Judgment No. SC 25/03
Crim. Appeal No. 269/01

HERBERT MAGODO v THE STATE

SUPREME COURT OF ZIMBABWE
CHEDA JA, MALABA JA & CHIWESHE AJA
BULAWAYO, JULY 28, 2003 & JULY 27, 2004

P Dube, for the appellant

M Cheda, for the respondent

CHEDA JA: The appellant was convicted of murder with actual intent. The trial court found that there were no extenuating circumstances and imposed the death sentence. The appellant has now appealed against both conviction and sentence.

The case against the appellant was that he lived as husband and wife with the deceased for about two months. The deceased had come to him because she was pregnant.

The appellant returned from work one evening and the deceased complained that she had not eaten anything as there was no money in the house. When she did not accept his explanation that he would be paid at the end of the month, the appellant says he then brought into the argument the issue of one Mwale whom, he said, had told him that he, Mwale, had made the deceased pregnant and that

the appellant had taken Mwale's wife. The appellant then told the deceased that he no longer loved her and she should go and stay with Mwale. This is the appellant's version of the events.

However, this argument ended and the parties retired to bed, with the appellant sleeping on a reed mat on the floor and the deceased sleeping on the bed.

In the early hours of the morning one Munkuli, a close neighbour, heard the deceased screaming and saying: "Herbert, my husband, what is this you are doing to me? But I am not dead yet, I will survive". Munkuli went outside and noticed that there was some fire in the room. He went to assist and saw the appellant with a bowl of water and a cup which he was using to put out the fire. He called out to neighbours. The deceased's underclothes or underwear was burning and after putting out the fire he noticed that she was completely naked and her hair had been burnt.

Munkuli left to call an ambulance and alert the police, leaving the appellant at the scene. On returning he found the deceased lying on the mattress but the appellant was no longer there. The deceased was taken to hospital where she later died.

Ms *Dube*, for the appellant, argued that the appellant was convicted on what was essentially hearsay evidence regarding the commission of the physical act, and the evidence led did not exclude beyond a reasonable doubt the possibility of reconstruction of the events by the deceased. She said it was an error for the court to

convict the appellant mainly on the basis of his failure to immediately rebut the deceased's claims that he had burnt her. She submitted on sentence that the fact that there had been an argument with the deceased about the absence of money in the house and the fact that the appellant was not responsible for the deceased's pregnancy ought to have been found to be extenuating factors.

The appellant made a warned and cautioned statement which was confirmed. In that statement, which I quote in full, he said:

> "I, HERBERT MAGODO, do not admit the charge of killing Patience Muhohanana. It was on the 23rd April 1999 when I arrived in the evening at 9.00 pm. I saw my wife Patience seated and was knitting well. I greeted her well and she began to talk to me, saying she was hungry, she did not eat anything. She asked if I had brought some money and I said I did not have money.
>
> I removed my shoes and I slept. I then saw my wife in flames. I opened the door to take some water to extinguish the fire. I did not set Patience Muhohanana on fire with some paraffin."

As can be seen from the statement, he made no mention of an argument concerning the pregnancy and Mwale.

In his defence outline the appellant said that he got home in the evening and he quarreled with the deceased over money and he told her he did not want her to live with him anymore. He then went to sleep on the floor. When he fell asleep the deceased was seated on the bed crying.

The appellant was woken up later that night by the screams of the deceased and saw that she was on fire. He got some water to put out the fire while calling for help. He then decided to go and tell his brother. When he found the gate

locked, he climbed over the fence and hit his head hard on the ground. He felt dizzy and confused and does not recall what he did until he arrived at his brother's house at 6 o'clock in the morning. He denied pouring paraffin on the deceased and setting her on fire. He said she lied when she said he did that.

The main evidence of the State came from Million Munkuli. The most important part of his evidence is that he heard the deceased screaming and accusing the appellant of pouring paraffin on her and setting her on fire. This specific accusation against the appellant is confirmed by the appellant himself. However, the appellant merely absorbed this accusation without disputing or reacting to indicate that he disputed what the deceased was saying. Munkuli's evidence is that the deceased repeated the accusation several times. The appellant admits that fact but could not give any proper explanation for his failure to dispute what she said.

Munkuli left the deceased with the appellant. On returning he found that the appellant had left her and disappeared from the scene.

The deceased made the same accusation to the doctor that it was her husband who doused her with paraffin and set her alight.

Since the accusation was made against the appellant in his presence and he too confirms that the deceased made that accusation against him, that evidence is no longer hearsay as Ms *Dube*, for the appellant, submitted. The appellant heard the deceased accusing him in the presence of the witness. He did not deny it. He did not even attempt to tell the witness or any of the other persons whom came there that

she was not being truthful when he had an opportunity to do so in her presence. He only sought to allege that she was lying when she was no longer there.

It is common cause that some paraffin was poured over the deceased and she was then set alight. The big question is – who set her alight? She gave an explanation which was neither challenged nor denied. She was consistent in her accusation. It would have been different if she had told her story to Munkuli or to the doctor only and in the absence of the appellant. However, when she was first heard screaming and accusing the appellant, the two of them were alone in their house. She repeated the accusation when the witness had arrived. She repeated the same accusation at the hospital.

Ms *Dube* submitted that the State had no evidence to prove that the appellant doused the deceased with paraffin and set her alight and that the State did not have any eye-witness to the act. The appellant accepted that they were the only two people in the house. The deceased later told people who had set her alight. The appellant suggests that the deceased set herself alight. There is no reason why should would set herself alight and then accuse the appellant of doing so.

The story by the appellant about Mwale is not referred to in his statement or defence outline. If it was the main issue that led to all this, the appellant would have mentioned it in both instances or at least in one of them.

Ms *Dube* submitted that the evidence of Munkuli on what the deceased was heard to say should not have been admitted because it is hearsay. I do not agree.

That evidence is no different from the evidence given in *R v Taylor* 1961 (3) SA 616 (N) where, on a charge of culpable homicide, evidence that occupants of nearby rooms heard sounds of a scuffle and thuds in the room occupied by the owner and the deceased, during which the deceased cried out: "John, please don't hit me anymore. You will kill me", was admitted as part of the *res gestae*.

Looking at the totality of the evidence, the fact that the deceased was heard screaming and at the same time accusing the appellant of dousing her with paraffin then setting her alight while they were the only ones in the room, and that the appellant never disputed the accusation, that he made no comment or denial even when this was repeated in the presence of Munkuli, and his subsequent disappearance from the scene for a long time, his conduct is clearly consistent with guilt.

Accordingly, the court *a quo* was correct in convicting him of the crime charged.

On sentence, the court found that there were no extenuating circumstances. The court did not accept that the appellant had changed his mind after committing the offence because if he had, he would have rendered assistance to the deceased and called for help. The fire was only put out when Munkuli came in. The court found that instead the appellant chose to disappear and leave her in that helpless state.

On the issue of quarreling over some money, the court found that it was an ordinary quarrel that ended and that the appellant himself says they went to

sleep. He did not act on the spur of the moment. It seems the appellant waited until the deceased slept, then set her on fire at about 3 am.

The court also rejected the issue of Mwale as an afterthought because it was never mentioned in the warned and cautioned statement or the defence outline.

I see no fault in the conclusion reached by the trial court as it is based on the facts of the case and the evidence led.

There is no merit in the appeal and it is dismissed.

MALABA JA: I agree.

CHIWESHE AJA: I agree.

Pro deo