

STATE
versus
BENETA BHUNU

HIGH COURT OF ZIMBABWE
MWAYERA J
MUTARE, 13 May 2021 and 03, 11 and 18 June 2021 and 13 September 2021

ASSESSORS: 1. Mr Magorokosho
2. Mrs Mawoneke

Ms T.L Katsiru, for the State
Mrs Y Chapata, for the Accused

MWAYERA J: The accused pleaded not guilty to a charge of Murder as defined in s 47 1(a) or (b) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. It is alleged by the state, that on 7 October 2019 and at L2, Rukudzo Village, Chief Marange, Odzi, the accused unlawfully caused the death of Norbert Kavharo by striking him with a stick on the head, hands, abdomen, back and buttocks several times with intent to kill him or realising that there was a real risk or possibility that the conduct might cause death and continued to engage in that conduct despite the risk or possibility thereby causing injuries from which Norbert Kavharo died.

The brief allegations per the state summary is that the deceased who was coming from a beer drink passed by the accused's homestead. The deceased chided the accused for denying her husband his conjugal rights. The accused then took a stick and struck the deceased on the head, hands, abdomen and buttocks several times. The deceased died early hours at around 0200 hours on 8 October 2019. A post mortem conducted on the deceased could not determine the cause of death.

Defence Evidence

The accused denied the allegations pointing out that she had no intention legal or actual to kill the deceased. In summary the deceased approached her coming from a beer drink. The deceased then accused her of feigning illness to avoid sexual intercourse with her husband. He then offered to be intimate with her remarking that he had a bigger penis than her husband. Despite her protestations the deceased continued to insult her using vulgar

language. The accused was extremely provoked and in a fit of rage she picked a stick which she then used to hit the deceased, as an expression of her dislike of what he was saying to her. When the deceased fell down she left him lying on the ground now in the company of one Phoebe Mupotaringa who had been drawn to the scene by noise. The accused denied having hit the deceased to the extent of causing his death. The accused maintained her version during the defence case and she adopted her defence outline as evidence in chief.

The accused's husband one Charles Mamvura's evidence was formerly admitted by consent as it appears on the defence outline. The evidence was basically to the effect that after receiving a report from his wife, the accused, the witness made a follow up with the deceased. The latter was no longer at the spot where he had been assaulted thus the witness went to his house for purposes of finding out why the deceased had insulted his wife. Upon reaching the deceased's house the latter was not there. When the witness was leaving, the deceased arrived home in the company of one Chimikai. The witness observed that deceased was drunk so he decided not to confront him until the following morning. Early morning hours he was advised of the demise of the deceased. According to the witness's version the deceased's body was smelly hours after he passed on. The accused as a witness maintained that she assaulted the deceased using a stick as a way of reprimanding him for misbehaving by requesting a married woman to be intimate with him. It is worth noting that the accused's confirmed warned and cautioned statement which was tendered as exh 1 by consent also reflected the same explanation as proffered by the accused in her defence outline and evidence in chief.

State Evidence

The evidence of 10 state witnesses was admitted as it appears on the summary of the state case as it was none contentious. Only one witness Dr Melanie Chibwowa gave oral evidence. The first witness Phoebe Mupotaringa's evidence was basically that she was drawn to the scene because of thudding sound of something being pounded. The witness found out that the accused was assaulting the deceased who was lying on his stomach alleging that he had insulted her. She then alerted Chimikai Sarumhungwe after failing to restrain accused. She later the following morning learnt of the passing on of the deceased.

The second witness Chimikai Sarumhungwe confirmed being alerted of the incident of accused assaulting deceased by Phoebe Mupotaringa. The witness arrived at the scene when the accused had left the scene. The deceased was lying on his stomach groaning in pain.

