

STATE
versus
LYDIA NEZANDONYI

HIGH COURT OF ZIMBABWE
MUZENDA J
MUTARE, 11, 12, 17 and 19 February 2020

Criminal Trial

ASSESORS: 1. Mr Magorokosho
2. Mr Mudzinge

Ms TL Katsiru, for the State
V Chinzamba, for the Accused

MUZENDA J: The accused is facing a charge of Murder as defined in s 47 (1) (a) or (b) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] and the State alleges that on 24 February 2019, and at Zandoyi Village, Bvumbura, Chief Mutambara, Chimanimani in Manicaland, the accused unlawfully caused the death of Mejury Matiza by striking her several times on her body with a stick, intending to kill her or realising that there was a real risk or possibility that her continued conduct might cause the death continued to engage in that conduct despite the risk or possibility thereby causing injuries from which the said Mejury Matiza died. The accused pleaded Not Guilty to the charge.

In her defence outline, (Annexure “B”) she stated that she never assaulted the deceased either as alleged or at all. She denies causing the death of the deceased or act in a manner in which the deceased’s death could have been foreseeable. According to accused she saw deceased slip and fall hard on a rocky and stony surface at her homestead, thereafter she observed the deceased fall three more times. When deceased fell for the fourth time, accused went to her aid and carried deceased home. She further stated that she will dispute the evidence of Gracious Matiza, Godfrey and Joseph Matiza, in as far as it suggests that she assaulted the deceased and caused some visible injuries. She indicated that she will accept the rest of the State evidence subject to clarification of the pathological report only. She prayed for an acquittal.

The facts of the matter appear from the Summary of the State case, (Annexure “A”). Accused is aged 28 years, deceased was accused’s step daughter aged eleven (11) years. On 24 February 2019 at around 1230 hours, the accused was at home with her two step daughters and her son Leon. The accused sent Gracious, aged ten years, to a neighbour’s house. Accused picked a stick, called deceased into the bed-room house and whilst inside the house, assaulted deceased several times upon her body. Deceased exited the house crying holding her head and back. Accused sent deceased to go and fetch water. On her way to fetch water deceased was instructed to drive a beast away from the fields, on her way deceased fell down three times and the fourth time she became unconscious.

Accused took the deceased to their homestead, deceased was vomiting. The deceased’s father, Joseph Matiza, rushed to the scene from the garden when he heard deceased crying. Joseph enquired from the accused what had happened but accused person denied any knowledge as to what could have happened. Joseph took the deceased to Mutambara Mission Hospital whereupon arrival she was further referred to Mutare Provincial Hospital where she was admitted. On 9 March 2019 deceased died. A post-mortem by Dr Aisa Serranole concluded that the cause of death was due to brain haemorrhage, head contusion and head injury.

STATE CASE

The evidence of the State witnesses namely Temba Mutsakani Manzete, Caroline Kitsire, Innocent Zano, Shepherd Mataure, Catherine Mvundure, Blessing Zumba, Partson Mudimbwa and Christina Chikodza was upon the application of the State and consent of the defence counsel, admitted in Court in terms of s 314 of the Criminal Procedure and Evidence Act [Chapter 9:07].

The confirmed warned and cautioned statement of the accused was produced by consent and marked exh 1 the English version of the statement reads:-

“I understood the nature of the allegations being levelled against me by the State. I do not admit to the charge. On this day I sent the now deceased to the well to fetch some water. On the way I further instructed her to drive away some cattle so that they should not enter into the field. She then slipped and fell down as she ran to drive cattle. I approached her and she appeared to be very weak and I lifted her and ferried her home. I did not assault the now deceased. She was later taken by Joseph Matiza to hospital.”

