

THE STATE

Versus

LUCKSON MULEYA

IN THE HIGH COURT OF ZIMBABWE
MUTEMA J (with Assessors S. Hadebe & A. Moyo)
BULAWAYO 7 & 11 FEBRUARY 2013

S. Ndlovu for the state
C. N. Dube(*pro deo*) for the accused

Criminal Trial

MUTEMA J: The 30 year old accused person is facing a charge of murder in contravention of section 47 of the Criminal Law (Codification and Reform) Act, Chapter 9:23. He is alleged to have strangled his 68 year old mother to death by closing her mouth and nose until she died. Accused pleaded not guilty to the charge.

The state's allegations are that the two resided at the same homestead. They had a strained relationship engendered by the fact that accused had taken his wife to his father's place at Chamunangana village and he would persistently ask his mother for money to go and pay lobola for his wife, which money was not forthcoming. As a result the two occasionally fought and would be brought before the village head for counseling. That was the motive why on 1 June 2012 at about 05:30 hours the accused entered the deceased's hut in which she was sleeping and murdered her as described above.

Accused's defence is that he did not commit the offence. He averred that on 1 June 2012 he left home for Lutumba to collect a (cell) phone from his young brother Hardlife Ndou and to also advise Hardlife to return home because he himself was on his way to visit his wife and that their mother (the deceased) wanted to go away for some days and cut hay for cattle feed. When Hardlife told him that he would only return home on the following Monday, accused went back home, having phoned the wife to advise her that he was no longer coming to see her. He left Lutumba around 16:00 hours and arrived at home around 20:00 hours and went directly to sleep in his hut. He woke up the next morning and went to water the cattle at the borehole. On returning home around 09:00 hours he found no sign of activity and then checked the deceased's hut, noticed that the door was not locked, opened it and saw the deceased lying on the floor covered with a blanket. He called out to her but got no response. He then went to Muhlaba Sibanda's homestead next door and advised her he thought something was wrong with the deceased because he had called out to her but she did not respond. Muhlaba Sibanda accompanied him to the deceased's hut where she checked the deceased and advised him that his mother was dead.

Five witnesses testified for the state.

Muhlaba Sibanda: She told the court that deceased was her neighbour and her husband's cousin. When accused came to her homestead on the morning in question he sat down and started crying. On asking why he was crying accused told her that he had tried to wake the deceased but she was not responding. Together with Matsubani Moyo and another old woman they went to the deceased's hut. She saw the deceased lying on her left hand wearing her clothes, covered with a blanket dead. Her stomach was bulging. She then sent Matsubani to go and tell the headman that deceased was dead. She had last seen deceased the Wednesday before but used to see her daily. She thought that accused and deceased were in good books. Accused said he had gone to Beitbridge the day before. She surmised that it was accused who killed the deceased because the two stayed together.

Samu Ndou: Also resides at Joko village 3 where he is the headman. On 29 May 2012 he had met the deceased at the borehole and she had told him that she had problems with the accused who had taken a wife and wanted her to give him money to go and pay lobola. Accused was also at the borehole and he told him not to pester his mother. On Saturday around 10:00 am Matsubani came to tell him that deceased had died. He uncovered the body and noticed that she was dead. After police came he noticed that deceased's eyes were not closed which was a sign that she had not died on her own. Accused said he had returned from Beitbridge around 8pm and had not checked on the deceased till the next morning when he discovered her dead. He also surmised that it was possible that accused could have killed the deceased in view of the misunderstanding between the two.

Rungano Moyo: Resides in the same village with accused. Deceased was his cousin. He believes that accused killed the deceased. On Thursday 31 May 2012 accused found him at the borehole watering cattle. Accused told him that deceased wanted to see him so that the two would go and cut grass for cattle. He told accused that he would go and see the deceased but he failed to go there. The next morning accused accompanied him to go and buy tobacco and they came back. Accused asked him if he had gone to see the deceased. He told accused he would see her that day after watering his cattle. This was on Friday morning. But he failed to go and see deceased on that day. Accused had never accompanied him to go and buy tobacco and he himself had never gone to cut grass with the deceased. He learnt of deceased's death on Saturday. He did not know whether accused and deceased related well or not. He said he thought accused killed deceased because when he met accused on the Friday, his eyes were red like someone who had been crying. He, however, did not ask the accused why his eyes were red.

Hardlife Ndou: He shared the same mother (the deceased) with accused but different fathers. On 30 May 2012 accused assaulted him by clapping over a memory card. He then ran away to Lutumba. On 1 June accused came to Lutumba and told him to go back home since the deceased wanted to go and look for cattle feed. Deceased had told him about her intention to go and cut grass days before. Accused left around 4 pm saying he was going to Beitbridge to

collect his wife. He accompanied accused and left him at a vehicle bound for their rural home so accused did not go to Beitbridge. From Lutumba to Joko village 3 by car one takes about 4 hours. He said he was always quarrelling and fighting with accused and whenever they did a job together for a fee accused would take all the money for himself. Accused did not have a good relationship with deceased as the two had a misunderstanding regarding accused's wife whom accused did not want deceased to reprimand. Accused had two wives and one left due to the misunderstandings. He thought accused killed deceased because by chasing him for 500m over a memory card issue accused wanted to kill him. He conceded that accused never threatened him but the deceased although he could not recall the words accused used.

