REPORTABLE (4)

TAKWANA KELVIN MUTYORAURI
v
THE STATE

SUPREME COURT OF ZIMBABWE
GUVAVA JA, MAVANGIRA JA & CHITAKUNYE JA
BULAWAYO: NOVEMBER 16 2022 & NOVEMBER 18, 2022

B. Mhandire, for the appellant.

Ms *N. Ngwenya,* for the respondent.

GUVAVA JA:

[1] This is an automatic appeal against both conviction and sentence. The appellant in this matter is a male adult who was convicted of murder with actual intent by the High Court sitting on circuit at Gweru on 17 September 2012. The charge related to the death of a minor child, Gamuchirai Mvumba who was merely three years old at the time of her demise. As a result, he was sentenced to death. At the hearing, the appeal was dismissed. The reasons for the order are set out hereunder.

FACTUAL BACKGROUND

[2] The heart breaking facts that gave rise to this matter are these. On 18 July 2011, the minor child went missing from her guardian's yard where she had been playing with other children from the nearby households in Chikwakukire Village, Gokwe North. The minor child had allegedly remained behind, playing in the yard, after the other children were called for breakfast. Her aunt, Tendai Sibanda became agitated following claims

by the other children that they could not find the minor child in question after they had finished their breakfast. She subsequently launched a manhunt for the minor child with the aid of other villagers after it dawned on her that her niece was indeed missing.

[3] After retracing the steps of where the minor child was last seen playing, they discovered a spoor of a large shoe print, which they assumed belonged to a male person as well as smaller footprints which were alongside them and which they concluded belonged to the missing minor child. They followed the spoor and noticed that after about 15 meters the smaller set disappeared leaving only the adult spoor. It seemed to suggest that the unknown assailant had lifted the minor child at that point. Very little came of their search as the larger spoor soon disappeared following an alteration of course towards a nearby stream which was partially covered under a brush. However, they later returned with reinforcements to the bushy stream where a pair of adult black shorts were recovered. The shorts had orange and white lines on the side but were soiled by human waste. They also identified two distinct fresh heaps of human waste which seemed to indicate that an adult and a minor had been in the vicinity.

[4] The search proved futile and was abandoned. On 26 July 2011, one of the minor child's relatives came across a putrid smell in the same bushy area while searching for her herd of cattle. Her determination to locate the source of the smell was heightened following her observation of a dog that appeared to be feeding on a miniature human skull. After alerting the missing minor's parents of her discovery, they then located the lower half of a child's limbs in a bush close to the stream. The identity of the missing minor child was matched to the corpse by the pink dress that she was last seen wearing. The soiled shorts earlier identified were taken away as evidence by the police. A post-mortem

conducted at the behest of the police failed to ascertain the cause of death due to the advanced stage of decomposition of the corpse.

[5] The appellant then aged 25 years came into the picture following investigations by the police of the minor child's disappearance. On 19 July 2011, they successfully managed to retrace the earlier mentioned adult spoor to the homestead of one Mirriam Sandawu who is the appellant's sister. Upon questioning, she disclosed that the shoeprint belonged to the appellant. She gave the police a vivid description of his profile and the clothes she had last seen him wearing. As matters would have it the appellant was fortuitously picked up by the police under the *alias* Tofara Musa for a completely unrelated incident in a different village. He was identified by one of the officers who had interviewed his sister during a cell parade on 7 August 2011. The officer testified that the appellant had an uncanny resemblance with the description of the person of interest given to the police.

[6] Thereafter, the appellant's sister and her sons were invited to the police station where they identified the black shorts that were recovered at the crime scene as belonging to the appellant. The appellant at one point in time had given the same pair of shorts to one of his sister's sons but had later retrieved the same before departing with it on the eve of the minor girl's disappearance. On 8 September 2011, following extensive investigation, the police recorded a warned and cautioned statement from the appellant concerning the death of the minor child in Chikwakukire Village, Gokwe North. He admitted killing the minor girl but stated that it was an accident. He averred that her death was caused by a ladder that he had been leaning on, which accidentally fell on top of the child. He narrated that he had carried off the child away from the yard in the

hope of resuscitating her. He however fled from the scene after his attempts failed. He insisted that he did not rape the minor and only hid her a distance away from her homestead after failing to resuscitate her.