The State called Gracious Matiza, as its first witness. Deceased was her elder sister, and accused is the witness’s step mother, to her (Gracious). Accused was in court because she assaulted Mejury. She did not know the offence which had been committed by Mejury that caused accused to assault her. What she recalls was that when she came back to her parent’s homestead from the errand she had been tasked by the accused, she heard accused calling the

now deceased for the latter to go into the house where accused was. This call to the deceased occurred after accused had picked a firewood stub. Deceased heeded to the call and went into the house. Later, the witness heard sounds of someone being beaten, she then observed deceased emerging from the house crying. She was holding a five litre plastic container in one of her hands. The witness heard accused ordering deceased to go and drive some cattle which were about to go into the field. She saw deceased obliging to the order but before deceased could reach where the cattle were, she fell, she saw her rising, stood up but fell again for the second time, stood up once again but fell for the third time, she managed to rise but fell for the fourth time at the fourth fall she never rose again. When she heard the deceased being assaulted by accused inside the house, she was standing at a distance of about fifteen metres from the house. She identified the firewood stub in court as the one which was used by accused to assault the deceased. She further told the court that when deceased fell accused was standing within the yard of the family's homestead. Accused later went to where deceased was lying, lifted her up, tried to console deceased and carried her to the house. She added that when deceased emerged from the house immediately after the assault she observed that deceased was touching the back of her head and also her back along the waist. She does not agree with the accused when the latter says she never assaulted the deceased.

Under cross-examination by Mr *Chinzamba*, the witness disputed that where deceased fell is a rocky or stony area. She also stated that she did not access the house or hut where deceased was being assaulted but she could hear deceased screaming whilst inside the house and simultaneously accused was hushing her to keep quiet. At the time of the assault the witness could see her uncle, Godfrey Matiza, seated at his homestead, but she would not know whether Godfrey could hear deceased screaming. She also repeated what she stated in her evidence in chief that when deceased emerged from the house where the assault took place she was holding her left side of the head and back; did so even at the time she went to fetch water and was still sobbing and at times cried loudly. She also confirmed that when deceased went to drive the cattle, she ran but still holding her back and waist. The witness elaborated that when deceased fell, she did so by the face and stomach, she never fell on her back. She also noted that when deceased emerged from the house after the assault she was drooling.

After accused lifted deceased the witness noted an injury on the left side of her belly region, Godfrey and Joseph also saw the injury. She also told the court that she is the one who identified the firewood stub, she found it near the outside fireplace, the stub had been left by the accused inside the house, she had previously seen the stick before the assault of the

deceased when accused was standing at the door of her house. The witness was also questioned about the relationship of the deceased and accused. She told the court that the relationship between the two had developed into acrimony of late when she saw accused denying deceased food and on the other occasion, assaulted her. The witness had since left the parental homestead and gone to stay with an aunt in Chegutu. She concluded her cross-examination answers by stating that from the first fall to the point where she finally collapsed without being able to rise again was a short distance.

The State then called Godfrey Matiza as a witness. He is the young brother to deceased's father. On the fateful day he was at his homestead 40-50, metres away from the scene of the alleged assault where he was shelling maize. He later saw deceased coming towards his homestead crying. He remonstrated her against unexplained crying and asked her why she was crying, she did not tell him. He observed her walking with one hand holding her hand on the left hand side, he saw her walking for a short distance and fell, he was at a distance of 4-5 metres from where deceased was. He later heard accused ordering deceased to go and drive some cattle which were about to go into a nearby maize crop field, as she moved towards that field, she fell again.

She placed the water containers down and staggered going towards where the cattle were. She called the name of the lead ox three times after the call, she fell again. At that stage accused walked through a pathway which has stones or rocks on either side going to where deceased was lying. The witness confirmed that there are sparsely distributed stones around the area but stated that the deceased fell headlong and at the place she fell for the second time the area is grassy, the second place of fall was 6 metres away from the first place she had fallen. He observed the accused lifting deceased and taking her to the house. She placed deceased at a place where accused normally conducted her prayers and accused started praying. When the witness finally followed accused to the latter's homestead, he found deceased lying but observed drool oozing from deceased's mouth and nostrils. The witness assisted deceased's father to look for transport to ferry deceased to Mutambara Hospital. He further told the court that he noted a fresh wound close to deceased's rib cage area when the father was changing her clothes in preparation to take deceased to the hospital. To the witness, the relationship between deceased and accused was cordial.

