

**THE STATE****Versus****ONE MUDENDA**

IN THE HIGH COURT OF ZIMBABWE

BERE J with Assessors Mr E.R.M. Nyoni &amp; Mrs E. Mashengele

BULAWAYO 21 JANUARY 2016

**Criminal Trial***W. Mabhaudi* for the state*T. Khumalo* for the defence

**BERE J:** The deceased Mandanda Mudenda of Njobola Village in Binga District lost her life in unclear circumstances on 30 November 2014. The accused who happens to be the deceased's son stand accused of having caused the deceased's death through assault which allegedly occurred on the evening of 25 November 2014. The assault was alleged to have occurred about 50 metres away from the deceased's homestead.

The post mortem report (exhibit II) gave possible cause of death as Intracranial Haemorrhage and Head Injury caused by assault. Exhibit I opined that the accused had a history of mental challenge and that it was reasonably possible that at the time of the alleged assault the accused was suffering from a mental disorder to the extent that in the psychiatrist's opinion the accused must not be held criminally responsible for his actions.

The state case was built around the viva voce evidence of Draw Muleya and Frank Siambeta accused's two neighbours who testified that they both saw what happened on the night of the 25<sup>th</sup> of November 2014. The witness' evidence was meant to confirm the deceased's assault by the accused on the evening in question.

Contrary to the allegations of the state, the accused denied ever assaulting the deceased. The accused alleged that on the evening in question he heard the deceased screaming and rushed to the scene to investigate the cause of the noise. When he got to the scene the accused claimed

that the deceased who was hopelessly drunk revealed to him that she suspected she had been given poisoned beer and that she had difficulties standing on her own. The accused alleged he battled to raise her from the ground to no avail as on two occasions she ended up falling down from his grip. He said he did this until the two key state witnesses arrived close to the spot where the deceased was.

It is not in dispute that the accused had a history of mental challenge in this case. It is also not in dispute that throughout the investigations that followed, there was no attempt by the investigating officer to record a warned and cautioned statement from the accused person. It was important in the court's view for the investigating officer to have recorded a warned and cautioned statement from the accused in order to investigate his averments, and if need be to get evidence that would have countered the stance taken by the accused. As it is, from the time the accused person was arrested up until his trial was conducted in this court, the police did not seem to know the defence which the accused was going to proffer to the charge. By not exploiting and closing this gap the state case remained heavily compromised.

If the investigating officer in this case had sought to record a statement from the accused person at a time the accused had recovered, the investigating officer would have in turn been able to draw the attention of the pathologist's mind to the allegations of possible beer poisoning and proper investigations in that regard to discount that explanation as the possible cause of death would have been either carried out or commented upon by the pathologist.

The thrust of the state case was that the deceased was assaulted by the accused in the manner described in dramatic fashion by the second witness Frank Siambeta who said that from about 8 metres he and his colleague Draw Muleya saw the accused holding the deceased by the throat or neck smashing her to the ground remarking that she should not play with a buffalo or lion. The witness said the accused repeated this manner of assault several times. When it was suggested to this witness that the accused was not assaulting the deceased but was merely trying to assist her rise from the ground, the witness retorted that this was not so as the accused was habitually given to assaulting the deceased.

It is not in dispute that the first witness was non-committal on the assault itself as described by the second witness. The 1<sup>st</sup> witness when asked by the court as to whether or not he had seen the accused assaulting the deceased was quite forthright. In his own words he retorted; “I did not see the assault. I just saw him lifting her up and down.”

The conclusion that the court has been urged upon to make by the state counsel to accept is fraught with a number of challenges. The acceptance of the evidence of Frank suggests that the accused was viciously assaulting the deceased. The accused countered this by suggesting that if indeed he had assaulted the deceased there should have been extrinsic evidence to support that in the form of visible wounds on the deceased or some bleeding on her. The police officer who visited the deceased in hospital saw no wounds. The nurses who attended the deceased appeared not to have seen these wounds. In fact none of the witnesses testified to the existence of any wounds.

