**Mutero v S Judgment No. SC 53/18. Civil Appeal No SC 340/15. Supreme Court of Zimbabwe. 3 August 2018**

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| **KEY CONCEPTS** |
| Sexual assault of 12-year-old | Sexual assault by mother’s boyfriend |
| Cautionary rule child witness | Cautionary rule single witness |
| Child witness | Credibility of child |

**ISSUE:** Appeal against sentence of death imposed by the High Court on a charge of murder

**FACTS:** The appellant was a39-year-old male who co-habited with the mother of the deceased, a 3-year-old girl. It was alleged that the appellant took the deceased into the bush to help him fetch firewood. While in the bush, he raped the deceased and penetrated her anus with his penis. Various other injuries were also inflicted on the body of the deceased. He then carried the body of the deceased back to the house, where he told the mother that the deceased had suffered epileptic fits.

 **At the time, the deceased was frothing in the mouth**

**and blood was oozing from her nose. The deceased died almost immediately after the**

**assault. After the village head, who happened to be appellant’s brother, refused to get**

**involved in the matter, the appellant then strapped the lifeless body of the deceased onto**

**his back and, with the deceased’s mother, walked a distance of twenty kilometres to the**

**deceased’s maternal grandmother’s residence where he requested that the body be buried.**

**As a result of the suspicion surrounding the whole episode the police were alerted leading**

**to the arrest of the appellant.**

**[3] The deceased’s body was examined by a nurse at Musume Hospital who reached the**

**conclusion that she had been raped and had injuries above the right eye, on each side of the**

**abdomen and on the back. A post-mortem examination was subsequently carried out. The**

**body was now in an advanced state of putrefaction. The doctor was however able to**

**conclude from his examination that the deceased had been sexually abused and in particular**

**that her rectum had been lacerated in the process.**

**[4] In his defence outline the appellant had denied causing the death of the deceased. He**

**denied raping her or penetrating her anus. He stated that whilst he was fetching firewood,**

**he noticed the deceased lying on the ground, frothing from the mouth. He then carried her**

**back to the homestead.3**

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**[5] The High Court did not believe the appellant’s version. It found the version highly**

**improbable. It concluded that the appellant had taken the deceased into the bush for the**

**sole purpose of killing her. It accordingly found him guilty of murder with actual intent.**

**On a further finding that the murder had been committed under aggravating circumstances,**

**the court imposed the death penalty. The appellant then noted an appeal against the**

**sentence of death imposed by the High Court.**

**PROCEEDINGS BEFORE THE SUPREME COURT ON AUGUST 3, 2015**

**[6] Although the appellant had noted an appeal against sentence only, at the hearing of the**

**appeal before this Court on 3 August 2015, this Court, as it is required to do in terms of the**

**law, scrutinized the evidence adduced before the High Court in order to determine whether**

**the conviction was also proper. See S v Mubaiwa 1992 (2) ZLR 362, 365D; Mupande v**

**The State SC 82/14; Samson Mutero v State SC 28/17; Cloudious Mutawo v State SC 37/14;**

**Enock Ncube and Anor v State SC 58/14.**

**[7] At the hearing of the appeal this Court accepted that the evidence against the appellant was**

**circumstantial. In its judgment in Samson Mutero v The State SC 28/17 this Court made a**

**number of observations. It is desirable that some of those observations be quoted. It stated**

**at page 9 of the cyclostyled judgment:-**

**“From the evidence, she had been brutalized. She had also been sexually abused.**

**She died from injuries as a result of the sexual abuse. He was, on his own**

**admission, the last person to see her alive. He admitted in his warned and cautioned**

**statement that when he returned home with her she was unconscious. When he**

**took her from her mother she was walking on her own two feet. The only inference**

**is that he was the one who abused her sexually resulting in the state that she was in**

**upon their return to the homestead”4**

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**[8] At page 10 of the cyclostyled judgment, the court continued:-**

**“The deceased’s body was in such an advanced state of decomposition that the**

**pathologist was unable to establish the exact cause of death. As a result, the postmortem report is silent as to the actual cause of death. However the tenor of the**

