

THE STATE
versus
VOINARD MUTARA

HIGH COURT OF ZIMBABWE
HUNGWE J
MUTARE, 28 October and 4 November 2014

Assessors - Mr Magorogosho and Mr Chagonda

Trial

Ms C. Sungai, for the State
D. Tandiri, for the defendant

HUNGWE J: The accused faces a charge of murder. The charge arises from the events which took place on the night of 17 December 2005 where it is alleged that the accused, with intent to kill, struck the deceased with a log on the head and tied a rope around his neck and hung him from the rope tied to a beam in a granary thereby causing injuries from which the deceased Martin Chizoma died.

What happened on this fateful night is known by the accused, her daughter Kudzai Chizema and another young boy, Prince Paul Mabika. That case was investigated soon after it occurred but was closed as a cold case file as there were no leads then as to who was responsible for the death of the deceased. Four years later the matter unravelled and took a strange twist. Accused's daughter, Kudzai disclosed to her fiancé what she knew about the matter. This led ultimately to the accused being summoned by the village Headman and the matter was referred to the Chief. Police then got wind of it and revisited their cold case file leading to the present proceedings; some seven years 10 months later.

At the outset I must summarise the evidence of which is common cause that was admitted on the record in terms of s 314(1) of the Criminal Procedure and Evidence Act, [Cap 9:07]. This is the evidence of four State witnesses namely, the

- (1) Prince Paul Mabika

- (2) Ziriri Mawire
- (3) Obert Chizema and
- (4) Columbia Musvaire

- (1) The evidence which is unchallenged

Prince Paul Mabika

Prince Paul Mabika was 5 years old in December 2005. On the fateful night he had been sleeping in the same room when the deceased was called by the accused. He heard it and noticed the deceased leave their room. He drifted back into slumber. When he later woke up, he noticed someone hanging up the deceased's body into the beam to their room with a rope. It was dark. He did not identify who this person was. The witness was ordered to cover up his head. The next morning the accused called out the deceased. She got no response and opened their bedroom and started weeping.

- (2) Ziriri Mawire is the Headman

On 18 December 2005 he was advised that the deceased had committed suicide. He noticed that the deceased had a deep cut on the back of his head. The legs of the deceased almost touched the floor as he dangled down the rope, which rope had blood up to the end which was tied to the beam. Four years later Kudzai Chizema approached him stating that she wished to give more information about how the deceased died those four years ago. He summoned his villagers to witness Kudzai's confession. Kudzai then revealed the role the accused played in the death of the deceased stating that the accused had warned her against disclosing the truth. He summoned the accused who confirmed to him the truthfulness of what Kudzai had narrated regarding the deceased's death. He referred the matter to Chief Nyashanu's Court.

- (3) Obert Chizema is the accused's husband. When the deceased died he was in Harare. He was called home on 18 December 2005. Upon arrival he observed that the deceased was hanging from a beam inside the granary hut. He observed the wound on the deceased's head but there was no blood on the floor. He observed that there was a blood spoor going to the granary hut and near a nearby stream. He showed these to the police who arrived at the scene. This was recorded. He was present when Ziriri Mawire summoned villagers to his court where Kudzai, his daughter, made disclosures which implicated his wife in the death of the deceased.

(4) Columbia Masvaire is the police officer who attended the scene on 18 December 2005. He had recorded all his observation which I have referred to above but decided to close the file as it went cold. However, in, November 2010 he got information implicating the accused in the murder of the deceased. He reopened his cold case file and recorded a statement from the accused after the accused had been properly warned and cautioned.

This much is not in dispute.

The accused gave evidence in her own defence. Whilst not disputing the factual averments contained in the summary of the state case, she denied that she, when she assaulted the accused, intended to kill him. She gave the following explanation.

When she came from the fields where she spent her day, she smelt rogor, a pesticide used by cotton farmers, as soon as she was in the vicinity of her kitchen. It had been raining that day. She got outside the kitchen and discovered that the source of the smell was water in the bucket which, by then, had discoloured. She was shocked by the discovery. She feared for the safety of her young children and she called them. They were all present and well. The deceased who had been herding the cattle was not present. Only he and herself knew where this pesticide was kept. She made inquiries with the other children. The information she gathered convinced her that the deceased was responsible for the mischief.

