

THE STATE
versus
ELISHA MLAMBO

HIGH COURT OF ZIMBABWE
HUNGWE J
MUTARE, 29 October 2015 & 3 November 2015

ASSESSORS : 1. Mr Rajah
 2. Mr Chipere

Criminal Trial

M Musarurwa, for State
P Takaedza, for defence

HUNGWE J: The accused pleaded not guilty to a charge of murder as defined in s 47 (1) of the Criminal Law (Codification & Reform) Act [*Chapter 9:23*], it being alleged in the indictment that on 25 July 2014 at Farm 75, Musimbo, Chief Mapungwana, Chipinge, he unlawfully and with intent to kill, assaulted Elcina Makuyana with a stick several times all over the body thereby causing injuries from which the said Elcina Makuyana died.

The state alleged that the assault on the deceased led to injuries from which she died.

In order to prove its case against the accused the state relied on the evidence of two witnesses who heard an altercation between the accused and the deceased; two police witnesses to whom the accused made certain statements and indications and a medical post mortem report by a doctor.

It is clear that there was no eye witness to the alleged assault on the deceased. The case against the accused was therefore wholly circumstantial evidence.

In his defence the accused claims that he had assaulted the deceased alleged or at all. He however admitted that he had an on-going civil matter which, at the time, was pending at Chief Mapungwana's Court. That case involved accusations of dabbling in witchcraft against the deceased by the accused. The accused claimed that the deceased had caused illness in him

by means of witchcraft. The Chief's Court was seized with that matter. He had hoped that the matter will be resolved at the Chief's Court when he received news of the death of the deceased. He denied any involvement in the assault although he had gathered that there were allegations of assault on the deceased.

The evidence led in court establish the following facts. The accused is the owner of Farm 75 Musimbo. The deceased lived on this farm. She was a distant relative of the accused's father. She lived alone. The accused fell ill and as a result of his own inquiries, he held the belief that the deceased had caused him to be ill by means of witchcraft. He reported his finding to Chief Mapungwana who summoned the deceased for a hearing. Both accused and deceased had attended at the Chief's Court and the matter was not concluded. It is not clear what the terms of adjournment of the matter before the Chief were. What is clear however, is that the parties were to attend at this court pending the resolution of the matter.

By 25 July 2014 the matter had not been resolved.

On that day James Mhlanga ("James") had heard the accused and the deceased exchange harsh words over the witchcraft matter. It was an altercation over allegations of witchcraft. According to James, the accused shouted that he did not want to keep witches at his farm. The accused threatened to assault deceased. Deceased challenged accused to prove that she was a witch. This altercation lasted about an hour, in James's estimation. He put the time as being between 18h00 and 19h00. He heard accused's voice recede in the distance after 19h00 indicating that accused was leaving deceased's homestead. He did not visit the deceased's residence until after the news of her death reached him.

Another witness Thomas Maphosa ("Thomas") had last seen the deceased, his sister the previous day, prior to 25 July 2014. She was going home after work. On 25 July 2014 as he arrived at Farm 27 Musimbo from a funeral. He overheard the accused's voice recede indicating that he was leaving deceased's residence. He did not hear what accused was saying but from the tone of the voices he concluded that there had been an altercation between the two. It had not been a cordial exchange. He knew of the court case between the two which was pending in the Chief's Court.

On 30 July 2014, Dr Makumbe, a medical doctor who examined the remains of the deceased made the following observations;

"Deceased was assaulted all over the body with stick or log. Died on the spot. External examination indicated multiple bruised on the face, toes, buttocks and thighs. Excessive neck hypermobility in region C2
No other broken bone.

Interior examination was not done.”

Dr Makumbe concluded that the cause of death was “cardio-respiratory arrest secondary to C-spine injury”

Other evidence relied upon by the state include the accused’s confirmed warned and cautioned statement, indications made by the accused to the Police details during investigations which were reduced to a sketch plan, a certificate of weight of a stick which the accused gave to the Police indicating to the police that it was the stick with which he had assault the deceased, as well as the photographs of the deceased’s remains.

The Police witnesses involved in the matter, Assistant Inspector Muchanya and Cst Mhuru gave evidence regarding how they gathered evidence in this matter.

