

STATE
versus
RENIAS MASOCHA

HIGH COURT OF ZIMBABWE
MAFUSIRE J
MASVINGO, 15 & 16 June 2017; 24 July 2017 & 24 August 2017

Criminal trial

Assessors: Messrs Mutomba and Dhauramanzi

Mr *B.E. Mathose*, for the State

Mr *F. Chirairo*, for the accused

MAFUSIRE J:

(a) **Synopsis**

- [1] The deceased suffered from a grossly distended abdomen. This was a condition that she had endured for five to eight years. It was a swollen stomach, the result of an abnormal cyst. The doctor said at its expansive worst the lump spanned a staggering thirty centimetres. She was heavily deformed. Her body was emaciated.
- [2] The deceased died of haemorrhagic shock, or internal bleeding. The cyst was an abnormal jelly-like growth that was covered by bloated blood veins. By reason of the incessant pressure on them, the veins were tender and prone to damage from any moderate to severe pressure.
- [3] The deceased died at the hands of her husband, the accused. This was common cause.
- [4] The State case was that at around 21:00 hours on 19 November 2016, at the couple's compound at Mkwesine, a sugar-cane growing estate situated in Chiredzi, Masvingo Province, the accused, a cane-cutter, assaulted the deceased to death. The allegations were that the two altercated over alleged financial indiscipline. The accused struck the

deceased on the rib-cage with a sugar-cane stick. He also hit her with clenched fists on the head. The deceased fell down. The accused kicked her in the abdomen. She vomited. A neighbour restrained the accused. But it had been too late. The deceased was found dead the following morning. The accused was subsequently arrested by fellow villagers and handed over to the police. He was charged with murder. He denied the charge.

[5] The accused admitted hitting the deceased with a sugar-cane stalk but said it was a mistake. He said the blow had been meant for an intruder who was assaulting him over a telephone dispute. The deceased had come between them in an effort to quell the scuffle.

(b) **The evidence**

[6] The State called four witnesses. The first, Mikias Mataruse [***Mikias***], was the neighbour and fellow cane-cutter who had come to restrain the accused. He said he happened to be passing by the couple's compound on the evening in question. He chanced upon the accused assaulting the deceased. He saw the accused strike the deceased on the head with fists. She fell down. He kicked her in the abdomen with his bare foot. She vomited. She was wailing. She asked the accused why he was killing her.

[7] Mikias intervened. He held and pulled the accused away. Sylvia Ndabani [***Sylvia***], another neighbour, arrived at the scene together with her husband. Mikias left for his compound as Sylvia was talking to the deceased. He heard the deceased telling Sylvia that the accused had struck her with a sugar cane stalk on the rib-cage. Mikias recalled having seen three such stalks propped against the accused's hut. The following morning, he heard that the deceased had died. He informed the other neighbours of the accused's assault on the deceased the previous night.

[8] Sylvia was the third State witness after the investigating officer, one sergeant Kelvin Mutemasango [***Kelvin***]. He was based at Mkwesine police camp. Except for some apparent confusion on the actual date of the accused's arrest, Kelvin's evidence was largely uncontentious.

- [9] The relevant bits of Kelvin's evidence were that upon information received, he went to the scene with fellow policemen. They were shown the deceased's lifeless body. Sylvia identified the sugar-cane stalk the deceased had pointed out to her as having been the one the accused had used to assault her with. Kelvin had secured the exhibit. He had also identified Mikias and Sylvia as potential witnesses. He recorded their statements. Subsequently, he had received into custody, the accused who all along had been detained at Chiredzi police following a citizens' arrest.
- [10] Kelvin also said when they searched the accused's compound, except for his work-suit, none of his other personal belongings was there. When he was questioned about the murder, the accused had allegedly denied the assault on the deceased. About his apparent disappearance in the wake of his wife's death, the accused alleged he had gone to the bank in Chiredzi to get some money. He said he intended to proceed to the deceased's rural home to inform her people about her severe illness.
- [11] Kelvin recorded the accused's warned and cautioned statement. In it he completely denied ever assaulting the deceased. He claimed she had fallen ill and died. The statement was produced without objection.
- [12] Sylvia said she was related to the accused through the deceased, who was some kind of niece. On the night in question, she was drawn to the couple's compound at around 21:00 hours by the commotion. Mikias was shouting at the accused to stop beating the deceased. When Sylvia arrived at the scene, Mikias was tussling with the accused. The deceased was seated. Upon enquiry, the deceased disclosed that the accused had assaulted her with a sugar-cane stick on her rib-cage. She pointed to the sugar-cane stalk. Sylvia also observed that the deceased had vomited some whitish substance.
- [13] On her request, Sylvia sprinkled some water on the deceased. Afterwards the deceased said she was feeling fine. Sylvia later left for her compound. Soon after, she heard the accused talking to another neighbour. He was asking for some money to ferry the deceased to hospital. The neighbour said he had no money. The following morning Sylvia learnt that the deceased had died.

