

THE STATE
versus
MIRIAM SANYANGA

HIGH COURT OF ZIMBABWE
HUNGWE J
MUTARE, 30 October 2015

Assessors 1. Mr Rajah
 2. Mr Chipere

Criminal Trial

M Musarurwa, for the state
Ms M Simango, for the defence

HUNGWE J: The accused, a 40 year old widow, faces a charge of murder it being alleged that on 2 April 2013 at Minihaha, Nyakupinga Resettlement Scheme, Nyanga, with actual intent to kill or realising the real risk or possibility that death may result, struck John Muchiriwesi, (56) with an unknown object and a stick thereby inflicting injuries from which the said John Muchiriwesi died.

In her defence outline she denies that her conduct led to the death of the deceased. She states that on that day, the deceased's cattle strayed at her field and destroyed her maize. She had approached the deceased and invited him to inspect the damage caused by his cattle. He suggested that he could, after the inspection, take the matter up with his sister who was the owner of the cattle. She went to his residence but was further upset when she learned that the deceased's sister, Felistas Mawodza ("Felistas") was not at home. She then confronted him as to why he had had lied about the matter of his sister. He became abusive. In the heat of the moment she had took a peach tree stick and struck him twice on his legs. On that day, she says she noticed that the deceased had a wound on the back of his head but since he was always with one kind of wound or the other, she did not bother to ask him how had sustained this particular one. He drove his cattle away.

In court she repeated in her evidence-in-chief, a version similar to the above. She however added that she had not boasted Cyril Rumhungwe (“Cyril”) about the severe beating she had meted on the deceased subsequent to the assault. Instead, she said that she had told him that she had struck the deceased twice on his legs with a stick as she had been upset by the negligence the deceased displayed with his cattle which negligence resulted in the loss of her maize at the fields.

The evidence led from the state witnesses showed that the deceased had been badly assaulted such that he had been helped to a neighbour’s residence by well-wisher on 3 April 2013. This well-wisher, Grace Saburi, had found the deceased unable to walk home. She helped him to get to the Chihwayi homestead where he spent the night. On 3 April 2013 Cyril was in his field when he noticed the accused pass by without exchanging pleasantries. He asked her why she was in such a foul mood. The accused told him that she was upset by the incident in which the deceased’s cattle had destroyed her maize. As a result, she said, she had assaulted the deceased.

On 4 April 2013, acting upon this information Cyril decided to call upon the deceased’s residence to check on him. He did not find him there but at the neighbouring Chihwayi’s residence. He was not well. He decided to bath him. As he did so, he observed a head injury. Upon asking how he had been so injured, the deceased advised him that the accused had assaulted him causing that injury. Cyril phoned the deceased’s sister, one Felistas and advised her that deceased was not well. She came and conveyed him to a health facility at Nyanga.

For her part, Felistas told the court that when she came to fetch her brother, she noticed that the accused was amongst the people who had helped the deceased to reach the access road. At the time no-one told her that her brother had been assaulted. At the hospital, the deceased tested positive for malaria. He was given the malaria prescription and discharged. According to the sister, after completing the prescribed course of treatment, the deceased did not get any better. If anything he got worse. Only then did Cyril relate to her the incident of the assault.

This prompted a report to the hospital and attention was later directed at the head injury. Deceased was then referred to Mutare Provincial Hospital on the third visit to this hospital.

We were satisfied that the two state witnesses were reliable, honest, forthright, dependable and credible.

On the other hand, the accused did not impress us as a truthful witness for the defence. She was uncomfortable when she gave her own version of the events surrounding her encounter with the deceased. Even as counsel led her in-chief, she was uneasy unsure and jittery to the point of exasperation by her counsel. We are aware that a court-room environment could induce stage fright to someone who has come into it as an accused for the first time but in the present case a person accused of something she did not do could not be so shaken as to fail to show belief in her own version of the events. It only showed that the accused had decided to be less than honest with the court.

Her version, in our assessment, lacks any credibility. Her bare denial of striking the deceased on the head is contradicted by the evidence of two witnesses Cyril and Grace Saburi who heard the deceased state that the accused inflicted the head wound on him on 2 April 2013.

In our view the accused chose to suppress the truth for fear of the obvious consequences associated with a grievous attack on the deceased which she boasted to Cyril about, on 3 April 2013.

We therefore find that the accused struck the deceased with an object causing the injury from which he died.

The question regarding intent poses some difficulty to us. The court is unable, without any idea of the type, shape or form of weapon used, to state categorically that the accused intended to kill or that she realised the real risk or possibility that death may result from an assault with that particular weapon when she struck the deceased in the head. It is settled law that the test whether a person has constructive intent to kill is a subjective one. Even accepting that it is sufficient if there is an appreciation that there is some risk to life involved in the action contemplated, coupled with recklessness as to whether or not the risk is fulfilled in death, the difficulty still exists in arriving at that inferential reasoning in the absence of the weapon used in the assault. The absence of the description of the weapon used, in our view, places this case in a category of its own where the general principles on the question of intent are hardly applicable. Before one can conclude that the accused was reckless one must have the factual position in respect of what aspect of the expected conduct she was reckless. Recklessness must extend to the issue of whether or not the risk involved is fulfilled in death but where the evidence is scant, as here, it is difficult to conclude that the accused was indeed

reckless as to whether the risk is fulfilled in death. At most she was negligent in respect of assaulting the deceased in the head with a weapon. See *R v John* 1969 (2) SA 560 (RA).

The facts in this case show that the accused assaulted the deceased with an unknown object with sufficient force that the weapon inflicted a 4cm laceration on the accused's head and induced a swelling of the brain. In our view, on these facts we find that in resorting to the use of such force on the head, a vulnerable part of the human anatomy, the accused was negligent. There is no doubt that the accused's conduct is the proximate cause of the deceased's death. But for the injuries inflicted on him in the assault by the accused, the deceased would not have died when he did.

In the result we find that the accused is guilty of culpable homicide and not guilty of murder.

Prosecutor General's Office, state's legal practitioners
Mupindu Legal Practitioners, defence's legal practitioners