

REPORTABLE ZLR (18)
Judgment No SC 16/07
Criminal Appeal No. 170/05

LEVISON SITHOLE v THE STATE

SUPREME COURT OF ZIMBABWE
SANDURA JA, CHEDA JA & GARWE JA
HARARE, MAY 21, & JULY 17, 2007

T Nyakunike, for the appellant

No appearance for the respondent

GARWE JA: On 28 February 2001, the appellant appeared before the High Court at Mutare charged with the crime of murder. He pleaded not guilty but was convicted of murder with actual intent and sentenced to death. He now appeals against that sentence to this Court.

The facts of this case are largely common cause or at least not seriously in dispute. The appellant and the deceased were engaged in an extra marital relationship. The relationship had commenced sometime in 1998. On 10 January 1999 at about 20:00 hrs the appellant and the deceased met along a certain path. They walked together for a distance. Thereafter the appellant took a machete from his cycle and struck the deceased with it five times on the head. The deceased collapsed and died on the spot. According to the post-mortem report, the cause of death was severe hemorrhage.

The sentence imposed by the court *a quo* is attacked on the basis that the trial court misdirected itself in finding that no extenuating circumstances existed.

In considering the question of extenuation the court *a quo* had regard *inter alia* to the statement made by the appellant to the police. In that statement the appellant told the police that he had been intimate with the deceased for a period of almost a year and had spent a lot of money on her. In early 1999, the deceased started to avoid him and the appellant formed the impression that she was no longer interested in him. On the day preceding the fateful day the appellant assaulted the deceased hoping that this would have a positive effect on the relationship. That did not happen. On the day in question he looked for her and eventually found her. He then took her along the main road on the pretext that he was going to give her back her property when in fact he wanted to kill her. Thereafter he struck her with a machete about five times and she fell. In the statement he stresses that the reason he became angry was that although he had spent a lot of money on her the deceased had lost interest in him.

The first ground of appeal against the finding that no extenuating circumstances existed is that no consideration was given to the fact that the appellant and the deceased were engaged in a relationship which had gone sour because the deceased was now seeing other men. No attempt was made by the appellant's legal practitioners to substantiate this statement in the heads of argument. Nor was any case law authority cited in support of this submission. On the facts it is apparent that the appellant fatally attacked the deceased because he felt spurned after having lavishly spent money on her. There was no heated exchange of words between the two shortly before the attack. This appears to be a

case where the appellant acted out of jealousy and decided to eliminate the deceased because she did not want him anymore. In these circumstances there can be no question of any extenuating circumstances. This court is aware of the decision of the South African appellate court in *S v Meyer* 1981 (3) SA 11(A). In that case the court held that the fact that the murderer and the victim were involved in a love relationship, involving mental tension resulting from jealousy and provocation, could amount to a factor which may serve as an extenuating circumstance. The present case is distinguishable in that there was no provocation in the ordinary sense and the appellant acted in the way he did because he felt spurned by the deceased.

The second ground of appeal against the finding that no extenuating circumstances existed is that the court *a quo* failed to take into account the fact that the appellant must have been drunk at the time because his irrational conduct in attacking a defenceless woman with a dangerous weapon can only be explained on the basis of drunkenness. The trial court considered the possibility that the appellant may have been labouring under intoxication at the time but concluded that intoxication did not play any part during the incident. The court *a quo* remarked as follows:

“... The evidence seems to make it clear that on the fateful day, the accused did not act under the influence of alcohol. Those who saw him at the market place were all convinced that he did not partake of any alcohol that day. The accused himself admitted in evidence that he did not drink alcohol on 10 January. Those who saw him on the day in question all agreed that there was no argument between the accused and the deceased on the day in question. There can be no question of any form of provocation being causal to the violent attack that took place on the deceased on that day. There is nothing upon which the court can find that the accused can justify the claim that he, that the accused acted under circumstances which usher an excuse (*sic*). On the contrary, the overwhelming indications are that there was a predetermined effort on the part of the accused to ensure not only that the deceased is injured but that her life should be taken.