[14] The last State witness was Doctor Adroph Dube [***Dr Dube***]. He was the medical practitioner who conducted a post mortem examination on the deceased's remains and compiled a report. He unpacked some medical jargon as follows:

- *distended abdomen*: an abnormal swelling of the stomach;
- *cystic pelvis mass*: the abnormal jelly-like growth in the deceased's waist;
- *haemoperitonim*: abnormal collection of blood in the abdomen;
- *haematoma* solid blood clot, and
- *haemorrhagic shock*: a collapse of the fluid system around the cyst leading to severe blood loss.

[15] Dr Dube explained that any moderate to severe pressure would collapse the fragile blood veins surrounding the abnormal growth inside the deceased's abdomen. The volume of blood that collected inside the abdomen as a result of the internal bleeding was a staggering five litres. With that kind of bleeding, the deceased had no chance of survival beyond twenty-four hours.

[16] Dr Dube ruled out any other possible cause of death besides haemorrhagic shock. He confirmed that a single kick of moderate to severe force unto the deceased's abdomen could cause that kind of damage, given her abnormal condition. But the same kick could probably not kill a normal person.

[17] After Dr Dube, the State closed its case.

[18] The accused gave evidence. He maintained that he struck the deceased with a sugar-cane stalk by mistake. His version of events was that on the night in question, at around 23:00 hours, when he and the deceased had already retired to bed outside their compound as it was extremely hot, Mikias came to harass him over some cellphone deal which was some five months old.

[19] The accused alleged he had bought a cellphone from Mikias for \$10 and had paid him. But on this particular night Mikias demanded the phone back. Mikias started to assault

him. The accused grabbed a sugar-cane stalk that was propped against some hut. He intended to strike Mikias. Unfortunately, the blow landed on the deceased. She had come between them. She was struck on the rib-cage. He could not remember on which side.

[20] After being struck, the deceased knelt down. Mikias left. Sylvia arrived. She spoke to the deceased. She sprinkled some water on the deceased before eventually leaving for her compound. He did not hear the deceased's report to Sylvia about his assault on her with the sugar-cane stalk.

[21] The accused claimed after the assault the deceased was fine. Among other things, she managed to walk by herself into the house. However, in cross-examination, he conceded that the deceased must have been in so much pain that, among other things, she could only manage to open her eyes much later.

[22] The accused denied hitting the deceased with fists or kicking her in the abdomen. He claimed on the following day he had left for Chiredzi to get some money from the bank. The deceased had been fine. He had actually talked to her before he left. He said on his way back, he met some other compound dwellers. They accused him of having killed his wife. They forced him to go to the police. When he would not, they apprehended and handed him over.

(c) **Analysis – the evidence**

[23] All the State witnesses gave their evidence very well. None was shaken in cross-examination. The accused's story was a concoction. The defence case literally went up in smoke, particularly during the cross-examination of Dr Dube. Some highlights will illustrate this:

“Q If deceased had been struck with a sugar-cane stalk on the rib-cage, would she have sustained such haemorrhagic shock?

A No, because the injury was in the abdomen, not the rib-cage.

Q Could deceased have died from haemorrhagic shock after being kicked in the stomach?

A Yes, it's possible.

Q Are you able to estimate the kind of force, moderate or severe?

A It stretched from moderate to severe.

Q Moderate force could have resulted in haemorrhagic shock?

A Yes. The veins were distended. They were fragile.

Q Could she have suffered haemorrhagic shock by falling on her stomach?

A Yes, it's possible.

