

DISTRIBUTABLE (82)
Judgment No. SC. 95/05
Crim. Appeal No. 228/05

MLATSHWA MPOFU v THE STATE

SUPREME COURT OF ZIMBABWE
MALABA JA, CHEDA AJA & BERE AJA
BULAWAYO, NOVEMBER 28, 2005 & MARCH 30, 2006

M Nzarayapenga, for the appellant

K Amon, for the respondent

MALABA JA: On 29 January 1996 the appellant was convicted by the High Court sitting in Gweru of murder with actual intent to kill and sentenced to death, no extenuating circumstances having been found. He now appeals against both conviction and sentence. The legal practitioner representing the appellant, however, indicated that he had no meaningful submissions to make against the judgment of the court *a quo* on both conviction and sentence.

The attitude of the appellant's legal representative was, in my view, proper, as the facts, which were common cause, lead to no other conclusion other than that reached by the court *a quo*.

The appellant was married to the deceased's mother, with whom he had one child aged below one year at the time the deceased met his death. The deceased, who was aged three years, was the appellant's stepson. He had lived with the appellant for one week, having been brought to them by his maternal grandmother. The appellant did not want to live with the deceased at his home.

On 25 January 1992 the appellant told the deceased's mother that he wanted to take the deceased back to his grandmother. She agreed that the deceased be taken back to her mother. She indicated that she wanted to accompany the appellant the following day after she had washed and ironed the child's clothes. The appellant did not want the deceased's mother to accompany him and the deceased. He told her to remain behind.

The following morning the deceased's mother left the appellant with the deceased and the other child whilst she went to the borehole to fetch water. In her absence, the appellant took the deceased and walked away with him, leaving the other child on its own.

On the way the appellant took a stick and severely assaulted the deceased with it on the head and other parts of the body. As a result of the severe assault the deceased's forearms were fractured. His head became swollen and he bled from the nose. After the deceased had died from the assault, the appellant took his body to his sister-in-law's homestead. There was no-one at the homestead. The appellant placed the deceased's body in a kitchen hut and covered it with a rug. The deceased's body was found by one Betty Moyo the following day.

In addition to the swollen head, bleeding from the nose and mouth and fractured forearms, the deceased had incisions on the stomach which had been smeared with a black substance.

The case was reported to the police on the third day of the deceased's death. By the time the police arrived the body had started to decompose. The post-mortem nonetheless confirmed that the right and left

humerus had been fractured and that the body showed signs of having been subjected to a severe assault.

The trial of the appellant on a charge of murder commenced on 7 October 1992. After all the evidence had been led, defence counsel applied for an order that the appellant be examined by a psychiatrist for any mental disorder in terms of s 27 of the Mental Health Act, No. 23 of 1992. The reason given for the application was that the violent act perpetrated on the deceased by the appellant appeared motiveless.

Following the order by the court *a quo*, the appellant was examined on two different occasions a year in 1993 and 1994 by a consultant psychiatrist at Mlondolozzi Special Institution. The psychiatric examination did not reveal any mental disorder in the appellant. He had no history of mental illness. The doctor concluded that the appellant was not mentally disordered at the time he killed the deceased.

The trial resumed on 29 January 1996. The learned Judge found that the evidence adduced had established beyond reasonable doubt that the appellant had actual intent to kill the deceased. The facts taken into account were the determination on the part of the appellant to remove the deceased from his mother's custody, ensuring that she was not with him when he took the child away, and the severity of the assault perpetrated on the deceased. The learned Judge said:

"There is no dispute that the deceased was assaulted severely by the accused. There is no dispute that he caused all these serious injuries that were viewed on the deceased. From his own admissions, he did not want this child there anymore, despite the evidence that the child had not been there for a long time.

The accused set off with the child simply to fulfil his plan, despite the fact that the deceased's mother had elected to go with the accused and the deceased the following day.

It is, therefore, clear that the accused had a plan already, which he wanted to carry out and that is why he decided to set off without the deceased's mother.

From this evidence, we are satisfied that the accused had a clear intention to kill the deceased, and he set off and carried out the plan."

There was no misdirection on the part of the learned Judge in arriving at the finding of the fact of the appellant's state of mind at the time he killed the deceased.

The appeal against conviction cannot succeed.

On sentence, the learned Judge held that there were no extenuating circumstances for not imposing the mandatory sentence of death. I agree with the learned Judge's finding that the aggravating circumstances far outweighed the factors of mitigation, such that there was nothing that reduced the appellant's moral blameworthiness. The deceased was an innocent child, whose sin was perhaps that the appellant's wife bore him. The deceased's death was premeditated and deliberately brought about by means of a severe and brutal assault.

The appeal against sentence must also fail.

Accordingly, the appeal is dismissed.

CHEDA AJA: I agree.

BERE AJA: I agree.

Pro deo