

THE STATE
versus
BERNARD MUCHADEI

HIGH COURT OF ZIMBABWE
MWAYERA J
MUTARE, 1 and 17 October 2019 and 13 November 2019

Criminal Trial

ASSESORS: 1. Mrs Mawoneke
2. Mr Mudzinge

Mr *M. Musarurwa*, for the State
Ms *F Maroko*, for the accused

MWAYERA J: The accused was arraigned before this court facing a charge of murder as defined in s 47 (1) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. The brief allegations are that the accused struck the deceased his mother with a stone on 9 March 2018 at Matereke Village Chief Zimunya, Arda Odzi. It is the state's contention that when accused struck his mother Constance Muchadei he intended to kill her or realised that there was a real risk or possibility that his conduct might cause death and continued to engage in that conduct despite the risk or possibility resulting in injuries from which the said Constance Muchadei died. The accused pleaded not guilty to the charge.

The accused's defence was basically a denial of the charges. He stood by his confirmed warned and cautioned statement which was tendered as exh 2 by consent. His stance was that he found the deceased already injured and lying on the floor in the house in which where many stones which showed the deceased had been struck by stones and sustained injuries on the forehead. The accused denied even having an altercation with the deceased. He pointed out that on the day in question there were many people at the homestead drinking beer as his mother the deceased was in the habit of selling traditional brew. The accused was the only witness who testified in the defence case while the state relied on 14 witnesses 2 of whom gave oral evidence while the other 12's evidence which was not contentious was formerly admitted as it appears on the summary of the state case.

Rutendo Matereke gave oral evidence. She narrated events of the fateful day as per her observation from the time she arrived at the scene. The witness a member of the neighbourhood watch committee told the court that upon her arrival at the scene she received

a report that the accused had assaulted deceased with a stone. She entered the room and found deceased lying unconscious on the floor. She also observed a cut on the deceased's forehead from which the deceased was bleeding. She with the help of others carried the deceased outside whereupon the deceased regained consciousness. According to the witness the deceased spoke words to the effect that Benard had hurt her and was supposed to finish her off. She stated deceased said "Benard why have you killed me? Come and finish me off." The witness told the court that at that stage accused picked another stone intending to strike the deceased and was restrained by other people. The witness identified the stone which she recovered from the scene as the murder weapon. She then arrested the accused and as she was taking accused to the police station she was interrupted by one Timothy Mutore who interfered insisting it was a domestic matter to be resolved at home. The accused's mother the deceased who was being wheeled in a wheel barrow by Madeline Javason was then wheeled back home instead of proceeding to hospital. The witness' evidence was straight forward. She maintained her version even under cross-examination. It was clear she did not seek to exaggerate her testimony. She got to the scene after the deceased had been struck and the report she received that accused had struck his mother tallied with the deceased's statement when she regained consciousness. The witness impressed the court as an honest witness.

Isaac Muchadei a juvenile 14 year old also gave oral evidence. His evidence was to the effect that on the day in question he was at home not having attended school at the deceased's behest. The witness told the court that the accused and the deceased had a misunderstanding over failure of the witness and other children to go to school in the morning. The altercation ended and people including accused drank beer. Later around 5:00pm a misunderstanding again arose between accused and deceased when the deceased sought refuge inside accused pursued her and struck the deceased on the forehead. The witness told the court that the stone used to strike the deceased was the only stone besides the deceased in the house and other stones were just outside in the yard. The witness observed that the deceased was hurt on the forehead and was bleeding. The witness's evidence tallied on all material aspects with Rutendo Matereke. There was only one stone indoors and that was indicated as the murder weapon. The witness' evidence that he observed accused pursue the deceased while accused was armed with a stone exh 5 when viewed in conjunction with the fact that accused and deceased had a misunderstanding and that deceased sustained injuries on the forehead gives a clear picture of what transpired. The witness stood his ground even during cross-examination. He was clear at the time of delivery of the fatal blow there

