

THE STATE
versus
MISHON MUSANGADZI

HIGH COURT OF ZIMBABWE
HUNGWE J
MUTARE, 26 February 2014

ASSESSORS: 1. Mr Raja
 2. Mr Chidawanyika

TRIAL CAUSE

Mrs *J. Matsikidze*, for the state
Ms *N.S. Nyamwanza*, for the accused

HUNGWE J: The accused faces a charge of murder as defined in s 47(1) of the Criminal Law (Codification and Reform) Act, [*Cap 9:07*]; in that on 15 September 2012 at Nyandoro Village, Chief Katerere, Nyanga, he unlawfully and with intent to kill or realising that there is a real risk or possibility that death may occur, assaulted Kondo Adiyas Musangadzi by assaulting him with a shovel once on the forehead and once on the chest thereby causing injuries from which on 22 September 2012 he died.

The outline of the case for the State is set out in Exh 1.

The defence outline in Exh 2 can be summarised as follows:

There was an altercation between accused's father's two wives and himself over sadza. His father, the deceased, was unhappy as to why he had entered the hut in which he was asleep with one of the wives. His father then slapped accused across the face. In retaliation he had pulled his father the deceased, who then fell onto hard surface. He helped his father to get up. Although the deceased appeared dazed, he was otherwise fine.

He denied that he had struck the deceased with a shovel. He suggested that if his father had injuries there could here been result of the fall onto hard surface.

The case for the state revolved around the evidence given by the deceased's two wives, his sister and son.

In assessing the evidence given by both the State witness and the defence we have considered the following factors.

The events occurred at night. The power of observations of all the parties was therefore subject to the limitation associated with darkness. This affected all the witnesses.

The second factor we considered is that all the witnesses were related to the deceased and to each other. Therefore there is a possibility that this relationship may have affected, to a degree the quality of the evidence given by the individual witnesses. We took care to assess each individual witness to ensure that his or her own bias as a result of sympathy or favour towards or against the deceased or accused did not taint his or her evidence.

The two wives were clearly biased against the accused as they exaggerated the extent of the injury to the eye sustained by the deceased. In that regard we had to seek corroboration of that evidence regarding the material aspects which implicated the accused.

After assessing the evidence presented by the State we find the following facts to have been proved.

1. The accused arrived home at night and demanded sadza from his step - mother Joyce Nyamudondo. Accused entered the hut in which she had retired to bed with the deceased.
2. When he was told that there was no sadza left for him, he was incensed by that failure to put aside this provision. He became aggressive and insulted his stepmother.
3. His father, the deceased asked him to get out. He did so but continued with his belligerently behaviour.
4. He picked up a shovel which he used to bang his senior step - mother's hut. Bhureza Musangadzi, the step – mother was sharing the hut that night with accused's aunt, Judith Chitsike.
5. His father got out and warned him against his conduct as he could damage the doors to the huts.

He then struck his father with a shovel on the chest and once on the face.

The deceased fell down. His aunt and Bhureza ran out of that hut. They saw him holding the shovel as they passed him in full flight.

Wengai Musangadzi, accused's younger brother was called to the scene. He found deceased bleeding from the nose and mouth. He had regained his consciousness.

No one saw the accused strike deceased with the shovel at the time he did so but he was seen holding it by his aunt Judith, as she ran out of the hut.

The next morning it was observed that the shovel had blood stains.

The defence took issue with the assertion made by the women, that accused used a shovel to strike and injure his father.

We accept that no one saw accused strike deceased with Exh 5 the shovel.

In the same breathe we also find that the conclusion that accused used the shovel to strike and kill his father is the only reasonable conclusion to be drawn from the following circumstances.

- a) The accused was upset part by the absence of sadza after Joyce told him that there was none.
- b) He had assaulted Joyce who ran out of the hut. His father followed to quell a possible assault when accused used the shovel to bang on Bhureza's hut-door.
- c) He was banging the door with the shovel when his father remonstrated with him not to bang the doors.
- d) A sound of metal hitting a person two times was heard first before a thud akin to a person falling to the ground was heard.
- e) When Judith got out she saw accused holding the shovel, which he then threw away, and deceased lying on the ground
- f) It is highly unlikely that a push, even with both hands, could result in a blood shot eye seen by Wengai and bleeding from the nose and mouth witnessed by everyone present.
- g) In view of these findings we are of the firm view that although the ladies did not see accused strike his father with a shovel, they reasonably concluded that he did so. There is no other reasonable explanation to the injuries described by the witnesses and seen by the doctor who examined the deceased and compiled a report.

We find that accused did not intend to kill his father when he attacked him.

We however are of the view that by striking him with a shovel on or about the face and chest, he realised that there was a real risk or possibility that his conduct may cause death and continued to engage in that conduct despite the risk or possibility.

We come to that conclusion because the accused, on his own testimony, does not say that such an application of force as involving a shovel blow to the face, could not possibly result in death. He denies that this ever happened. In our view, there is no doubt that if these facts are put to any reasonable person, that person could accept that such conduct as would involve assaulting another with a shovel in the chest or about the face carries with it a real risk or possibility of causing death.

In our view his version cannot possibly be true and is therefore rejected.

The reasons we rejected his version are several not the least of which is the inherent impossibilities of it being true but it is in all probability false.

This is demonstrated by the contradictions in the defence outline and the evidence given in court.

In court described a scene in which the step - mothers jointly assaulted him. Deceased then joined in and he pushed him and he fell.

This was a new version which was neither in the defence outline or put in to the ladies during cross examination.

We rejected that version as false just as false as we rejected the explanation that the deceased sustained the injuries from which he died as a result of a push to the ground. We therefore find him guilty of murder as defined in s 47 (1) (b) of the Criminal Law Code.

National Prosecuting Authority, state's legal practitioners
Nyamwanza & Associates, accused's legal practitioners