

THE STATE
versus
TIMOTHY MANJINI

HIGH COURT OF ZIMBABAWE
TSANGA J
HARARE, 26, 27 MARCH & 4, 10 & 24 APRIL, 11, 22 & 24 MAY 2018

Assessors: 1. Mr Musengezi
2. Mr Mafunga

Criminal Trial

Mr T Kasema, for the State
Mr T Muganhiri, for the accused

TSANGA J: The accused faced a charge of murder for killing his 60 year old grandfather. The trial was informed by certain agreed facts which were not in dispute. What was in issue was the question of *mens rea* and the accused's intention. The agreed facts as placed before the court were as follows:

1. The deceased was the accused person's grandfather.
2. On the 13th of October 2009 at around 17:00 and at Sanyati turn off the accused and the deceased had a heated argument.
3. The accused then assaulted the deceased with a walking stick which the deceased had. The assault was after he had disarmed him of the stick.
4. The accused assaulted the deceased on the body and on the head with the stick until it broke.
5. The deceased sustained injuries on the head and bled profusely.
6. The deceased was taken to Sanyati Hospital where he died.
7. A post-mortem report was carried out on the remains of the deceased and a post-mortem report was compiled.

8. The cause of death was concluded to be intracerebral haemorrhage secondary to head injury with subsequent raised intra –cranial pressure and disturbance of normal function resulting in loss of vital functions necessary for survival.

Admitted as evidence in terms of s 314 of the Criminal Procedure and Evidence Act [Chapter 9:07] were the following:

- i. The post-mortem report by Dr Norman Chikonzo.
- ii. Accused's warned and cautioned statement.
- iii. Certificates of weight of the broken stick used to assault the deceased by the accused person.

The stick or knobkerrie used was not before the court as the state faced difficulty locating it. In light of the agreed statement of facts, the focus was on the defence case. In expanding on the factual circumstances surrounding the events of that day the accused told the court that he resided in the same compound as his grandfather. They did not stay amicably together. The relationship had soured in 2006 when the accused's parents died two weeks apart from each other. His father died first having been ill for about seven months with swollen feet. His mother had succumbed to a headache two weeks later after just a day's illness. Some three years later in 2009 they had sat down as a family inclusive of the deceased and his brothers to discuss the issue of the sudden deaths of both parents. The accused who was the architect of the gathering attributed the delay in calling a family meeting to time and lack of resources on his part to bring scattered family members together.

The family gathering had reached a consensus that prophets should be consulted to ascertain the cause of the double tragedy as their belief was that there had to be some explanation. Both prophets and traditional healers were consulted and had ferreted out his grandfather as having a goblin which he used in his business dealings. His grandfather had a shop and three grinding mills and cattle.

His grandfather had been informed of the results by his brothers. He had reacted angrily at these accusations and had told all family members off. He told the accused in particular as the one who had orchestrated the meeting in the first place that he was "too forward and too clever for nothing". He had threatened to deal with the accused person. Relations which had never been good had soured even more from that time on.

The accused, who is one in a family of eight children told the court that he had also learnt just before his father's death that his grandfather was said to have sired a child with

one of the accused's sisters. He had told the court that his father had disclosed this to him just before he died and had told them to live in peace. He said his father also did not get on with the deceased. He said his sister had also told him about the child but she was also now late having died in 2006. To further bolster his belief that the accused was given to dabbling he told the court that one of his sisters now 43 years, old had never been married. From what they were told by the prophets and healers the grandfather and his goblin were to blame as the sister was effectively a wife to the goblin.

On the day of the fatal assault, the accused had gone to buy groceries at the shops. On his way back he had seen his grandfather at his son's house which was near the bus stop. Upon seeing him, the accused's sister had alerted the deceased that the person he had been talking about and looking for was coming. The deceased had ordered accused to stop as he wanted to talk to him. He had obliged. The deceased had then told him that he wanted to solve the issue then and once and for all. An altercation had ensued. The accused said deceased had threatened to kill him or burn his hut. The accused had told him he could not do that as he was too old. The accused had tried to walk away. He had given his groceries to his nephew having also decided to solve the issue once and for all. The two had pushed each other and the deceased had lifted his walking stick. It was at that point that the accused had grabbed it from him and hit him once on his head and then on his body until the stick broke. When the stick broke he had left him there and proceeded on his way. He heard later that the deceased had been taken to hospital. The accused had been arrested. The deceased died after about six days in hospital.

The accused denied any intention to actually kill the deceased. He told the court that he simply wanted to show him that whatever he had said or threatened, he could overpower him. He told the court he had acted out of anger and felt that the deceased could not just insult him. If the deceased had not threatened him he would have walked away.

