

THE STATE

Versus

NKULULEKO NLEYA

IN THE HIGH COURT OF ZIMBABWE
CHEDA J
BULAWAYO 23 NOVEMBER & 12 DECEMBER 2002

Mrs I. Nyoni for the state
Siziba for the accused

Judgment

CHEDA J: Accused was charged with murder to which charge he pleaded not guilty.

The brief facts of the matter as outlined by the state are that both accused and deceased were aged 23 at the time of this offence. On 25 December 2000 at about 2130 hours both accused and deceased were drinking beer at Tokwane business centre. Some misunderstanding developed between the two of them, which resulted in a quarrel. The two were separated by one Sikhumbuzo Mlalazi who pulled the deceased away and warned the two of them against fighting near his shop. Subsequently accused approached deceased and stabbed him with an Okapi knife resulting in his death.

The state opened its case by calling one Sikhumbuzo Mlalazi whose evidence was that on the day in question he found the two sitting in the verandah of his shop and it appeared that there was a misunderstanding. He separated the two by pulling deceased to the back of his shop. After 30 minutes he saw accused coming from behind his motor vehicle holding a knife and he uttered the words "I am going to kill you." At that stage deceased was following him. This witness then noted that

deceased was bleeding below the shoulder. He further observed that he was unable to talk, was shivering, leaned on this witness' motor vehicle and subsequently fell down. Deceased died as a result of the stab wound.

This witness also observed that deceased was more argumentative than the accused and was speaking in a loud voice. He pulled him away because it was clear that deceased was more quarrelsome. He did not hear what they were quarrelling about. He also stated under cross-examination that when he got to the verandah accused pleaded with him to ask deceased to refrain from fighting him. He could not say who was in possession of the knife as he did not see it. From his general observation he concluded that both accused and deceased were drunk. He further stated that when he pulled deceased away from accused, deceased was in fact advancing towards accused. The state closed its case.

The accused through his legal practitioner *Mr Siziba* led evidence. His evidence was that on the day in question, he arrived at the business centre at about 4pm and started drinking beer until 7pm. Deceased then arrived and started nagging him by asking him to buy him beer. His response was that he did not have any money, but obviously deceased did not believe him and he persisted with his request. Deceased started insulting him by telling him that he was a very proud person as he regards himself as a South African and struck him with a fist on the face. As a result of this assault accused then ran away and sought refuge in the bottle store, but, deceased followed, whereupon accused again ran out of the bottle store and back again to the bottle store with deceased still in pursuit. Sikhumbuzo Mlalazi found them in the verandah a point at which Sikhumbuzo Mlalazi intervened.

He also stated that deceased in fact had a knife which knife he attempted to use on him but he ducked the blow and finally got hold of the knife and subsequently stabbed him. Such was the evidence of the accused.

The state, through *Mrs Nyoni* has argued that the defence raised by accused, being that of self defence should not avail accused because accused was not under imminent danger as he stabbed deceased after they had been separated by Sikhumbuzo Mlalazi. She further argued that the court should disregard accused's evidence as he was not a credible witness at all but rather believe that of Sikhumbuzo Mlalazi as he was a neutral person.

Mr Siziba on the other hand argued that accused should benefit from the defence of self-defence. The requirements for self-defence are:

1. there must be an unlawful attack
2. the attack must be on the accused
3. the attack must have commenced or be imminent
4. the action taken must be necessary to avert the attack
5. the means used to avert the attack must be reasonable.

The court's approach to this defence should be as objective as possible, as it should take into account the circumstances the victim would have been in, in that attack, namely his emotions, the survival instinct and psychological pressure he would be under, in his quest to escape from the attack and the possibility of a fatality resulting therefrom. This point was emphasised by his Lordship VAN De VENTER AJ in *Ntsomi v Minister of Law and Order* 1990(1) SA 512 at 530B where he stated,

“My conclusions may be summarised as follows:

- (a) In finding the equilibrium of force between the counter attack in self defence and assault, the court should apply an objective test *ex post facto* but avoid an armchair perspective ...”

In this matter there was no eyewitness. It has however been proved by the state that both accused and deceased were drunk and that deceased appeared to have been more quarrelsome of the two and hence I find that he was the aggressor when they were at the verandah as evidenced by Sikhumbuzo Mlalazi.

It is also a proven fact that accused was under attack. It is not entirely clear whether at the time of the stabbing the attack had already commenced for the second time or was imminent. The accused was in my view an honest witness and his evidence is to a large extent corroborated by the state witness with regard to the sequence of events of the evening, therefore, I have to give him the benefit of doubt about the attack.

The only problem which the court faces is with regards to the means employed to avert the attack and the necessity of the action taken. Accused was aware that deceased was drunk and had been nagging him for a while. Accused had all the opportunity of avoiding further confrontation with the hopelessly drunken deceased who was not prepared to listen to reason. In such circumstances accused should have taken avoiding action and left deceased on his own.

In order for defence of self-defence to hold accused should satisfy all the requirements. Accused, however, has failed to satisfy the last two requirements and as such his defence cannot succeed.

Accused was under imminent attack without provocation and had been drinking although it has not been suggested or proved that he did not appreciate what he was doing. In my view he did not have an actual intention to kill the deceased, this is buttressed not only by his warned and cautioned statement but his evidence in chief which was very consistent.

I therefore find him guilty of murder with constructive intent.

Attorney General's Office applicant's legal practitioners
Cheda & Partners defendant's legal practitioners