He carried deceased to his home where upon he met accused's husband who was shouting on top of his voice accusing deceased of causing disunity in his family. The witness later reported the assault to the village chairman John Gore. John Gore in turn went to visit the deceased and applied some first aid before going back to his home. Also formerly admitted is the evidence of Fungisai Shonhiwa the wife of the deceased. She just like Chimikai Sarumhungwe observed injuries on the deceased a wound on the back of the head, the forehead, top eye and bruises on the left side of the stomach. The evidence of Nyasha Mamvura a 14 year old who was at home with accused tallied with accused and other state witnesses' evidence on material aspects. It was essentially that accused was insulted by deceased and she took a stick which she used to assault him expressing her displeasure on his utterances.

The evidence of the police details was formerly admitted as it was on common cause aspects. The police recovered the stick used to assault the deceased and caused it to be weighed at the post office. The details drew a sketch plan and identified the deceased's body for post mortem examination. The police details also observed injuries on the deceased's head, above the left eye and on the abdomen. Also adduced in evidence was the certificate of weight exh 2 reflecting the stick weighing 0.4kg and 117cm long with circumference ranging 7 to 8.5cm. The stick itself was also produced as exh 2(a). The sketch plan was tendered as exh 3 by consent and the post mortem report exh 4 by consent.

The only witness who gave oral evidence is Dr Melanie Chibwowa. The doctor confirmed having compiled the post mortem report exh 4 refers. She narrated that she carried out both external and internal examination of the body. She also stated that she received history of alleged assault of the deceased. Conspicuously missing from the post mortem report is the recording of history and doctor's observations. The doctor unlike the other witnesses did not observe injuries on the head or she did not write as evidenced by the lack of notations on the post mortem report. The doctor actually advised the court that she was reminded of the history of assault by the police who subpoenaed her for court. In giving evidence after having been reminded by the police the doctor told the court she observed bruises on the deceased's stomach she opened up the deceased and noted that the internal organs, that is the liver, stomach, kidneys and spleen had decomposed. This again is glaringly not recorded on exh 4. The doctor noted as follows on exh 4

“Deceased noted to have bruises on the abdomen, no internal injuries noted body in advanced state of decomposition “

Again conspicuously missing from the report is the assertion by the doctor that she took some stomach contents for toxicology examination but results never came back from Harare. Whether this was done or not it remains essentially speculative considering the absence of narration. Further the gap is widened by the fact that there is no indication of police follow up of the alleged toxicology examination. The doctor also orally suggested that the deceased could have ingested a poisonous substance or that deceased had a precondition of liver or kidney problem which could explain the rapid decomposition. The doctor concluded that the cause of death was indeterminate. We must point out that in murder cases it is imperative that the doctors as experts in complex matters do not carry out a cursory examination but thorough examination which include notation of findings of both internal and external examination. In this case all the other witnesses who encountered the deceased body observed injuries on the head but the doctor did not. If samples were taken for toxicology one wonders what then happened. The reverse of the standard post mortem report was not filled in just like the history narration. The doctor simply stated it was an oversight in the same manner that the doctor stated that the cause of death is indeterminate. The doctor's evidence was not of much assistance. The court is left with a lot of questions as regards what transpired and what caused the death of the deceased. It is possible deceased had a precondition, or was poisoned or assaulted.

At the close of all evidence the following factors are common cause. That the deceased who was drunk approached the accused at her residence and insulted her uttering vulgarities. It is also common cause that accused did not take lightly to being requested to have sexual intercourse with the deceased who demeaned her husband and made mockery of her health conditions. It is also not in dispute that the accused used a stick to beat up the deceased as a way of chastising him. It is also not in dispute that the deceased passed on the following day.

The only issues that have to be decided by this court are

1. Whether or not the accused with actual or legal intention caused the death of the deceased.
2. Whether or not the deceased's death was a consequence of the assault.