He told the court that the deceased's brothers had told him to pay compensation in the form of one black cow and another cow for the chief for killing the deceased. He had not yet paid but was in the process of doing so.

In cross examination he told the court that although the deceased and himself lived in the same compound he had erected a cabin away from him and always tried to avoid him. As regards the number of blows he said he had assaulted him once on the head and three times on his body. He agreed that the deceased had bled profusely and that he had not paid particular attention as to where he hit him. He had left him in that state because he was angry.

He equally agreed with state that his actions betrayed recklessness, were unwarranted and were devoid of emotion towards the deceased given his age.

Since the accused points to anger as the reasons for his actions that day, what this court has to decide in light of s 239 (1) (b) of the Criminal Code is whether the accused lost his self-control and killed intentionally, in circumstances where even the reasonable person, faced with that extent of provocation, would also have lost self-control. If the accused lost self-control and a reasonable person would have done likewise, the accused has a partial defence and will be found guilty of culpable homicide and not murder. [*S v Nangani* 1982 (1) ZLR 150 (S)]. Whilst the evidence is that the deceased is the one who called the accused and said he wanted to deal with him, the events of that day alone do not suggest that a reasonable person would have lost self-control and would have killed under the same circumstances.

In this instance the anger was underscored by the belief that the accused had that his grandfather had been responsible for his parents' death some years earlier. He also harboured resentment and understandably so at his grandfather's incest if we assume that the accused had no reason to lie about what he said he had been told. The events of that day in terms of his grandfather calling him and threatening to deal with him, was what ultimately unleashed his hidden anger.

Sadly, this court observes that beliefs in witchcraft have had and continue to have a devastating impact on families. These beliefs are among the leading causes of homicides that are brought before our courts as people eschew finding scientific causes for misfortune, illness and death in favour of explanations grounded in the occult. See cases such as *S v Hamunakwadi* 2015 (1) ZLR 392 (H); *S v Mafuka* HH 782-17; *S v Ndlovu & Anor* HB398/15 all involving witchcraft.

Granted the accused's anger against the deceased had its roots in his belief system. The accused's belief in witchcraft in terms of 101 can only act in mitigation.

“101 Belief in witchcraft to operate in mitigation and not as defence to crimes

It shall not be a defence to murder, assault or any other crime that the accused was actuated by a genuine belief that the victim was a witch or wizard, but a court convicting such person may take such belief into account when imposing sentence upon him or her for the crime.”

As regards provocation where, as is in this case, the court finds that the provocation at the material time of the commission of the offence was not sufficient to make a reasonable person in the accused's position and circumstances lose his or her self-control, the accused is not entitled to a partial defence but the court may regard the provocation as mitigatory. See s 239(2).

As for *mens rea* and the accused's intention, as the State rightly points out, it is sufficient if the accused subjectively foresaw that his actions would result in death but recklessly proceeded with his actions. The accused's counsel zeroes in on the fact that the stick was not placed before this court for it to assess its potential for harm. This is beside the point as it is not in dispute that the accused used the stick on the accused until it broke. The fact that it broke shows the degree of force that was used by the accused in attacking the deceased. As a 60 year old man the deceased would have been no match for the accused.

It is not in dispute that the injuries occasioned by the assault with the stick are what caused the fatal injuries. It cannot be said that because the stick was not produced that the inference must be drawn that there was no intention to cause harm. The injuries and the deceased's own description of what transpired speak volumes. In any event our courts have always highlighted that assault to the head, which is a delicate part of the body, is almost always likely to cause death. In this case it is not in dispute that it did cause fatal harm. Where an accused does not have actual intention to cause death, but realises that there is a real risk that death would result, then such an accused is deemed guilty on the basis of legal intention as opposed to actual intention. *S v Mhako* 2012 (2) ZLR 73 (H).

Verdict: Against the totality of the facts in this case we find the accused guilty of murder in terms of s 47(1) (b) of the Criminal Code.

Sentence

The convicted is a first offender and a family man. He was also the breadwinner said to be looking after a number of family members. In addition, his trial commenced after a lengthy delay for reasons which were not immediately apparent on record. The delay was a factor which this court was also asked to take into account on the grounds that he has suffered great anguish in the intervening period. He was said to have spent two and a half years in custody before being released.

Ultimately, applicant has been convicted of murder with constructive intent which is itself a very serious offence. As such the mitigating personal circumstances, though important, are obviously not as weighty. He must carry his cross in terms of punishment. Granted his belief in witchcraft is to be also taken into account as a mitigating factor. Taking into account that he spent two and half years in custody, and taking into account the circumstances of his case, the accused is sentenced to 10 years imprisonment.

National Prosecuting Authority, State's legal practitioners
Machaya and Associates, accused's legal practitioners