Under cross-examination he told the court that because of the distance between his brother's and his homestead he did perceive deceased screaming. When deceased approached the witness's homestead, he saw Gracious standing by the wreck built for plates, outside the

house. Although the witness confirmed that where deceased fell there is a stony surface, he did not see deceased's head hitting the ground, nor upon observing her did he discern any visible injuries on the head. He did not ask the accused whether she had assaulted the deceased, he only got the information from Gracious. He identified the stick and handed it to the police. The State then called Joseph Matiza, deceased's father. The relationship between deceased and accused used to be very cordial but as time moved on it became unfriendly.

On the day in question he recalled being summoned by accused through deceased who was sent to call the father who was at the garden. Upon arriving at the homestead he was told by the accused that deceased had caused his son Leon to fall. The accused did not know what deceased had done to her son Leon. After the briefing, the witness went back to the garden barely had he settled at the garden did the witness hear deceased crying he called out to accused to establish what had caused deceased to scream, he did not get a response from the accused, the witness resolved to go back to the homestead to find out. He found Gracious standing near the wreck for the plates and observed accused giving order to deceased to drive away the beasts. He then saw the accused carrying the deceased in her arms. He asked the accused as to what had happened to the deceased and accused told him that she knew nothing that could have happened to the deceased that led to the condition deceased was then in.

At the time deceased was handed over to the witness, her blouse was unravelled, it exposed a fresh injury just below her abdomen, above the hip. The witness asked accused whether she had not done anything to the deceased but she told him that she has not done anything to her. He kept on asking accused that question because earlier on accused had told him what deceased had done to Leon. He was asked to describe the terrain where the deceased fell and he told the court that from his homestead going towards Godfrey Matiza's place, there is a lawn surface but on another side there are some gravel or stones or erosion brought about by cyclone Idai.

Under cross-examination by defence counsel, the witness stated that from the date he took deceased to hospital he was seeing accused after a long period of time. After the death of his daughter he asked accused to go and stay with her parents. He was asked about the injury he saw on the body of the deceased, he remained adamant that he saw it. Before he left the garden for the second time, he heard deceased crying, from a distance he saw her coming out of the house/ hut, stood between two huts where there was a wreck and when he returned to the homestead he was surprised to see her emaciated compared to the condition she had been. Before the alleged assault, deceased was healthy.

The State then called Assistant Inspector Herbert Chari. His evidence is that the place where deceased stayed is stony there are both big and small stones. Under cross-examination he stated that he saw the place where deceased fell, if one hits against such surface one may sustain injuries. However the place where deceased finally fell was patchy grass. The stick allegedly used to assault the now deceased was given to the police by Gracious.

The State then called Constable Tinashe Chikomo, the investigating officer in this matter. He drew the sketch plan which was produced by consent and marked exh number 2. He also produced the stub, exh number 3, the certificate of weight, exh number 4. He confirmed that the scene of the crime is rocky. The rest of his evidence is what he heard from State witnesses

The last witness to be called by the State was Dr Blessing Zamba, a medical doctor. He was called specifically to assist the court in explaining the medical terms of the post mortem. The post mortem showed that there were no visible wounds or injuries. The skull indicated that there were no fractures but the left side of the brain showed that there was significant internal bleeding, there was clotted blood on the left side covering the entire side of the left side, the brain was swollen, the lungs were congested because of the nature of the injuries on the head, the head was hit against a hard object resulting in severe brain oedema. For one to sustain that injury, severe force could have been used. The post mortem report was produced as exh number 5.

Under cross examination, the doctor was asked if the stick, exh 3, could have caused the injuries, he answered in the affirmative. He further explained that depending on the degree of force used by the assailant and also the vulnerability of the victim, yes the stub could have caused such an injury on the head. The haematoma was located on the left hand side of the head and a blunt object cannot be ruled out. He added that if a skull could have hit on a sharp edged stone that sharp object could have ruptured the skull.

