

THE STATE
versus
BEST SIBANDA

HIGH COURT OF ZIMBABWE
MATHONSI J
GWERU 23 MAY 2018 AND 24 MAY 2018

Criminal Trial

T Mupariwa for the state
Ms N Maguranyanga for the accused

MATHONSI J: This is a case in which the accused is charged with murder as defined in section 47 (1) of the Criminal Law [Codification and Reform] Act [Chapter 9:23]. The state alleges that at Kapu Business Centre in Shangani on 4 August 2016 he unlawfully caused the death of Lot Mhlanga, then aged 29 years, by striking him once on the head and twice on the stomach with a log intending to kill him or realizing that there was a real risk or possibility that his conduct may cause death but continued to engage in that conduct notwithstanding. After so fatally assaulting the deceased he is said to have fled the scene only to be arrested at Collen Bawn Matabeleland South more than two months later on 12 October 2016.

The accused pleaded not guilty to the charge of murder but tendered a limited plea of guilty to culpable homicide. That offer was rejected by the state which pursued a conviction for murder. In defending himself the accused stated that he was “cumulatively provoked” by the deceased who had sold him stolen property resulting in him being continuously harassed by neighbourhood watch committee members and he was later arrested. In addition, the owners of the stolen property had proceeded to confiscate his own property as compensation for the property which the deceased had stolen from them thereby causing him to suffer loss.

Even though, according to the accused’s story he was the aggrieved party, instead it is the deceased who had started stalking him. On one occasion the deceased had chased him to the bush throwing stones at him. Even his appeal for the intervention of the deceased’s family to bring an end to the harassment ended in negativity as the deceased issued threats against his

person. In addition to that, on another occasion the deceased had attacked him with an axe and stones but his report of that attack to the police yielded nothing. As a result, the accused says he was living in constant fear of the deceased which acted as long term provocation which presumably motivated him to take action against the deceased with fatal consequences.

On the fateful day, the accused said it is the deceased who attacked him first forcing him to retaliate in defence of his person by striking the deceased with a log on the head. It is against that background that the accused craved the return of a not guilty verdict on the charge of murder but that he be found guilty of culpable homicide.

Most of the facts are common cause. It is common cause that on 4 August 2016 and at Kapu Business Centre in Shangani the accused struck the deceased on the head with a log produced in court as exhibit 5. The log in question is not small at all. In fact it is thick having a 26cm circumference, a diameter of 7cm, a weight of 3,419kg and is 84cm long, a formidable weapon indeed when used to hit the head of a human being. It is common cause that after the attack the deceased died on the spot while the accused made good his escape and was a fugitive from justice for more than two months before being arrested several kilometres away in Collen Bawn, Matabeleland South.

It is common cause that the cause of death, as observed by the pathologist Dr Roberto Trecu of United Bulawayo Hospitals during the examination of the deceased's body conducted on 12 August 2016, was severe cerebral oedema, subdural haematoma and severe head trauma due to beating with a log.

It is only the circumstances of the accused's attack on the deceased which call for a closer examination. According to Nicholas Mhlanga, the deceased's father, there was a long-standing feud between the accused and the deceased which was also known to him. He had tried to intervene engaging both the deceased and the accused as the bad blood bothered between them him given that the deceased was married to the accused's cousin. When he engaged the deceased he had expressed ignorance of the cause. When he engaged the accused he had only threatened to deal with the deceased.

It was the unchallenged evidence of Mhlanga that in July 2016 the accused had struck the deceased with an axe on the leg causing a swelling. The deceased was unable to walk. It was

also the uncontroverted evidence of Mhlanga that from point up to the fatal assault of the deceased by the accused the latter had resorted to moving around armed with an axe as he hunted down the deceased with ill-motive. So clearly the accused harboured a grudge against the deceased and had long threatened to deal with him. He succeeded in doing so on 4 August 2016 when, fortuitously, he found the deceased incapacitated by intoxication and having fallen asleep by the fire place at Kapu Business Centre.

According to Xolani Moyo who had been in the company of the deceased with others by the fire, the deceased was extremely drunk, was seated by the fire with his head bowed down and was fast asleep when the accused arrived. The moment he ascertained from this witness that it was indeed the deceased who was a sitting duck, he told this witness that the deceased had caused him to lose his property which had resulted in the feud between them. Although Xolani pleaded with the accused not to assault the deceased, he would have none of it. He quickly overtook the witness on their way from the toilet heading towards the sitting target and upon arrival he immediately pulled exhibit 5 from the fire while burning and struck the sleeping victim once on the centre of the head causing a depression and forcing the deceased to fall. As the deceased lay on the ground the accused struck him two more times with the same weapon on the side of the stomach. He died while the accused escaped. The evidence of Xolani Moyo found corroboration in that of Betram Mlilo who was also present when the deceased was fatally assaulted. This witness added that after the deceased started bleeding profusely the accused poured water on him trying to resuscitate him to no avail. He also stated that the accused had in his possession a chain which he wanted to use to tie the deceased which is strange indeed considering the manner in which he had struck him and by his own admission, upon feeling the deceased with the back of his hand, he felt that the deceased was cold.

It is not without reason that the accused person himself conceded that these two eye witnesses had cordial relations with him and his claim that they misled the court because they were drunk is red-herring. The evidence of the state witnesses was given well by people who struck us as truthful and reliable. Indeed although they were subjected to cross examination which focused mainly on putting the accused's own version of events to them they stuck to their story. In fact cross examination did not shake their resolve and did not discredit their evidence.