[7] The police also managed to recover several items of clothing from the appellant amongst which were a pair of brown Timberland shoes that had a perfect match to the prints identified by witnesses and which led the police to his sister's homestead. The items had been kept at the police station where the appellant had been originally arrested for a different crime. The shoes were also identified as belonging to the appellant by his sister. As a result of the above evidence, the appellant was charged with the crime of murder with an unknown object and arraigned before the court *a quo*.

PROCEEDINGS IN THE COURT *A QUO*

[8] On being charged, the appellant entered a plea of not guilty. His defence outline buttressed his warned and cautioned statement that the minor child had died as a result of a ladder that he leaned on accidentally falling on top of the minor child. He disputed that the identified clothes belonged to him. He stated that on the day in question he was wearing different clothes and slippers. The slippers would produce a different print from the Timberland shoe prints found at the scene. He stated that he never walked with the child at any point as she became unconscious when the ladder fell on top of her. He averred that he carried her off to the nearby bush from the playground where he found her. The appellant impugned the veracity of his sister's testimony by pointing to their alleged fallout as her reason for assisting the police in fabricating a strong case against him. He insisted that the minor's death was an accident and he regretted fleeing the scene soon after.

[9] At the hearing of the trial, the appellant's version of events was disputed by the witness who maintained that the yard in which the minor child was last seen did not have any ladder. The tree in the yard was also described as a 'small snot apple tree'. The appellant also sought to impute his actions leading up to the alleged mishap to his alleged drunken state. His version of events was contradictory. He professed that he had resorted to using an *alias* out of fear of being linked to the present case.

[10] In the appellant's closing submissions, it was stated that the respondent had failed to prove murder beyond reasonable doubt as its evidence was purely circumstantial. The appellant's confession was put forward as a sign of his probity. This was opposed by the respondent who insisted that the appellant murdered the minor girl to cover up the heinous acts he had performed upon her.

THE COURT *A QUO*'S FINDINGS

[11] The court *a quo* found that the respondent had relied on circumstantial evidence. It reasoned that it was critical that the pair of shorts that the appellant had been wearing when he left his sister's place on 17 July 2011 were found the following day at the scene of crime. The court *a quo* noted that the respondent's version of events was more plausible as it was corroborated by various witnesses and by the two sets of footprints that were observed leaving the yard before the smaller set disappeared. It took issue with the appellant's explanation that he did not attempt to hide the body even though it took more than eight days for the decomposing corpse to be found after a manhunt in the area had failed to locate her. The court *a quo* posited that the appellant's excuse that he was drunk only cropped up for the first time when he was cross examined by respondent's counsel. The court *a quo* thus concluded that this was an afterthought.

[12] In conclusion, the court found that the circumstantial evidence on record was sufficient to support the conclusion that the appellant had deliberately caused the death of the minor child. Regarding extenuating factors, the court *a quo* reasoned that other than the fact that the appellant was a youthful offender, there was nothing which could detract from the gruesome murder of a minor girl. His attempts at covering up the act were specially held to be an aggravating factor. Following the court *a quo*'s conviction and sentence, the automatic right of appeal was exercised on the following grounds:

GROUNDS OF APPEAL

[13] ***AD CONVICTION***

1. The court *a quo* misdirected itself and erred in law in finding that the state had proved its case beyond a reasonable doubt and found the appellant guilty of murder with actual intent as it only relied on circumstantial evidence and disregarded the appellant's version of events that he accidentally caused the death of the deceased.
2. A *fortiori*. The court *a quo* erred at law by concluding that the appellant deliberately caused the death of the deceased so as to conceal information which might have been averse to him if disclosed by the deceased without any evidence to buttress the suspicion. The cause of death was not even established by the post-mortem.

[14] ***AD SENTENCE***

1. The court *a quo* erred in finding that there were no extenuating circumstances thereby imposing a death sentence.
2. The court *a quo* erred and misdirected itself by turning a blind eye to the mitigatory circumstances surrounding the commission of the offence in particular:
    a) That the accused was a youthful first offender.

b) He placed himself at the scene of the crime and hence his explanation was more probable that he accidentally caused the death of the deceased.

c) He did not deliberately conceal the body of the deceased but rather he acted out of panic after failing to resuscitate the deceased.