After the evidence of the medical doctor, the State closed its case. The defence counsel applied for discharge of the accused at the close of the State case. He submitted that the State had failed to lead evidence which is reliable. The State witnesses were in sufficient inconsistent and contradictory. The State failed to prove the cause of death of the deceased. The State failed to call a pathologist who should have discounted the other possible cause of death like falling on a stony area, the State thus left a number of medical questions hanging. The defence also submitted that the State witnesses were contradictory on the aspect of whether there were visible injuries or not on the deceased. Also there was conflicting evidence on where the stub

was recovered and by whom. The defence also attacked the State on whether deceased fell on a rocky surface or not. The defence prayed that the accused be discharged at the close of the State case.

In response the State submitted an application of this nature, the test is whether the State had managed to prove a prima facie case for an accused to answer, not proof beyond a reasonable doubt. It submitted that Gracious Matiza saw accused calling deceased into the house holding a stub and heard deceased being assaulted and that she was screaming. Godfrey Matiza saw the deceased crying falling down staggering and falling down again. The doctor confirmed that a blunt force trauma was used to inflict the injury and a stick produced in court could have caused such an injury on an eleven (11) year old girl. The State contended that the accused had a case to answer.

After the application and State response I dismissed the application and indicated that my reasons for such a dismissal of the application would follow I ordered that accused be put on her defence, she had a case to answer.

The accused adopted her defence outline, confirmed warned and cautioned statement to form the basis of her defence. She denies assaulting the deceased in any way. She admitted most of the State witnesses' evidence from the falling of Leon, her summoning of the husband from the garden, the return of the husband from the garden, the presence of Gracious at the scene, the sending of the deceased to fetch water, the order to drive the cattle and the falling of the deceased on four occasions. What she disputes is the assaulting of the deceased and the knowledge of the stick allegedly used on the date in question to assault the deceased. The accused did not put a spirited challenge to the evidence that deceased emerged from the house where she was crying and was seen by Godfrey Matiza crying. The accused's counsel never challenged this crucial piece of evidence, the question that remains to be probed is why was the deceased crying? The next question for this court to decide is whether this court to decide is whether the accused assaulted the deceased leading to the injuries that ultimately caused deceased's death?

APPLICATION FOR DISCHARGE OF ACCUSED AT THE CLOSE OF STATE CASE

The court gave *extempo* ruling dismissing the application for discharge at the close of the State case and indicated that full reasons for such a dismissal will be provided in the main judgment. These are they.

In the matter of *S v Kachipare*¹ it was held²

“the wording of s 198 (3) of the Criminal Procedure and Evidence Act [Chapter 9:07] made it clear that where at the end of the State case, there is no evidence upon which a reasonable court might convict, the court has no discretion: it must discharge the accused. The court may not exercise its discretion against the accused if it has reason to suppose that the inadequate State evidence might be bolstered by the defence evidence. The evidence in this case was purely circumstantial and was not evidence upon which a reasonable man might draw inference suggested by the State. The appellant should have been discharged at that stage of the trial.”

In the matter of *S v Morgan Richard Tsvangirai and Others*³ it was held:

“In terms of s 198 (3) of the Criminal Procedure and Evidence Act, where at the end of the State case the court considers that there is no evidence that the accused committed the offence, it has no discretion but to acquit.

In particular, the court must discharge the accused at the close of the case for the prosecution where:

- (a) there is no evidence to prove an essential element of the offence
- (b) there is no evidence on which a reasonable court acting carefully, might properly convict
- (c) the evidence adduced on behalf of the State is so manifestly unreliable that no reasonable court could safely act on it.

Whilst it is settled that a court must acquit at the end of the State case where the evidence of the prosecution witnesses has been so manifestly unreliable that no reasonable tribunal could safely convict on it, such cases will be rare and would occur only in most exceptional cases where the witnesses' credibility is so utterly destroyed that no part of his material evidence can possibly be believable.”⁴

Accused was seen by Gracious Matiza holding a firewood stub standing at the entrance of her house, called deceased into the house, was heard by Gracious assaulting deceased, deceased was heard screaming obviously in pain during the assault and when deceased emerged from the house where the assault was taking place she was crying holding her head and her back. Immediately thereafter she was ordered to go and fetch water. On her way to fetch water she fell, rose up, staggered and fell again. This chain of events was chronicled by Gracious Matiza. In the court's view her evidence was believable and consistent. Indeed the State had established a *prima facie* case for the accused to answer. It was so ordered.

