REPORTABLE (76)

Judgment No S.C.79\2002
Crim. Appeal No 209\99

MASAMBA CHININGA v THE STATE

SUPREME COURT OF ZIMBABWE
CHIDYAUSIKU CJ, ZIYAMBI JA & MALABA JA
BULAWAYO MARCH 26 & OCTOBER 30, 2002

*S. Siziba*, for the appellant

*T. Mujaji*, for the respondent

CHIDYAUSIKU CJ: The appellant in this case was charged with the crime of murder. He pleaded not guilty but was found guilty of murder with actual intent. The court found no extenuating circumstances and imposed the death sentence. The appellant now appeals to this court against both the conviction and sentence.

In convicting the appellant the trial court found the following facts to have been proved. That on the day the appellant killed the deceased he and other patrons were having a drink at Pumula East Bottle Store. The deceased, Fortunate Ncube, also called at this bottle store for a drink. When the deceased arrived at the bottle store, his height caused a stir among the patrons and several comments were made about his height. It was observed that when he walked into the bottle store he had to bend even where other people do not bend. The deceased, who was very tall,

pointed out to the people in the bottle store that he felt harassed by those people who were making comments about his height.

The trial court accepted the evidence of Mr Jele, the manager of the bottle store, to the effect that he had observed the deceased enter and leave the bottle store. He also saw the appellant, through the big windows, approaching the deceased and stabbing him. He further saw people gather around the deceased. After the stabbing he observed the appellant take to his heels and run away outpacing all the people who were there. It was also the bottle store manager's evidence that there was no quarrel between the deceased and the appellant. The court *a quo* was impressed by this witness and accepted his evidence. The acceptance of Jele's evidence by the court *a quo* cannot be faulted.

The court also accepted the evidence of Mr Duvai, who appears to be a friend of the deceased, and was with him at the bottle store. His evidence corroborated that of Jele in many respects. He stated that, of all the people who were mocking the deceased, the appellant was the most vocal. He advised the deceased to ignore the provocation which advice was followed by the deceased except for the occasion when he wished to go for the appellant but was dissuaded from doing so. The appellant was heard to say that although the deceased was tall, he, the appellant, could bring the deceased down. The deceased responded by querying how would such a short person fell him.

The appellant was thereafter observed approaching the deceased pointing a finger at him and pulling a knife from his pocket with the other hand.

Having pulled out the knife, the appellant stabbed the deceased three times before running away.

The injuries sustained by the deceased as a result of this attack are contained in the post-mortem report.

The appellant raised the defences of provocation and drunkenness. Both defences were rejected by the court *a quo*. Indeed, although there was no formal abandonment of the appeal against conviction, Mr *Siziba*, for the appellant, conceded that he had no useful submissions to make in respect of conviction. He made submissions only in respect of the finding that no extenuating circumstances exist in this case. This attitude by the appellant's counsel is perfectly understandable given the facts of this case and, in particular, given the nature of the injuries inflicted on the deceased and the weapon used - an Okapi knife which was relatively long and sharp. The deceased died instantly.

The post-mortem report reveals the following injuries on the deceased:-

> "EXTERNAL EXAMINATION Nutrition - Good
> Marks of violence:-
>
> a) Three stab wounds are present: one on the left chest and two on the left shoulder. The chest stab wound is 4 cm long, 1.5cm wide and 7cm deep. It is located 4cm from the midline and 4cm below the left clavicle. The shoulder stab wounds are measuring 6cm long, 2cm wide and 10cm deep for the wound on the lateral aspect and 3cm long, 1,5cm wide and 7cm deep for the wound on the posterior aspect of the shoulder."

According to the report death was due to haemorrhagic shock following multiple stab wounds. On these facts a conviction of murder with actual intent is the correct verdict. Accordingly the appeal against conviction cannot succeed.

I now turn to deal with the issue of the sentence. The court *a quo* found no extenuating circumstances to exist and imposed the death sentence. In the court *a quo* the appellant advanced two grounds of extenuation, namely, drunkenness and youthfulness. A reading of the judgment of the court *a quo* clearly reveals that the court considered these grounds separately and concluded that there were no extenuating circumstances. The court did not consider the cumulative effect of the two extenuating factors. This is where the court erred. A trial court should consider the cumulative effect of possible extenuating circumstances. Where an accused person relies on a number of factors for extenuation a trial court misdirects itself if it considers and dismisses each factor in isolation. The trial court must consider the cumulative effect of the extenuating circumstances pleaded. This proposition is well supported by a line of cases starting with the case of S *v Manyathi* 1967 (1) SA 435 (A). In that case WILLIAMSON JA had this to say at p 439D-F:-

> "To decide properly whether an accused's mental state at the time he committed a crime was such that his conduct was less blameworthy than it might normally be obviously requires a consideration of the cumulative effect of all the relevant circumstances. A failure by a Court to address its mind to the possible cumulative effect of all the relevant factors which might constitute extenuating circumstances in a case such as the present would amount to the Court misdirecting itself on the question in issue."

*Manyathi's* case, *supra*, was considered and followed in the case of *S v Sigwahla* 1967 (4) SA 556 (A).

I am therefore satisfied that the court *a quo* misdirected itself in its approach to the issue of the existence or otherwise of extenuating circumstances. Because of the trial court's misdirection this Court is at large to determine that issue. See *S v Babada* 1964 (1) SA 702 at p 705; *S v Bowers* 1971 (4) SA 646 (A); *S v Felix and Another* 1980 (4) SA 604 (A).

