

THE STATE
versus
FORTUNE NCUBE

HIGH COURT OF ZIMBABWE
MATHONSI J
BULAWAYO 10 AND 11 MAY 2016

Criminal Trial

Ms S. Ndlovu for the state
S. Nyathi for the accused

MATHONSI J: The accused person, a 46 year old mine employee, is charged with murder in contravention of s47 of the Criminal Law Code [Chapter 9:23] it being alleged that on the night of 24 December 2015 at Joplum Mine, Springs Farm Kessington Bulawayo, he wrongfully, unlawfully and intentionally killed Sindisani Sibanda, a male adult then aged 24 years.

The allegations are that the accused and the deceased were workmates at Joplum mine in Kessington Bulawayo where a drinking party had been organized on the night of 24 December 2015. As the workers at the mine were carousing the accused and the deceased had a misunderstanding and, as so often happens when people have taken copious amounts of intoxicating liquor, the deceased is said to have attacked the accused with a shovel but was restrained by a witness, Duke Khumalo.

The accused is said to have picked up an iron bar, exhibit 5, which was lying around and struck the deceased three times on the head causing him to fall down unconscious. The incapacitation of the deceased appeared to inspire the accused to further attack the deceased as he is said to have struck him five more times on the back with the weapon killing him instantly before taking to his heels, only to surrender himself to police at McDonald Police Base the following day on Christmas day.

The accused pleaded not guilty to the charge. In his defence outline, while admitting attacking the deceased as alleged and pleading drunkenness, the accused denied any intention to kill the deceased. He stated that he had acted under extreme provocation as the deceased

insulted him continuously. On three occasions the deceased had attacked him with stones angry that the accused had fingered him out as the person who had stolen seven bottles of spirits stored in the accused's room.

On the third occasion the deceased has used a shovel to attack him and after repelling that last attack, the accused says he succumbed to the extreme provocation and also acted in self-defence while drunk. Picking up an iron bar which fortuitously happened to be lying around he attacked the deceased. In those circumstances he "failed to judge or measure his response."

The state led evidence from Duke Khumalo who witnessed the killing of the deceased. His evidence is to the effect that he is the one who organized an end of year party for all the mine workers at the mine complex on 24 December 2015. When he got to the venue he found the deceased and the accused exchanging insults over a dispute he did not know. He managed to calm down the two combatants but no sooner had peace prevailed than the deceased picked up a shovel and confronted the accused intending to strike the accused with it as he stood by the fire.

The deceased shouted obscenities at the accused. When he tried to strike the accused with the shovel, the latter succeeded to block the attack with his arm and then withdrew an iron bar which he used to strike the deceased once on the forehead felling him to the ground. While on the ground, the deceased was struck a further two times on the back of the neck thereby incapacitating him.

The accused retreated about three paces while still holding the iron bar before turning round and launching a fresh attack on the deceased after remarking that he was now finishing off the deceased. He struck the deceased a further five times on the back before absconding leaving the deceased bleeding from the forehead apparently dead.

According to the postmortem report the deceased had multiple injuries including injuries to the head, a ruptured liver and injuries to the abdomen. The doctor observed that the cause of death was haemorrhagic shock, haemoperitoneum, ruptured liver, blunt force trauma in the abdomen due to assault. What is significant is that the blows which the accused directed to the deceased's head may not have been fatal. Quite to the contrary, it is the blows directed elsewhere on the deceased's body which killed him. That is significant in that to the extent that the accused incapacitated the deceased by the blows to the head, had he ended then the deceased could have lived.

The accused also gave evidence in essence reiterating his position as summarized in the defence outline. He added that although he does not deny the possibility of assaulting the deceased as alleged by the state witness, he does not know the number of times he hit the deceased neither does he know the parts of the body to which the strokes were directed. Not very useful testimony one would say.

According to him he was so intoxicated that although he could still make a fire to cook, he was incapable of cooking himself. Although he left intending to go to the police post 6km away, he could not make it there but slept in the bush, only arriving there at 6am the following morning. He says he was accompanied by workmates when he finally arrived at McDonald Police base but does not tell us where he got these workmates and when, especially as Khumalo was the last man standing and told us the accused had left running. There is also a dispute as to when he surrendered himself. Sikwila's admitted evidence is that it was 24 hours later.