¹ 1998 (2) ZLR 271 (S)

² At 271 G-H per GUBBAY CJ (as he then was)

³ 2003 (2) ZLR 88 (H) per GARWE J (as he then was)

⁴ See also *Attorney-General v Bvuma and Ano*. 1987 (2) ZLR 96 (S)

AG v Mzizi 1991 (1) ZLR 321 (S)

AG v Tarwirei 1997 (2) ZLR 75 (S)

WHETHER ACCUSED ASSAULTED THE DECEASED

Joseph Matiza, deceased's biological father during his testimony provided very essential information that explains the reaction of the accused. On that day the accused threatened to assault Leon with a stick. Leon ran towards deceased presumably seeking refuge or protection, the deceased evaded Leon's thrust and fell. The accused was not happy about the conduct of the deceased. She sent deceased to go and call Joseph, the father who was attending to his garden. Joseph heeded and went back to the homestead. He was told about the fall of Leon due to the conduct of the deceased. Joseph did not reprimand the deceased or comment on that. He went back to the garden, after a while Joseph heard deceased screaming from the direction of the homestead. He immediately went back to find out the cause of the crying. He tried to call out accused's name to find out what was happening but he did not get a response.

Upon arrival at the homestead he observed Gracious standing at the wreck for plates. He then saw accused carrying the deceased in her arms. From the foregoing chronicle of events we conclude that the accused was incensed by the fall of Leon and to her, deceased had caused accused's son to fall. When she saw that the father had not punished the deceased she decided to punish deceased by assaulting her. Gracious Matiza, though of a tender age of eleven years, appeared extra-ordinarily calm to a rigorous cross-examination by the defence but she did not shake or prevaricate nor contradict herself. Her story is very clear: upon her return from where she had been sent by the accused, she saw accused calling deceased into the house. Accused was holding a stick in her hand. The deceased entered the house and immediately thereafter Gracious heard the sound of beating, contemporaneously deceased screamed and accused was telling her to keep quiet.

Later Gracious saw deceased emerging from the house holding her head and back part of her waist crying. The deceased was sent to go and fetch water. She obliged albeit in pain and still crying. Gracious saw her falling on four occasions, the four occasions relating to deceased's fall are confirmed by accused in her defence outline. At the time deceased was sent to go and fetch water, she was weak and at one occasion staggered after the first fall. The defence contend that there was conflicting evidence on the part of the State witnesses, but the accused seem to agree unreservedly on what transpired from the time deceased left her (accused's) house after the assault.

The court is conscious to the fact that there is a single witness pertaining to what transpired at the house where deceased was assaulted.

In the matter of *David Worswick v the State*⁵ the then Learned Chief Justice DUMBUTSHENA held that:

“Whenever the court considers and assesses the evidence of a single witness, its first duty is to examine his evidence critically. In this regard it is salutary to pay attention to what DIEMONT JA, said in *S v Sauls and Ors*⁶

“There is no rule of thumb test or formula to apply when it comes to a consideration of the credibility of the single witness. The trial judge will weigh his evidence will consider its merits and demerits and having done so, will decide whether its trustworthy and whether despite the fact that there are shortcomings or defects or contradiction in the testimony, he is satisfied that the truth has been told. The cautionary rule referred to by DE VILLIERS JP in 1932 may be a guide to a right decision but it does not mean “the appeal must succeed if any criticism, however slender of the witnesses’ evidence were well founded” (per SCHREINER JA in *R v NHLAPO*⁷) it has been said, more than once that the exercise of caution must not be allowed to displace the exercise of common sense.”