The Law

The charge that the accused is facing of murder requires the state to prove that the accused unlawfully and intentionally caused the death of the deceased. This presupposes that

there should be a causal link between the conduct of the accused and the death of the deceased. Both the *actus reas* and *mens rea* have to be present for a charge of murder to be sustained. See *S v Mukukuzi and Anor* HH 577/17, *S v Mugwanda* 2002 (1) ZLR 574 and also *S v Milos Moyo* HB 85/2010. Also *A Guide to the Criminal Law of Zimbabwe*, 3rd ed by Professor G Feltoe p 102 is instructive. For a charge of culpable homicide to ascribe it must be proved beyond reasonable doubt that it was foreseeable or within the range or ordinary human experience that accused's action would lead to the death of the deceased. In the present case as rightly conceded by the state in closing submissions the essential elements of murder have not been proved beyond reasonable doubt. Equally the essential elements of culpable homicide have not been proved considering the totality of evidence adduced. The accused cannot be said to have negligently caused the death of the deceased. This is moreso when one considers the small size of the stick the accused used to assault the deceased. The nature and manner of assault is not indicative of desire to kill neither is it indicative of negligently causing the death of another.

It is worth mentioning that an accused has no onus to prove her innocence. Whereas the state has a duty to prove its case beyond reasonable doubt. See *S v Kuiper* 2000 (i) ZLR 113 (s) and *R v Difford* 1937 AD 370. Also see s 18(i) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] which provides that

“Subject to subsection (2) no person shall be held to be guilty of a crime in terms of this code or any other enactment unless each essential element of the crime is proved beyond reasonable doubt”

In the case of *State v Edward Gumbo* HB 119/18 it was stated that

“The state should diligently prove that the assertions it makes or the guilt of an accused person. The state's mere say so does not meet the required threshold of proof. It is not the state's wishes that carry the day, but it is the substance in the facts as proven before the court that do”.

Application Of The Law To The Facts

In this case there is no causal link between the deceased's death and the beating occasioned by the accused. There is no evidence that the death was a consequence of accused's negligent assault of the deceased. The post mortem report does not spell out the cause of death. This was further eluded by the doctor's assertion that the deceased may have had an underlying condition or ailment which accassioned the fast or quick decomposition within hours and advanced decomposition within two days of demise. That the accused was

insulted and then she reacted by beating up the deceased does denote that she lost self-control and negligently assaulted the deceased thereby negligently causing his death. From the totality of the evidence the nature and manner of assault cannot be ruled as the proximate cause of the death.

The accused in this case lacked the requisite *mens rea* and as such cannot be held liable for murder with actual or legal intention. Further the accused did not negligently cause the death of the deceased as such she cannot be found guilty of culpable homicide. There is no nexus between the death of the deceased and the assault perpetrated by the accused.

Accordingly accused is found not guilty of murder and is found guilty of assault as defined in s 89 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*].

Sentence

In reaching at an appropriate sentence we have considered all mitigatory factors advanced by Mrs Chapata and considered aggravatory circumstances submitted by Ms Katsiru. Accused is a female first offender who has always accepted having assaulted the deceased. The court will take note of the fact that customarily the accused was ordered to compensate the deceased's family. Although the accused has been found not guilty she will leave with the stigma that goes with the murder charges. It is also mitigatory that the accused was provoked by the demeaning utterances of the accused who immorally requested a married woman to be intimate with him. The accused's moral blameworthiness is minimal considering the small size of stick she used to assault the deceased. Accused has been waiting anxiously for two years. The anxiety cannot be understated.

In aggravation as observed by the state counsel Ms Katsiru is the fact that the accused took the law into her own hands and assaulted the deceased for his misdemeanour. Deterrence is called for so as to foster lawfulness into not only accused but like minded members of the community. It is our considered view that a suspended prison term will meet the justice of the case.

Three months imprisonment wholly suspended for three years on condition accused does not within that period commit any offence involving the use of violence on the person of another for which she is sentenced to imprisonment without the option of a fine.

National Prosecuting Authority, state's legal practitioners.
Henning & Lock, legal practitioners for the accused.