

ABSOLOM NCUBE v THE STATE

SUPREME COURT OF ZIMBABWE
MALABA DCJ, GOWORA JA & CHEDA AJA
HARARE, JULY 30 & 31, 2012

Miss *C Nunu*, for the appellant

Miss *A Munyariwa*, for the respondent

MALABA DCJ: This is an appeal against a sentence of death imposed by the High Court on circuit in Gweru on 7 April 2006. The court *a quo* found that there were no extenuating circumstances.

The facts of the case are as follows. The appellant and the mother of the deceased were husband and wife. The appellant left deceased's mother with his parents whilst he lived in Shurugwi where he was temporarily employed. The deceased's mother gave birth to the deceased whilst living with her parents.

The child was born severely incapacitated. It had an enlarged head, limbs were emaciated; mucus and saliva drooled unabated. He could not walk, talk, feed and could not sit up. He had to be helped for all bodily functions.

After birth, the mother took the child to the appellant's parents. She intended to leave the child with them. She and her brother were persuaded by the appellant's parents to go back with the child as the appellant was not at home.

When the child was 3 years old, the mother and her brother returned with the child. This time they left the child in the custody of the appellant's mother. The appellant was away at church.

After seven days, the appellant came home after having been summoned by his father. When he saw the child, the appellant cried. He, however, took the child and spent the night with him.

The following day the appellant took the child and carried him on his back to Zvishavane Police Station. He intended to attain the assistance of the police in locating the child's mother. The police advised him to go to Mabasa Police Post which was closer to his home. The appellant duly went to Mabasa where he was advised to go and leave the child with its grandmother whilst a search for the mother was being carried out.

On his way home the appellant passed through the home of his sister Dorica Ncube. The appellant said she refused to assist.

On the way the appellant dropped the deceased into a wide, deep and vertical cave. He threw large stones on top of the deceased. The appellant left the deceased in the cave after satisfying himself that he had died.

When he got home the appellant advised his parents that the child had died whilst being carried on his back and that he had buried it in the cave. The appellant led members of the community to the place where the remains of the child were recovered. The body was buried soon thereafter. The police received a report on the death and burial of the

deceased. They had the body exhumed and taken for a post- mortem examination. The post-mortem examination revealed fractures to both the parietal and occipital bone. The cause of death was attributed to multiple skull fractures.

The appellant was found guilty of murder with actual intent to kill. On extenuating circumstances the appellant said he killed the deceased out of frustration, depression, desperation and a sense of hopelessness. He said he felt the child had been ostracised by his own people. According to him, the child had no future and was bound to suffer eternally. He suggested that it was due to his mental state that he felt he needed to end the child's misery by killing him. He said he felt he had no choice in the matter because he felt so much pity for his son whose suffering he could no longer tolerate and decided to bring the suffering to an end by "sending the soul of his son to God".

The court *a quo* in considering the question of the existence of extenuating circumstances took these factors into account. It, however, held that the overriding consideration and motivation of the appellant in ending the life of his son was the wish to rid himself of the responsibility of taking care of the disabled child. It rejected the appellant's contention that he was driven by the emotion of mercy and trying to end the child's misery. The court *a quo* made a factual finding that the appellant did not kill out of pity.

Miss *Nunu* extraneously argued that the court *a quo*, misdirected itself and adopted an armchair approach in considering the question of extenuating circumstances. On the other hand Miss *Munyariwa* supported the finding by the court *a quo* that there were no extenuating circumstances.

The position of an appellate court in dealing with a finding on extenuating circumstances by a court *a quo* was set out in *State v Woods & Ors 1993(2) ZLR 258(S)* at p 284A-B where GUBBAY CJ said:

“In deciding whether or not extenuating circumstances exist which allow for the imposition of a sentence other than death, the trial court exercises what is essentially a moral judgment. On appeal, this Court, cannot substitute its own view. It may only interfere if persuaded that the conclusion of the trial court could not reasonably have been reached; and where that court had regard to wrong factors or had mistakenly excluded factors proper to be taken into account or had in some other way erred in principle.”

Extenuating circumstances have been defined as any facts bearing on the commission of the crime which tend to reduce the moral blameworthiness of an accused person. See *State v Chingaona S-105-02*.

The court holds that there was no misdirection on the part of the trial court. The court *a quo* applied its mind to the question whether the factors advanced by the appellant as extenuation had the effect of tending to reduce his moral blameworthiness. In the exercise of its discretion the court *a quo* discounted those factors as constituting extenuation. As the court *a quo*'s decision involved a moral judgment it is not open to this Court sitting as an appeal court to second guess the decision of the trial court and impose its own view in the absence of a misdirection.

The unanimous view of the Court is that the appeal is devoid of merit. It is dismissed.

GOWORA JA: I agree

CHEDA AJA: I agree

Calderwood, Bryce Hendrie & Partners, appellant's legal practitioners

Attorney-General's Office, respondent's legal practitioners