

THE STATE
versus
IDEA RUKWARIPO

HIGH OF ZIMBABWE
BERE J
MASVINGO, 31 May 2011

Criminal Trial

Assessors:
Mr Dauramanzi
Mr Mushuku

L. Masuku, State Counsel
J. Ruvengo, Defence Counsel

BERE J: On 5 May 2009 the accused had an altercation with the deceased as a result of which the accused assaulted the deceased. The deceased was taken to Bikita, then to Silveira Hospital and subsequently to Masvingo General Hospital where he eventually succumbed and passed on on 17 May 2009.

At the time of the assault the accused was a young man of 21 years of age. The deceased was advanced in age – 79 years old. The post mortem report concluded the cause of death was assault which manifested itself in a depressed skull fracture on the left front to the temporal area of the head. The post mortem report also recorded oozing cerebrospinal fluid of the left ear.

The State case alleges the deceased died as a result of the assault on him by the accused and the bulk of its evidence, went in by way of admissions in terms of s 341 of the code. The only viva voce evidence came from the deceased's wife who was credible enough to concede that she did not herself witness the assault as she only arrived at the scene after the deceased had been floored by the accused's assault.

The accused admitted to having assaulted the deceased using a switch whose dimensions he gave as 1 cm or so in diameter and 90 cm in length.

The evidence tendered by the State did not provide direct evidence as to how the assault itself was perpetrated as all the witnesses arrived at the scene after the assault had already been perpetrated on the deceased.

However the evidence of Ndamukanei Mudavanhu, the deceased's wife and the first person to see the accused after the assault gave the court a clue as to how the assault would have been perpetrated by the accused person. Her uncontroverted evidence was that when she got to the scene of the assault she found the accused holding part of the log which she suspected must have been used by the accused in assaulting the deceased. She said the log was about 3 or so centimetres in diameter and about 90 centimetres in length but at the time had been broken with the other part firmly in the hands of the accused.

She testified on the aggressiveness of the accused's conduct on the day. On being questioned why he had severely assaulted the deceased, the accused responded by threatening to kill the witness as well. It was her unchallenged evidence that the accused pulled out an almost similar log to the one used by the accused on the deceased and assaulted her to the extent that she had to crawl away to her homestead.

She was later to observe that the accused had sustained head injuries. The witness's observations of the injuries on the deceased are consistent with the injuries as captured in the post mortem report which were described to be the cause of the deceased's death.

The injuries on the post mortem report are inconsistent with the assault described by the accused and we are satisfied that for obvious reasons the accused was too conservative with the truth. We did not allow his version of events to detain us even for a moment.

None of the defences commented upon by the prosecution could by any stretch of imagination apply in this case. This explains why the accused himself did not attempt in his defence outline or evidence in chief attempt to raise such defences. There is nothing in the evidence consistent with or justifying provocation or drunkenness as possible defences.

In his own words the accused admitted that despite having partaken of liquor on the day in question he was in total control of his faculties and knew what he was doing. It was his unsolicited evidence that he assaulted the deceased in order to immobilize or disable him from attacking him. He continued to viciously attack the 79 year old deceased even at a time when he was down and literally posing no threat to him.

There was no evidence led by the accused to try and lay the foundation of the defence of provocation. The totality of the evidence tabled did not leave room for any attempt to raise that as a defence.

What is clear from the evidence led and accepted by the court is that the accused armed himself with the log as described by the deceased's wife and used it to punish the deceased by hitting him on the head until the log broke.

By using that log on the deceased, the accused must have foreseen the possibility of him causing serious injury to the deceased and was reckless as to whether or not death occurred. There is no way under these circumstances that the accused could be found guilty of culpable homicide.

We are unanimously agreed that the accused person be found guilty of murder with constructive intent.

Verdict – Guilty of murder with constructive intent.

Sentence:

There is no mathematical formula which the court has to rely on when it comes to sentencing. It is a question of value judgment deriving from both the mitigating and aggravating factors. In mitigation we accept the following: That the accused was 21 years at the time and even seeing him in court we are satisfied that there is apparent in him an element of youthfulness. He has been languishing in custody for the past two years whilst awaiting the outcome of this case. He had taken liquor on the day in question and we accept that this must have impaired his level of appreciation. The accused's family has covered quite some distance in trying from a traditional point of view to appease the spirit of the deceased. This is how it should be in our rich culture. There must always be an attempt to amend family ties in such an event like the one that we are now seized with as a court.

In aggravation we are extremely concerned by the unprovoked conduct of the accused on the day in question. The disparity in age between the accused and the deceased is of extreme concern to us. The elders have invested so much in the youth and the youth are supposed to protect our elders and vice-versa. The deceased must have looked to the accused for protection.

We are concerned as a court that in the majority of these cases there is almost the aspect of drunkenness. Statistically it is the youth who are drinking alcohol and committing these serious offences under the influence of alcohol.

In this case the accused's condition is made worse by the fact that even when the deceased tried to flee from the accused, the accused continued to assault him.

Such conduct naturally calls for a deterrant sentence.

We are satisfied that a sentence of 14 years imprisonment would be appropriate in this case.

Attorney General's Office, for the State
Mwonzora & Associates, for Defence Counsel