

THE STATE

AND

LUCIEL MOYO

IN THE HIGH COURT OF ZIMBABWE

MAKONESE J

GWERU 31 JANUARY 2013

Mr S. R. Mafa for the state

Mr S. Kangembeu for the accused

Criminal Trial

MAKONESE J: The accused a male adult age 31 years old was charged with murdering a female adult aged 65 years at the time she met her death. It was alleged that on the 29th day of May 2012 and at village Baye, Chief Mazvihwa, Zvishavane, the said accused person did unlawfully and with intent to kill, strike Perlagia Makiwa with a metal bar on the forehead thereby causing injuries which resulted in death. The accused pleaded not guilty to the charge of murder but tendered a limited plea of guilty to culpable homicide. The State did not accept the limited plea, I entered a plea of not guilty and proceeded to trial.

The State outline was read and produced as Exhibit 1 and I do not intend to repeat its contents. The accused tendered into evidence a defence outline, Exhibit 2. In his lengthy defence outline the accused states that he had gone to the deceased's homestead around 11pm intending to collect his child. The deceased was his mother in law, but he was no longer living with the deceased's daughter with whom they had one daughter Claris. On the fateful day, the accused states that deceased had attacked her with bricks and a metal rod. Accused says he got angry, dispossessed the deceased of the metal rod and threw it in the general direction of the deceased, without actually aiming at her head. The accused person realized that deceased had fallen down and then said "muchembere ndinokukuvadza", in venecular, which means "old lady I can cause you some injuries."

The accused says that he later ran away from the scene after his ex-wife, Patience Makiwa had advanced towards him intending to attack him. The accused states that he had no intention of killing the deceased or cause her death. He further states that he acted out of frustration, anger and under the influence of intoxicating substances.

The State produced, by consent of defence counsel, accused's warned and cautioned statement recorded at Zvishavane on 22nd June 2012. The statement was duly confirmed by a magistrate. The statement was marked Exhibit 3 and reads as follows:

"I do not deny the charge levelled against me. I arrived at Pelargia Makiwa's homestead intending to collect my daughter Claris Moyo but she refused with her. She threw a brick at me while she was holding an iron bar. This angered me and I hit her with the same iron bar after she had denied me the right to go out through the gate of her homestead. That is all." (emphasis is mine)

The fourth Exhibit was the Post Mortem Report No. 440-434-2012 prepared by Dr S. Pesanai at United Bulawayo Hospitals on the 1st June 2012. The cause of death according to the Post Mortem Report was:

- (1) Brain damage
- (2) depressed skull fracture
- (3) Blunt Trauma
- (4) Homicide

The report also details that there were marks of violence as follows: "Laceration Left Frontal above the Orbital region (5 x 4) cm. The doctor opined that the injuries were consistent with a heavy blunt object.

The next Exhibit tendered into evidence was a metal pipe weighing 0.808kg, 72cm long and 2.5cm in diameter. It is not in dispute that this is the metal pipe which was used to inflict fatal injuries upon the deceased.

The State sought and obtained formal admissions in terms of section 314 of the Criminal Procedure Evidence Act [Chapter 9:07], with respect to the evidence of the following witness: Fungai Tawanda Makiwa, Jephta Zhou, Timothy Muzeza and Viola Bobo.

The State then led *viva voce* evidence from Patience Makiwa. She stated that she resides at village Baye, Chief Mazvihwa, Zvishavane. The accused is her former husband and

the deceased was her mother. It was her evidence that on the 29th day of May 2012 she was asleep at her homestead. At around 2300 hours she was awoken by someone who pulled her hair. She asked who the person was. Accused person responded that it was him and he had come to collect their two year old daughter, Claris Moyo. The witness indicated that this was not possible since the child was too young, besides it was too late in the night. The witness tried to persuade the accused to leave the homestead as the deceased would wake up and discover that he was in her room. The two argued for over 20 minutes before the witness decided to leave the room where she was sleeping to wake up the deceased who was sleeping in another house. When the deceased woke up she told the accused to go and come the following day since it was too late in the night, besides she would have to inform other members of the family about accused's request. The accused left the homestead. The witness said she then went back to sleep. A little later, however she was again awoken by a noise outside. She says that she heard a voice saying:-

“Muchembere ndinokukuvadza”, which means “old lady I can cause you some injuries.”