In the matter of *SFW Group & Ano v Martel & Another*⁸ the technique generally employed by these courts in factual disputes where there are two irreconcilable versions on the evidence, may be summarised as follows:

“To come to a conclusion on the disputed issues, a court must make findings on:

- (a) the credibility of the witnesses. This depends on the court’s impression which in turn depends on a variety of subsidiary factors such as:-
 - (i) the witness candour and demeanour in the witness box.
 - (ii) his bias, latent and blatant
 - (iii) internal contradictions in his evidence
 - (iv) external contradictions with what was pleaded or put on his behalf or with established fact or with his own extra-curial statements or actions.
 - (v) the probability or improbability of particular aspects of his version, and
 - (vi) the calibre and cogency of his performance compared to that of other witnesses’ testimony about the same incident or events.
- (b) the reliability of the witnesses: this depends apart from the factors mentioned under (a) (ii), (iv) and (v) above. On (i) the opportunities the witness concerned had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof.
- (c) the probabilities: this necessitates an analysis and evaluation of the probability or improbability of each party’s version. On each of the disputed issues.

In the light of its assessment of (a), (b) and (c), the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it. The hard case presumably rarely occurs when a court’s credibility findings compel it in one direction and its evaluation of general probabilities in another. The more convincing the credibility findings the less convincing will be the evaluation of general probabilities. But when all factors are equipoised, probabilities prevail.”

⁵ SC 27/88

⁶ 1981 (3) SA 172 (AD) at 180 E-G

⁷ AD 10 November 1952, quoted in *R v Bellingham* 1955 (2) SA 566 (A) at 569

⁸ 2003 (1) SA 11 (SCA)

No one saw the accused assaulting the deceased and as such the court has to rely on circumstantial evidence in this matter. In the matter *S v Reddy and Others*⁹ the South African Appeal outlines the proper approach in circumstantial evidence as follows:

“In assessing circumstantial evidence one needs to be careful not to approach it upon a piecemeal basis and to subject each individual piece of evidence to a consideration of whether it excludes the reasonable possibility that the explanation given by an accused is true. It is only then that one can apply the oft quoted dictum in *R v Blom*¹⁰ where reference is made to two cardinal rules of logic: firstly, that the inference sought to be drawn must be consistent with all the proved facts and secondly, that the proved facts should be such that they exclude every reasonable inference from them, save the one sought to be drawn. The fact that a number of inferences can be drawn from a certain fact taken in isolation, does not mean that in every case the State, in order to discharge the onus which rests upon it, is obliged to indulge in conjecture and find an answer to every possible inference that ingenuity may suggest any more than the court is called on to seek speculative explanations for conduct which on the face of it is incriminating.”

Having considered the facts and the law in this case we have come to the conclusion that accused’s version that deceased sustained the injuries after falling on a stony area is improbable and not proved at all. The mere presence of the rocky or stony surface does not necessarily mean that the deceased fell on the stone and got injured. The deceased was assaulted by the accused and when she fell she had been already injured in the head. The injuries detected by the pathologist were caused by the accused who assaulted the deceased on the head and back.

The accused’s intention was to chastise the deceased. She however exerted great force in so doing. We are unable to find accused guilty of Murder in these circumstances. The accused negligently caused the death of Merjury Matiza, she failed to realise that by assaulting deceased on the head using a blunt object could result in her death. Accordingly the accused is found guilty of contravening s 49 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*], Culpable Homicide and Not Guilty of Murder.

Sentence

Accused is a female first offender who was a step mother to the deceased. In arriving at an appropriate sentence the court will factor in both the mitigatory and aggravating features in this case. The sentence provided for in s 49 of the code stretches from life imprisonment down to a fine exceeding level fourteen. Such a sentence shows that the law regards a conviction of culpable homicide as a serious offence. Deceased collapsed four times showing

⁹ 1996 (2) SACR 1 (A)

¹⁰ 1939 AD 188 at 202-3

that she was in great pain and when she fell on the 4th occasion she never regained consciousness till she passed on.

The nature of the head injuries also show that the force used by the accused was severe. Efforts must be made to guard against domestic violence more so against young children, worse if such violence ends up in a loss of life of a young girl. Children are the future of the nation and life must not be lost unnecessarily as in this case.

Accordingly, accused is sentenced as follows:

4 years imprisonment of which 1 year imprisonment is suspended for 5 years on condition accused is not convicted of an offence involving violence to the person of another and to which accused will be sentenced to imprisonment without an option of a fine.

National Prosecuting Authority, State's legal practitioners
Mugadza Chinzamba & Partners, accused's legal practitioners- Pro-Deo