**evidence of the witnesses who saw the deceased shortly after the Appellant brought**

**her home from the bush bears testimony to the application of force to her body as**

**well as her private parts. In view of the evidence of the pathologist that the**

**proximate cause of death was the laceration to the rectum, the question before this**

**court is whether, by raping the deceased in the manner described by the pathologist,**

**the Appellant meant to perpetrate the prohibited conduct or bring about the criminal**

**consequence ...”**

**[9] At page 11, the court further remarked:-**

**“The nurse who admitted the deceased’s body observed fresh bruises on the right**

**eye. There was also bruising on each side of the abdomen. The grandmother**

**observed swellings on both sides of her neck. In my view, the injuries point to the**

**application of force around her throat resulting in her bleeding from the mouth.**

**Taken together, these injuries suggest that the deceased was lying with her face on**

**the ground. In order for the Appellant to perpetrate the rape per annum, the**

**deceased would have to be lying on her stomach.”**

**[10] And at page 12:-**

**“The open genitalia which had faeces confirms that she was raped and further that**

**after sodomising her at some point he perpetrated a frontal assault leaving faeces**

**on the genitalia. From the bruises and injuries observed on the body, it was the**

**conclusion of the pathologist that the deceased had been sexually abused both per**

**vaginum and anum. As a result of the sexual abuse there was a laceration in the**

**rectum. A laceration of this nature would cause bleeding which could be fatal ...**

**The evidence on the sexual assault leads one to conclude that the Appellant**

**intended to rape and assault the deceased. In order to give effect to his intent. the**

**Appellant took her to the mountains against the will of her mother. He subjected**

**her to such a vicious assault that he tore her insides causing her to die from the**

**injuries inflicted from the assault.”**

**[11] Still at page 12, the court further commented:-**

**“Given the age of the deceased and her body size, it can be said that the death of**

**the deceased was the Appellant’s aim and object. He could not give a reason why**

**he wanted a three-year old juvenile to accompany him to the bush to fetch firewood.**

**When the mother indicated her unwillingness for the child to accompany him he 5**

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**threatened her with physical assault. He kept her in the bush for two hours only to**

**return with her lifeless body on his shoulder. He callously laid her body in the**

**kitchen hut where he proceeded to prepare food for himself and ate it. He made no**

**attempt to obtain medical assistance, even from the child’s own mother. He then**

**surreptiously conveyed her to her grandmother’s homestead for burial during the**

**night. He made no effort to advise the grandmother of the child’s passing …”**

**[12] By way of conclusion, the court stated at page 13 of the judgment:-**

**“... In view of her age, her small body and the manner in which he perpetrated the**

**sexual assault on her, it is clear that the Appellant contemplated and foresaw that**

**the deceased would sustain serious injuries that would have irreparably and**

**extensively damaged her small undeveloped body. It must have been in his**

**contemplation that her pubescent body could not withstand such an assault and that**

**serious harm would be occasioned to her from the assault. As a result, he must be**

**presumed to have intended to cause her death ...**

**... I am satisfied, on these facts, that the Appellant was properly convicted of murder**

**with an actual intent to kill the deceased.”**

**[13] Having confirmed the conviction, this Court found that, in passing sentence, the High Court**

**had relied on the provisions of s 48 of the Constitution. That section provides for the right**

**to life and in subs 2 provides that a law may permit the death penalty to be imposed only**

**on a person convicted of murder committed in aggravating circumstances. Subsection (2)**

**further provides that the law that permits the imposition of the death penalty must permit**

**the court a discretion whether or not to impose the penalty, that it may only be carried out**

**in accordance with a final judgment of a competent court, and that it must not be imposed**

**on a person who was less than twenty one or more than seventy years or on a woman.**

**[14] It was common cause that at the time of sentence the law envisaged in s 48(2) of the**

**Constitution had not yet been promulgated and that the High Court had regarded the**

**constitutional provision itself to be the law. This Court found that this was:-6**

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**“...clearly in error as s 48 of the Constitution is not an operative provision for**

**purposes of sentencing. It does not specify what sentence the court may pass upon**

**a person convicted of murder. It is a section which defines and sets out fundamental**

**rights of a person convicted of murder ...”**

**Therefore it stands to reason that s 48 is not such a law. In my view, it is an enabling**

**provision for the promulgation of the necessary law. In the absence of the**

**contemplated law therefore the trial court could not pass a sentence of death. To**

**do so would be a violation of s 48(2).”**

**[15] The court accordingly set aside the sentence of death and remitted the matter to the trial**

**court for sentence to be passed in accordance with the law.**

REMITTAL OF MATTER TO TRIAL COURT

[16] By the time the above determination was made by this Court, Parliament had, by the

General Laws Amendment Act 3/2016 passed a law in conformity with s 48(2) of the

Constitution. Having set aside the sentence of death imposed by the High Court this Court

then remitted the matter to the High Court for sentence to be passed afresh taking into

account the provisions of the General Laws Amendment Act, 2016.

[17] At the reconvened hearing, the State submitted that, in view of the findings of fact made

by the court, in particular that the appellant had raped the victim, who was a mere three

year old girl, that there was physical torture of the victim, that the assault was perpetrated

in order to conceal the rape, there were aggravating circumstances justifying a sentence of

death. The appellant’s counsel, asked to address the court, conceded that indeed the murder

had been committed in aggravating circumstances.7

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[18] The High Court took into account that the victim was a three year old toddler. The offence

was committed during the course of a rape. The murder had been premeditated. Physical

torture was used. It accordingly found that the murder had indeed been committed in

circumstances of aggravation.

