, leading to unnecessary loss of life.

The sentence of death imposed by the court *a quo* is set aside and substituted with the following –

“The accused is sentenced to fifteen years’ imprisonment with labour.”

CHIDYAUSIKU CJ: I agree.

ZIYAMBI JA: I agree.

*Pro deo*