

SHONHAYI MAMUKWA v THE STATE

SUPREME COURT OF ZIMBABWE
SANDURA JA, ZIYAMBI JA & GWAUNZA JA
HARARE, NOVEMBER 6, 2006 & SEPTEMBER 7, 2007

M S Gwaunza, for the appellant

R K Tokwe, for the respondent

SANDURA JA: The appellant (“Mamukwa”) was charged with murder, the allegation being that on 22 October 1999 and at Tafira Village in Zvimba District, he unlawfully and intentionally killed Munashe Chagweda (“the deceased”). He pleaded not guilty, but was found guilty and sentenced to death, no extenuating circumstances having been found. He appealed against the conviction and sentence.

The evidence led at the trial established the following facts. At the time of his death the deceased was two years and five months old. About six months before the deceased’s death, Mamukwa married the deceased’s mother (“Sekai”). The deceased was Sekai’s son with another man.

On the morning of 22 October 1999, Sekai left the matrimonial residence in order to go to another village in the area. Before leaving, she indicated to Mamukwa

that she intended taking the deceased with her. She intended taking him with her because on three previous occasions when she left the deceased with Mamukwa, the deceased sustained injuries which Sekai suspected had been inflicted by Mamukwa.

However, Mamukwa advised Sekai to leave the deceased at the residence so that the deceased could play with the other children there. Sekai took that advice and left the deceased in Mamukwa's custody. The deceased was in good health.

When Sekai left the residence, Mamukwa was thatching a hut on the premises. He had not consumed any alcohol and was sober.

Whilst Sekai was away, and the deceased was in Mamukwa's custody, the deceased sustained serious injuries. Mamukwa, who was sober, informed his sister, Plaxedes, that the deceased had sustained the injuries after falling on a stone as he and the deceased walked towards the hut which he (i.e. Mamukwa) had been thatching. The reason for saying that to Plaxedes was that he wanted her to confirm his own version of what had happened to the deceased when Sekai returned to the homestead, because he feared that Sekai might not believe him.

When Sekai returned to the homestead at about 4 p.m. on that day, Mamukwa was not at home. He was at a beer drink at a neighbour's house.

However, Sekai saw Plaxedes who informed her that the deceased had fallen on a stone, and was behind a certain hut on the premises. She went there and found the deceased lying on the ground under a tree. He was sweating and groaning. His clothes were bloodstained, and when he coughed he spat out a mixture of blood and saliva. She decided to bath him, and when she removed his clothes she observed bruises on both sides of his neck which appeared to have been caused by someone using his fingernails and applying some pressure to the deceased's neck.

When she tried to make him sit up, his head and neck could not maintain an upright position, but tilted to one side. When she asked him what had happened he said his uncle (meaning Mamukwa) had injured him.

Mamukwa who had by then returned to the homestead, was present when the deceased made that allegation. He, however, denied the allegation and maintained that the deceased had fallen on a stone.

As it was too late, then, to take the deceased to Murombedzi Clinic, Sekai decided that she would do that on the following day.

On the following morning she took the deceased, boarded a bus with him and proceeded to Murombedzi Clinic. However, before she reached the clinic, the condition of the deceased deteriorated.

Fearing that the deceased might die at the clinic, when her parents knew nothing about the deceased's condition, she disembarked from the bus and took the deceased to her parents' village where the deceased died later that day.

Sekai was confused and did not know what to do. She did not report the matter to the police. It was her parents who subsequently made the report, and Mamukwa was arrested.

After his arrest, Mamukwa made a warned and cautioned statement to the police. He denied the allegation that he had murdered the deceased, and stated *inter alia* that as the deceased was walking at the homestead he:

“... fell, hitting against a stone very seriously with his chest which I think caused his death. At that time Munashe started bleeding through the mouth and the blood was coming from the chest cavity. I did not see any wound on the outside of his body... I do not know where the bruises on the neck of the deceased came from.”

The post-mortem report compiled by Dr Nyazika who carried out the post-mortem examination of the deceased's body gives two causes of death. The first is cardiac tamponade, which is the compression of the heart by an accumulation of fluid, in this case, blood, in the pericardial sac, i.e. the membranous sac enclosing the heart. The doctor noted that the pericardium was full of blood, with some of the blood leaking into the chest cavity.

And the second cause of death given in the report is pericardial effusion, which is the build-up of fluid or blood in the pericardium. It was the doctor's opinion,

when he gave evidence at the trial, that this could have been caused by trauma to the chest or to the neck.

He said the following:

“My conclusion was that the child was subjected to some force around the neck and possibly the chest, and as a result of that force and deprivation of oxygen, the child then developed the complications that I observed, the pericardial effusion as a result of that trauma, which then led onto the cardiac tamponade.”

In his evidence at the trial, Mamukwa denied the charge and alleged that the deceased had fallen on a stone. He added that on the day in question he drank five litres of sikokiyana, an alcoholic beverage, and was drunk. He subsequently reduced the quantity of the sikokiyana he drank from five litres to two litres.

The trial court had to determine four issues. The first was whether the deceased fell on a stone and sustained the injuries which caused his death, as alleged by Mamukwa.