The accused has raised essentially three defences namely provocation, self defence and intoxication. We will deal with those three defences in turn backwards starting with intoxication. The position of our law is that voluntary intoxication at most can be a partial defence. In specific intent crimes like murder which the accused is presently facing, where it has been established that the accused person voluntarily consumed alcohol to the extent of losing self-control or inhibitions, that defence will reduce the crime to a lesser crime, for instance culpable homicide.

Professor G. Feltoe, *A Guide to the Criminal Law of Zimbabwe*, 3rd edition *Legal Resources Foundation*, at page 22 makes the important observation that the court must therefore explore carefully the actual effect upon the accused of his consumption of liquor or drugs. The learned author goes on to say:

“Liquor and drugs affect different people in different ways. It may be that, although he consumed a considerable amount of liquor, the liquor did not remove his ability to discern what he was doing and he was still able to form the intention to commit the crime. Some people become easily intoxicated and become drunk after consuming a small amount of liquor and others are able to consume a considerable amount of liquor and still remain in control over their mental faculties.”

In carefully examining the actual effect of the liquor on the accused person, it has not escaped our notice that he was able to restrain himself considerably when the deceased was belting out insults at him. He was also able to ward off the shovel attack with his left arm

suggesting that not only was he strong enough he was also in control of his mental faculties. We are also mindful of the fact that when he responded to the deceased's misbehavior, he felled him to the ground with a single blow and the deceased remained there throughout.

Indeed the accused is said to have retreated after incapacitating the deceased. It was only after a while that he returned to inflict the fatal blows avowing: "Let me finish him off." It occurs to us therefore that the liquor the accused consumed did not remove his ability to discern what he was still doing and he had sufficient control of his faculties to formulate an intention. His avowed intention was to finish off the deceased. In that regard the defence of intoxication is not available to the accused.

Regarding self defence, the legal position is that a person is entitled to take reasonable steps to defend himself against an unlawful attack and to inflict harm or even death in order to ward off an attack. The requirements for that defence are:

- 1) The accused must be under an unlawful attack or, where he is defending another person, that person must be under unlawful attack and the accused intervenes to protect that person;
- 2) The attack must have commenced or must be imminent;
- 3) The action taken must be necessary to avert the attack; and
- 4) The means used must be reasonable.

See generally, G. Feltoe, *ibid*, at pp42 -43.

In the present case, the accused person was clearly under attack from an abusive and intoxicated person who was using a weapon to do so, that is, a shovel. He picked up what was probably the nearest available weapon to defend himself and ward off the attack, and struck the deceased once on the head bringing him crashing to the ground. It cannot be said that the actions and the means used up to that stage were unlawful or wrongful. The law allowed him to do so and he had succeeded in warding off the attack.

It is however what he did after that with the avowed intention of "finishing off" the deceased which was unlawful. It is sometimes said that a person under attack is not entitled to exceed the bounds of self-defence. There is no doubt that the accused exceeded the bounds of

self-defence and killed the deceased. Self defence is therefore not available to him as a defence to the charge of murder.

According to G Feltoe, *ibid* at pp 43-44;

“Where X exceeds the bounds of reasonable defence and kills the assailant, he may none the-less still be found guilty of culpable homicide unless the excess was immoderate. The approach here is that the account should be taken of the fact that X was under attack, although, in the circumstances, he overreacted. He should thus be entitled to a partial defence on a murder charge. This partial defence will not, apply where X response was entirely excessive in the light of the type of threat he was under.”

The question to be decided therefore is whether the accused’s response could be justified under that head. It would seem, in light of the post mortem findings that the excess was immoderate. We will however park that issue here for consideration together with the final leg of the accused’s defence, that of provocation, to see whether cumulatively, the two can reduce murder to culpable homicide.

Provocation in Zimbabwean law may, where proved, reduce murder to culpable homicide, itself a punishable offence. This is because despite the fact that the accused would have responded to provocative behavior, it is every person’s social responsibility to exercise self-restraint. Where they fail to do so, they must still be punished in order to prevent anarchy.

