

THE STATE
versus
ANTONY NDLOVU

HIGH COURT OF ZIMBABWE
MATHONSI J
BULAWAYO 5 OCTOBER 2017

Criminal Trial

Ms N Ngwenya with Ms S Ndlovu for the state
M Mpofo for the accused

MATHONSI J: If the facts of this matter are anything to go by then what the deceased person, Tapiwanashe Mutakaya, a whole adult male aged 39 years at the time, did on the night of 8 April 2017, means that the old adage that when the time to die has arrived and death comes knocking on one's door there is no stopping it, is really true. The deceased is alleged to have persistently and incessantly followed the accused person, a neighbour who was 5 years his junior and repeatedly provoked him over nothing really except that the accused and another person had left him behind at a beer drinking spot known as Miriam's Bar along Railway Avenue in Bulawayo as the accused proceeded home.

Not even the intervention of a number of people who included two security guards employed by Road Motor Services (RMS) at its depot could calm the deceased down. Renowned Nigerian writer Chinua Achebe, once wrote;

“a fly that has no one to guide it follows the corpse into the grave.”

And so it is with the deceased who provocatively pursued the accused person right up to his lodgings at RMS Quarters in Bulawayo, appearing to be angry over nothing as he hurled insults at the accused. Distraught and with no sense of solution the accused is said to have snapped. Opening the door as the deceased continued banging it as he churned out insults, the accused armed himself with an axe which he used to bludgeon the deceased to death.

For his troubles the accused person has been arraigned before this court on a charge of murder as defined in s47 of the Criminal Law [Codification and Reform] Act [Chapter 9:23] it being alleged that on 8 April 2017 at Room 3, Block 5 RMS Quarters, Old Khami Road Bulawayo he struck the deceased with an axe several times on the head intending to kill the deceased or realizing that there was a risk or possibility that his conduct may cause death.

The accused person pleaded not guilty to the charge and raised the defence of defence of person. He stated in his defence outline that after the deceased had caught up with him as he walked home in the company of Nelson Muzuru and Mqondisi Maseko, he called him an asshole. At the RMS Headquarters the two of them engaged each other in what he called “a light fist fight” before they were restrained by those present including the two RMS Security guards. As he left the deceased with the security guards, the deceased said that he wanted to go to the accused’s home and kill him in front of his wife.

The accused stated further that a few minutes after he got home, there was a violent knock on the door to his house. He thought that thieves were at the door and therefore armed himself with an axe as he opened the door. The deceased pounced on him threatening to kill him in front of his wife. The deceased uttered the words to the effect that he was trained to kill people like the accused person and that one of them would die on that day. The two of them then wrestled for the axe at the veranda as the deceased tried to disarm him. He over powered the deceased and struck him with the axe in self-defence which conduct was necessary to avert an unlawful attack. For that reason he should be found not guilty and acquitted of the charge of murder.

According to the post mortem report prepared by Dr S Pesanai who conducted the autopsy on the body of the deceased the cause of death was brain damage, multiple skull fractures, chop wounds due to assault. The doctor observed four chop wounds of varying sizes all in the head which certainly gave the deceased no chance of survival.

This is one of those cases in which almost all the facts are common cause. The only issue for determination being whether the defence proffered by the accused for doing what he did on that night in question is available to him as to entitle him to an acquittal on a charge of murder. The accused claims that he opened the door as the deceased was noisily knocking for the sole reason of defending himself and his family. Asked why he did not ignore the deceased and leave him to rant and rave outside, the accused stated that he did not trust the door lock to hold and feared it would give in and allow whoever was knocking to come in.

Self defence or defence of person is now codified and provided for in Part XIII of the Penal Code. Unlawful attack is defined in s252 as any unlawful conduct which endangers a

person's life, bodily integrity or freedom.” The requirements for defence of person to be a complete defence are set out in s253 which reads:

- “(1) Subject to this Part, the fact that a person accused of a crime was defending himself or herself or another person against an unlawful attack when he or she did or omitted to do anything which is an essential element of the crime shall be a complete defence to the charge—
- (a) when he or she did or omitted to do the thing, the unlawful attack had commenced or was imminent or he or she believed on reasonable grounds that the unlawful attack had commenced or was imminent, and
 - (b) his or her conduct was necessary to avert the unlawful attack and he or she could not otherwise escape from or avert the attack or he or she, believed on reasonable grounds that his or her conduct was necessary to avert the unlawful attack and that he or she could not otherwise escape from or avert the attack, and
 - (c) the means he or she used to avert the unlawful attack were reasonable in all the circumstances; and
 - (d) any harm or injury caused by his or her conduct—
 - (i) was caused to the attacker and not to any innocent third party; and
 - (ii) was not grossly disproportionate to that liable to be caused by the unlawful attack.
- (2) In determining whether or not the requirements specified in subsection (1) have been satisfied in any case, a court shall take due account of the circumstances in which the accused found himself or herself including any knowledge or capability he or she may have had and any stress or fear that may have been operating on his or her mind.”

