

THE STATE
versus
MARIA GOCHE

HIGH COURT OF ZIMBABWE
MAWADZE J
HARARE, 10, 11, 12, 14, 19, 26 March & 19 June 2014

Assessors: 1. Mr S Tutani
2. Mr G. Chakuvinga

Criminal Trial

S.W. Munyoro, for the State
I. Chingarande, for the Accused

MAWADZE J: The accused is charged with murder as defined in s 47 of the Criminal Law (Codification and Reform) Act [*Cap 9:23*], it being alleged that on 27 March 2012 at Chiunda Village Chief Negomo in Chiweshe, the accused unlawfully assaulted LUCAS ZARIRO with a home-made standard brick on the head knowing or realizing that there was a risk or possibility that LUCAS ZARIRA might be killed and continued to engage in the conduct resulting in LUCAS ZARIRA's death.

The accused is married to the now deceased LUCAS ZARIRA's elder brother one ZIVANAI ZARIRA and she resided at the same homestead with the now deceased. At the material time the accused's husband was unwell.

It is alleged that on 27 March 2014 at about 20.00 hours the accused and the now deceased had a misunderstanding over a debt the now deceased owed the accused resulting in the two exchanging harsh words. It is alleged this degenerated into a physical fist fight culminating in one PATIENCE MUZENJE restraining them. It is alleged that thereafter as the now deceased was walking away from the scene the accused picked a home-made standard brick and used it to strike the now deceased on the left side of the head inflicting a serious injury which caused the now deceased to fall down and to bled profusely. The now deceased was rushed to local Dambo clinic and thereafter referred to the Howard Mission Hospital where he died while admitted the following day on 28 March 2012. The post mortem report shows the cause of death as head injury secondary to trauma.

In her defence which accused also later incorporated as part of her evidence, the accused stated that on the day in question the now deceased was drunk after having drunk the illicit brew called Kachasu (some traditional alcohol). According to the accused the cause of the altercation was not a debt but that the now deceased was alleging that the accused was not giving proper care to her sick husband who is also the now deceased's elder brother. The accused said it the now deceased who started to assault her all over the body with clenched fists and booted feet. The accused said no one at the homestead came to her rescue. Accused said the now deceased armed himself with a big piece of firewood and was now bent on intensifying his ferrous attack upon the accused who had her baby with her. The accused said she then decided to act in self-defence as explained in her confirmed warned and cautioned statement by striking the now deceased with a brick. The accused in her defence outline denied causing the now deceased's death and incorporated her confirmed warned and cautioned statement.

In support of its case the State called the following witnesses:-

1. Irene Kasingarigwi a nurse at Dambo Clinic
2. Dr Paul James Thistle who was then based at Howard Mission Hospital
3. Margreth Mpadzula a nurse at Howard Mission Hospital
4. Alois Chitanda a nurse at Howard Hospital
5. Patience Muzenje who stayed with the accused and the now deceased
6. Levius Kondowe a neighbour of both the now deceased and accused and was the now deceased's friend
7. Dr Blessing Tachiona then based at Concession Hospital who carried a post mortem and compiled the report.

The statements of the following State witnesses were admitted in evidence in terms of s 314 of the Criminal Procedure and Evidence Act [*Cap 9:07*];

8. Charity Mufema's statement, a nurse at Howard Mission Hospital.
9. Zivanai Zarira's statement – accused's husband and elder brother of the now deceased.
10. Ptronella Hore's statement who assisted in ferrying deceased's body to the mortuary at Concession
11. Cst Rachel Mapawu who witnessed the recording of accused's warned and cautioned statement.
12. Sgt Joseph Muzenda's statement who is the Investigating Officer.

13. Cst Peter Karenga at Gweshe Police base who received an anonymous report on how now deceased had been injured.

The following relevant exhibits were produced:-

Exh 1 – the post mortem report by Dr Tachiona dated 1 April 2012 which shows he carried out an external post mortem and concluded that the now deceased who was 32 years old died as a result of head injury secondary to trauma.

Exh 2 – Accused's confirmed warned and cautioned statement in which the accused said:

"I have understood the caution of the offence I admit the allegation of striking the now deceased with a brick that caused deceased his death. I struck him after he assaulted me while strapping my baby, therefore I was afraid he could injure my baby. That is all".