ISSUES FOR DETERMINATION

[15] From the foregoing, the following issues arise for consideration by this Court:

1. Whether or not the appellant was properly convicted of murder
2. Whether or not the sentence was proper in the circumstances

APPLICATION OF THE LAW

WHETHER OR NOT THE APPELLANT WAS PROPERLY CONVICTED OF MURDER.

[16] On appeal, Mr *Mhandire*, for the appellant, indicated that he would largely abide by the papers filed of record and sought to withdraw the appeal against sentence. Regarding, the conviction, it was his submission that the court *a quo* fell into error when it held that the respondent had proved its case beyond reasonable doubt. To this end, counsel submitted that the court *a quo*'s reasoning was premised upon circumstantial evidence and cited the authoritative case of *R v Blom* 1939 AD 188, in support of his contention that improper inferences were drawn to the prejudice of the appellant.

[17] Mr *Mhandire* submitted that the inference drawn ought to be consistent with the proven facts. He argued that there were no witnesses to the alleged murder and that the appellant did not know the minor prior to the incident. He also pointed out that the appellant was telling the truth about what had happened as he had voluntarily placed himself at the scene where the minor child disappeared. He maintained that the appellant was not

wearing the Timberland shoes on the fateful day and that the identified footprints could have belonged to the group of villagers that went looking for the minor. However, he could not offer any meaningful explanation as to how, when traced, the footprints led back to the appellant's sister's homestead.

[18] It is common cause that the appellant was responsible for the death of the minor child as he confessed to the killing. However, the point of departure relates to the appellant's intention when he committed the crime. Mr *Mhandire* placed emphasis on the fact that there was no one present at the time the appellant interacted with the deceased. In this situation the court a *quo* could therefore only make a finding based on circumstantial evidence. The case of *Mangoma v The State* SC 36/20 discussed the applicability of circumstantial evidence in respect of a murder conviction. MATHONSI JA posited the following:

> "It is important to note, that notwithstanding, the confession was not the only evidence linking the appellant to the commission of the offence. I have said that the evidence of the State was circumstantial. The proper use of circumstantial evidence can be regarded as settled in our jurisdiction. There are two cardinal rules of logic governing the use of such evidence in criminal proceedings. They are that:
>
> 1. The inference sought to be drawn must be consistent with all the proved facts; and
> 2. The proved facts should be such that they exclude every reasonable inference from them save the one sought to be drawn."

It should be noted that the test was also utilised in the case of *Moyo v The State* SC 65/13 wherein GWAUNZA JA (as she then was) stated the following:

> "Counsel for the appellant cited authorities regarding the proper use of circumstantial evidence. She referred to *R v Blom* 1939 AD 188 at 202-203 where the cardinal rules of logic governing the use of such evidence in a criminal trial are set out as follows:
>
> '1. The inference sought to be drawn must be consistent with all the proved facts and
> 2. The proved facts should be such that they exclude every reasonable inference from them save the one sought to be drawn.'
>
> We are satisfied, on the basis of the evidence assessed above, that the inference that the appellant killed the deceased was properly drawn. From the indications that the

> appellant made it is evident that he had knowledge of the facts pertaining to the killing. **The proved facts and manner of death of the deceased, in our view, exclude any other reasonable inference except the one drawn.**" (my emphasis)

[19] The circumstantial evidence in this case weighs heavily against the appellant's version of events. His narration that he carried the minor child from the homestead is contradicted by the evidence of her footprints which were observed alongside his own for a distance of about fifteen metres before they abruptly disappeared. This was close to the bushy area where her body was later discovered. His black shorts were also located at the scene where the corpse was observed. Even more fatal to his explanation is that the purported ladder that he based his defence upon was non-existent according to the testimony of the villagers from the deceased's homestead.