Our approach with provocation is two pronged. The first stage being the application of the normal subjective test to decide whether there was an intent to kill. If there was intention to kill then the court must proceed to inquire whether the extent of the provocation was of such magnitude as to reduce murder to culpable homicide.

We however prefer the less problematic approach adopted in *S v Nangani* 1982 (1) ZLR 150 (S) instead of conducting the second rung of the inquiry. In that case the court formulated the test stating that the question to be asked is: Was the provocation such as could reasonably be regarded as sufficient ground for loss of self-control?

What we have is a situation where the conduct of the deceased was provocative in the extreme. He exhibited homosexual tendencies towards the accused as he violently made amorous advances to him. At the same time he accosted the accused with stones as he made the immoral insults which the accused says he was prepared to let go until he had sobered up when he was going to chastise him the following morning.

The accused says it is the shovel attack which forced him to take up arms in order to ward off the unprovoked aggression on him. We however cannot overlook that verbal abuse.

In our view the extent of the provocation was gross and sustained. Here is a young man who was half the age of the accused but was running riot for several hours after stealing “thatha nkau” left in the custody of the accused. He first launched a frontal attack which was just a light skirmishing manouvre with stones. He upped the ante with immoral verbal assault which went to the very root of the elderly man’s manhood- threatening to turn him into a perverted sex object.

When all that did not work he waxed even more dangerous, rushing to his tent to arm himself with a shovel. According to the state evidence he attempted to chop the accused with it. In our view, a reasonable person in the position of the accused person would have lost self-control and acted in the same manner. We are satisfied that indeed the accused person lost self-control and acted in the manner that he did.

Applying the test propounded in *S v Nangani, supra* namely whether the provocation was such as could reasonably be regarded as sufficient ground for loss of self-control that led the accused to act against the deceased as he did, we answer that question in the affirmative. The effect of that finding is therefore to reduce the crime of murder to culpable homicide. We are also mindful of the issue which we parked concerning self-defence.

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

Reasons for sentence

In considering sentence we have taken into account the mitigating factors highlighted by Mr *Nyathi* who appeared for the accused person and the aggravation alluded to by Ms *Ndlovu* for the state.

The accused was 46 years old when he committed the offence. He is a first offender who is married with seven children. Although he really had no choice, we acknowledge that he surrendered himself to the police. He is a bread winner in the family and has, as a result of the offence, obviously lost his employment. The accused was a victim of drunken abuse at the hand of a drunk, unruly and undisciplined young man half his age who targeted him for verbal and physical attack in a completely senseless manner. The conduct of the deceased forced the

accused's hand thereby reducing his moral blameworthiness. The accused had also consumed copious quantities of alcohol when he committed the offence.

In aggravation, we cannot ignore the fact that a life was lost in a very violent manner. When the tables turned against him, the aggressive deceased person was ruthlessly clobbered with a grotesque weapon which would have killed even an animal.

The initial few blows were directed at the head, itself a very vulnerable part of the body. The flurry of strokes which followed which the accused himself says were several were not only vicious but also directed all over the body with sufficient force to rupture the liver and badly injure the abdomen resulting in instant death. The accused's conduct of escaping the scene without even the thought of rendering first aid betrays lack of contrition especially as, up to now the accused still maintains that "the deceased brought the fatal mishap upon himself."

This court cannot allow a situation where people consume alcohol to excess rendering them senseless and although provoked, to then go about killing people in the name of drunkenness. There is still need for respect of human life. Indeed the law encourages people, especially mature people like the accused, to exercise self-restraint. It is for that reason that the sentence to be imposed must recognize that although the accused was found guilty of the lesser crime of culpable homicide, this was an extreme case of culpable homicide. It actually is a borderline case.

Our people must be reminded that violence does not pay. We cannot be a society of primitive individuals who readily resort to extreme bouts of violence at the slightest excuse. Our courts will continue to enforce the broad social policy to require people to control their emotions even under extreme provocation.

In the result, the accused is sentenced to 10 years imprisonment of which 2 years imprisonment is suspended for 5 years on condition he does not, during that period commit an offence involving violence for which, upon conviction, he is sentenced to imprisonment without the option of a fine.

*National Prosecuting Authority, the state's legal practitioners
Dube-Banda, Nzarayapenga & Partners, accused's legal practitioners*