Most of the facts of this matter are common cause and we believe there is no useful purpose to be served by summarising and analysing the evidence of the witnesses which is not contested.

It is not disputed that the accused and the now deceased had a misunderstanding which led to a fight on 27 March 2012. The dispute leading to the quarrel is not clear. The State alleges that it was a debt owed to accused by now deceased but the accused said it was because the now deceased alleged she was neglecting her sick husband. In our view the reason for the altercation is immaterial to the issues to be resolved.

It is common cause that it is the now deceased who approached the accused at her fire place outside her hut and started to assault her. There is a dispute as to whether accused was strapping her baby or not. The manner of the alleged fight is in issue. However it is not disputed that accused picked a standard home-made brick from the fire place and struck the now deceased on the left side of the head. The nature and extent of the injury has been put into issue.

The evidence of the witnesses which is uncontroverted is that after the now deceased had been injured he was ferried to the local clinic that night on a bicycle by his friend Levious Kondowe and his brother Zivanai Zarira. As confirmed by Zivanai Zarira he together with the now deceased lied that the now deceased had been injured after he fell and hurt his head on the door step. This is confirmed by Levious Kondowe and Irene Kasingarigwi a nurse at Dambo clinic. According to Zivanai Zarira the reason for this lie was twofold; firstly

it was to ensure that the now deceased would be treated urgently without first having to report to the police and secondly to protect his wife the accused as he did not anticipate that death would result. This false medical history was recorded at the local clinic and relayed to Howard Mission Hospital where now deceased was referred and admitted.

It is not in dispute that the now deceased on the same night on 27 March 2012 was attended at the local clinic and referred to Howard Mission Hospital where he was admitted on 28 March 2012 at about 0.500 hours. The accused through her legal practitioner made an issue about the delay between the time the now deceased left the local clinic on night of 27 March 2012 and the time he was admitted at the Howard Mission Hospital. We again did not find this to material to the issues to be determined by the court. The fact remains that the now deceased was admitted at Howard Mission Hospital in the early hours of 28 March 2012. Sight should not be lost of the fact that witnesses said they had to walk some long distance in order to find transport to hire to ferry now deceased to Howard Mission Hospital.

The evidence led shows that he now deceased was admitted at Howard Mission Hospital at about 0500 hours after which he was attended and taken to the theatre where he was released back into the male ward at about 1100 hours. It is not in issue that the now deceased passed on two hours later that day at about 1300 hours at the hospital.

As per Zivanai Zarirai evidence he collected deceased's body for burial at their village without advising the police and still living the lie that the now deceased had injured himself on 29 March 2012.

The uncontroverted evidence is that on 30 March 2012 the police through Cst Karenga stopped the burial of the now deceased. According to Cst Karenga this was after a local villager left an anonymous letter at Gweshe Police base indicating that the now deceased had been assaulted and died from injuries inflicted and that the relatives were covering up the matter and proceeding with the burial without the police's involvement. It is not in dispute that through Sgt Muzenda Police stopped the now deceased's burial and through investigations established the truth that it is the accused who had hit the now deceased with a brick inflicting the injury linked to the now deceased's death. The accused was then arrested and deceased's body taken for a post mortem examination which was done on 1 April 2012.

What is in issue in this matter is the circumstances under which the now deceased was hit with the brick, the nature of the injury inflicted, the cause of death and accused's criminal liability. We now proceed to deal with these issues.

The nature of the injuries and the cause of death

Exh 1 – the post mortem report is not very useful as regard the extent of the injury the now deceased suffered as it simply refers to the cause of death being head injury secondary to trauma.

Dr Tachiona who carried out the post mortem told the court that he did an external post mortem which entails just the physical examination of the body without opening it. All he observed was what the now deceased had a severe head injury. He did not open the skull although he was adamant that the possibility of intra cranial haemorrhage was very high and that it was the possible cause of death. He explained under cross examination that internal bleeding in the brain is fatal because if blood accumulates in the head it squashes the brain.

Dr Tachiona's evidence is not challenged. However he did not open the skull to establish as a fact that there was internal bleeding in the brain. His expert opinion is however not doubted, despite the lack of clarity on the description and extent of the injury.

In terms of the description and extent of the injury we have to refer to the evidence of the witnesses who were with the now deceased on 27 March 2012 and the medical staff who attended to him.