Those are the requirements for a successful defence to a charge even of murder in the form of defence of person. Before I consider whether those requirements are met, let me also draw attention to the provisions of s254 relating to situations where defence of person is a partial defence. It provides;

“If a person accused of murder was defending himself or herself or another person against an unlawful attack when he or she did or omitted to do anything that is an essential element of the crime he or she shall be guilty of culpable homicide if all the requirements for defence of person specified in section two hundred and fifty-three are satisfied in the case except that the means he or she used to avert the unlawful attack were not reasonable in all the circumstances.”

The first question to be asked is: At what stage did the accused person come under unlawful attack? Was it at the time that a violent knock was made at his locked door? Was it at the time that he claims to have been told by the deceased that he was trained to kill and would

kill him in front of his wife after he had opened the door? Was it at the time that they wrestled for control of the axe? We have a situation where a person locks a door because he wants to keep unwanted people out. When an unwanted person comes knocking, whether it is the deceased who had earlier threatened to visit for the purpose of killing him in front of his wife or thieves as he says he suspected, that person immediately arms himself with an axe, counsels his wife and Elizabeth Ncube against coming out of the house, and confronts the unwanted visitor. I am not persuaded by his explanation that he had to do so because he did not trust the lock to hold tight.

In my view the accused could not rely on defence of person in those circumstances when the intruder did not breakdown the door. Clearly when he came out brandishing an axe he was not under attack and could have avoided a fight by remaining in the house. Once outside, it became apparent to him that the deceased was unarmed and that indeed Tawanda who was with the deceased was remonstrating with him to move away from the door and go home. Therefore the accused certainly did not need an axe under those circumstances. There is no substance in his assertion that he did not know the identity of the person at the door because we have the uncontroverted evidence of Tawanda that as he was banging the door the deceased was making noise demanding that the accused should come out and square off with him. He therefore heard the voice of the deceased. He had, a short while earlier had a fight with the deceased and, by his own admission, the deceased had threatened to come to his house and fight him in front of his wife.

It therefore becomes clear that the noisy arrival of the deceased was expected. The accused prepared for it and armed himself with an axe. The reason for coming out of the house armed to the teeth was for purposes of assaulting what was by then a persistent irritant who was unwilling to leave the accused alone. It was certainly not in defence of his person or that of his family.

Even if we were wrong in arriving at that conclusion defence of person would still not be available as a full defence to the accused for another reason. It is that the accused person exceeded the bounds of self-defence. We have the very reliable and indeed uncontroverted evidence of Tawanda that when the accused and the deceased had an altercation they both fell to the ground with the axe lying a short distance from both of them. Tawanda testified that at that

point the accused was sitting on the deceased. He had therefore subdued him and by his own admission again, he had overpowered the deceased.

It means therefore that at that point in time his life was neither in danger nor under any threat whatsoever. The uncontroverted evidence is that he stood up and picked up the axe which he used to strike the deceased nowhere else except the head, not once, but four times as appears from the post mortem report. There can be no doubt therefore that the accused exceeded the bounds of self-defence. In terms of s254 of the Penal Code if, in the process of defending himself, the accused used means which were not reasonable in all the circumstances to avert the attack, then the accused person would be guilty of culpable homicide.

That therefore is an outcome which can still be achieved by resort to the defence of provocation which comes out from the evidence led by both sides even through the accused person did not see the wisdom of relying on it.

In that regard our criminal law is again codified and the defence of provocation is found in sections 238 and 239 of the Penal Code which provides;

“238. Provocation in relation to crimes other than murder

Except as provided for in section two hundred and thirty nine and subject to any other enactment, provocation shall not be a defence to a crime but the court may regard it as mitigatory when assessing the sentence to be imposed for the crime.