[19] The appellant’slegal practitioner then addressed the court on whether there were mitigating

circumstances. He submitted that the appellant was illiterate and lived a life of abject

poverty. He appeared to have been shunned by his relatives and neighbours and lived a

reclusive lifestyle. Both his brother and headman had distanced themselves from him once

they got to know what he had done. His societal seclusion must have affected his

psychological and emotional state.

[20] The State, on the other hand, submitted that there were no mitigating circumstances. The

appellant’s brother and immediate family and neighbours deserted him because of the

heinous crime that he had committed. Whilst it is true that he is illiterate, he had tried to

cover up the murder by alleging that the deceased had died as a result of an epileptic

seizure. He brought the body back to the homestead. He did not feel compelled to take

the deceased to hospital. Instead he cooked food and ate it. He showed no care. The State

accordingly argued that the few mitigating factors that may have been present were far

outweighed by the aggravating features.

RULING BY THE HIGH COURT ON REMITTAL8

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[21] In its ruling, the High Court found that the appellant exhibited inherent wickedness. He

raped and severely assaulted the three year old toddler who was his girlfriend’s daughter.

Even when he brought the body back to the homestead at a time he claims she was still

breathing, he made no attempt to render first aid. Instead he placed the body on a table

whilst she was frothing and proceeded to cook sadza which he ate. The court concluded

that there were aggravating circumstances after which it then proceeded to pronounce the

sentence of death on the appellant.

THE PRESENT APPEAL

[22] The propriety of the conviction having been confirmed previously by this Court, the only

issue raised in the grounds of appeal is that the court a quo erred at law in finding that the

murder was committed in aggravating circumstances and that the court should have

considered other forms of punishment such as life imprisonment.

[23] Counsel for the appellant conceded that, in the circumstances of this case, he was unable

to make any meaningful submissions in support of the only ground of appeal that the court

a quo erred in finding aggravating circumstances. The mitigating factors, namely that he

was a poor, illiterate peasant farmer who had no social support are of little weight when

compared against the circumstances surrounding the commission of the offence.

[24] The State submitted that this was a heinous murder committed during the course of a rape

and had been premeditated. In the circumstances the State submitted that there was no

basis for interference with the sentence imposed by the High Court.9

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[25] It is correct, as submitted by both parties, that the appellant is a poor, rustic individual who

appears to have been shunned by both relatives and the local community once this offence

came to light. The reaction of the community was not unexpected, regard being had to the

fact that this was the heinous murder of a three year old toddler, born to his live-in girlfriend

and another man. He took her to the bushes despite clear reluctance by his girlfriend. It

was almost as if, intuitively, the mother suspected all was not well and that something

untoward was going to occur.

[26] Two hours later, he brought the body of the infant back to the homestead alleging that the

child had suffered fits. He placed the body on a table in the kitchen. He made no effort to

seek assistance or to render first aid. Instead he cooked sadza which he ate – almost as if

nothing untoward had occurred. When his own brother made it clear that he did not want

to get involved in the mess he had created and the headman insisted the body was not going

to be buried in the village, he strapped the body of the deceased onto his back and, with the

deceased’s mother walked a distance of about twenty kilometers to the homestead of the

deceased’s grandmother where he intended to bury the body.

[27] As found by the court a quo and confirmed by this Court, the appellant deliberately took

the deceased to the bush where he physically assaulted her and penetrated her both per

vaginum and anum. The force of the assault was so severe that the rectum was lacerated.

The body was found to have various other injuries.10 Judgment No. SC 53/18

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[28] Clearly this was a sadistic attack on a defenseless three year old toddler who had done

nothing wrong. It is unclear why he decided to ravish the toddler in the manner he did. He

tried to cover up the crime by alleging that the deceased had had epileptic seizures. This

was obviously not a very convincing cover-up as it was clear that the deceased had been

physically assaulted owing to the blood oozing out of her nostrils. The deceased must have

experienced a very painful death. Faeces found on her private parts and on her anus bear

testimony to this.

[29] I agree with both counsel that there were no mitigating features in this case. The facts

show a murder committed in circumstances of extreme aggravation.

DISPOSITION

[30] It remains unclear why the appellant committed such a brutal murder on his girlfriend’s

defenseless three year old daughter. There is no other ready explanation as to why he

would have committed this heinous offence, save, in all probability, to satisfy his own

perverted sexual desires.

[31] The finding that the murder was committed in circumstances of aggravation is supported

by the established facts. There is no basis upon which this court can interfere with that

finding.

[32] In the result, the appeal against sentence is dismissed.