Their evidence was that when they arrested the accused he was properly warned and cautioned and advised of his legal rights. He briefly was silent but then indicated that he was not involved in the death of the deceased. However, upon getting to the police station, he had then admitted that he assaulted the deceased over witchcraft. He went on to give a statement to that effect. That statement was subsequently confirmed by the magistrate in terms of s 113 of the Criminal Procedure and Evidence Act, [*Chapter 9:07*].

The accused explained that the statement he gave was freely and voluntarily made. He had given the statement in order to avoid further ill-treatment by the Police. He claimed that they had placed him in handcuffs and leg iron before hanging him headlong between two tables in such a manner he was suspended on an iron bar.

I find that his claim of torture not to have been substantially proved as to require this court to inquire into the voluntariness of the giving of the statement. I come to this conclusion on the basis that had he been subjected to such ill-treatment; this would have featured quite prominently in his defence outline. What was quite apparent however, was that the confirmation proceedings were irregularly conducted in that the magistrate allowed the investigating officer to sit in the proceedings. As such the proceedings were a nullity and must be ruled to have been such a nullity. The deceased, in my view discharged the onus on him to show that those proceedings were irregularly conducted. *S v Nkomo* 1989 (3) ZLR 117 (SC); *S v Ndebele* 1983 (2) ZLR 216 (SC)

However, that is not the end of the matter. The warned and cautioned remained admitted by the accused. It was a detailed one; it touched on matters which only the accused could have known about. It deals with matters of details which are confirmed by the

witnesses. The accused does not claim that the Police forced him to write or say what is contained in the statement. He maintains he composed it himself but is all lies.

Whether an admitted extra curial statement given by the accused is false is matter of fact. Whether it was given freely and voluntarily is a question of law. As I have already stated, the accused gave his statement freely and voluntarily. He was not induced to do so by any threats of harm on his person; nor were other undue influences brought to bear upon him to give that statement. *S v Slatter And Others* 1984 (3) SA 798 (ZS)

He had proceeded to make indications freely. The indications he made to the police confirm what the state witnesses observed in respect of where the deceased's body was and generally how the scene of the crime looked like soon after the event. Accused's statement is also corroborated by medical evidence which show that the deceased was heavily assaulted resulting in severe injuries all over the body.

In any event, there is sufficient circumstantial evidence which points to the accused, and the accused alone, as the perpetrator of the crime. The dangers inherent in relying on circumstantial evidence were highlighted by KORSAH JA in *S v Maranga* 1991 (1) ZLR 244 (SC) where @ p 349 he states:

"Before I answer this question, I wish to draw attention to the dangers inherent in drawing conclusions from circumstantial evidence. Lord Normand observed in *Teper v R* [1952] AC 480 at 489 that:

"Circumstantial evidence may sometimes be conclusive, but it must always be narrowly examined, if only because evidence of this kind may be fabricated to cast doubt on another. Joseph commanded the steward of his house, 'put my cup, the silver cup, in the sacks' 'mouth of the youngest,' and when the cup was found there Benjamin's brethren too hastily assumed that he must have stolen it. It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference."

See also *S v Chaluwa* 1985 (2) ZLR 121 (SC)

Two witnesses independently confirm the following facts:-

1. The accused was heard quarrelling with the deceased on the evening of 25 July 2014.
2. In the quarrel the accused threatened to assault the deceased.
3. The exchange between him and deceased indicate that accused had the motive to commit the crime.

4. The accused was the only person who harboured a grudge against the deceased over witchcraft allegations and had a matter pending before the Chief's court on the subject.

There is no basis, in my view, for the court to reject the evidence of these two critical witnesses. That evidence, on its own, does not implicate the accused. It merely provides the motive for the crime.

The indications to my mind, demonstrate the accused's involvement in the assault of the deceased. He had the motive to do so. The evidence shows that the accused had attended court where the deceased was expected to pitch up but on no less than three occasions, she had not done so. This must have angered the accused. He was bitter that the person he held responsible for the illness was not attending the Chief's Court.

He had reason to confront her. That confrontation occurred on 25 July 2014. James Mhlanga and Thomas Maphosa confirmed this. Although they do not state that the altercation degenerated into an assault the accused confirmed to the police that he had assaulted the deceased on that day.

Whether he assaulted her between 6pm and 7 pm, as the evidence suggests or later, is best known by him. The fact remains that the deceased was discovered dead two days later.

Who could have killed the deceased? All the evidence point to accused.

He is found guilty of s 47 (1) (b) of the Criminal Law (Codification and Reform) Act, [*Chapter 9:23*].

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