

THE STATE
versus
VICTOR MABEZA

HIGH COURT OF ZIMBABWE
MUSAKWAJ
HARARE, 30, 31 March & 2 April 2015

ASSESSORS: 1. Mr Chakvinga
2. Mr Chidyausiku

Criminal Trial

A Muziwi, for the state
O Gasva, for the accused

MUSAKWA J: The accused pleaded not guilty to a charge of murder in which it is alleged that on 9 April 2014 and at Hope Farm, Shamva the accused unlawfully and with intent to kill murdered Lilian Kabwe by assaulting her with a wooden hoe handle and fists all over the body thereby inflicting serious injuries from which the deceased died.

It is common cause that the accused and the deceased were husband and wife. On the day in question the accused was upset by the fact that when he arrived home the deceased was quarrelling with their neighbour. The accused then assaulted the deceased. It is the nature of the assault that was perpetrated that is in issue.

In his defence outline the accused claims that he assaulted the deceased with a switch. He did this in order to discipline the deceased as she had visited one Shadreck Chimupeni (Shadreck), a bachelor with whom she had an altercation which culminated in Shadreck clapping her.

The day after the incident the deceased told the accused that she was not feeling well (presumably from the assault) and that she was suffering from gastroesophageal reflux. Thus she had dizziness and was vomiting and this led to her death. The accused gave the investigating officer the switch that he used.

The state led evidence from Sangurani Majora (Sangurani), Joyleen Kwainona (Joyleen), Mario Changa (Mario) and Samson Divirimwe.

From Sangurani the court heard that the accused first assaulted the deceased with hands. When the witness interposed the deceased got the chance to run into his house. The accused tried to get in but the witness prevented him. The accused then went away.

Upon his return the accused pleaded to see the deceased claimed he would not further assault her. That is when the witness let out the deceased. As they left he heard screams. He went to the scene and saw the deceased on the ground. When he sought to restrain the accused the latter kicked the deceased in the ribs with a safety shoe. He then stepped on the deceased's head. The accused further picked a hoe handle and struck the deceased on the back of the thighs and on the buttocks. The accused continued to assault the deceased until he was disarmed by Shadreck.

There were some aspects of this witness' testimony that were not very clear. When Police attended the scene he was not present as he had gone away. Upon his return a statement was recorded. He also made indications but he claimed that he was not made to sign them as he was not present. Instead, he claimed that the indications were signed on his behalf by his wife.

Joyleen was a work mate of the deceased. She and another visited the deceased when she failed to report for work. They found her lying down. She could not sit on her own and failed to eat when they fed her some porridge. She assisted in dressing the deceased. In the process she observed that the deceased had blackening of the skin on the right side of the chest and on the thighs. They secured a farm tractor to take her to hospital. However, whilst they were still within the farm she died.

Upon taking her back to the house they placed the body inside after removing other things. During the process the accused and the deceased's four year old son handed over exhibit 3, the hoe handle. The statement accompanying the handover of the hoe handle by the child is purely hearsay as that child did not testify.

Mario confirmed accompanying Joyleen to visit the deceased. He was also present when the deceased died whilst on the way to hospital. He is the one who arrested the accused at a neighbouring farm. The accused was at a bar.

When they returned the body of the deceased to her home their four year old child produced a hoe handle. He subsequently handed the hoe handle to the investigating officer.

There was some unsettling aspect of this witness' testimony. During cross-examination he conceded that the accused had been handcuffed to the corpse overnight. He claimed this was done in order to deter him from fleeing. This witness is a member of the Constabulary. It was evident that he has but a very rudimentary grasp of the powers of law enforcement officers and the rights of suspects.

Divirimwe testified on the investigations that they conducted. He described the injuries that he observed on the deceased. He was adamant that Sangurani and Constable Makusha personally signed the indications.

The state produced the hoe handle, post-mortem report and the accused's confirmed warned and cautioned statement.

The post-mortem report noted the following injuries-

“blood from the mouth and nostrils
Haematoma on the limbs (thighs) and left lumbar area. This was said to ante mortem.
Subgaleal haematoma (5cm) on the frontal area of the head
Slight brain oedema
Slight pulmonary oedema
800ml of blood in the abdominal cavity
The liver was pale
Laceration of spleen”

The cause of death was given as haemoperitoneo, laceration of spleen and abdominal trauma as a result of assault.