Q Could deceased have suffered haemorrhagic shock by performing household chores like washing, cooking, or fetching water?

A Not possible.

Q Is it possible that the haemorrhage could have started prior to 19 November 2016?

A I think it is not possible because of the state of the patient being thin. She could have collapsed some days earlier.

Q Are you ruling out the possibility that she might have started bleeding prior to 19 November 2017?

A Yes, I'm ruling that out.

Q Could this bleeding have occurred between the assault and the transfer to hospital?

A Not possible, it's not possible. The bleeding occurred whilst the patient was still alive. Haematoma is a clotting of the blood that occurs after death. It is not possible for a dead body to clot.

Q Is it not possible for blood to collect in the abdomen when the body is lifeless?

A Yes [meaning *no*], especially the fresh blood.

Q Are you ruling out the possibility of [the five litres of blood] getting into the stomach?

A Yes, I am ruling that out because a dead body does not bleed. It is only a live body which bleeds.

Q Can you approximate the time from injury to death?

A I think less than twenty-four hours, considering the state of the body which was thin."

[24] It must have been after the doctor's evidence that the defence capitulated. In the closing submissions, the defence practically abandoned virtually everything else said in the defence outline and in the accused's evidence, except perhaps, the striking of the deceased by the accused with a sugar-cane stalk. This was common cause anyway. The only issue was the deceased's intention in doing so.

[25] In the defence outline and evidence-in-chief, the accused had purported to resuscitate the dead cellphone deal. Mikias said he had all but forgotten about it. He said he had sold the accused a cellphone but that he had never been paid for it. The accused had made himself scarce by being constantly camped at the dam where he did some fishing.

[26] The accused's version was that there had been some bad blood between him and Mikias. He said although he had paid Mikias for the cellphone, he was a bad customer. Mikias refused to pay for the fish he had sold him.

[27] Defence counsel, in written closing submissions, expressly admitted that the accused's defence outline had been discredited and that the State had proved the following:

- that the accused had never fought with Mikias;
- that Mikias had actually arrived at the scene to restrain the accused from assaulting the deceased;
- that the accused had assaulted the deceased with a sugar-cane stick and that he had also kicked her in the stomach;
- that the deceased had died as a result of haemorrhagic shock.

(d) **Analysis – the law**

[28] The defence had no choice but to concede. The evidence against the accused was overwhelming. We are satisfied that the State proved that the accused killed the deceased. *Actus reus* is beyond question. The State said the killing was murder because the accused had the requisite legal intention to kill.

[29] On legal intention, the State argued that the accused had been unrelenting in his attack. He had hit her with a sugar-cane stalk. He had assaulted her on the head with fists. When she fell down, he had kicked her in the fragile abdomen.

[30] Undoubtedly, the deceased was an *eggshell* case. The *thin-skull* rule applies. It says you take your victim as you find her.

- [31] The residual leg the defence has tried to stand on is that legal intention has not been proved. It has argued that from the doctor's evidence, any other normal person would not have died from the kind of assault the accused perpetrated on the deceased. It was only because of her abnormal medical condition that she succumbed.
- [32] The defence is mistaken. The hall-mark of the *thin-skull* rule is that you take your victim as you find her. In *R v John*¹ it was said that it must always be remembered that some human beings suffer from latent ailments and succumb to slight violence which would not kill a healthy person. *Egg-shell* skulls, weak hearts and other human ailments which might cause a man to die from a trivial assault are well within the range of ordinary human experience.
- [33] The accused well knew that his wife was an *egg-shell* case. They had lived together for more than five years. He himself maintained she was not supposed to perform such household chores like fetching water with large containers, cooking or washing. He also admitted sexual intercourse with her was a huge risk, even though he had sired two children with her. Thus physical domestic violence of the nature and extent that he perpetrated on her was just about the last thing she could bear in her fragile state.
- [34] In the closing submissions, the defence tendered a plea of guilty to culpable homicide. It argued that the accused should reasonably have foreseen that assaulting his wife in the manner he did would cause death considering her condition.
- [35] Section 49 of the Criminal Law [Codification and Reform] Act, [Cap 9:23] [*“the Code”*] explains culpable homicide as negligently failing to realise that death may result from one's conduct; or [even if] realising that death may result from such conduct, negligently failing to guard against that possibility. The accused's conduct on the night in question could fit the bill. But that is not all.
- [36] Sometimes it is a very thin line between the worst form of culpable homicide and murder with legal or constructive intent. In *R v John* above, it was said murder and

