THE STATE
versus
PETRONELLA NYARUGWE

HIGH COURT OF ZIMBABWE
HUNGWE J
MUTARE, 26, 27 October 2015 & 3 November 2015

ASSESSORS : 1. Mr Rajah
2. Mr Chipere

Ruling on application for discharge at close of State case

M Musarurwa, for State
T Jakazi assisted by *P Nyakureba*, for defence

HUNGWE J: This application is made at the instance of the accused in terms of s 198 (3) of the Criminal Procedure & Evidence Act, [*Chapter 9:07*]. That section provides

> "If at the close of the case for the prosecution the court considers that there is no evidence that the accused committed the offence charged in the indictment, summons or charge, or any other offence of which he might be convicted thereon, it shall return a verdict of not guilty."

It is essential that I set out the bare facts which led to this application so as to put the application into context.

The accused is the mother to the two children who died in an inferno which destroyed the house in which the two children were asleep. She was charged with murder as defined in s 47 (1) of the Criminal Law (Codification and Reform) Act, [*Cap 9:23*]. The State alleged that

> "on the 26th day of May 2014 and at Tapera Village, Chief Makoni, Rusape, the accused unlawfully and with intent to kill, burnt Bathsheba Berly Mamhunze and Divine Rhythm Mamhunze by setting on fire the bedroom in which both were sleeping and got burns all over their bodies thereby causing injuries from which the said Bathsheba Berly Mamhunze and Divine Rhythm Mamhunze died."

It is common cause that the accused is the mother to both deceased children. On 26 May 2014 the bedroom in which she was sleeping with the two children with her husband and the two children was gutted by fire. The State claims that the accused had intentionally

set the bedroom on fire with intent to kill her children. She denies the nefarious motive and maintains that the fire started accidentally and gutted the bedroom where she and her family were. The matter proceeded to trial on that basis. Evidence was led from not less than eleven witnesses. The first witness was her husband's mother. Her evidence was that the accused was the senior wife in her marriage to Tapiwa Mamhunze, her son. The junior wife was Esina Kunaka. Earlier that day, the accused had quarrelled with her husband over certain issues which remained unclear. She had restrained and counselled them in this misunderstanding. She later observed the accused sprinkle petrol on Tapiwa, her son, who she then attempted to set on fire. Her son had managed to douse out the fire without incident or injury to himself. She and a neighbour, one Loveness, had counselled the young couple and later retired to bed. It was only in the early hours of the next morning that she woke up to the shouts for help from her son Tapiwa who said his house was on fire. When she got to the scene her son had managed to rescue Divine Rhythm. She accompanied the child who had suffered serious burns to Rusape General Hospital.

The junior wife, Esina Kunaka, confirmed the altercation between the accused and their husband. She also confirmed that the accused had sprinkled petrol over their husband and attempted to set him alight. He did not suffer any injuries as he managed to put out the flames. Later that night going into early hours of the next day she had been woken up by their husband who shouted that the house was on fire. She occupied a separate section of the house. She managed to escape with her children. Accused's two children were severely burnt in the fire.

The father-in-law to the accused Elton Mamhunze gave evidence in court. That evidence touched on the events of the day preceding the incident in which his son's house got burnt. He had earlier that day counselled the young couple against violence. They appeared to have heeded his wise counsel as their father. He was awakened by his wife who told him of the fire engulfing his son's house. He did not see nor did he later get to know from other sources how the fire had started. He was unable to say the accused had set the house alight. The rest of the evidence was of a formal nature touching upon hoe the hospital staff had treated the deceased and later complied post mortem reports at different times as well as hoe the police had conducted the investigations. It is critical to observe that the only person who could have shed light in this matter, besides the accused, was the accused's husband, Tapiwa. They were in the same room with the children when the fire started. He would have had the first hand information regarding this aspect of the case. Unfortunately the State decided to

exclude this crucial evidence and instead chose to call a witness, Elton, who was not listed as part of the line-up of the state witnesses. In the end there was no evidence linking the accused with the death of the deceased. As she was entitled to, the accused applied for the discharge of the case against her at the close of the state case on the basis that no evidence was led that she committed the offence charged or any other offence for that matter.

The courts in Zimbabwe have pronounced themselves in a long line of cases including *S* v *Kachipare* 1998 (2) ZLR 271 (S) as to the law in Zimbabwe on an application for discharge at the close of the case for the state. The position at law is sufficiently clear as to be called trite. It may be restated as follows. Where the court considers that there is no evidence that the accused committed the offence charged or any other offence of which he or she might be convicted, the court has no discretion but to acquit.

