

THE STATE

Versus

SIMON NCUBE

IN THE HIGH COURT OF ZIMBABWE

BERE J with Assessors Mrs E. Mashengele & Mrs A. Dhlula

BULAWAYO 9 & 10 JUNE 2016

Criminal Trial

W. Mabhaudi for the state

Miss L. Mguni for the accused

BERE J: On 10th of April 2015, Nkululeko Vuma (the deceased) lost his life through stabbing at Manwele Beer Garden in the suburb of Mzilikazi here in Bulawayo. The accused person, Simon Ncube was responsible for the stabbing hence he stands accused of the crime of murder as defined by section 47 (1) of the Criminal Law (Codification and Reform) Act [Chapter 9:23].

From the facts given in this case it is clear that the following facts are not in dispute. On the day the deceased met his fate he was drinking beer at Manwele Beer garden with Ritha Nxumalo and other patrons related to Ritha Nxumalo. At around 2100 hours in the evening the accused arrived in the beer hall and after exchanging greetings with his aunt Ritha and after having briefly conversed with her the accused picked up a misunderstanding with her over the death of his mother. It was this misunderstanding which prompted the deceased to reprimand the accused for being disrespectful to those who were around and much older than the accused.

It is common cause that the misunderstanding between the deceased and the accused led to a fight between the two leading to the accused being overpowered and fleeing out of the bar. It is also not in dispute that when the accused ran out of the bar he was pursued by the deceased who caught up with him outside.

Ironically what happened outside was outside the purview of any of the state witnesses. This is because Ritha Nxumalo had gone to the toilet to relieve herself and the other people including Thomas Dube who had witnessed the first fight had remained in the bar. The details of what happened when the deceased caught up with the accused outside the bar is privy to the accused person only.

What Thomas Dube and Ritha Nxumalo only saw outside was the deceased lying supine on the ground with blood oozing from him. From Exhibit 'A', the post mortem report, it looks like the stabbing was so bad that it severely damaged the aorta artery and in the process causing severe left haemothorax leading to the immediate demise of the deceased.

Tragically, as in most of these cases, the deceased did not survive to tell his story. Only the accused remains to tell us what exactly happened leading to the stabbing itself. Deprived of the benefit of direct evidence the court has been urged to rely on circumstantial evidence to try and find out how exactly the deceased lost his life. I will come back to deal with the principles governing conviction through circumstantial evidence later in this judgment.

In denying the charge of murder that has been preferred against him the accused principally raised the defence of self defence after receiving what he referred in his defence outline as "extreme assault and provocation from the deceased." The accused's brief script around his defence is that after engaging in a fight with the deceased he was overpowered and ran out of the bar with the deceased in hot pursuit of him. When the deceased caught up with him the deceased tripped him to the ground and continued to punish him with clenched fists while he lay down struggling to free himself. The accused said as the deceased laid on his belly with one hand holding him by his collar, the deceased reached out for what turned out to be the murder weapon. But fortunately as the two continued to struggle on the ground the deceased dropped the knife which the accused picked up and stabbed the deceased once on the collar bone, ending the deceased's life.

As already indicated, the accused's defence is built around the defence of self-defence and our codified law recognizes the existence of this defence. Self-defence which is also referred to as defence of person can be a complete defence if all the requirements set out in section 253 of the Code are satisfied. It is important to re-state the requirements of this defence as codified in our law. The relevant section reads as follows:

“253. REQUIREMENTS FOR DEFENCE OF PERSON TO BE COMPLETE DEFENCE

- (1) Subject to this Part, the fact that a person accused of a crime was defending himself or herself or another person against 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 if –
 - (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 capacity he or she may have had and any stress or fear that may have been operating on his or her mind.”¹

See also UCHENA J's (now JA) position in *The State vs Webster Choruma and Action Choruma*.²

The accused's uncontroverted evidence which incidentally got support from Thomas Dube and Ritha Nxumalo was that both the accused and the deceased appeared to have been drunk when they picked up a misunderstanding. We must therefore assume that their power of judgment must have been compromised.

1. Section 53 of Criminal Law (Codification and Reform) Act (Chapter 9:23)
2. HH-103-10

Thomas Dube, who is the only witness for the state to have witnessed the first fight between the accused and the deceased confirmed what the accused told the court that he was overpowered by the accused and ran out of the bar with the accused after him in hot pursuit. In his own words Thomas Dube, was said to have stated the following in the state summary.

“This witness will state that as they were drinking beer the deceased started a scuffle with the accused person. This witness will state that he did not know how the scuffle had started and what was the bone of contention. The scuffle between the two continued until it generated to a first fight. The accused person was overpowered and he ran out of the beer garden, however the deceased followed him in hot pursuit.” My emphasis

Unfortunately for the state what happened outside the bar was not witnessed by any of its witnesses. The accused’s testimony filled up that lacuna by providing graphic details of how he was tripped by the deceased and continued to be punished whilst lying down on his back right up to the stage when the deceased pulled out a knife which the accused, by mere opportunity used to stab him. It is significant to us that the stabbing was once.

In his evidence in chief and under cross-examination the accused largely corroborated the evidence of Thomas Dube. Thomas Dube could not controvert the evidence of the accused surrounding the stabbing because he was not there when that happened. The accused said that he used the knife by opportunity and he felt that if he had no used it, it could possibly have been used against him.