I will now proceed to determine the issue of extenuating circumstances. It is common cause that the appellant had taken alcohol before stabbing the deceased. What is at issue is how much he had taken and what effect, if any, it had on him at the time he stabbed the deceased. The evidence of the appellant was that he had started drinking at ten o'clock in the morning, and more or less continued doing so until the fight with the deceased during which he stabbed him to death. According to his evidence he had consumed about nine scuds from about 10 o'clock in the morning to 2 pm. It would appear that a scud contains about two litres of opaque beer. On this basis the appellant, in effect, was contending that he had consumed 18 litres of opaque beer prior to this incident. It is also common cause that after the appellant stabbed the deceased he took to his heels and outpaced everyone and could not be arrested there and then. It was put to the appellant that if he was that drunk he could not have run that fast. The following exchange between the appellant and State counsel is instructive:-

"Q. After you had stabbed the deceased you were able to run away from the people who wanted to apprehend you.

A. Yes, because I got frightened, in panic I ran away when I realised what I had done.

Q. So regardless of the fact that you had been taking alcohol, you were able to outrun all the people who were at the bottle store?

A. Yes, once I realized what I had done I sobered up.

Q. I put it to you that you had not taken as much alcohol as you would want this court to believe and that is why you were able to outrun everyone who was there and to sober up in a short space of time as you are saying you had then sobered up.

A. No, I had taken a lot of beer."

The court *a quo* also rejected the appellant's evidence on the amount of alcohol he had taken. In this regard the learned judge remarked as follows:-

> "We are unable to believe this kind of evidence. If you had consumed so much beer in fact, you would be in a deep sleep or in a coma and what happened in this case would not have happened at all. It would just not be possible for you to be moving around, standing there with your friends and threatening the deceased as you did.
>
> Even if you had taken some alcohol, it is clear you knew what you were doing. Once you saw what happened you were able to run away, outpacing all the people there including possibly some people who were sober and not drunk at all.
>
> We do not believe that you would be able to pull yourself at such a high speed with almost twenty litres in your stomach to outpace other people who were not drunk."

The above remarks were made when the learned judge was considering the verdict and the defence of drunkenness.

The following is what the learned judge said when he considered alcohol as an extenuating factor:-

> "We have considered the submission regarding the consumption of alcohol by yourself. We nevertheless find that we are not moved from the finding that you had not consumed as much alcohol as you allege. Even if you may have

> consumed alcohol, there is nothing to suggest that you had consumed so much to the extent that your conduct was influenced by it because the evidence is to the effect that you just arrived at the bottle store and purchased what you were drinking at the time."

From the above excerpts it would appear that both the State and the court *a quo* were satisfied that the appellant had consumed some alcohol prior to the fatal stabbing of the deceased. The court *a quo,* having determined that the appellant knew what he was doing, left open the issue of how much alcohol the appellant had taken and what effect, if any, it had on him. Given the above evidence I have no doubt that alcohol had some influence on the appellant's unlawful conduct. The reason for the fight between the deceased and the appellant was trivial. The appellant persistently jeered at the deceased because of his height. This incident occurred at a bottle store where both parties were drinking in the company of friends. The most probable inference to be drawn from the above facts, in my view, is that the appellant, perhaps not as drunk as he would want the Court to believe, was under the influence of alcohol to some extent. It is not possible to determine on the evidence before the Court the degree of such intoxication.

On this basis I am satisfied that the appellant, at the time he stabbed the deceased was under the influence of alcohol although it is not possible, on the evidence, to determine the precise degree of influence. The probabilities are that the influence was considerable.

The appellant was aged 21 years at the time he committed the offence. It is trite that youthfulness is an extenuating feature or factor. In terms of s 338(c) of the Criminal Procedure and Evidence Act [*Chapter 9:07*] it is not competent for a

court to impose a death sentence on an accused aged 18 years and under. Thus, in the case of an accused person aged 18 years and under the issue of extenuation does not even arise as the death sentence is incompetent because of youthfulness.

It is trite that youthfulness on its own or together with other factors can constitute an extenuating circumstance. *S v Lehnberg* 1975 (4) SA 553 (AD). Youthfulness connotes immaturity, lack of experience of life, thoughtlessness and a mental condition of susceptibility to external influences, especially those emanating from adult persons. *Lehnberg, supra,* at 561A-C.

In dealing with the appellant's youth the learned judge had this to say:-

> "On youthfulness, again we are advised that you were twenty-one at the time you committed this crime. We do not accept that because of youthfulness at twenty-one you can be excused from the serious crime that you committed just because you are still a young person. Young persons cannot and should never be allowed to go about committing serious crimes and hiding behind youthfulness. The law of the land is very clear on situations like this. Where you kill and there are no extenuating circumstances, the legal consequences have to follow.
>
> We have examined the situation in this case and we come to the conclusion that there are no extenuating circumstances."

When a court concludes that extenuating circumstances exist in a case it is not in any way condoning or justifying the commission of the most heinous of offences, namely, murder. It merely means that the court is being perceptive of human frailties and balancing them against the evil deed. See *S v Sigwala* 1967 (4) SA 566 (AD) at 571.

The conduct of the appellant in this case, in my view, evinces a very high degree of thoughtlessness and immaturity that can only be explained by his youthfulness and the fact that he had consumed some alcohol.

I am satisfied that in this case the cumulative effect of the appellant's youth and the influence of the alcohol he had consumed justifies the imposition of a sentence other than a death sentence. I wish, however, to emphasise the point that if it had not been for the misdirection it would not have been possible for this Court to interfere with the discretion of the court *a quo*.

As the court *a quo* correctly observed this was a very bad case of murder. An innocent life was lost for no reason. The most severe sentence other than the death sentence would be the most appropriate sentence taking into account all the factors in this case.

In the result the appeal against conviction is dismissed. The appeal against sentence succeeds to the extent that the death sentence is set aside and substituted with imprisonment for life.

ZIYAMBI JA: I agree

MALABA JA: I agree

*Pro Deo*