Judgment No. S.C. 83/99
Crim. Appeal No. 23/98

VICTOR CHIDZIVA v THE STATE

SUPREME COURT OF ZIMBABWE
GUBBAY CJ, McNALLY JA & SANDURA JA
HARARE, JUNE 7 & JULY 30, 1999

E T Matinenga, for the appellant

P Muziri, for the respondent

SANDURA JA: The appellant and a girl called Sally Mungwari ("Sally") were charged with murder, the allegation being that on 26 November 1996 and at Mucheke Bridge in Masvingo they unlawfully and intentionally killed their baby ("the deceased") who was about nineteen days old. Both of them pleaded not guilty. At the end of the trial Sally was acquitted but the appellant was convicted and sentenced to death. He now appeals against both conviction and sentence.

The background facts are as follows. At the relevant time the appellant was a teacher at Nyautonge Primary School in Chirumanzu District. He was about twenty-seven years old. Sally was a day scholar at Mushandirapamwe Secondary School in the same district. She was about nineteen years old and lived with her maternal grandmother. She was related to the appellant in that her maternal grandmother was the elder sister of the appellant's wife.

In 1996 the appellant and Sally fell in love with each other. As a result of the sexual relationship between them Sally became pregnant and the deceased, a boy, was born on 7 November 1996. Because the appellant did not want Sally's grandmother to know that he was the deceased's father, he persuaded Sally to tell her grandmother and the other members of her family that the deceased's father was a man called Muzondo who lived and worked in Gweru. At the same time he convinced Sally that it was better for her and the deceased to leave her grandmother's village in order to go and live in Gweru. He undertook to find suitable accommodation for her and the deceased in that city.

On 26 November 1996 the appellant met Sally in Gweru by arrangement. Sally was carrying the deceased on her back. They looked for accommodation in Gweru and went to Mkoba Township for that purpose. Unfortunately, they failed to find any suitable accommodation.

They then decided to go to Masvingo in search of suitable accommodation. They arrived in Masvingo late in the evening and went to Rujeko, a high density suburb. They looked for accommodation but did not succeed in finding any.

Having given up hope of finding accommodation, they left the high density suburb of Rujeko and made their way back to the town of Masvingo. When they arrived at Mucheke Bridge, at about 11 pm, the deceased was removed from Sally's back, stripped naked and thrown into Mucheke River. Sally later returned to her grandmother and told her that she had left the deceased with his father in Gweru.

When the deceased's body was subsequently recovered from the river it was badly decomposed. Consequently, no post mortem examination could be carried out. In the circumstances, the cause of the deceased's death could not be established.

In the court *a quo* Sally's evidence was that when she and the appellant arrived at Mucheke Bridge it was the appellant who removed the deceased from her back, stripped him naked and threw him into the river. On the other hand, the appellant's evidence was that it was Sally who threw the deceased into the river as they were walking towards the town and at a time when he was some distance ahead of her.

The learned trial judge accepted Sally's evidence and rejected the appellant's version. He also found that it was the appellant who had a motive for killing the deceased. From the time the appellant fell in love with Sally he wanted to keep the love affair secret. He was a married man and did not want his wife to know about it. Above all, Sally was a relation of his. Because of that, when she became pregnant he was embarrassed and suggested that she should have an abortion. When she refused to do that, he persuaded her to lie to her grandmother and the other members of her family by telling them that the man responsible for the pregnancy was Muzondo who lived and worked in Gweru. At the same time he made arrangements for the removal of Sally and the deceased from her grandmother's village to Gweru. When he could not find suitable accommodation for them there, he took them to Masvingo where, again, he failed to find any accommodation.

In the circumstances, the learned trial judge found that the appellant had a motive for killing the deceased, and accepted Sally's evidence that it was the appellant who threw the deceased into the river. He found the appellant guilty of murder with an actual intent to kill.