239. When provocation a partial defence to murder

- (1) If after being provoked, a person does or omits to do anything resulting in the death of a person which would be an essential element of the crime of murder if done or omitted, as the case may be, with the intention or realization referred to in section forty-seven, the person shall be guilty of culpable homicide if, as a result of the provocation—
 - (a) he or she does not have the intention or realization referred to in section forty-seven; or
 - (b) he or she has the intention referred to in section forty-seven but has completely lost his or her self-control the provocation being sufficient to make a reasonable person in his or her position and circumstances to lose his or her self-control.
- (2) For the avoidance of doubt it is declared that if a court finds that a person accused of murder was provoked but that—
 - (a) he or she did have the intention or realization referred to in section forty-seven; or
 - (b) the provocation was not sufficient to make a reasonable person in his or her position and circumstances lose his or her self-control;

the accused shall not be entitled to partial defence in terms of subsection (1) but the court may regard the provocation as mitigatory as provided in section two hundred and thirty-eight.”

What is clear therefore is that the jurisprudence formulated as far back as 1982 in the case of *S v Nangani* 1982 (1) ZLR 150 (S) is still applicable because s239 simply codifies that approach. Our law applies a twofold approach to provocation. The first stage is to apply the normal subjective test to decide whether there was an intention to kill. If there was intention the court should proceed to the second stage formulated in *S v Nangani, supra* as: Was the provocation such as would reasonably be regarded as sufficient ground for loss of self-control that made the accused act against the deceased the way he did? If the answer to that question is in the affirmative then the accused must be found guilty of culpable homicide. See G Feltoe, *A Guide to the Criminal Law in Zimbabwe*, LRF at pp 29-30; *S v Ncube* HB 119-16. Where the provocation caused the accused person to lose self-control it has the effect of reducing murder to culpable homicide and no more. It is only a partial defence.

It occurs to me that when someone arms himself with an axe which he then uses to strike a human being on the head several times causing the injuries observed by the pathologist who performed the post-mortem on the deceased, that person clearly harbours an intention to kill. In fact he did kill the deceased instantly. However we find as proved that the deceased seriously provoked the accused.

It is common cause that the deceased insulted the accused using vulgar language when he caught up with the accused and the two other people who were accompanying the accused. The accused's only sin was having left the deceased behind at Miriam's Bar as if it was the accused's responsibility to baby sit the deceased. As a result a fist-fight ensued between them before they were restrained by Muzuru, Maseko and the two RMS security guards. The guards had the presence of mind to hold the deceased back to allow the accused to proceed home thereby separating the two combatants.

Apparently the deceased was not done. According to Tawanda, who was with the deceased, and Sandra Mudadi, the accused's wife, and Elizabeth Ncube who were with the accused at Room 3 RMS Single quarters, the deceased violently knocked at the accused's door before he could even take his supper. He had pursued the accused right up to his room still pursuing his aggression on a neighbour. He demanded that the accused should come out and fight. In my view any reasonable person in the position of the accused person would have, at

that stage lost self-control, and behaved in the manner that the accused person did. The effect of that conclusion therefore is to reduce the crime of murder to culpable homicide.

Accordingly the accused person is hereby found not guilty of murder but guilty of culpable homicide.

Reasons for sentence

In considering sentence we take into account that the accused person was 34 years old at the time of the commission of the offence. He is married with three minor children. He was employed by RMS at the time of this incident and the deceased was both his work mate and neighbour at the single quarters.

The accused is a first offender. He is the sole breadwinner in his family. There can be no doubt that he was the victim of drunken abuse at the hand of a cantankerous, unruly and completely uncontrollable person who targeted him for physical and verbal abuse in a senseless manner and for no reason whatsoever. This caused the accused, who was abused in the presence of his in laws, workmates and neighbours, to lose self-control. Therefore his moral blameworthiness is low. This is because the deceased was the author of his own misfortune.

Against that is the fact that a life was lost in an extremely violent manner at a time when the accused had already overpowered the deceased. He vented his anger using an axe directed at the head causing serious damage. This court has a duty to uphold the sanctity of human life and to impose sentences which underscore the importance of self-restraint. Anarchy can never be tolerated in a civilized society. This was an extreme case of culpable homicide which is borderline indeed.

Accordingly the accused is sentenced to 8 years imprisonment of which 2 years imprisonment is suspended for 5 years on condition the accused does not, during that period commit any offence involving violence for which, upon conviction, he is sentenced to imprisonment without the option of a fine.

Effective sentence: 6 years imprisonment.

National Prosecuting Authority, state's legal practitioners
Samp Mlaudzi and Partners, accused's person's legal practitioners