were not many people gathered. The accused pursued the deceased. The stone was recovered from beside the deceased indoors. We find no reason why the witness would have given false evidence against the accused protecting the actual perpetrator. Generally the witness gave a substantial and credible narration of events of the fateful day regard being had to his age. Worth noting is the fact that the witness Isaac Muchadei's version tallied with Timothy Mutore's evidence which was formerly admitted in terms of the law. The evidence of Timothy Mutore was to the effect that around 5:00pm the accused exchanged harsh words with the deceased. The witness observed accused entering the house in which the deceased was and shortly after heard deceased crying accusing the accused of stoning her. The witness rushed to the house and observed deceased lying on the floor whilst holding her forehead from which she was bleeding.

Also formerly admitted was evidence of an 11 year old grandchild of the deceased Maxwell Muchadei. His evidence was essentially to the effect that accused had an altercation with the deceased. At around 5:00pm the witness invited Isaac Muchadei to the scene. He witnessed accused stone the deceased on the forehead from which she bled. The witness also saw the stone beside the deceased. The admitted evidence corroborated the oral evidence of the two witnesses who testified especially on the issue of altercation between the deceased and accused and also the murder weapon and the striking of the deceased itself. Also formerly admitted was the evidence of Madeline Javason which confirmed the deceased was injured on the forehead. The witness, before being interrupted by one Timothy Mutore ferried the injured deceased towards Odzi Clinic in a wheel burrow. It is apparent the admitted evidence of Kuziva Zinyundu is that he ferried the now deceased in an ambulance from Odzi Clinic to Mutare Provincial Hospital. At Mutare Provincial Hospital Mufaro Mhungu admitted the deceased who passed on during admission process, following which Doctor Domonic Khulu examined the remains and compiled a post mortem report exh 1, concluding that cause of death was head injury. The police details namely Itai Chawatama, Artwell Mangwindime, who attended the scene, recorded statements and drew a sketch plan their evidence was formerly admitted. Also formerly admitted is the evidence of Liberty Mukwavaya's who measured the stone and compiled a certificate of weight exh 4 showing stone weighed 2,080 kg and had a circumference of 43 cm.

Further adduced in evidence by consent were the following exhibits. The post-mortem report exh 1. Accused's confirmed warned and cautioned statement exh 2. Sketch plan exh 3 Certificate of weight exh 4. The stone exh 5.

The accused in turn testified in the defence case. The accused insisted that he only got to the scene after the deceased had been struck while he was answering to the call of nature. He could however not dispute that he was the only person who was with the deceased at the time the deceased was struck. Absurdly, the accused was the only witness who observed more than one stone in the house next to the deceased. Also he seemed to be the only witness from those who were at the scene (Isaac Muchadei and Timothy Mutore) who did not know that he had an altercation with the deceased. We observed and viewed the accused as a dishonest witness who was raising dust so as to mislead the court. In the face of clear evidence that the stone recovered from the kitchen hut was the one used to strike the deceased the accused sought to unconvincingly introduce existence of other stones so as to shift liability. The other patrons if they were still at the deceased's home would have been well known to the state witnesses and the neighbourhood watch member Rutendo Matereke would have taken them in for questioning if it was not clear. Only accused had an altercation with the deceased and only the accused struck the deceased as evidenced by not only the deceased's utterances which amount more to a dying declaration but by the juvenile witnesses who were at the homestead. The accused impressed the court as an incredible man with no conscience and heart for the truth. He was evasive and denied even the obvious that the deceased died as a result of head injuries caused by being struck with a stone tendered as exh 5 in court. The accused is simply foreign to truth and thus unreliable. This unreliable personality was also envisaged in closing submissions where it is suggested that accused be found guilty of culpable homicide because there was an altercation between him and his mother and that they were in a drunken state thus accused negligently caused the death of his mother. The accused throughout the proceedings as evidenced by the contradictions, inconsistencies and change of stance in his defence, sought to raise smoke so as to mislead the court. The accused simply has no defence. We are alive to the fact that the accused has no obligation to prove his innocence however the accused's story has to be reasonably possibly true. In this case the accused's story of having gone to the lavatory and coming back after the deceased had been struck is not only unbelievable but false. A lot of questions come in given the eye witness' evidence inclusive of Timothy Mutore accused's friend. What further exposes the accused's version is that he could not have guessed his mother was lying unconscious indoors if the injury had been caused during his absence.