¹ 1969 [2] RLR 23, at p 37C – E

culpable homicide are closely related offences. Together, they cover the whole field of criminal liability for bodily injury, the one taking over where the other leaves off. Thus, the true nature of each can only be fully understood if their interrelationship is clearly grasped:

“Because of this interrelationship and essential unity, culpable homicide, correctly defined, must, of necessity, dovetail neatly with the definition of ‘constructive intent’ in murder.”²
[*my emphasis*]

- [37] Section 47 of the Code explains both murder with actual intent [*dolus directus*], and murder with constructive or legal intent [*dolus eventualis*].
- [38] On constructive or legal intent, the Code says a person is guilty of murder if he causes the death of another after realising that there is a real risk or possibility that his conduct may cause death, but nevertheless continues to engage in such conduct.
- [39] Sylvia said the deceased suffered from a distended abdomen for about eight years. The accused said for about five years. We give him the benefit of the doubt and accept his five years.
- [40] But for all that time that they were married, the accused knew of her delicate situation and vulnerable condition. He knew that any form of pressure on her body, particularly the abdomen, could prove disastrous. Mikias said the accused and the deceased always fought and that he always counselled them. The accused denied it. No other witness said that. So, again we give the accused the benefit of the doubt.
- [41] However, even if we disregard the fact of the constant fights, nonetheless, for five years the accused had accepted the deceased the way she was. It was not disclosed what exactly had been the cause of the altercation on the fatal night. If by any chance the deceased had provoked him, which nobody said was the case, he ought to have restrained himself.

² At p 30B – C

[42] The accused did strike the deceased with a sugar-cane stalk. The blow had landed on the rib-cage. Dr Dube discounted it as the cause of death. The accused had not stopped there. He felled her with fists to the head. Those blows alone might not have been fatal. But Dr Dube was not sure about the fall. If she had landed on her delicate stomach that could prove fatal. The accused did not stop there. He concluded the assault session with a vicious kick to the most vulnerable part of the deceased's body. That definitely proved fatal.

[43] The accused's attempt to repair the damage that he had caused was pathetic. He started and ended only with trying to borrow money from some neighbour who had none. Yet there were several other neighbours. If after the assault all the deceased could manage to do was to open her eyes much later, it must have been obvious to the accused that the deceased was in very bad shape. The accused had needed to do something more serious to help her. Instead, he had gone to bed.

[44] Mikias said the accused had run away after the assault. The accused denied it. We give him the benefit of the doubt. But it is neither here nor there. For the whole night the accused put up with a fatally injured person. The following morning, he had collected all his belongings and left. Kelvin said when the accused was apprehended he had withdrawn money from the bank. It was common cause the account was in the name of the deceased. He received his wages through it because he had no bank account of his own. He had no identity document. The deceased had.

[45] Whereas negligence is the bedrock of culpable homicide, recklessness or carelessness is for murder with legal or constructive intent. In murder with actual intent you desire the result. You will it. You want it. You intend it. But for murder with legal or constructive intent, you may not desire or will the death. However, you realise that it is a possibility. Death may ensue from your conduct. But you do not care, or you are reckless about it.

[46] *Dolus eventualis* is not about what a reasonable person would have foreseen or done. That is a test for culpable homicide. It is about what you yourself did subjectively see or realised could happen, but was unmoved to stop yourself or to guard against it.

[47] The accused realised that a vicious kick to the deceased's distended abdomen would all but finish her off. He did just that. Afterwards, he neglected her. That is murder with legal or constructive intent.

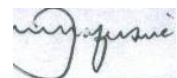
(d) **The verdict**

[48] The accused is hereby found guilty with legal or constructive intent of the murder of the deceased, Alice Simango, on 19 November 2016.

(e) **The sentence**

To be continued

24 August 2017

A handwritten signature in black ink, appearing to read 'J. J. J.', is written over a horizontal line.

National Prosecuting Authority, legal practitioners for the State
Saratoga Makausi Law Chambers, legal practitioners for the accused, pro Deo