[20] The case of *Mangoma v The State* (*supra*) decisively deals with the question of the alternative version of events proposed by the appellant. It was held that:

> "It is trite that where an accused person has given an explanation, the court is not at liberty to reject it unless satisfied, not only that the explanation is probable, but that it is, beyond a reasonable doubt, false. See *R v Difford* 1973 AD 370 at 373; *S v Mapfumo & Ors* 1983(1) ZLR 250."

The above position is eminently apposite in the present case. When put to Mr *Mhandire* that his submissions in favour of the appellant would entail the acceptance of an elaborate scheme hatched amongst the villagers who observed the footprints, his sister who identified his shoes and clothing found at the scene as well as the police who recovered possession of the shoes from a previous arrest, counsel relented and conceded that the story did not add up.

[21] I am fortified that, in view of the fact that the appellant's story having been refuted, the only reasonable inference that could be drawn was that he lured the minor child into the

bush in order to murder her. A reasonable and genuine accident would have resulted in a call for assistance rather than for the appellant to carry off the minor girl to a secluded location in order to try and resuscitate her. The appellant evidently had intent to commit the heinous act and in some respect was saved from further scrutiny by the advanced decomposition in which the corpse was found. The court *a quo*'s conviction cannot be vacated in the circumstances and is hereby confirmed.

WHETHER *OR NOT THE SENTENCE WAS PROPER*

[22] Regarding sentence, Mr *Mhandire* submitted at the hearing that he intended to withdraw the appeal against sentence and focus solely on the conviction. However, in view of the fact that an automatic right of appeal is mandatory where the death penalty has been meted, this Court is enjoined to also consider whether or not the sentence was appropriate. From the appellant's papers filed of record emphasis had been placed on s 48(2) of the Constitution as binding on the present appeal. However, given that the sentence was handed down prior to the advent of the new 2013 Constitution, the repealed law under s 337 of the Criminal Procedure and Evidence Act [*Chapter 9:07*] was still in force. Mr *Mhandire* conceded that there were no extenuating circumstances in the case. The concession was accepted by Ms *Ngwenya* on behalf of the respondent. The law on appeals against sentencing is well-established in our jurisdiction. In *S v Sidat* 1997(1) ZLR 487(SC) it was held by MCNALLY JA at 491 as follows:

> "Once it is decided that there has been a material misdirection in relation to sentence then there has been a substantial miscarriage of justice. The appellate court is then at large to consider on the right facts, what an appropriate sentence should be. In so considering, it is not fettered by a consideration of the sentence by the lower court.
>
> If, on the other hand, there has not been a misdirection by the lower court, then there can only have been a substantial miscarriage of justice if the sentence is "disturbingly inappropriate" or "so severe as to induce a sense of shock". Lacking a misdirection, in other words, the court will not be "at

> large" and will only be able to interfere if the severity of the sentence amounts to a substantial miscarriage of justice."

The case of *S v Nhumwa* SC 40/88 at p. 5, further clarifies the parameters of sentencing as follows:

> "It is not for the court of appeal to interfere with the discretion of the sentencing court merely on the ground that it might have passed a sentence somewhat different from that imposed**. <u>If the sentence complies with the relevant principles, even it if is severe than one that the court would have imposed sitting as a court of first instance, this Court will not interfere with the discretion of the sentencing court.</u>"** (my emphasis)

[23] In *casu*, the court *a quo* in passing its sentence noted that the only extenuating circumstance in the matter did not detract it from handing down the death penalty. It held that the relative youthfulness of the appellant at the time was insufficient to deter the sentence that it imposed. It is evident that its decision was made having due regard to the applicable principles in the matter. Thus, there is nothing on record before this Court that would warrant interference with the sentence imposed by the court *a quo*.

DISPOSITION

[24] The appellant's appeal against the conviction does not have merit. The circumstantial evidence that was relied upon by the court *a quo* is consistent with the proven facts that support the inference of murder with actual intent. In respect to sentence, though not challenged on appeal, it is appropriate in the circumstances as this was a heinous murder committed on a young and innocent child.

[25] It is for these reasons that the following order was issued:

> "The appeal against both conviction and sentence be and is hereby dismissed."

MAVANGIRA JA: I agree

CHITAKUNYE JA: I agree

Masawi & Partners, appellants' legal practitioners

National Prosecuting Authority, respondent's legal practitioners