Patience Muzenje who witnessed how the now deceased was injured described the injury inflicted as very serious as severe force was used causing the now deceased to fall down bleeding profusely to the extent that the accused was still shocked and remained standing a distance away from the fallen deceased.

Zivanai Zarira accused's husband described the injury as a deep long cut on the left side of the head and that blood was oozing out of the wound.

Levious Kondowe a neighbour and friend of the now deceased simply described the injury on the head as serious and that he poured water on the head and bandaged the now deceased in a bid to stop the bleeding before taking him to the local clinic.

Irene Kasingarigwi a nurse of Dambo clinic who first attended to the now deceased told the court that the now deceased's clothes were soaked in blood and that he had a fresh deep wound on the left side of the head. Her evidence is that she bandaged the wound to stop bleeding and administered amoxicillin an antibiotic and paracetamol a pain killer. There was no ringer lactate used to mitigate dehydration as it was clear now deceased had lost a lot of blood. She was also unable to administer TT medicine to prevent tetanus as it was unavailable at the clinic. However she said after attending to now deceased for about 30

minutes she immediately referred him to a bigger hospital Howard Mission Hospital due to the severity and nature of the injury.

Margret Mpadzula the first nurse to attend at the now deceased at Howard Mission Hospital told the court that deceased on arrival was unable to talk. His clothes were soaked in blood and had a bandage on the head which was also blood soaked. She observed that the now deceased had a deep cut on the left side of the head and due to the serious nature of the injury she immediately called Dr Thistle who immediately told her to apply the pressure bandage, put the now deceased on the drip and immediately took him to the theatre for immediate attention.

Dr Thistle is the one who took the now deceased to the theatre. His evidence is that the now deceased had a deep sharp laceration on the scalp which was about 5 cm long and about 1½ cm in depth. He observed that the wound penetrated an external tissue and the scalp bones which had caused the head to be swollen. Dr Thistle explained how he treated the now deceased on an emergency basis. He said he administered intravenous fluids as now deceased had apparently lost a lot of blood due to excessive external bleeding which he estimated to be about first 10% of the blood in the body. The Doctor explained that he applied pressure bandage to stop the bleeding and took now deceased to the theatre where he sutured the wound after which external bleeding stopped. The now deceased who was now stable was referred back to the ward from the theatre. This was confirmed by Alois Chitanda the nurse who attended to the now deceased when he came back from the theatre that the now deceased was stable as his temperature and blood pressure were normal. The sutured wound was no longer bleeding. He however said within 1½ hours the now deceased's condition deteriorated and he passed on within that period while in the ward.

In our view the nature of the injury sustained by the now deceased is clear. It was inflicted by the accused with a home-made standard brick which was on the fire from a close distance of about 3m. The now deceased was hit by the sharp edge of the brick in view of the nature of the injury which was a sharp deep cut on the left parietal region. The wound was 5 cm long and 1½ cm deep penetrating the scalp bones. It is the extent of the depth of the wound which was never established or whether the skull was fractured or cracked. The injury caused the now deceased to loose a lot of blood.

This leads us to the next issue which is the cause of death. It cannot be disputed that there is clearly a causal link between the assault of the now deceased and his death. According to Dr Thistle the likely cause of death was internal bleeding due to the head injury.

Dr Thistle discounted that death could have resulted from external bleeding as the loss of blood was just about 10%, which is not fatal more so as the now deceased was admitted while alive and conscious despite the initial loss of blood due to external bleeding. Dr Thistle was certain that it is the internal bleeding which affected the brain which was fatal. The same view was shared by Dr Tachiona who did the post mortem. We therefore have no reason not to accept this clear medical evidence of the two doctors. The now deceased therefore died from the head injury inflicted by the accused with the brick.

The accused's criminal liability

In deciding the accused's criminal liability we had to rely on the evidence of the two witnesses who were present at the scene, that is the accused herself and Patience Muzenje. While the accused admitted assaulting the now deceased with the brick and inflicting the fatal blow she raised the defence of self- defence as defined in s 253(1) (a) to (d) of the code [*Cap* 9:23]. The question to be answered is whether on the evidence on record such a defence is available to the accused.

I have already alluded to the accused's version as per her defence outline and warned and cautioned statement. The accused's evidence is that she was first assaulted with booted feet and clenched fists while seated by the fire with her baby strapped on her back. Her pleas for help did not yield any help. The accused said instead the now deceased went to pick a piece of firewood and advanced towards the accused who still had a child on her back. It is at that stage that the accused said that she picked the brick and hit the now deceased in a bid to protect her child.

