

THE STATE
versus
LIBERTY DUBE

HIGH COURT OF ZIMBABWE
ZHOU J
HARARE, 23, 24 and 28 September 2015 & 14 September 2017

Criminal Trial

Assessors: 1. Mr Chidyausiku
2. Mr Shenje

H.M Muringani, for the state
R Mahuni, for the accused

ZHOU J: The accused is facing one count of murder as defined in s 47 (1) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] and one count of attempted murder as defined in s 189 as read with s 47 (1) of the same Act. In respect of the charge of murder, it is alleged that on 5 February 2011 and at Dube homestead, Mazvani Village, Chief Mashayamombe, Mhondoro, the accused unlawfully and with intent to kill caused the death of the now deceased Zuzheya Kulado by striking him on the head and body with a wooden log several times causing injuries from which the deceased died. In respect of count 2, the allegations are that on 5 February 2011 at the same place to which count 1 relates, the accused unlawfully and with intent to kill or realising that there was a real risk or possibility that his conduct might cause death, attempted to murder Woka Bizeki by striking him with a brick once on the forehead and striking him with a knobkerrie on the head and all over the body several

times thereby causing him serious injuries. The accused person pleaded not guilty to both counts and tendered a defence outline which he adopted in his evidence.

In seeking to prove its case the state led evidence from five witnesses. Three of these witnesses, namely, Emily Kulado, Woka Bizeki and Peter Mutumwe gave their evidence orally. The evidence of two witnesses, Vangani Marufu and Rugare Mutimba was admitted in terms of s 314 of the Criminal Procedure and Evidence Act [*Chapter 9:07*]. A post-mortem report prepared by Dr Edvardo Estrada who examined the remains of the deceased Zuzheya Kulado gave the cause of death as “brain aedema, head injury, due to assault.”

The post-mortem report was admitted in evidence as exh 1.

In relation to count 1, the evidence led established the following facts: On the day in question the accused had an altercation with the deceased who had put to him allegations relating to a misunderstanding with a neighbour’s children. The altercation degenerated into a physical confrontation during which the accused used a wooden log to strike the deceased on the head and other parts of the body. The deceased sustained injuries on the head caused by the assault. The injuries caused the deceased’s death. The log used by the accused to assault the deceased was produced in evidence. An affidavit deposed to by Amos Dzvora employed by ZIMPOST gave the length of the log as 1.12 metres, and its weight as 3.902 kilograms.

The evidence placed before this court does not establish an intention to kill on the part of the accused, or that he reasonably foresaw the possibility or risk that his action might cause the death of the deceased but nonetheless persisted with such action. All the State witnesses were not present when the accused struck the deceased with the log. His evidence that the deceased is the one who assaulted him first and that he merely reacted to the assault are therefore not rebutted. However, there is no evidence to suggest that the accused’s life was in any danger from the assault which the deceased perpetrated upon him to warrant the response which the accused gave to the assault. The court is convinced that a reasonable person would have foreseen that the application of force upon the head of the deceased using a log which was almost 4 kilograms in weight would cause death, and would have reasonably prevented the eventuality by applying the force in the lower part of the deceased’s body. The accused person acted negligently by targeting the deceased’s head in the assault. His negligence is further evidenced by the fact that he generally targeted the upper part of the deceased’s body. On his own evidence which is

consistent with the observations reflected in the post-mortem report, the accused also struck the deceased on the chest using the same log. That shows careful targeting of the upper part of the deceased's body and a careless attitude as to the possible consequences of such an attack.

In the result, in respect of count one the accused must be found guilty of culpable homicide.

In respect of the second count, the evidence which is not in dispute is that the accused struck Woka Bizeki on the head and other parts of the body using a walking stick. The brick which the complainant says was used to assault him was not produced in evidence. Only the broken walking stick was produced. The complaint had no full recollection of the instruments that were used to assault him as he lost consciousness at some point and only regained consciousness when he was already at hospital. The accused admitted to striking Woka Bizeki using the walking stick. The medical affidavit deposed to by Doctor Tinhende who examined Woka Bizeki shows that he had head injuries and complained of severe chest pains. The injuries which are described as moderate are said to have been inflicted using a blunt object. From the weapon used as well as the moderate nature of the injuries, the court is unable to find that the accused had any intention to kill Woka Bizeki or that he reasonably foresaw the risk or possibility that death might ensue. A conviction for attempted murder cannot, therefore, be sustained on the proved facts. The evidence, however, establishes the offence of assault as defined in s 89 of the Criminal Law (Codification and Reform) Act.

In the result, the court's verdict is as follows:

1. In respect of count one, the accused is found guilty of culpable homicide as defined in s 49 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*];
2. In respect of count two, the accused is found guilty of assault as defined in s 89 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*].

*National Prosecuting Authority, State's legal practitioners
Mahuni and Matutu, accused's legal practitioners*