The accused is facing a charge of murder which requires both the *actus reas* and *mens rea* to be proved beyond reasonable doubt. A reading of s 47 (1) of the Criminal Law

(Codification and Reform) Act defines murder with actual intention and murder with constructive intention. It is apparent when there is no clear evidence of one setting out with an aim to kill and proceeding to kill, then the second stage of murder with constructive intention has to be considered. This is murder emanating from the realisation or possibility of risk of death but despite the realisation proceed with conduct resulting in death.

The law is clear that where there is no actual intention legal intention can be inferred from the circumstances of the matter, with factors such as the nature of blow, weapon used and the body parts to which the blow is directed among others falling into consideration. Where the state has discharged the required onus of proof then the accused ought to be convicted. The reverse is true that where the state has failed to prove the guilt of the accused beyond reasonable doubt then the accused ought to be acquitted. In this case therefore upon considering the totality of the evidence adduced the issue to be determined is whether or not the accused unlawfully and intentionally killed the deceased.

It is clear from the circumstances of the matter there was no plan by accused to kill the deceased which the accused executed. He may from the evidence escape liability for murder with actual intention but certainly going by the nature of weapon used a stone weighing 2, 080 kg aimed at the head one cannot fail to realise the risk of death occurring. The accused and deceased had both partaken the traditional beer but there is no evidence placed before the court to show that the accused did not know what he was doing. In any event if he was intoxicated voluntary intoxication is not a defence. See *S v Musina* 2010 (2) ZLR 498 and also s 221 of the Criminal Code. In this case events shortly before striking and after striking do not show that the accused was not capable of having foresight that by striking his mother with a big stone in the head there was real risk and possibility of death occurring. Despite such realisation the accused proceeded with his conduct and struck the deceased on the head resulting in the fatal injuries.

The accused is accordingly found guilty of murder with constructive intention as defined in s 47 1 (b) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*].

Sentence

In our endeavour to reach at an appropriate sentence we have considered all mitigatory and aggravatory factors submitted by Ms *Maroko* and Mr *Musarurwa* respectively. You are a first offender who has been awaiting the finalisation of the matter since 9 March 2018 when the offence was committed. Although you were out of custody for

the longer part of the waiting period the court will take note of the trauma and anxiety that goes with that difficult period of suspense. You are a family man with a dependant juvenile child. You had partaken of alcohol on the day in question. That is all that can be said in mitigation.

You however stand convicted of a serious murder charge emanating from domestic violence. The state counsel has correctly pointed out the societal expectations of children having a duty to exercise self-restraint and respect parents. In this case life was needlessly lost. You struck your own mother on the head with a stone weighing more than 2kgs. You exhibited a high degree of cruelty and lack of respect for human life. From the time of commission of the offence you were devious as evidenced by desire to have the matter resolved at home and not reported to police as you stopped the member of the neighbourhood watch from taking you to the police and taking your mother to hospital. What further aggravates the offence is the fact that you do not regret commission of the offence at all. There are no signs of remorse at all. You in your defence and closing submissions admitted to culpable homicide saying it happened when you were intoxicated but in mitigation despite direct questions you did not seem moved at all by the loss of life of your mother at your hands. Further in aggravation is the fact that you have throughout the proceedings been very economical with truth. The murder was callous and savage. Society abhors the use of violence and courts have to weigh in and pass appropriate sentences in order to deter likeminded people. The inhuman treatment you subjected the deceased to has to be visited with an appropriate sentence.

The offence you stand convicted of is deserving of a custodial sentence. People like you who are not perturbed by loss of life have to be removed from circulation for you pose danger to society.

You are sentenced as follows:

20 years imprisonment.