

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

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 a 39-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 surreptitiously 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's legal 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.