She went outside to investigate. She was horrified to find the deceased lying down in a pool of blood. She observed that deceased was bleeding profusely and there was a deep wound on her forehead and she could not talk. While assessing the deceased's condition accused struck her with a brick before running away and disappearing into the night. The witness observed a metal pipe close to where the deceased was lying. The witness then called Fungai Makiwa for assistance and they ferried the deceased to the local clinic. On the 30th May 2012 at around 0330 hours the deceased was carried by an ambulance to Zvishavane District Hospital where she was further transferred to United Bulawayo Hospitals. The witness learnt about the death of the deceased on the 31st May 2012. The police later came to her homestead and she made indications to the police.

Patience Makiwa denied that the accused had come to her homestead on the night of the 29th may 2012 by her invitation. She also refuted the accused's assertions that she had initially agreed to allow the accused to come at night to collect the minor child only to change her mind at the last minute. This witness remained steadfast under intensive cross-examination by the defence. She impressed us as an honest and straightforward witness. Her

evidence was not tainted with bias or malice as she readily agreed that the accused had consumed alcohol that day. She however said that the accused was not drunk to the extent of not appreciating what he was doing. She said she had lived with the accused for one year and she was able to comment on his drinking habits. She said that when accused got drunk he quickly fell asleep and the fact that he came to their homestead and tried to take the daughter in the manner he did shows that he was not affected by alcohol to a degree where he did not know what he was doing. The witness also conceded that she did not witness the assault on the deceased. She denied that her 65 year old mother could have fought a young person such as the accused.

The witness gave her evidence well and is worth to be believed. She was credible and her evidence generally reads well.

The accused was called to testify. In brief, his testimony was that he met Patience Makiwa earlier in the day on the 29th May 2012. He says they struck an agreement wherein the accused would sneak into Patience's bedroom late that night and they would leave together with their two year old daughter Claris Moyo en-route to Nyazura to accused person's mother. Accused says that it was Patience who invited him to come around 2200 hours when the deceased would be asleep. Accused says that prior to visiting Patience's homestead he had consumed intoxicating liquor in the form of at least 6 litres of opaque beer. He had also smoked dagga in the afternoon. At around 2300 hours the accused proceeded to Patience's homestead. Upon arrival, he went straight to Patience's bedroom and he found the door unlocked and he entered her bedroom. While inside the bedroom he woke up Patience by shaking her head and advised her that he had come to collect her and Claris in accordance with their earlier arrangement. To his surprise accused says that Patience changed her mind indicating that it was no longer possible for her to leave with the child. She indicated that it was improper for the deceased to wake up in the morning to find them gone. There was an argument between the two. Patience went outside the bedroom and proceeded to the deceased's bedroom whilst the accused waited in the verandah. The deceased came out and advised accused person to come in the morning to discuss the issue with other relatives.

The accused left the homestead and stopped about fifty metres from the homestead for a period of approximately 15 minutes. He sat down. In his evidence accused says that during that time he was thinking about his daughter, about his work, and the fact that he wanted to collect his daughter and Patience was refusing to let him take the child. Accused says at that stage what come into his mind was the idea that he should return to Patience's homestead and persuade her to allow him to take custody of the child. Accused went back to the homestead and upon arrival, he was met with a dog which started barking at him and this barking woke up the deceased. The deceased came out of her bedroom holding a torch and a metal pipe. The accused says that deceased flashed the torch at him, and started shouting at the accused person indicating that he was troubling her and being contemptuous of her and not respecting her, at the same time she was advancing towards him. Accused says the deceased started assaulting him on the shoulders with the metal pipe. Accused says that he overpowered the deceased and took away the metal pipe from the deceased. After he forcibly took the metal pipe the deceased lost her balance and retreated for a distance of about 3-4 metres. At that stage, accused says the deceased picked some bricks and started throwing them at the accused and he ducked behind a scotch-cart. Accused testified that he got angry and threw the metal pipe in the general direction of the deceased, "in order to scare her away." The accused says he realised that the deceased person had fallen down and then said in venecular,

"muchembere ndinokukuvadzai", meaning to say "old woman I can cause you some injuries." The accused did not ascertain whether the deceased had sustained injuries because he says Patience had started throwing bricks at him. Patience was shouting that accused had injured her mother, and accused says he then ran away from the homestead.

