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Judgment No. SC 30/03
Crim. Appeal No. 126/03

(1) CEPHAS GOVERE (2) MERENZIA GOVERE

v THE STATE

SUPREME COURT OF ZIMBABWE
SANDURA JA, CHEDA JA & GWAUNZA JA
HARARE, OCTOBER 16 & 22, 2003

G Musariri, for the first appellant

L Mkuhlani, for the second appellant

N J Mushangwe, for the respondent

SANDURA JA: The appellants, who are husband and wife, were charged with murder, the allegation being that on 2 September 1998 and at Govere Village in Chivhu District they unlawfully and intentionally killed their six week old baby girl called Nomsa by "cutting off her body parts". They pleaded not guilty but were found guilty and sentenced to death. They appealed against conviction and sentence.

Most of the facts in this case were common cause. At about 9 pm on 1 September 1998 the appellants, Nomsa ("the deceased") and two other children of the appellants went to bed in a hut which was used as a kitchen and as a bedroom.

They all slept on the floor. The deceased was about thirty centimetres away from the wall; the second appellant lay next to her; and the first appellant lay

next to the second appellant. The other two children were some distance away. The door was secured from the inside by means of an iron bar placed beneath it.

At about 3 am on the following morning the appellants discovered that the deceased had died. A subsequent examination of the deceased's body by the appellants' relatives, who came to the appellants' homestead after hearing of the deceased's death, revealed that some flesh had been removed from the deceased's little finger, ring finger, index finger and private parts. However, no blood was detected on these injuries, although there was a bit of blood on the deceased's lower lip, on the shawl wrapped round the deceased, and on the deceased's napkin.

The deceased was buried in the afternoon of 2 September 1998. No report of the deceased's sudden death had been made to the police.

Subsequently, the police received information about the deceased's death. Suspecting that the deceased might have been murdered, they proceeded to Govere Village, exhumed the deceased's body and took it to Chivhu Hospital for a post mortem examination. However, because of the advanced state of the body's decomposition the cause of the deceased's death could not be established.

Nevertheless, the appellants were later arrested in November 1998. They subsequently made warned and cautioned statements in which they denied having murdered the deceased.

In the court *a quo* the appellants persisted in their denials. In addition, they denied having caused the injuries observed on the deceased's body. They maintained that they did not know how the deceased had died and how the injuries had been inflicted on her.

In convicting the appellants of murder the trial judge relied upon circumstantial evidence and concluded that the only reasonable inference to draw was that the deceased had been murdered by the appellants acting with a common purpose to murder her. That conclusion has been challenged in this appeal on the ground that the proved facts do not exclude other reasonable inferences. That, in my view, is the sole issue for determination in this appeal.

As WATERMEYER JA said in *R v Blom* 1939 AD 188, there are two cardinal rules of logic which govern the use of circumstantial evidence in a criminal trial. At 202-203, the learned JUDGE OF APPEAL said:

> "In reasoning by inference there are two cardinal rules of logic which cannot be ignored:
>
> (1) The inference sought to be drawn must be consistent with all the proved facts. If it is not, the inference cannot be drawn.
>
> (2) The proved facts should be such that they exclude every reasonable inference from them save the one sought to be drawn. If they do not exclude other reasonable inferences, then there must be a doubt whether the inference sought to be drawn is correct."

I now wish to consider whether the only reasonable inference from the proved facts is the one which was drawn by the trial judge. I do not think that it is. I say so for two main reasons.

In the first place, the allegation against the appellants, as set out in the indictment, was that the appellants had murdered the deceased by "cutting off her body parts". In other words, it was alleged that the injuries sustained by the deceased had been inflicted by the appellants and had caused the deceased's death. That allegation was not supported by the witnesses called for the prosecution, whose evidence was that the injuries could have been caused by a rat or by a cat.

Renia Govere, the first appellant's sister-in-law, who examined the deceased's body and was called as a State witness, said that some flesh had been "eaten away" from or "bitten off" the deceased's little finger, ring finger, index finger and private parts. She added that a rat might have caused the injuries because the wounds were rough and did not give the impression that they had been inflicted by an object with a sharp edge.

Pindurai Govere, the first appellant's uncle, also examined the deceased's body after the deceased had died, and was called as a State witness. Regrettably, most of the evidence given by this witness was not recorded because the interpreter was not speaking into the microphone. However, it is clear from the questions put to him in cross-examination and re-examination that, in his opinion, the deceased's injuries had been caused by an animal. For example, in cross-examination the following question was put to him by counsel for the second appellant:

> "Q. So, it is your evidence to the honourable court that the wounds could only have been caused by or you perceive them as having been caused by an animal … and not as a result of a cut by a sharp instrument?

A. … (Interpreter not on microphone)."

In re-examination, the following questions were put to him by State counsel:

"Q. In answer to a question put by the defence counsel … you said a knife could not have caused that. Why do you say that?

A. … (Interpreter not on microphone).

Q. Did I understand you to say probably you thought it was an animal which had caused these injuries?

A. … (Interpreter not on microphone)."

In addition two questions put to him by the learned judge in the court *a quo* clearly indicate that he had told the court that, in his opinion, the injuries had been caused by a cat. The questions are as follows:

"Q. Now, you mentioned something about the possibility that the bites might have been caused by a cat. Is that correct?

A. … (Interpreter not on microphone).

Q. So, can you specifically say that those injuries were caused by a cat bite?

A. … (Interpreter not on microphone)."

In my view, the evidence given by these prosecution witnesses is inconsistent with the allegation set out in the indictment, and does not support the conclusion that the only reasonable inference to draw from the proved facts is that the appellants inflicted the injuries and murdered the deceased. There is, I think, a real possibility that the injuries were inflicted by a rat or by a cat. However, the injuries would have been inflicted after the deceased's death because if they had been inflicted before the deceased had died, the deceased would have screamed so much that the

appellants would have woken up. The absence of any evidence indicating that the deceased screamed before she died is, therefore, significant.

The second reason why I say that the inference drawn from the proved facts by the trial judge is not the only reasonable inference that can be drawn from those facts is that the cause of death was not established, and the possibility that the deceased died of natural causes cannot, therefore, be ruled out. For example, the possibility that this was a cot-death, i.e. the sudden death of a sleeping baby who had not been ill, cannot be ruled out.

It, therefore, follows that the second rule in *Blom's* case *supra* was not satisfied and the trial judge ought to have acquitted the appellants.

In the circumstances, the convictions are quashed and the sentences are set aside.

CHEDA JA: I agree.

GWAUNZA JA: I agree.

Pro deo