

THE STATE  
versus  
MARY WISDOM

HIGH COURT OF ZIMBABWE  
BACHI MZAWAZI J:  
CHINHOYI, 31 October, 14 November, 2023

Assessors: *Mr. Mutombwa*  
*Mr. Kamanga*

### **Criminal Trial**

*Mr. T. H. Maromo*, for the State  
*Mr. K. Choga*, for the Accused

BACHI MZAWAZI J: Mary Wisdom, a 70-year-old woman stands accused of the murder of her 74-year-old husband. She has been arraigned and charged of murder as defined in section 47(1) of the Criminal Law Reform and Codification Act, [Chapter,9:23]. She pleaded not guilty to the offence.

The facts are that, on the 6<sup>th</sup> of November 2022, the accused woke up around 3am in the morning and found her husband unresponsive. In her defence the accused told the court that the deceased had established a pattern of smoking around the mentioned time every day. The husband was a habitual smoker. Apparently as a couple they were also both perennial consumers of cheap illicit beer. The accused who had grown accustomed to that routine was startled when her husband failed to wake up for the traditional smoke. She tried to resuscitate him by pouring cold water to no avail. She then sought assistance from the first State witness, Julius Charika who instantly came to her aid.

Julius Charika, removed the deceased, from the bedroom into the kitchen where he changed his wet clothes and tried to feed him. The second State witness Batoni Kasiya, also joined in to help revive the deceased after he had already been changed and shifted to the kitchen. After the failed concerted efforts to bring him about the deceased was ferried to the nearest hospital. It is said that he then died before receiving treatment. Notably, what all this means

is that the deceased during all that period was in some form of stupor or comatose until his death at the hospital.

The post mortem report, tendered into evidence as an exhibit disclosed the cause of death as inhibition secondary to severe testicular trauma. A medical practitioner who was not the pathologist who had compiled the report was called to explain some medical terms in the pathology report. He said amongst other explanations that injuries to that region of the body are synonymous to external pressure being applied to them such as blunt trauma.

The first two witnesses who examined the deceased prior to transportation to the hospital stated that they saw some abnormality on the testicles of the deceased which led them to arrive at the conclusion that there was foul play from the accused. Both these witnesses gave varied descriptions of how the testicles appeared. Julius Charika said they were slightly up and protruding, whilst Batoni said one of the balls was depressed.

Two key principles underpinning criminal litigation, particularly in murder cases, are that the State is duty bound to prove all the essential elements of the crime beyond reasonable doubt. The second is that the accused has no onus to prove his innocence. All he needs to do is to put forward a probable defence. The second principle is anchored by the presumption of innocence until proven guilty entrenched as a Constitutional right in s70 (1) (a) of Amendment No. 20 of 2013. See, *S v Isolano*, 1985(1) ZLR 62 (S Geoff Feltoe, *A Guide to the Criminal law in Zimbabwe*, Reid-Rowland, *Criminal Procedure in Zimbabwe* LRF 15-16.

In that regard, the State has to place both direct and indirect evidence to prove beyond reasonable doubt that the accused did cause the death of the deceased. In the case of *S v Mtetwa* 2014 (2) ZLR 533(H) it was noted that even in the most straight forward cases the court must ultimately draw inferences. In *Sv Mapfumo & Anor* 1983 (1) ZLR 250 (S) at 253, the court highlighted that an accused person has no onus to establish his or her defence.

In this case, the State placed reliance on the post mortem report 's findings on the cause of death. It failed to place evidence that the injury to the testicles were caused by the accused. There were no facts placed on record which if taken together a reasonable inference can be drawn pointing exclusively to the guilty of the accused not her innocence. See, *R v Blom*

1939 AD 188, 202-3, *S v Zuma* 2006 (2) SACR 191 (W) at 209 and *Sv Muyanga* HH79-13 amongst others.

What can be elicited from the evidence is that, the deceased was unconscious but not dead from the time the accused woke up to the time he was taken to hospital. No evidence was placed before the court to support that it was the accused who had exclusively been in contact with the deceased from the time the deceased came from work and the time he retired to bed.