Dealing with that issue, the learned Judge in the *court a quo* said:

“The Court has to determine whether the deceased fell on the stone and thus sustained the injuries which caused death. The doctor’s evidence corroborates Sekai’s on scratch marks being found on the deceased’s neck. The alleged fall on a jagged stone could not have caused obvious scratch marks on both sides of (the) deceased’s neck. While giving evidence under cross-examination, the accused made indications of how the child fell. He indicated the child falling face forward. If injuries were to be found on the neck and having been caused by that fall, those injuries would have been at the front part of the deceased’s neck, and not on both sides. If the stone was such that it would cause injuries to the extent of the sides of the neck then there should have been injuries all over the neck.

The doctor's findings are consistent with the child having been deliberately strangled ... The fall on the stone could also not have caused pericardial effusion, which is caused by a denial of oxygen. There is no evidence from the accused person himself that the child remained pressed on the stone for a long time. He said the child fell and he immediately picked up the child by his waist. How then could the child have been starved of oxygen? The doctor's finding on pericardial effusion, like his finding on obvious scratch marks on both sides of the deceased's neck, is consistent with strangulation."

I entirely agree with the learned Judge's comments and conclusions.

The second issue which the trial court had to determine was the identity of the person who inflicted the injuries on both sides of the deceased's neck and starved him of oxygen.

Dealing with that issue the learned Judge in the *court a quo* said the following:

"The next question to be considered is: who starved the deceased of oxygen and caused obvious scratch marks on both sides of his neck? We should seek to be sure that no one else had access to the child. We also should exclude the possibility of other persons having caused these injuries. We know from the accused's own story that the deceased was left in his custody in a room they used as their bedroom hut. He is the one who went to attend to him when he woke up. He is the one who fed the child and asked him if he wanted to play with other children. He told us the child said he did not want to play with other children. He then took that child to where he was thatching a hut.

He does not say when he got to the house or the hut he found the child in pain. He did not see any injuries on the child. He did not see the child coughing a mixture of blood and saliva. But he said this happened when the child fell on a stone. In other words, the condition which caused the deceased's death developed when the child was in the sole custody of the accused person.

It is, therefore, clear that no one else other than the accused could have caused that condition."

Again, I agree with the learned trial Judge's comments and conclusions on the issue. Mamukwa did not say that some other person inflicted the injuries on the deceased when the deceased was in his custody, and his own version of how the deceased sustained the injuries was correctly rejected.

In the circumstances, the only reasonable inference which can be drawn is that the injuries in question were inflicted on the deceased by Mamukwa.

Thirdly, the trial court had to determine whether Mamukwa was drunk or under the influence of alcohol when he inflicted the injuries. The learned Judge carefully considered the allegation of drunkenness and rejected it. He said:

“He said he was drunk on the day in question. He said he had taken 5 litres of sikokiyana. He subsequently reduced the quantity to 2 litres ...

The evidence of Plaxedes clearly indicates that the accused person was sober when she was called to see the child. So whatever was done to the child was done while the accused person was not under the influence of alcohol. There is no reason why Plaxedes would mislead this Court on the accused's sobriety against her own brother.

Sekai said when she left, the accused person was sober. The accused's own story gives a clear narration of events of the day. In our view it would have been very difficult for a man who had consumed 5 litres of sikokiyana to be so coherent about what happened on the day in question. He gave clear details of how the child indicated it had woken up, how he went there, how he fed it and how he alleges the child fell and how he called his sister Plaxedes.

We are therefore of the view that the accused's mental state was not affected by anything at the time he committed the offence.”

I entirely agree. The allegation of drunkenness was an afterthought. It was not contained in the warned and cautioned statement made by Mamukwa, and it was not mentioned in Mamukwa's defence outline.

Finally, the trial court had to determine what was Mamukwa's intention when he inflicted the injuries. It found that he had an actual intention to kill the deceased.

In this regard, the learned trial Judge commented as follows:

"The next question is on intention. In our view once we found that the accused inflicted the injuries found on the neck of the deceased and caused the death as explained by the doctor there could be no other intention in strangling the deceased besides wanting to cause his death. The scratch marks found on both sides of (the) deceased's neck cannot be explained in any other way."

Bearing in mind the amount of pressure which must have been applied to the deceased's neck in order to inflict the injuries which caused the deceased's death, I cannot find any fault with the learned trial Judge's reasoning and conclusion.

It is, therefore, my view that Mamukwa was properly convicted.

In fact, what he said when he was asked if there was any reason why the death sentence should not be passed, indicated that he was at that stage admitting having killed the deceased, though apparently alleging that he had acted under the influence of alcohol. He said the following:

“My Lord, it is true that I take some alcohol, but in this case this was a mistake and I was unable to appreciate what I was doing.”

After Mamukwa had been found guilty as charged, his counsel informed the trial court that she was unable to address the court on the issue of extenuating circumstances. In my view, that attitude was not surprising because there were in fact, no extenuating circumstances, and the death sentence was the only appropriate sentence.

The appeal is, therefore, devoid of merit and is dismissed in its entirety.

ZIYAMBI JA: I agree

GWAUNZA JA: I agree

Pro deo