

THE STATE
versus
GIFT NZIRADZAFA

HIGH COURT OF ZIMBABWE
HUNGWE J
MUTARE, 26 February 2015, 3 & 4 March 2015

Assessors: 1. Mr Rajah
2. Mr Chidawanyika

Criminal Trial

Mrs J Matsikidze, for the State
R M Mubata, for the defence

HUNGWE J: This is a macabre case where the accused killed his own paternal grandmother.

The accused pleaded not guilty to a charge of murder as defined in s 47 of the Criminal Law (Codification and Reform) Act, [*Chapter 9:23*] where it is alleged that on 14 July 2009 at Chinangana Village, Chief Katere, Nyanga he struck Cecilia Nziradzafa with a walking stick several times all over her body thereby causing injuries from which she died.

The facts are largely beyond dispute. They may be summarised as follows. The accused on the day in issue arrived from the business centre. He had had one beer too many. He was drunk, noticeably drunk. He was served with supper inside a kitchen hut and he ate peacefully. Inside this hut were his grandmother the deceased, his sister Theresa Nziradzafa, Maringisei Kozo his aunt were present in the kitchen hut from where he was served supper.

After he had his fill, he began to accuse his grandmother the deceased, an 82 year old lady, of being a witch. She asked him why he called her that. In answer to her question she slapped her with open hands. From nowhere the accused unleashed a vicious assault on the old lady. The two ladies present rushed out to call for help as the accused literally went berserk. He was uncontrollable. When the rescue party arrived, the accused stood outside the

hut. His victim lay outside the hut in obvious agony. She exhibited bruises on the left cheek and a broken arm. The offending weapon also lay beside her. She told the rescue party that the accused had assaulted her after accusing her of being a witch who had bewitched her. She complained of pain all over her body. She was bleeding from external wounds.

An autopsy carried out some three days later revealed the following injuries on her person.

- (a) Bruises on the left side of the face;
- (b) Deformed skull at the occiput;
- (c) Fracture of the skull at the occiput;
- (d) Torn right ear;
- (e) Fractured right upper hand; and
- (f) Bruises all over the chest.

The doctor concluded that the cause of death was intracranial haemorrhage following severe head injury. These injuries are described in the post mortem report produced during trial.

In his defence the accused claimed that he had killed her in a fit of rage following a spate of misfortunes suffered by the family.

He told the court that prior to the day in question he had experienced bad dreams. In the dreams the now deceased would be intimate with him. He had previously confronted her about her possible involvement in witchcraft but she had denied it. On the day when he again took her to task over his dreams, she had tried to strike her with her walking stick. In a fit of rage he had assaulted her as described by the witnesses. He denied any intent to cause her death or that he had foreseen the risk of death or serious injury following this indiscriminate attack on the 82 year old. The accused raised the defence of intoxication and provocation.

In *S v Nangani* 1982 (1) ZLR 150 (SC) it was held that provocation can, in appropriate circumstances, have the effect of excusing or reducing an intentional killing, at least to the point of reducing murder to culpable homicide, even where the killing is intentional. (See also *Tenganyika v R*, 1958 R & N 228 (FSC)).

The court in discussing the defence of provocation held that provocation must be such as to have actually caused the accused to have lost his self-control, though not necessarily his capacity to intent to kill. It must also be such that in the circumstances an ordinary man would have lost his self-control and acted as the accused did. Put in another way, the provocation be such that it could reasonably be regarded as sufficient ground for the loss of

self-control that led the accused to act against the victim as he did and that it actually caused the accused to lose his self-control. This common law position was codified in section 238 and section 239 of the Criminal Law Code. Section 238 provides that provocation shall not be a defence to crimes other than murder. The following section then elaborates when it may be a partial defence to the crime of murder. It is a partial defence, if, after being provoked, the accused as a result of provocation does not have the intention or realisation referred to in s 47 or; although the accused has the intention or realisation referred to in s 47 but has completely lost his self-control in circumstances where the provocation was sufficient to make a reasonable person lose his or her self-control. Then in those circumstances, the charge of murder will be reduced to culpable homicide.

As I said, the accused raised a two pronged defence: provocation and intoxication.

Our law regarding the defence of intoxication is clear; for policy reasons, voluntary intoxication is not a defence. Were it so; it would be difficult to effectively fight crime as every person suspected of having committed a crime would take refuge in the wise waters! However the law recognises that there can be instances where one can involuntarily get intoxicated and, while so inebriated, commit an offence. Section 220 of the criminal law code permits involuntary intoxication to be a complete defence where a person gets involuntarily intoxicated to the extent that he or she lacked the requisite intention, knowledge or realisation. Generally, no onus rests on the accused to prove these defences. The accused only need to lay factual foundation for the court to decide whether, on the facts, the State has proved that when he committed the act constituting the crime charged he had the necessary intention.

The accused does not deny that he savagely assaulted his grandmother but that he was so inebriated that he could not have formed the necessary intent. He was so provoked that he lost his self-control as a result of liquor. We rejected the defence of provocation and intoxication given by the accused for the following reasons.

Firstly, no family member testified that the accused had previously confronted the deceased over his claims of witchcraft against her. Even if he had, as he says, then her alleged dabbling in that dark science could not have in any way suddenly enraged him to the extent that he would have lost his self-control. He had, on his own version, grown accustomed to the idea that she may be a witch long before the day in issue. Secondly, the claim that the old lad tried to strike her with her walking stick is not supported by the evidence. To the contrary, he

was the first to raise an accusation against her. She politely asked him his reasons for such an outrageous allegation whereupon he slapped her and then struck her with a stick.

Thirdly, none of those people present testified that the deceased tried to attack the accused before she was attacked. Although no one saw how he had attacked the deceased there is no suggestion that she had retaliated at any stage.

In our view this was a callous attack by the accused motivated by his belief in witchcraft. He took intoxicating beverages in order to gather Dutch courage which he required to punish someone he subjectively believed to be a witch.

Belief in witchcraft may have provided him with a motive for this heinous attack on a frail old lady. If he intended to punish her for his misfortunes quite clearly he must have realised that there was a real risk of death or serious injury resulting from the manner in which he assaulted her. He proceeded notwithstanding that realisation. Therefore, in our view, he intended to achieve the natural and probable consequences of that action.

The accused in our view that there was a real risk of death or serious injury if he assaulted the deceased indiscriminately but persisted with such conduct despite such realisation.

Being intoxicated in our view of the facts of this case did not deprive the accused of the capacity to formulate the above intention in the form of realisation of a real risk of death or serious injury.

He must be found guilty of murder with constructive intent.

*National Prosecuting Authority, State's legal practitioners
Takaidza & Mubata, defence's legal practitioners*