There is that an unexplainable intervening period. We do not know where, as to the actual place, the injuries were inflicted. There is no indication of when, that is the time they were caused and the time lapse between the infliction, the effect and the end result. What happens to the victim who had received such trauma soon after or much later is unclear. Could the symptoms manifest there and then or the impact is felt after some time? All what the doctor said is that, any slight force, squeeze or pressure to that sensitive and delicate part of the body affects the function of the entire body, with major organs fighting to ameliorate the harm.

In the absence of any eye witness, the word of the accused, the only person who was present carries the day until rebutted. The accused told the court in her defence, that the deceased had spent the whole day at work. Upon arrival at home they both, in the company of another person imbibed some beer whilst seated outside their house.

The accused's leg was giving her problems and she retired to bed leaving the two outside in their drinking spree. She did not hear or witness the deceased entering into the bedroom or the bed. However, she noted that he slept dressed which was unusual. This aspect was corroborated by the first witness who said he found the deceased in wet clothes.

It is clear that, there is no way of knowing what happened from the time the accused was at work, left outside of his home, up to the time he went to bed and eventually found unconscious. We are told that Julius alone changed and lifted the deceased who was unconscious but alive into a different room. We don't know what happened during that transfer and the change of clothes. After all, it is common knowledge that it takes more than one person to shift an immobile human body. It cannot be ruled out that the testicles could have been injured through that phase. Also given this background the injuries found on the

body and forehead cannot be attributed to non-other than those who struggled to dress the deceased and transfer him into the kitchen. There is no other evidence pointing to an assault on record as again submitted by the State.

The cause of the unconsciousness itself was not established especially against the findings on the lungs and the deceased's history of chain smoking. If the deceased was not clinically dead then it means his body could sustain injuries from all who came into contact with it up to the time it was pronounced dead. Further, all the witnesses are mature people who can distinguish between a dead body and an unconscious body. Had it been that the deceased was dead before the intervention of the witnesses they all would not have tirelessly worked to bring him back. The hospital would not have accepted him either.

Clearly, it is Julius who raised the issue of the possibility of an injury to the testicles, hence the body examination after Batoni had arrived. They apparently communicated their suspicions and it emerged as part of the medical history giving rise to the conclusions made. This is not uncommon as Doctors do work with the information they receive either from the patient or the relatives in order to restrict and concentrate their prognosis. In as much as we find all the State witnesses evidence credible to some extent it did not shed light on what actually transpired on that day in question.

The court found the accused's evidence, honest and consistent. She did not shake under suggestive rather, accusative cross examination. In our view, it is not uncommon for next of kin or spouse to render first aid or any other measures to help their relative or spouse to come to. This in itself does not insinuate that the accused was desperate after injuring the deceased, as suggested by the State.

It is again not unusual for couples with a well-known drinking reputation and record of drinking together to shout at each other or even petty squabbles. So the evidence of Batoni that he had heard the couple shouting at each other earlier that night which was rejected by the accused is found irrelevant, nor the evidence of their past isolated single fight.

That being the case it is the Court's finding that the State failed to place any direct evidence linking the accused to the offence. Her offence is being a spouse who happened to have

discovered her husband's condition and decided to take some action which boomeranged in her face. As the saying goes the number one suspect in the murder of a spouse is the surviving spouse. Further, the State has also not managed to prove any facts that if taken together points to the guilty of the accused exclusively. See, *Sv Mada*, HCC 01/22 *Sv Muyanga* and *S v Shonhiwa* 1987(1) 215 (SC)

In a nutshell it all boils down to the fact that the state failed to prove beyond any reasonable doubt that the accused murdered the deceased.

She is accordingly found not guilty and acquitted.

*National Prosecuting Authority for the Prosecution*  
*Choga & Associates for the Accused.*