When it was supper time the deceased did not join the other children as he remained at the cattle kraal. This further confirmed her suspicion. It angered her too.

She had raised the deceased from a tender age of 18 months till then, when he was 17 years. She retired to her bedroom while eager to take the deceased to task over this incident.

Later she heard the deceased coming into the kitchen for his evening meal. She heard him leave for the granary where he slept. She bided her time.

Around 1 am, she resolved to confront him. She approached the granary which the boys used as a bedroom. She called him to come out. When he come out the deceased tried to jump and run away. She struck him with the log from a wood stack. He fell but quickly got up. They struggled. She said she feared that he might over power her so she pushed him away. He fell down hitting against stones. She struck him again.

This time he did not get up nor did he shout back at her as he had been doing all along. She said she had used all her might as she feared he would retaliate with serious consequences for her.

She realised that accused was bleeding profusely and dragged him into the kitchen. She panicked. She went out to fetch water which she poured over him in an attempt to revive him. He lay motionless. She went into a frenzy of panick.

Kudzai was at hand. She asked her to help lift up the deceased. She refused. She then asked her to bring a rope so that she uses it to drag him into the granary. Kudzai obliged. She tied the deceased by his hands and pulled him. The accused ordered Kudzai to turn the drum which had an open top, upside down. She did so.

When she could not pull him using the rope, she had lifted him by the arm pits and dragged her to the granary. She detected some warmth in his armpits but was under the impression that he was now dead.

In order to cover up for the crime she had committed she decided to tie the deceased with a rope around the neck; hoist him onto the beam inside the granary using the drum. She removed the drum so that it would appear as if the deceased had committed suicide.

After she had tied him but before hoisting the deceased, she removed his wet clothing and attired him in fresh dry clothes. She then pulled down the rope. It tightened around the deceased's neck. She removed the drum and left the room.

Towards dawn she got up went out and called the deceased. She then opened the door and began to weep. She sent Kudzai to her uncle Ziriri to break the news of the deceased having committed suicide.

Police attended the scene.

Later she learnt that word was dosing the rounds that she killed the deceased. When she was eventually summoned by the Headman Ziriri she made a clean breast of the whole grizzly affair.

This evidence was at slight variance with the evidence led form Kudzai Chizema.

We noted that Kudzai testified to hearing sounds of someone being assaulted inside the kitchen.

Kudzai's version was that after the deceased had remained at the cattle kraal they had supper and retired to bed. Later the deceased came, had his supper and went to sleep.

The accused got out after midnight and called the deceased. The deceased and accused had an exchange. She got out and saw the accused come into the house holding the deceased by the collar. She asked the accused what was going on. The accused referred her to the deceased. When she asked the deceased he referred her back to the accused.

The accused asked for a rope. She gave her and the accused took the deceased into the kitchen.

Later after an exchange she heard the sound of someone being assaulted. Later she noticed the accused help the deceased walk to the granary. The deceased fell at the steps to the granary.

The accused called her to come and take the children out of the granary into the main house. She did so. The accused told her the deceased was dead.

She was again called to help lift the deceased up onto the drum. She did.

The accused then tied a rope around the deceased's neck, removed his wet clothes which were blood soaked and then lifted the deceased up using the rope which she tied onto the beam.

They left the deceased. Later the accused washed the deceased's blood stained clothes that night.

She then sent him to inform the kraal Head/Headman of the death by suicide of the deceased. She did.

She told the court that as time passed she realised she could not keep this event secret as it was criminal. She confided her fiancé whose relatives arranged for her to seek audience with the Headman. This was four years later.

We noted that Kudzai was testifying against her own mother. It may be the reason why she was unable to give better detail regarding what took place outside the granary and inside the kitchen.

But there is another possible reason. The events took place at the dead of night. She only got close contact with both the accused and the deceased when first she gave the accused the rope whilst the accused held the deceased by the collar and the deceased was alive and later when she was asked to help lift up the deceased to get on top of the drum.