The position must then be juxtaposed by the stance taken by the accused bearing in mind that at law the accused has no onus to establish his innocence but is merely required to cast doubt on the state case by giving an explanation which is reasonably and possibly true. As DAVIES AJA succinctly puts it in *Rex v M*<sup>1</sup>

“And I repeat, the court does not have to believe the defence story; still less has it to believe it in all its details, it is sufficient if it thinks that there is a reasonable possibility that it may be substantially true.”

I may add and say that the only time that the court can reject the story told by the accused is when the court is convinced that that story is palpably false.

The accused stated that he was merely battling to raise her mother, the deceased, from the ground but because of her drunken stupor he found it hard to do so.

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The reluctance or hesitance by the first witness to commit himself on the assault would tend to lend credence to the accused's stance.

The accused explained that as he battled to raise her mother he uttered words likening her mother's going for a beer drink to a person voluntarily entering a place infected with either lions or buffalos. The accused through his counsel argued that it was quite possible that his utterances were noted out of context. This argument is indeed persuasive in our view.

The other challenges with the position urged upon us by the state counsel to accept is that because the accused had a history of mental challenge we must make a specific finding that his vivid recollection of events be rejected because it was tainted by that mental condition.

We are unable to do that for several reasons one of which is that a mentally challenged person is not in a perpetual trance. He has moments of recovery. In some cases it takes a few seconds, minutes or hours to recover. Secondly the accused's mental condition at the time of the alleged offence must be weighed against his viva voce evidence in court. In the majority of these cases the accused does not remember what exactly happened at the time of the alleged offence but in this case the accused claimed to have a vivid recollection of what transpired. The accused's evidence in chief and even under cross examination remained intact and consistent.

It does seem to us that when the two state witnesses saw that accused trying to lift the deceased their minds were flooded by the past history between the accused and the deceased and with that heavy prejudice they wrongly concluded that the accused was assaulting the deceased. That bias is understandable but should not be allowed to carry the day because of the convincing counter explanation given by the accused person.

In my view nothing much tends on exhibits I and II. The accused explained that when exhibit II was compiled there was a possibility that the doctor may have missed what he intended to convey by making reference to the deceased's mother instead of his maternal aunt. It is quite

possible that a nurse who is not trained as an interpreter may have genuinely created the unintended confusion to the innocent doctor.

Exhibit I must not confuse anyone. The compilation of that exhibit was largely influenced by the nature of the report the doctor/pathologist got. The pathologist had in mind an assault and not a poisoned drink when he carried out his examination report. The pathologist was not expected to carry out an examination on beer poisoning because he was never made aware of that as a possibility of the cause of the deceased's death.

It was still possible even in these proceedings to call the pathologist to deal with the issue which was now being raised by the accused that the deceased had suggested she had drunk poisoned beer. In the absence of that counter explanation it remains a possibility that the deceased may have died as a result of having partaken of poisoned beer. I must emphasise that generally speaking a doctor's examination is largely informed by what he is informed by a patient or by the person who gives a report about the circumstances leading to a deceased's death.

We all had an opportunity to hear and see the accused giving his evidence in court. The question at the end of the day must be, "Is the accused's explanation reasonably possibly true?"

In my view the answer ought to be in the affirmative. Consequently the state has not discharged the required onus to justify a conviction on the evidence presented to us.

It is not possible in these circumstances to even say that the act of assault itself has been established beyond a reasonable doubt.

The accused is found not guilty and acquitted of the murder charge. The court is not satisfied that the accused be freed at this stage. I order that the accused be remanded in custody for continued monitored treatment at Mlondolozhi Mental Institution where he will be dealt with in terms of the Mental Health Regulations and section 30 2 (a) of the Mental Health Act.

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*Prosecutor General's Office, state's legal practitioners  
Lunga Gonese Attorneys accused's legal practitioners*