The confirmed warned and cautioned statement reads as follows-

“Yes I have understood the caution. I deny the allegations of murdering Lilian Kabwe. Indeed I assaulted Lilian Kabwe with a switch six times on the back and twice on her legs but I had no intention to murder her. I wanted to discipline her since she had gone to a bachelor's homestead who stays in the same compound where I stay. I was angered as to why she had gone to this bachelor's homestead who then assaulted her. I assaulted Lilian Kabwe on a Tuesday and we spend (sic) the whole day together. The following day she complained that she was feeling dizzy. Lilian Kabwe then passed away on a Friday. Whilst she was alive she told me that she nauseating (sic). So I suspect that this illness has to do with Lilian Kabwe's death. That is all I know.”

In his testimony the accused told the court that when he arrived home he found the deceased seated by the doorstep. She was arguing with Shadreck. He ascertained that the deceased had gone to Shadreck's house where she challenged him on what was in the sack he had brought from work. Having been rebuffed by Shadreck the deceased had retorted that he had AIDS. This is what prompted Shadreck to assault her.

As to why he was angered by this incident the accused explained that he suspected that

the deceased and Shadreck were having an affair. The accused confronted Shadreck who remained defiant. This prompted him to go home from where he brought the hoe handle. When Shadreck emerged from his house armed with an iron bar the accused retreated and dropped the hoe handle.

The accused then went to where the deceased stood and clapped her. He claimed he was angry that she had gone to Shadreck's house. Although he claimed to have been drunk he conceded that he appreciated what he was doing. He confirmed being held by Sangurani as the deceased ran into Sangurani's house. He also confirmed insisting that Sangurani let go of him. He justified this on his quest to resolve the matter with the deceased.

Whilst on the way the deceased resisted going home and sat down. That is when he plucked a switch with which he assaulted the deceased. He claimed to have assaulted the deceased six times on the back and twice on the thighs. He admitted kicking the deceased before she ran into Sangurani's house.

On the following day Sangurani and his wife visited in order to check on the deceased. The deceased said she had not been injured although she complained of pains caused by the kick. Around midday the deceased complained of weakness and dizziness. Although she requested to be escorted to the toilet the accused did not assist. He thought she was not serious. The deceased went on her own and collapsed behind one Kingston's house.

The accused got some bruffen tablets which he gave to the deceased. He said these were for pain relief. He approached a friend at a neighbouring farm in order to secure transport to take the deceased to hospital. He was promised help and was subsequently arrested whilst waiting for his friend. He claimed not to have approached the farm manager because he had not been helpful on previous occasions when he sought assistance.

The state counsel was forthright and concise in his closing address. In seeking a verdict for murder in terms of s 47 (1) (b) of the Code, he submitted that the only dispute is what instrument was used to inflict the injuries. He further submitted that the accused's intention can be inferred from the injuries that the deceased sustained.

Whilst agreeing with the submission that the issue is what caused the injuries Mr *Gasva* submitted that the accused should be believed in his evidence that he did not use the hoe handle. He further submitted that the accused did not deny the evidence that incriminated him. I might remark that this is a contradiction because the accused was denying the use of a hoe handle. He also submitted that the court was placed in a difficult situation by the

investigating officer's failure to avail the exhibit shown to him by the accused person. Criticism was also directed at the manner in which indications were handled. Mr Gasva further submitted that there was no pre-meditation as the accused only sought to discipline the deceased. He thus submitted that the accused should be found guilty of culpable homicide.

The facts of the matter and consequently the issues for determination are relatively simple. The relevant aspects are summed up as follows.

Sangurani testified that the accused picked the hoe handle and then assaulted the deceased. He had not seen the accused bringing the exhibit as he was inside the house. He stated that the accused continued to assault the deceased until he was disarmed by Shadreck. He was challenged on his testimony regarding the use of the hoe handle and he stuck to his story. Regarding the shoes worn by the accused person, he was challenged on the type. He maintained that they were safety shoes with a metal capped toe.

Joyleen described the hoe handle as having a crack on the knob. This was observed on the exhibit. She said she had seen the hoe handle being used by the deceased when they weeded a tobacco field.

Mario said the hoe handle was produced by the deceased and accused's child. The summary of evidence relating to this witness reads that he would tell the court that he retrieved the exhibit from the room in which the body was. Indeed this is what happened when he gave it to Police. The only difference is that he had previously received it from the child. He seemed to mix up when this happened. Whilst agreeing that this was on the day following the assault, he also agreed that it was on the day the deceased died. It is now common cause that the deceased was assaulted on a Tuesday and died on a Friday.