She told the court that the assault took place in the kitchen whilst the accused herself says it took place at the entrance to the granary when she used a sharp edged 1½ metre log of +/- 4cm diameter to strike him at the back of the head.

Because Kudzai could not give testimony regarding the actual assault upon the deceased the court is left with no choice but to go by what the accused herself told the court.

She destroyed obvious evidence the same night, including the blood stained clothes, the rogor smelling bucket and so too the log.

We know from the medical report by Dr Masokovere that the deceased had bruises on his face, forehead as well as a deep cut in the back of the head.

We also know that at the time of the examination the rope was still tied tightly around his neck. The tongue protruded out of the mouth.

Death was due to asphyxiation.

The issue for decision is whether on these facts the accused ought to be found guilty of murder with actual intent as contended by the State.

Murder consists in the intentional and unlawful killing of another person.

There are two forms of intention (or *mens rea*.)

1. The first type is actual intention that is where the accused desires the death of the deceased. In other words, the accused sets out to plan to kill thereby making the death of the deceased his aim and object.

The second type is legal intention i.e. where the accused does not mean to bring about the death of the deceased but continues to engage in conduct or activity after he foresees that there is a real risk that the activity will result in the death of a person.

Three elements constitute legal intention:-

- a) subjective foresight;
- b) of the real possibility (not probability) of death;
- c) recklessness. (section 13 of the Criminal Law (Codification & Reform) Act [Cap 9:23].

The accused's defence was that when she committed the act constituting this crime, she was exercising her parental authority of chastisement. Put in another way the argument here was that as a parent to the deceased she was entitled to inflict moderate corporal punishment on an errant child. As such she acted negligently by exceeding the bounds of private parental chastisement. Therefore, she denied any intention to kill but admitted causing the death of the child negligently.

This proposition is so far divorced from the facts that Mr Tandiri did not even try to make an effort to apply the facts of the case to the defence so proposed.

First, private chastisement implies an application of moderate corporate punishment. The present case fails on the first hurdle in that by her own admission, the accused picked a log at random whose length was approximated by herself at 1,5 meters and diameter as wide as her own hand. It had a sharp edge since, she said this was a split-up firewood log.

This explains the deep cut it left on the head.

This weapon of choice by the accused cannot by any standard be classified as a weapon for the administration of corporal punishment under the rubric of parental chastisement.

Secondly, the timing of the confrontation, at the dead of night negates any claim that this was a *bona fide* disciplinary proceeding. Why would she confront a 17 years old boy at midnight armed with a log?

Thirdly, her action upon realising the effect of her attack upon the deceased are inconsistent with a parent who had exceeded the bounds of reasonable and moderate chastisement.

A normal parent acting in good faith and reasonably would have sought help immediately rather than exacerbate the desperate condition of her victim by literally leaving him to hang “high and dry”.

In our view there is no merit in the submission. We reject it.

We however, found and agree, that there was no preconceived plan to kill the deceased. In short the facts do not show that there could have been any motive to kill the deceased.

However, by embarking upon a course of action which included picking up a log to use, should he attempt to flee, and actually using it to strike the back of the deceased’s head, the accused must have subjectively foreseen and therefore fore saw the real possibility that death of the deceased may result if she persisted in her conduct.

Notwithstanding the subjective foresight of the possibility of death she proceeded with her course of conduct and struck the deceased on the head, not once, but twice, reckless whether or not death resulted from this action.

In our view she had the legal intention required for the charge of murder.

The facts show it.

Even when she realised that the deceased had lost consciousness, she went on to secure his death by tying a rope tightly around the neck and leaving him. Her explanation is that she by then believed the deceased to be dead.

That does not help her at all.

It would be taking an unrealistic view of this case to say that because the deceased was not dead but the accused mistakenly believed him to be dead, so we ought to give her credit by reducing the charge to culpable homicide.

There is a line of cases that discourages this line of reasoning.

(See *S v Mtombeni* 1992 (2) ZLR 104 and the cases there are cited)

In our view the accused ought to be found guilty of murder with constructive intent.

This will be our verdict.

National Prosecuting Authority, State's Legal Practitioners
Tandiri Law Chambers, Defendant's Legal Practitioners