There is no doubt in my mind that the appellant was correctly convicted. The evidence against him established his guilt beyond reasonable doubt. Indeed, Mr *Matinenga*, who appeared for the appellant, did not make any submissions in support of the appeal against conviction. In view of the overwhelming evidence against the appellant, the attitude adopted by counsel was understandable.

However, Mr *Matinenga* submitted that the trial court erred when it concluded that no extenuating circumstances existed. In this regard, he advanced three arguments which I now deal with, though not in the order in which they were advanced.

The first argument was that, having regard to the appellant's position in the community and the fact that he was married and was related to Sally, he was under great pressure to act as he did in order to avoid being embarrassed. It was submitted that the court *a quo* should have found that the pressure which prompted the appellant to commit the offence constituted an extenuating circumstance. I disagree.

As LANDSDOWN JP said in *R v Biyana* 1938 EDL 310 at 311: "an extenuating circumstance is a fact associated with the crime which serves in the minds

of reasonable men to diminish morally, albeit not legally, the degree of the prisoner's guilt". In the present case, the appellant killed the deceased because he was afraid that the deceased's existence would put him to shame with his relatives and the community in which he lived and worked. I cannot see how that can morally diminish the degree of the appellant's guilt. He was much older than Sally and ought to have resisted the temptation of having a sexual affair with her, bearing in mind the fact that he was related to her.

The second argument advanced by counsel for the appellant was that the court *a quo* should have found that Sally participated in the deceased's murder. It was submitted that such a finding would have lowered the moral blameworthiness of the appellant and constituted an extenuating circumstance. Once again I disagree. Assuming that Sally participated in the deceased's murder, I cannot see how that would serve, in the minds of reasonable men, to diminish morally the degree of the appellant's guilt.

The third argument put forward by the appellant's counsel was that when the court *a quo* found no extenuating circumstances, it overlooked the effect of alcohol on the actions of the appellant.

The appellant's evidence in respect of the beer he consumed was as follows. At about 11 am on the day in question he drank four pints of Castle beer in Gweru in order to acquire the courage to disclose to his uncle, who lived and worked in Gweru, that he was the deceased's father. He intended asking his uncle to provide

accommodation for Sally and the deceased. Unfortunately, the uncle could not be located.

Later that afternoon the appellant drank four litres of opaque beer before he, Sally and the deceased arrived at Masvingo. It was his evidence that they arrived at Masvingo some time after 6 pm and went to Rujeko high density suburb in search of accommodation.

When he was asked by his counsel at the trial in what state he was when he and Sally, who was carrying the deceased on her back, arrived at Mucheke Bridge at about 11 pm on that night he gave the following evidence:-

> "Q. At that stage what was the state of your sobriety, you indicated you had taken some alcohol, some Castle beer and then scuds? A. I was normal.
>
> Q. You were normal? A. Yes. I had not taken much for that particular day.
>
> Q. What is the quantity you had taken? A. I had taken four pints here in Gweru and then two scuds, each having a capacity of two litres, so it was four litres.
>
> Q. So you were still (sober)? A. I was still okay.
>
> Q. You were still okay? A. Yes. I knew what I was doing. I was not drunk in actual fact …".

Assuming that the appellant consumed the beer which he said he consumed on the day in question, it is quite clear from his answers to the questions put to him by his counsel at the trial that he did not consume much beer on that day and that at about 11 pm, when the deceased was thrown into the river, the appellant was sober. In the circumstances, I am convinced that whatever beer he had

consumed had no effect on him when he killed the deceased and would not morally diminish the degree of his guilt. The conclusion reached by the court *a quo* was, therefore, correct.

Finally, it is pertinent to note that where the trial court has found that no extenuating circumstances exist, this Court can only interfere with such a finding if it is of the opinion that no reasonable court could have come to that conclusion. In my view, the conclusion reached by the court *a quo* in the present case does not fall into that category.

In the circumstances, the appeal is dismissed in its entirety.

GUBBAY CJ: I agree.

McNALLY JA: I agree.

Jumo, Mashoko & Partners, appellant's legal practitioners