It is quite tempting for us sitting here as a court and in the comfort of this court room to start speculating on what the accused should have done to avoid the killing. But practice and experience cautions us against adopting an armchair approach when we deal with situations of self-defence. See G Feltoe’s views³

As a court we invited the accused to take us to the scene of the stabbing when he was giving evidence. The accused gave us a chilling account of what happened leading to the deceased's stabbing.

3. *A Guide to the Criminal Law of Zimbabwe* (Legal Resources Foundation) 2nd Edition p 45

We are unanimously convinced that the accused's use of the knife in those circumstances was a necessary evil.

There was a heated debate generated in these proceedings as regards the origins of the knife that turned out to be the murder weapon. Two schools of thought arose. The prosecution urged the court to make a specific finding that the knife was with the accused person at the time he was being assaulted by the deceased. The defence on the other hand passionately argued and urged the court to make a finding consistent with the accused's testimony that the knife was in the possession of the deceased person and that it was him who produced it when the accused was down and being punished by the deceased.

In its argument, the state was persuaded to take its position by the evidence of the accused's sister Sibonginkosi Ncube who testified that on the night of the assault when she was awoken by the accused, the accused tussled and threw exhibit 2 on the top of her blankets and that she later gave this knife to the police. It must be emphasised that Sibonginkosi was clear that this knife had no blood stains on it. Given the injuries reflected in exhibit 1, the post mortem report, it is very unlikely that that knife, if it was the murder weapon would not have had blood stains. Our view is that if the state wanted to derive some evidential value from that knife it should have been sent for forensic examination.

In an event there is nowhere in the state case where it is shown that exhibit 2 was at any time shown to the accused for him to confirm that it was the murder weapon before he was taken to court for trial.

The state also sought to rely on the fact that when the knife was produced in court by consent in terms of section 314⁴ it meant that the accused was accepting that it was the murder weapon. I do not believe that the acceptance in evidence of the knife in terms of section 314 in this case meant that the accused was accepting the knife as the murder weapon because this was

4. Criminal Procedure and Evidence Act [Chapter 9:07]

not suggested to him during its production, nor was her counsel asked to confirm that the knife was being produced as the murder weapon. The court's view is that it is a misreading of section 314 that anything produced in terms of it is immune from challenge in the absence of the other part having so confirmed that. I draw an analogy with the production of a confirmed warned and cautioned statement which is admissible upon its mere production by the prosecution. This does not mean that such a statement is immune from challenge by an accused if he decides to do so. The effect is simply that the onus shifts to him if he/she decides to challenge it.

In his evidence in chief, the accused consistently maintained that the investigating officer never showed him and sought his confirmation on the murder weapon. It was only when he was in court that he gathered that the exhibit was being referred to as the murder weapon. The accused's challenge to that exhibit runs through his evidence in chief and examination of that evidence. The accused maintained throughout his testimony that the knife he used to stab the deceased was not before the court. Our view is that the position remains probable.

The court has been urged by the state counsel to pronounce the accused person guilty in this case on the basis of circumstantial evidence. As observed by my brother MAKONESE J in the case of *The State vs Sonny Kuzomunhu Chasi*⁵

“The law of circumstantial evidence is however well traversed in our jurisdiction. The law on this subject has its basis on the two cordial rules of logical inference as laid down by WATERMEYER (JA) in the case of *R v Blom* 1939 AD 188, where the learned judge observed that the following rules must be observed;

- “(a) the inference sought to be drawn must be consistent with all the proved facts. If it is not the inference cannot be drawn.
- (b) the proved facts should be such that they exclude every reasonable inference from them save the one sought to be drawn. If they do not exclude other reasonable inference, then there must be doubt whether the inference sought to be drawn is correct.”

See also the case of *S v Marange* 1999 (1) ZLR 244 SC where KORSAN JA at page 249 referred to an English case as follows;

5. ^{HB-29-14}

“Lord Normand observed in *Tepes v R* [1952] AC 480 @ 489 that “Circumstantial evidence may sometime be conclusive, but it must always be narrowly examined, if only because of this kind may be fabricated to cast doubt on another. ... It is also necessary before drawing the inference of the accused’s guilt from circumstantial evidence to be sure that there are not other co-existing circumstances which would weaken or destroy the inference.”

The story told by the accused person in this case is not without corroboration and it is as follows:

When he entered Manwele Beer Garden to drink beer he picked up a quarrel with the deceased and this resulted in a fight in which he was overpowered and ran away. The accused was then chased after by the deceased outside the bar where a few minutes later the deceased was found in a pool of blood. All this is confirmed by the state witnesses.

The accused goes further to give a detailed uncontroverted explanation surrounding the circumstances of the actual stabbing leading to the death of the deceased. Taking into account the prior circumstances of the misunderstanding between the deceased and the accused, we believe the story told by the accused person is reasonably possible and in such circumstances guilt by inference is clearly inappropriate.

In conclusion I wish to emphasise the fact that the use of immoderate force will not excuse an accused where the defence of self-defence is relied upon. I have already dealt with the circumstances under which the accused stabbed the deceased in this case.

The accused's uncontroverted explanation is that in the hustling and pushing that he engaged in with the deceased he thought he would stab the deceased by the shoulder but unfortunately the knife unintentionally ended on the collar bone. We do not believe that it can be said that the accused used excessive force given the circumstances he was under when he stabbed the deceased.

Consequently, our unanimous position as a court is that the accused be given the benefit of doubt in this case.

The accused is found not guilty and acquitted.

National Prosecuting Authority, state's legal practitioners
Job Sibanda & Associates, accused's legal practitioners