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If we are to believe the accused's version it must at least make sense or ignite in our minds a reasonable doubt. But then what the accused told us is that his feud with the deceased started when the deceased sold him stolen items which caused him embarrassment and harassment by both the village police and the owners of such property. It means therefore that it is the accused who was the wronged and aggrieved party. It is him who had all the reason to be angry with the deceased and to desire to exert revenge on him. It could not be the other way round. It is not within human experience that the wrongdoer would be the one stalking the wronged and would be the one repeatedly subjecting the innocent accused to beatings as the feud escalated. It just does not add up. We therefore reject that version of the accused as being demonstrably false. In any event we have the evidence of Nicholas Mhlanga which is reliable and which we have embraced that, far from it being the deceased who was harassing the accused, it is the latter who was moving around hunting down the deceased.

Regarding the fatal attack itself we have the reliable evidence of eye-witnesses who have not been shown to have any reason to lie, to the effect that immediately before the deceased was struck with a burning log, he was fast asleep and was not alive to what was happening around him. The accused attacked him while he was in that state. It therefore does not make any sense whatsoever for him to allege that he was acting in self defence. While in that alcohol induced stupor the deceased did not pose any danger to the person of the accused. The defence of defence person is not available to the accused.

In terms of s253 of the Criminal Law Code [Chapter 9:23] in order to succeed in relying on defence of person the accused person must prove that when he or she did or omitted to do the thing, the unlawful attack had commenced or was imminent; his or her conduct was necessary to avert the unlawful attack or that he or she could not escape from or avert the attack, the means used were reasonable in all the circumstances; and that any harm or injury caused by his or her conduct was caused to the attacker. The accused was not under any form of attack and therefore he does not even begin to motivate that defence. It is rejected.

The accused has also suggested that he was provoked, what he calls "cumulative provocation." He even tried to raise that in his warned and cautioned statement to the police. In

terms of s239 provocation can only be a partial defence to a charge of murder. It works to reduce murder to culpable homicide. It provides:

- “(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 realisation referred to in section forty-seven; or
 - (b) he or she has the intention or realization 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 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 the accused’s position and circumstances lose his or her self-control;the accused shall not be entitled to a partial defence in terms of subsection (1) but the court may regard the provocation as mitigatory as provided for in section two hundred and thirty-eight.”

It occurs to me that the accused falls squarely within the provisions of s239 (2). This obtains from the fact that provocation, by its very nature, connotes instantaneous and spontaneous reaction to phenomena in which the actor does not have an opportunity to formulate a strategy but acts on the spur of the moment having lost self-control in response to the actions of another. Where a person is angered by the actions of another but does not immediately react to such actions but instead allows a grudge to incubate inside him or her while waiting for an opportune time to exert revenge, such a person cannot shelter under the defence of provocation. This is because by making an election to exert revenge that person would have formulated an intention or a realization provided for in s47 of the Penal Code. How on earth does a human being get provoked by a sleeping person?

Even by his own version, the accused may have been provoked several months before the date of the offence. He had the time to construct a desire to exert revenge. He even moved

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around with an axe which he used to strike the deceased in July 2016, a month before his fatal attack on the deceased. He could not have lost self-control as to qualify for the defence of provocation and certainly did not react to a *stimuli* on the spur of the moment. I conclude therefore that the defence of provocation, which would have had the effect of reducing murder to culpable homicide, is not available to the accused. In light of the foregoing analysis we commend *Ms Maguranyanga* for the accused for her concession that the two defences are not available.

It is remarkable that the accused attempted first aid on the deceased immediately after the fatal assault which suggests that he certainly did not have the actual intention to cause the death of the deceased. However where a person realizes that there is a real risk or possibility that his or her conduct may cause death, but pursues such conduct notwithstanding the realization, such person is said to possess the legal intention or what is roundly referred to as constructive intention to cause death. I am satisfied that by pulling what I have described as a formidable weapon, a burning log from the fire, and using it to assault the deceased directing a severe blow with it to the centre of the deceased's head, the accused possessed the *dolus eventualis* to cause death.

In the result, the accused is hereby found guilty of murder with constructive intent.

Reasons for sentence

In assessing sentence we take into account what has been said by counsel in mitigation. The accused was aged 28 in 2016 when he committed the offence. He is a first offender but has contested a straight forward case all the way to the wire, thereby showing a lamentable lack of contrition. He is married with two children who look up to him for sustenance.

We take judicial notice of the fact that he had a reason to begrudge the deceased after he had sold him stolen property. He assisted with funeral expenses. He has in a way atoned for his actions by paying compensation of four head of cattle to the deceased's family. He has been in custody since October 2016, which is a period of one year seven months which should be credited to him.

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However, as I have said, the accused has not shown any contrition. In fact after committing the offence he absconded and became a fugitive from justice only to be accounted for after more than two months, he having taken refuge in Collen Bawn, Matabeleland South. The accused passes out as an extremely vengeful person who could brook no scruples whatsoever about resorting to self-help and attaining justice by his own hand, a rudimentary method of justice which belongs to the fossils of feudalism. He set about hunting down the deceased armed to the teeth until he cornered him at Shangani and cowardly attacked him while he slept.

As a result, a precious life was needlessly lost as the accused indulged his inflated ego. The accused exhibited all the qualities of a village bully throughout which cannot be allowed. This court owes it to communities to come very hard on such people in order to send an unwavering message that such resort to vigilante justice will not be tolerated in our civilized society.

In the result the accused is sentenced to 15 years imprisonment.

*National Prosecuting Authority, state's legal practitioners
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