The thrust of the accused's defence is that he had no intention of killing the deceased to or cause her death. He acted out of frustration, anger and was influenced by intoxicating alcohol and dagga. He says when he threw the metal pipe at the deceased he did not aim at any part of her body but he wanted to scare her away because she had cornered him and he could not leave the homestead because she had somehow blocked his path since he wanted to use the main gate. The accused failed to explain why he could not use the smaller gate which was just behind him.

The accused's testimony is fraught with contradictions and inconsistencies. The accused was untruthful and his evidence cannot be believed. He is not a credible witness. His argument that he acted under the influence of alcohol is not consistent with his conduct. He consumed the alcohol in the afternoon. He smoked the dagga during the day on his way to Mipasi's shop. He had ample time to sober up. He was able to clearly detail all the events of the fateful night. We concluded that at the relevant time he was in control of his mental faculties and his mind was not impaired by the consumption of alcohol. This is further buttressed by the fact that he had time to leave the deceased's homestead and go away for a distance of fifty metres and reminisce. In his own evidence he sat down and started considering his options. He made a conscious but unfortunate decision to go back and collect his child at whatever cost.

We conclude that when accused hurled the metal pipe in the general direction of the deceased, a 65 year old lady, at night, he must have realized that he could injure and kill the deceased. He struck the deceased and thereafter announced that:-

"muchembere ndinokukuvadzai", meaning to say, "old lady I can cause you some injuries." This statement was uttered by the accused when he observed that the deceased had fallen to the ground. In his confirmed warned and cautioned statement, recorded soon after the incident accused said:

"---- she (deceased) threw a brick at me while she was holding an iron bar. This angered me and I hit her with the same iron bar---." (emphasis)

The injuries sustained by the deceased as reflected in the Post Mortem Report, Exhibit 4, show that the deceased suffered brain damage, had a depressed skull fracture, the injury was inflicted by a blunt object. The nature of the injuries are consistent with accused's version of events as narrated in the warned and cautioned statement. The accused must have struck the deceased with the metal pipe with a high degree of force on the head. He did not throw the pipe but struck her realizing that this may cause severe injuries leading to her death. He intended to cause her serious harm and acted recklessly. The court notes here, that the metal pipe is a heavy object weighing close to a kilogram. The suggestion by accused person that he wanted to scare away the deceased cannot be believed and is obviously an attempt to mislead the court. We reject the accused's defence without any hesitation.

The accused must have appreciated that by striking the deceased with a heavy metal pipe on the head there was a possibility that death would result but he continued with the assault with a reckless disregard of whether death ensued or not.

There is no direct evidence regarding the form of assault upon the deceased person besides what the accused told the court. All circumstantial evidence depends ultimately upon facts which are proved by direct evidence, but its use involves an additional source of potential mistake in its reasoning. The inference which it draws may be a *non sequitor*, or it may overlook the possibility of other inferences which are equally probable or at least reasonably possible. See South African Law of Evidence – Hoffman and Seffert 3rd Ed. at page 464 and *R v Bloom* 1939 AD 188 at p202-203. In the latter case the court referred to two cardinal rules of logic which govern the use of circumstantial evidence in a criminal trial:

- “(1) *The inference to be drawn must be consistent with all the proved facts. If it is not, then the inference cannot be drawn.*
- (2) *The proved facts should be such that to exclude every reasonable inference from the one to be drawn. If they do not exclude other reasonable inferences, then there must be doubt whether the inference sought to be drawn is correct.”*

See also *S v Vhera* 2003 (1) ZLR 668 *R v Sibanda* 1963(4) SA 182 (SR) and *S v Mduduzi Tshakaza and 2 others* HB 233/12

The proved facts in the present case are that the accused person attacked the deceased with a heavy object upon the head. We have rejected the accused’s defence that he threw the metal pipe in the direction of the deceased without aiming at her head. The Post Mortem Report clearly shows that the injuries were a result of severe force being exerted upon the head leading to brain damage and a depressed skull fracture. The accused’s own confirmed warned and cautioned statement established that he did not throw the metal pipe but instead he hit her with the metal pipe. This is consistent with the nature of the injuries sustained by the deceased. The cumulative effect of the proved facts establishes the guilt of he accused person on a charge of murder.

The evidence before the court, however, does not prove that the accused actually intended to cause the death of the deceased.

Judgment NO. HB 26/13
Case No. CRB 4/13

In the result we find the accused guilty of murder with constructive intent.

Sentence: 15 years imprisonment with labour.

*Criminal Division, Attorney General's Office, state's legal practitioners
Chitere, Chidawanyika and partners, accused's legal practitioners*