The accused's version was dismissed as completely false by the state witness Patience Muzenje who in our view is the key State witness. I now deal with her testimony.

Patience Muzenje (Patience) told the court that accused and now deceased firstly quarrelled at about 1800 hours and she intervened and they stopped.

Later that evening as she was in her kitchen hut Patience said she heard accused and now deceased shouting at each other again and realised that the two were fighting. She observed that as she came out of her kitchen hut that the now deceased was assaulting the accused who was seated with clenched fists. This evidence is not disputed by the accused.

Patience said the accused stood up. Accused's baby was not on her back but seated by the fire. Patience said when accused stood up a fist fight ensued and after a brief exchange of blows the two held each other. Patience said she had her baby on her back and unable to intervene to restrain the two besides verbally telling them to stop fighting. She said

the two disengaged on their own. Patience then explained how at that stage the now deceased was injured with a brick.

Patience said as the two disengaged accused remained by her fire place and the now deceased turned walking away towards his nearby hut. It is at that stage that Patience said accused picked a brick from her fire place used as “mapfiwa” and threw at now deceased hitting him on the left side of the head causing him to fall down groaning in pain. Patience was clear that the accused at this point was not under attack as the now deceased was walking away and about three meters away from the accused and about to enter his hut. She dismissed as false that the now deceased had picked a piece of firewood or that he was advancing towards the accused. Patience said the now deceased did not use any weapon besides clenched fists.

Patience was extensively cross examined and the colour of her evidence did not change. She denies that accused had a baby on her back at the material time but that the baby was seated at the fire place crawling as the two were fighting. She denied that the now deceased at any stage picked a piece of firewood readying to attack the accused.

We were very impressed by Patience as a witness. She gave a very clear account of how the events unfolded. She was an eye witness. Her evidence is not tainted with contradictions and the vigorous cross examination she was subjected to did not have an adverse effect on her evidence. Our view is that she is a credible witness. Patience impressed us as a fair witness who was not keen to exaggerate the roles by the accused and the now deceased. She did not seek to minimise the now deceased’s role and clearly stated that initially he was the aggressor. She dismissed as untrue that the now deceased was drunk and that was corroborated by Levious Kondowe. In our view, Patience had no motive to lie. She is closely related to both accused and the now deceased. Accused admitted that she enjoyed good relations with Patience.

It is our finding that the accused’s version of events is not true. The story that the now deceased picked a piece of firewood or that he was drunk is not part of accused’s warned and cautioned statement. If that was the case accused would not have omitted such a crucial aspects when events were still fresh in her mind. The accused has therefore misled the court about the now deceased’s sobriety. Accused also lied that she was carrying her baby at the material time. All these fabrications were not only designed to mask the truth but to create the impression that accused acted in her defence and that of the baby against the drunk aggressor when she picked the brick. The accused did not impress us as a truthful witness.

Her demeanour was poor. The truth of the matter is that accused retaliated in anger not that she acted in self- defence. The facts proved and the evidence we accept do not at all make the defence of self-defence available to the accused.

The last issue to consider is whether on the evidence on record accused is guilty of contravening s 47 (1) (b) of the code [*Cap 9:23*] or any other permissible verdict.

Our view is that we were not satisfied that it had been proved beyond reasonable doubt that when accused picked the brick and threw it at the now deceased she realised that her conduct may possibly result in the death of the now deceased. It would appear that accused acted in the heat of the moment. The now deceased was the aggressor and had plummeted her while seated. The urge to revenge clouded her judgment and as the now deceased walked away she picked the brick. In our view the accused acted negligently by failing to realise that death may result if she threw a brick to the now deceased aiming at the head carelessly with severe force.

We are of the view that accused cannot be properly convicted of contravening s 47 (1) of the code [*Cap 9:23*]. The evidence prove beyond reasonable doubt that accused is guilty of contravening s 49 of the code – the permissible verdict of culpable homicide.

Verdict

Guilty of contravening s 49 of the code [*Cap 9:23*] – culpable homicide.

*Prosecutor General's Office, State's Legal Practitioners
Sengwe Law Chambers, Accused's Legal Practitioners*