There may be reasons which have not been disclosed to the court as to why such a bald determination was made that the deceased should die. Whatever

those reasons might be have not been made open to the court. But be that as it may, the court's task is made easier by the fact that the evidence led both by the State and by the accused himself turn (*sic*) to show that the love affair that took place between the two went horribly wrong about that time. In fact so long (*sic*) that there was such a serious determination on the part of the accused to eliminate the deceased and that apparently is what happened. The court has no choice except to hold that the accused acted with an actual intent to bring about the result which eventuated and we, accordingly find the accused guilty of murder with actual intent".

This finding by the trial court cannot be impugned in any way. The totality of the evidence suggests that the murder was not committed on the spur of the moment or that the murder was committed as a result of drunkenness. Rather the evidence suggests that the appellant lured the deceased to a lonely spot where he then took a machete and struck the latter at least five times on the head. The reason given by the appellant for his conduct is that the deceased was no longer interested in him but in other men and yet he had spent what he considered a considerable sum of money on her. In these circumstances there is no basis upon which the trial court can be criticized for coming to the conclusion that the appellant's conduct was not attributable to alcohol.

The last ground upon which the sentence of the court *a quo* is attacked is that the court should have taken into account the fact that the appellant paid compensation to the deceased's family as a sign of his remorsefulness. The claim by the appellant during the trial that he had paid compensation was never fully investigated and it remains unknown whether in fact he did so. As the State did not dispute the claim it can be assumed in the appellant's favour that he did so. However the payment of compensation in these circumstances would not, on its own, amount to extenuation. An extenuating circumstance has been defined as:

"... a fact associated with the crime which serves, in the minds of reasonable men, to diminish, morally albeit not legally, the degree of the prisoners' guilt ..."

See Gardiner and Lansdown, *South African Criminal Law and Procedure*, Vol 1, General Principles and Procedure 6 ed by C W Lansdown, W G Hoall and A V Lansdown (p 675). See also *Criminal Law* 2 ed by C R Snyman p 424.

The position is also settled that:

"... a circumstance will not be of extenuating character in relation to a murder unless it is associated therewith at some stage of the chain leading from motive to execution, both inclusive, but a circumstance may, it is submitted, be extenuating in this connection which has reference to the mentality or the personality of the accused ..."

See Gardiner and Lansdown, *South African Criminal Law and Procedure*, Vol 1 *supra* at p 395

The payment of compensation to the deceased's relatives by the appellant in this case was done in accordance with tradition in order to show remorse for the death of the deceased. Such remorse is a factor that a court would normally take into account in assessing an appropriate sentence. It is not a circumstance that is associated with the crime or one that would throw light on the appellant's state of mind at the time of the commission of the offence. As stated by Snyman in *Criminal Law*, 2 ed this is a factor which:

"... like other factors affecting punishment, may be considered only when the court, having found extenuating circumstances, has to decide what sentence to ... to impose." (at p 425)

In other words the payment of compensation in these circumstances is a mitigating factor rather than an extenuating circumstance. The case of *State v Jaure* 2001 (2) ZLR 393 cited in the appellant's heads of argument deals *inter alia* with conduct suggesting repentance and endeavors to assist the victim before death ensues. That is not the position in this case.

In all the circumstances therefore there is no basis upon which the trial court could be said to have misdirected itself in arriving at the conclusion that no circumstances of extenuation existed in this case. Indeed both defence and State counsel appear to have been agreed at the conclusion of the trial that there were no extenuating circumstances. Although, as the trial court found, the full reasons have not been disclosed as to why there was such a bold determination on the part of the appellant that the deceased should die, the evidence led before the court *a quo* suggested clearly that the appellant became bitter when the deceased started to ignore him after he had spent what he considered a substantial sum of money on her. The attack did not take place on the spur of the moment. The appellant lured the deceased to a lonely spot at night where he then used a machete to inflict fatal blows to the head. It is common cause she died on the spot.

The appeal against sentence must therefore fail.

In the result the appeal is dismissed.

SANDURA JA: I agree

CHEDA JA: I agree

Pro deo