On a charge of murder the possible alternative charges include culpable homicide and assault.

The test whether the court ought or must discharge the accused at the close of the State case has been set out as follows;

The court should 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;

(*A-G* v *Bvuma & Anor* 1987 (2) ZLR 96 @ 102);

(b) there is no evidence on which a reasonable court acting carefully might properly convict;

A-G v *Mzizi* 1991 (2) ZLR 321 @ 323;

(c) the evidence adduced on behalf of the State is so manifestly unreliable that no reasonable court could safely act on it.

A-G v *Tarwireyi* 1997 (1) ZLR 575 @ 576.

In all these instances the cardinal guide is that the State would have failed to prove a *prima facie* case against the accused. A *prima facie* case is a case where one can say there has been shown, on the evidence led, a probable cause to put the accused on his defence. Generally, probable cause or a *prima facie* case is made where all the essential elements of the offence charged or any other offence on which the accused may be convicted have been

proved on a balance of probability. At this stage the test is not whether there is proof beyond reasonable doubt but whether on a balance of probabilities it can be argued that the essential elements constituting the offence charge or any other offence have been proved.

On a charge of murder, the State, at this stage ought to show a balance that the following elements have been proved:

(a) the accused burnt the deceased;

(b) by setting the bedroom on fire;

(c) with intent to kill;

(d) that the accused acted unlawfully.

In other words the evidence must be such that a reasonable court, acting carefully, may convict the accused for the offence charged or any other offence on which he can be convicted.

The evidence led so far related to how the accused acted towards her husband during the day. The accused had quarrelled with her husband. She has secured petrol. She had later attempted to set him alight. She had poured the petrol onto her husband and so on. The charges she faces in this trial relate to her two children and not her husband. The crime charged, murder, was allegedly committed by setting the bedroom in which the two children were asleep alight. There is no evidence to show how she did this. There is too, no evidence to suggest that she did so intending that her two children only be consumed by the raging inferno without risking her own life in the process. There is no evidence to suggest that she lit the bedroom from the outside. There is no evidence of any motive that she, as the natural mother would have to achieve such a wicked outcome. Of course the existence of a motive is not, on its own, sufficient evidence linking a suspect to a crime but it does provide probative value, in cases, to other pieces of circumstantial evidence that may exist in a case. This evidence could have been procured from the only other witness present in the bedroom who survived the fire, Tapiwa, her husband. He was not called.

As matters stand, an essential element of the crime, which is the act constituting or linking the circumstances to the intent to kill, was not proved. It is not clear on the evidence led so far, how she set the bedroom alight, and least of all how she set alight or burnt her children. It is mere speculation for this court to suppose that she had sprinkled the entire bedroom with the petrol she had acquired earlier in the day in an effort to kill her husband as testified to by the mother-in-law; or the junior wife. These two could, not by any stretch of imagination, be adjudged independent witnesses in the circumstances of this case. Therefore,

if one discounts the evidence from the close family members, who themselves do not state that the accused set the bedroom ablaze in a particular manner, or that she had confided in one or both or more of the witnesses that she had done so, it is unclear how the case for the State could ever reach the threshold of proof beyond a reasonable doubt.

The accused's defence is that this was a tragic and unforeseen accident in which she too was a victim. What this defence does is to challenge the State to prove that the burning of the children was accompanied by a malicious mind on the part of the accused.

If, as she says, this was an accident, then even accepting that the death was a result of her own conduct which conduct is still unknown, there can be no *prima facie* case for murder, culpable homicide or even assault. In order to constitute a criminal act, there must be a guilty mind accompanying an *actus reus* i.e. the circumstances constituting criminal conduct.

It is trite that there can be no blame in criminal law without fault. It is a principle of natural justice and our law that *actus facit renum nisis mens in rea* which means "an act does not make a person guilty unless their mind is also guilty."

In the present case, up to the close of the State case, it is not disclosed what the accused did to either set the children's bedroom alight or to burn them. Without some form of proof of her conduct it is inconceivable that the accused can be convicted on any other offence which is a competent verdict on a charge of murder.

In the result the accused must be found not guilty and acquitted.

National Prosecuting Authority, State's legal practitioners
Maunga, Maanda & Associates, accused's legal practitioners