

DISTRIBUTABLE (68)

AMOS GWINYA
v
THE STATE

**SUPREME COURT OF ZIMBABWE
HARARE, 8 NOVEMBER 2021**

T. Tazvitya with *T. Mukwindidza*, for the applicant

A. Muzivi, for the respondent

CHAMBER APPLICATION

BHUNU JA:

[1] This is an application for leave to appeal against the judgment of the High Court (the court *a quo*). The applicant was convicted of murder with constructive intent and sentenced to 10 years imprisonment. He applied for leave to appeal before the court *a quo* without success. He now brings the application in terms of s 44 of the High Court Act [*Chapter 7:06*] as read with r 20 (1) of the Supreme Court Rules 2018.

BRIEF SUMMARY OF THE CASE

[2] The applicant was charged with murder in the court *a quo* as defined in s 47 (1) (b) of the Criminal Law (Codification and Reform Act) [*Chapter 9:23*]. He is alleged to have intentionally killed his wife Nyasha Mudzimu in a feat of domestic violence. He pleaded not guilty to the charge but offered a plea of guilty to the lesser charge of culpable homicide.

- [3] The facts leading to the deceased's death are by and large common cause. It is common cause that on the night of 6 March 2020 the deceased and the accused had a fight in their bedroom. Neighbours intervened and quelled the commotion after hearing the now deceased's screams.
- [4] The fight however broke out again after the neighbours had left. The deceased bolted out of the bedroom with the accused hot in pursuit. The deceased fell down. The accused continued to attack the deceased while she lay on the ground. The deceased sustained serious head injuries. She was hospitalised from 7 March to 6 April when she succumbed to death due to the injuries.
- [5] The post-mortem report revealed the following facts:
- i. The deceased was being managed for severe head injury from 7 March 2020 to 6 April 2020.
 - ii. The CT scan on the brain showed intra-cerebral haemorrhage due to oedema.
 - iii. Head swelling and body bruises.
 - iv. Cause of death due to head injury.
- [6] The state case was that the accused was guilty of murder with constructive intent because he continued to attack the deceased realising that the attack might result in the deceased's death. It was therefore the state's case that death was due to the assault.
- [7] On the other hand the accused admitted having caused the deceased to fall by chasing after her but denied that it was the assault he perpetrated on her that caused the fatal head injury. It was his defence that the deceased sustained the injury when she fell and hit her head on hard ground. He admitted that he was negligent in chasing the deceased in the manner he did, hence the tender of a plea of guilty to culpable homicide.

[8] The applicant's defence is captured in his warned and cautioned statement in which he says:

“We fought and I overpowered her. We started when we were inside the bedroom and she tried to run away. That is when I followed her outside. Then she fell down and I hit her with open hands and kicked her with booted feet. The neighbours then came and restrained us. I never used any weapon against her. I never intended to kill her. It was just a mistake and I did not intend to reach that extent.”

[9] On those facts the court *a quo* found that it was improbable that the fatal head injuries were sustained through a simple fall. It reasoned that a healthy young lady was unlikely to die from a simple fall. It therefore concluded as a matter of fact that the vicious assault that the applicant perpetrated on the deceased probably caused the deceased's death.

THE LAW

[10] In terms of s 47 (1) (b) murder with constructive intent is committed when the accused persists with conduct which he realises might cause his victim's death. The section provides as follows:

“47 Murder

- (1) Any person who causes the death of another person—
(a) intending to kill the other person; or
(b) *realising that there is a real risk or possibility that his or her conduct may cause death, and continues to engage in that conduct despite the risk or possibility; shall be guilty of murder.”*

[11] Professor Feltoe in his book, *Guide to Criminal Law in Zimbabwe 2005* at p 95 states that an accused person can only be convicted of murder with constructive intent if the only reasonable inference that can be drawn from the facts is that he had the legal intention to kill. In drawing such inference the court decides that he must have and did foresee the possibility of death.

[12] In this case it is plain that apart from mere conjecture and speculation there is no direct evidence establishing as to how the deceased sustained the fatal injury. There are clearly three distinct possibilities. Either she fell and hit her head against the ground while fleeing from the applicant or the assault caused the fatal injury or a combination of both the fall and the assault.

[13] There was no evidence to corroborate the State's assertion that the deceased sustained the fatal injury from the assault perpetrated on her by the applicant. The post-mortem report is silent on how the deceased sustained the fatal head injury. The court *a quo* therefore convicted the applicant by drawing the inference from the proven facts.

[14] In drawing that inference the court *a quo* had this to say at p 5 of its cyclostyled judgment:

"On the aspect of falling of the deceased, it is probable that the deceased could have fallen and injured herself, but it is inherently improbable that a healthy young woman would cause herself such fatal injury simply from falling to the ground. In any case the accused purposely pursued the deceased with the intention of perpetrating further assaults. Had the deceased sustained serious injury by falling, accused could not have embarked on assaulting her on the upper part of her body. To us it is far more probable that the injury on the head which caused deceased's death was caused by stamping and kicking of accused (sic). Accused also punched the deceased on the head using a fist." (My italics).

[15] It is self-evident from the above quotation that the court *a quo* made a specific finding of fact that it is probable that the deceased could have fallen and injured herself while fleeing from the applicant. That finding accords with the proven facts. The natural consequence of which was to disable the court *a quo* from drawing assault as the only inference that caused the fatal injury.

[16] The law however requires that in the circumstances of this case, for the accused to have been found guilty of murder with constructive intent, death due to assault ought to have

been the only reasonable inference to be drawn from the proven facts. The court's specific factual finding that death could be attributed to another cause rendered the conviction of murder precarious on appeal.

DISPOSAL

[17] Having regard to the court *a quo*'s finding of fact that apart from the assault perpetrated on the deceased by the applicant death can also be attributed to the deceased falling down, I therefore can only find that the applicant has good prospects of success on appeal. That being the case it is accordingly ordered that:

1. The applicant is granted leave to appeal against the decision of the High Court under judgment number HMT/45/21.
2. There is no order as to costs.

Bere Brothers Legal Practitioners, applicant's legal practitioners.

The Prosecutor General's Office, respondent's legal practitioners.