

THE STATE
versus
GRIFFEN KAVHURA

HIGH COURT OF ZIMBABWE
HUNGWE J
MUTARE, 27 October 2014 and 7 November 2014

Criminal Trial

Mrs J Matsikidze, for the appellant
T. Bvuma, for the defendant

HUNGWE J: The accused pleaded not guilty to a charge of murder as defined in s 47(1) of the Criminal Law (Codification and Reform) Act [*Cap 9:23*]. However, at the opening of his trial the accused made certain admission of fact as a result of which the following facts became common cause.

1. On 30 November 2013 the accused, the deceased and her daughter (2years) left home to seek the services of a spiritual healer in Mutambirwa Village.
2. On their way back an argument erupted over the deceased's proposal that the two of them go for voluntary HIV testing.
3. In anger the accused picked up a log and commenced a vicious assault upon his wife. He struck her indiscriminately all over her body but particularly the head.
4. She lost consciousness and he left her for dead. The 2 year old was left beside her mother.
5. On the following day the two were discovered by villages and conveyed to hospital. She later died at Parirenyatwa Hospital. A post mortem report was carried out by Dr Mafunda.
6. The accused gave a warned and cautioned statement which was duly confirmed before a magistrate. He also made indications during which the murder weapon was found, identified and kept.

7. The accused did not help his wife but left her for dead. He did not report his dark misdeed to the police.
8. The cause of death was established to be brain oedema secondary to mechanical asphyxiation of upper air passages as a result of blunt trauma.

The above findings of fact are a result of both the facts admitted in terms of s 314 of the Criminal Procedure and Evidence Act, [*Cap 9:07*] as well as the documentary evidence admitted into evidence by consent of the defence. The documentary evidence include the post mortem report, the sketch plan, the worked and cautioned statement, the certificate of weight of the murder weapons, (the 2 logs), and; finally the photo album of the deceased showing the various steps of the examination with particular focus on the injuries visible to the eyes.

The defence put forward by the accused was that whilst admitting the fact of assault, he claimed that he had been provoked by the deceased just therefore he assaulted her.

The evidence in this case was given by George Mutambirwa. He knows the accused but not the deceased. On 30 November 2013 he saw accused, deceased and a child. It was around 1700 hours. They were tussling or struggling; the accused was dragging the deceased. He did not intervene as he believed this was a minor altercation between spouses. The next day he learnt that a female adult, who turned out to be the deceased had been found heavily assaulted, in the bush.

When he proceeded to the clinic where she had been conveyed, he recognised the deceased as the same woman the accused, a local, had been dragging. She had a deep cut above the left eye.

A description of the accused and the clothes he wore were given to special Constabulary Cephon Change who managed to arrest the accused on 4 December 2013.

In his warned and cautioned statement to the police recorded on 4 December 2013 the accused stated that they had gone to “see” a prophetess in Mutambirwa Village. He went on;

“On our way back at around 12 midday, Beauty Majazi suggested that we should go for HIV testing and I agreed. She also said I once suffered from herpes which affected me on the eye. These words did not go down well with me, therefore we continued to make an altercation until I picked up a log which was nearby and struck her thrice on the head and she fell down. She started bleeding through the mouth. I left her prone like that. I then started walking without knowing where I was going since I was mentally confused.”

In court he gave a different story. He said that the deceased had confessed to having infected him with HIV. He had, however, forgiven her. However, what had provoked him was that on their way back she had then accused him of having infected her with HIV as he had suffered from herpes. This angered him and in 10 seconds he had unleashed the savage attack.

He had departed from his earlier warned and cautioned statement. In our assessment, the accused was less than truthful. He was clearly not honest regarding the real reason behind the assault. The two versions he gave are contradictory and therefore this court is left wondering where the truth lies. It is not what he claims it is. The probabilities do not support his claims.

On a charge of murder where the defence of provocation has been raised, the State must, in proving constructive intent, show that the accused must have appreciated the consequences of what he was doing in the sense that he appreciated the result of his actions.

This court has to decide whether the State has proved its case against the accused.

The first stage in the State case is to satisfy this court beyond a reasonable doubt that the accused had an intent to kill either in the sense that he positively intended to kill the deceased and was quite reckless as to whether death did result.

Ms *Matsikidze* argued that the accused knew what he was doing when he took the stick or log and struck the first blow to the deceased's head, then the second and the third. He knew that he was hitting the deceased about the head with a log. From this knowledge an inference must be drawn that he intended to kill the deceased in the sense of constructive intent.

Whatever provocation was received did not, in our view, reduce the crime of murder to culpable homicide.

Mr Bvuma conceded that he had not established the defence of provocation if the standard test for the defence is used.

The facts upon which the defence is based, need to be viewed objectively when considering whether despite the established intent to kill, he did so after losing self - control as a result of the provocation. The question to ask is whether a reasonable person in the circumstances in which the accused found himself, would have lost his self - control and decide whether when faced with that degree of provocation, would have acted as accused did.

In our view the facts do not show that the accused was so provoked as to lose his self-control.

According to the accused upon the deceased confessing to infecting him with HIV, he had forgiven her. They had both left the prophetess's home without incident. They had discussed the issue raised by the deceased concerning the necessity to go for voluntary testing as they walked along. Exactly how he got so provoked as to lose self - control such as to hold that in assaulting the deceased he acted in the heat of the moment is not explained by him. We found therefore that he was angry but not provoked to the extent of losing self-control. In short we reject his defence as not established.

We therefore found him guilty of murder with constructive intent as defined in s 47 (1) (b) of the Criminal Code.

Bvuma & Associates, Accused's Legal Practitioners
Prosecutor-General, Defendant's Legal Practitioners