Divirimwe confirmed that the axe handle given to him was retrieved from the room in which the deceased's body was. On indications he initially made a draft which the witnesses signed. He subsequently typed them and followed up the witnesses to sign. As it turned out the indications do not reflect the actual date when they were signed. The simple thing to have done was to show when the indications were done and when they were signed, if the draft was not available. In my view, nothing turns on this issue. The indications were a re-enactment of how the assault took place. In as much as they may help in summing up the scene of crime nothing new came out of those indications.

A more critical blemish is how Divirimwe handled the stick shown to him by the accused. He discounted it as the murder weapon. He based this on the fact that the state

witnesses had made reference to the hoe handle. He also stated that the accused could not indicate where he got the stick. That exhibit remains lodged at Shamva Police Station. The officer obviously has a shallow view of evidence gathering. It is not for him to decide which exhibit is relevant for court purposes.

The accused described the switch he used as a type of weed which has a reddish stem. The leaves serve as a vegetable. The switch was neither fresh nor dry. It was solid and was between 1,2m and 1,3m in length.

Without medical evidence led to clarify what type of weapon caused the injuries the court has to decide on the probabilities. There is no doubt that the accused took the hoe handle to the scene. The only witness who saw the hoe handle being used was Sangurani. He saw the accused picking up the hoe handle. As it turned out, the accused had at some stage dropped the hoe handle when he had the confrontation with Shadreck. Sangurani did not appear to be mistaken as to what was used. The probability is that the accused used the hoe handle as opposed to a switch. Considering the nature of the plant described by the accused, it is unlikely to have been sturdy enough to inflict the injuries on the deceased without fragmenting.

Concerning the accused's motive, which was to discipline the deceased, the starting point to note is that this conduct violated of s 53 of the Constitution which provides that-

“No person may be subjected to physical or psychological torture or to cruel, inhuman or degrading treatment or punishment.”

In light of this provision there is no question of an aggrieved spouse exacting punishment of the other physically. Just by seeking to discipline the deceased the accused was already offside. He made it worse by using a weapon. Although the accused contrived to suggest that the deceased may have died of gastroesophageal reflux, during cross-examination he admitted that she sustained serious injuries from which she died. Although he also claimed not to have foreseen death he also admitted that there was a real risk or possibility of harm and that he was reckless.

The concept of real risk or possibility replaced constructive intent. According to s 15 of the Code, it has two elements-

- “(a) a component of awareness, that is, whether or not the person whose conduct is in issue realised that there was a risk or possibility, other than a remote risk or possibility, that
 - (i) his or her conduct might give rise to the relevant consequence; or
 - (ii) the relevant fact or circumstance existed when he or she engaged in the conduct;and
- (b) a component of recklessness, that is, whether, despite realising the risk or possibility

referred to in paragraph (a), the person whose conduct is in issue continued to engage in that conduct.”

That being the case according to s 15 (3) of the Code-

“Where, in a prosecution of a crime of which the realisation of a real risk or possibility is an element, the component of awareness is proved, the component of recklessness shall be inferred from the fact that

- (a) the relevant consequence actually ensued from the conduct of the accused; or
- (b) the relevant fact or circumstance actually existed when the accused engaged in the conduct; as the case may be.”

Fuelled by intoxication and a jealous fit the accused embarked on a wanton assault of the deceased. He shrugged off the intervention of Sangurani. He only relented after he was disarmed by Shadreck. Whilst he may not have meant to kill the deceased he must have appreciated that there was a real risk or possibility that his conduct might cause harm but was reckless as to the consequences. Causing death by realising the real risk or possibility of harm may be a matter of degree. This is so in the present case where the accused had no legal cause to assault the deceased. This is unlike a situation where, arising from a relatively minor assault the victim dies, possibly because of inherent frailties. In such a case the appropriate verdict would be culpable homicide.

In *S v Sigwahla* 1967 (4) S.A. 566 it was held that intention to kill does not at law necessarily require that an accused should have applied his will to compassing the death of the deceased. It is sufficient if the accused subjectively foresaw the possibility of his act causing death and was reckless of such result.

Accordingly the accused is found guilty of contravening s 47 (1) (b) of the Code.

Prosecutor-General's Office, legal practitioners for the state
Chirimuuta & Associates, legal practitioners for the defence