Stanford Clemence Gutsa: Is a detective sergeant in the Zimbabwe Republic Police with 16 years in the force, 6 of which he spent as a detective. He knows accused only in connection with this case.

After receiving the report of deceased's death he visited the scene with other police officers. Accused showed him the hut where deceased was. He made a body search on deceased and noticed that deceased was bleeding from the nose and mouth. She was lying with her head slightly tilted to her left shoulder. He recovered two pieces of letters under the body. He took the letters and the body to Beitbridge Hospital mortuary. Thereafter the body was ferried to United Bulawayo Hospitals for a post mortem.

He did not see any signs of struggle in deceased's hut. He opined that deceased had died two days before because the body was in an advanced state of decomposition as a pungent smell emanated from it. Accused said he had arrived home from Beitbridge where he had gone to see his wife and found deceased motion less. Initially deceased's death was treated as sudden death but because the pathologist stated the fractured femur could have been caused by assault, coupled with villagers' averments that accused and deceased did not see eye to eye, he then arrested the accused for murder.

The evidence of the other ten state witnesses listed in the notice was admitted in terms of section 314 of the Criminal Procedure and Evidence Act, Chapter 9:07 and the state then closed its case. The defence then applied for discharge of the accused at that stage in terms of section 198 (3) of the same Act.

Section 198 (3) provides:

“(3) If at the close of the case for the prosecution the court considers that there is no evidence that the accused committed the offence charged in the indictment, summons or charge or any other offence of which he might be convicted thereon, it shall return a verdict of not guilty.”

In *S v Kachipare* 1998 (2) ZLR 271 (SC) it was held that the wording of section 198 (3) of the Criminal Procedure and Evidence Act made it clear that where, at the end of the state case, there is no evidence upon which a reasonable court might convict, the court has no discretion: it must discharge the accused. The court may not exercise its discretion against the accused if it has reason to suppose that the inadequate state evidence might be bolstered by defence evidence.

In the instant case the evidence adduced by the state this far is entirely circumstantial, concerned mainly with motive and opportunity. In *R v Bloom* 1939 AD 188 at 202 – 203 the court referred to two cardinal rules of logic which govern the use of circumstantial evidence in a criminal trial, viz

- “(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 they exclude every reasonable inference from them save the one 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.”

We may add here that this is a process of reasoning where the court is enjoined to look at the various strands of circumstantial evidence, not individually, but in their totality and determine whether the inference sought to be drawn is the only reasonable one consistent with the proven facts to the exclusion of other competing possible inferences.

In casu the inference sought to be drawn is that it is the accused who murdered the deceased. On the evidence, is this the sole reasonable inference to be drawn? We think not for the following reasons:

Granted, the accused may have had the opportunity to do so since he was the only one residing with deceased at the homestead at the relevant time but that *per se* does not support the inference sought to be drawn. The likely motives on accused's part which were hazarded or ascribed to him by the witnesses, viz that he was pestering the deceased for lobola money or that he was issuing threats to her or that because he chased Hardlife Ndou for 500m over a memory card are on their own so weak that one would need to move a mountain to elevate them to a motive for murder.

Crucially, we note that despite accused not being truthful regarding his going to Beitbridge as contended by the state, it if true remains of no moment when standing alone for he could have just panicked in an endeavour to distance himself from the scene. In any event, whether he went there or returned at Lutumba is neither here nor there if account is had of the fact stated by Hardlife that one takes about four hours by car from Lutumba to Joko village 3 and accused left at 16:00 hours. This means that accused got home around 20:00 hours which corroborates accused's version that he got home around that time.

Also crucially is the issue of the post mortem result that the cause of death was unascertained due to the advanced state of decomposition of the corpse. As we speak, no one can put a finger on the exact cause of deceased's death let alone the time of her death. The pathologist's remarks re: fractured left femur indicate that that could have been caused by old age with the possibility that she fell and sustained the fracture or was assaulted. This does not point solely at the accused.

Another crucial piece of evidence which the state missed relates to the two letters recovered from underneath deceased's body. Had their authorship and contents been ascertained, perhaps a clear motive, depending on the outcome, would have been easily established.

From the foregoing it is clear that on the evidence led so far, no reasonable court acting carefully might properly convict: *Attorney-General v Mzizi* 1991 (2) ZLR 321 (S) at 323 B.

In the result, the application for discharge of the accused at the close of the state case must succeed and accused is accordingly found not guilty and acquitted.

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