

THE STATE**Versus****NIGEL NDLOVU**

IN THE HIGH COURT OF ZIMBABWE
TAKUVA J with Assessors Mrs Moyo and Mr Hadebe
BULAWAYO 3, 4 & 7 MARCH 2016

Criminal Trial

Ms N. Ngwenya for the state
Ms S. Sandi for the accused

TAKUVA J: The accused is facing a murder charge in that on the 5th of August 2013 and at 22527 Pumula South, Bulawayo, in the said Province, the accused person did wrongfully, unlawfully and intentionally kill and murder Oppah Ndlovu a female adult during her lifetime therebeing.

The facts are as outlined in the state outline. They were read into the record and I do not intend to repeat all of them here. I will just state the summary of the facts (Ex 1 – 1st part). The accused pleaded not guilty and his defence outline was read into the record and produced as exhibit 2. The crux of his defence is that he did not intend to kill the deceased but wanted to defend himself. He also raised the issue of anger or provocation as a defence. He however admitted committing the *actus reas* and using the murder weapon on the day in question. State produced exhibits as shown in the exhibit list.

Exhibit 4 is a post mortem report by Dr Ivian Betancourt who found the cause of death to be:

- (1) Hypovolaemic shock
- (2) Damage of left lung, severe Haemothorax
- (3) Severe Thoracic Trauma due to stabbing injury

The state then led *viva voce* evidence from Tapelo Ndlovu a ten year old boy who is deceased's son and accused's cousin. His evidence was that on the night in question he was bathing when he heard his mother (deceased) screaming calling out his name. He rushed out and saw blood stains on the sofa and floor in the sitting room. He rushed to his mother's bedroom where he heard the door being locked from inside. He tried to open the door but realised that it had been locked. He then ran out of the house but before he got far accused who was pursuing him caught up with him and covered his mouth with his hand at the same time threatening to beat him if he made any noise. Accused took him back into the house where he ordered him to clean the blood on the knife and sofa. Accused wiped the blood that was on the floor. He saw accused changing his clothes. Later, accused told him to accompany him to the shops to buy bread. Accused then told the witness that they should go to Mrs Tshuma's house to report that deceased had been murdered by unknown assailants. Before they left, accused took all the money from deceased's bag. He also threw clothes all over the room. They then proceeded to Mrs Tshuma's house where upon arrival, the accused told her that deceased had been attacked by unknown persons. Mrs Tshuma called a neighbour, one Witness Antonio Ngwenya who also brought her husband and together they went to the deceased's house.

When they arrived, the accused showed them the room where deceased was. The witness saw her mother lying on the floor facing upwards. According to this witness, the relationship between accused and deceased was at times sour because of accused's disobedience. He said on one occasion deceased assaulted accused with a cooking stick after accused had slept on deceased's bed with his girlfriend while deceased was away. Further, he said the bone of contention between the two was that accused would not perform the chores assigned to him by the deceased. Deceased would end up performing those chores. Tapelo's evidence was not challenged during cross-examination. Size of cooking stick not put to him by the defence.

In fact, the accused's evidence corroborates Tapelo's evidence in material respects. For example, he admitted that the cause of the misunderstanding between him and the deceased was his failure to perform domestic chores. He admitted that he told Tapelo a concocted story that

deceased had been attacked by unknown assailants. He admitted that there was blood on the sofa and on the floor in the sitting room. Also, he agreed with Tapelo that he at one time brought his girlfriend home to spend the night there. He, however denied sleeping on deceased's bed with this girl.

In our view Tapelo gave evidence very well. His version is clear and straight forward. He neither exaggerated his evidence, nor showed any bias towards any particular person. He is in fact a very intelligent boy, who despite the traumatic experience he endured was able to narrate events chronologically with sufficient and relevant detail. We take the view that this witness was a credible witness and we accept his evidence *in toto* wherever it conflicts with that of the accused. The state then applied to have the evidence of the rest of their witnesses admitted in terms of section 314 of the Criminal Procedure and Evidence Act (Chapter 9:07). The application was not opposed and the evidence of -

- (1) Tryphine Tshuma
- (2) Witness Antonio Ngwenya
- (3) Lazarus Ngwenya
- (4) Byron Dunura
- (5) Never Kamupita and
- (6) Dr Betancourt

was admitted by consent. The state then closed its case.

The defence opened its case by producing the accused's national registration certificate which shows that the accused was born on 28 April 1998 in Bulawayo.

Accused then gave evidence in his defence. His version is simply that he arrived home late from school on the fateful night. Deceased took issue with that and demanded an explanation from him. After proffering an explanation deceased did not believe him and told him that he was going to beat him thoroughly. She then stood up and armed herself with a "big

cooking stick” which was in the kitchen. After that she then advanced towards him and started assaulting him with this big stick. According to him, prior to explaining the reason for coming home late, he had taken a kitchen knife (Ex 8) from the kitchen intending to use it to cut a piece of soap. When deceased started assaulting him, he had placed the bar of soap on the floor but kept the knife in his hand. When deceased continued to assault him, he then stabbed her above the eye and ran into deceased’s bedroom with deceased in hot pursuit. He continued to stab deceased in the bedroom but could not say how many times he stabbed her. However, he admitted that he aimed his blows at the upper part of deceased’s body. After that he told Tapelo to clean the knife. Further, he admitted that he told Mrs Tshuma a fabricated story as to how deceased had been injured. He maintained that he stabbed deceased in self defence since he could not have fled due to the fact that deceased had “blocked” his way. As regards their relations, he admitted that at times they were turbulent and deceased would insult him and chase him away from home after having assaulted him. On the day in question, he said he acted out of anger but lacked the intention to kill the deceased.

We find accused’s version as regards how he ended up with a knife and how he was assaulted by the deceased hard to believe. We appreciate that the only direct evidence as regards the cause and sequence of the fight is coming from the accused. However, his evidence is improbable in certain respects. For example, we find that it was highly unlikely that deceased would immediately after being stabbed with such a dangerous weapon follow the assailant. Also, the accused’s version of the manner and nature of weapon used by the deceased to assault him is highly incredible. He failed to show or mention the “big cooking stick” to the police who attended the scene that evening. Instead, he told them a different reason for the fight – namely that deceased had confiscated his cell phone. Accused’s evidence that deceased chased him is inconsistent with Tapelo’s evidence that it was deceased who “screamed calling out his name”. We agree with the state counsel that it was in fact the deceased who was running away from the accused. It appears to us from the surrounding circumstances and other evidence, coupled with probabilities that the accused’s version is false.

In any event, assuming we are wrong that there was no unlawful attack on the accused, the following analysis and application of the law to the facts will demonstrate that the two defences raised by the accused are unsustainable.

The law

Our law recognizes that the infliction of harm upon unlawful attackers is permissible to the extent that such harm was reasonably necessary to avoid them off. Section 253 of the Criminal Law Codification and Reform Act Chapter 20:04 provide the requirements of this defence. They are (1) there must be an unlawful attack. (2) when the accused engaged in the conduct, he believed on reasonable grounds that the unlawful attack had commenced or was imminent; (3) the accused 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; (4) that the means used to avert the unlawful attack were reasonable in all the circumstances; (5) any harm or injury caused by his conduct or her conduct – (a) was caused to the attacker; (b) was not grossly disproportionate to that liable to be caused by the unlawful attack.

In assessing these requirements the court must avoid an armchair approach from the refined atmosphere of the court. Put differently, the court must take into account the accused's predicament – *S v Phiri* SC-190-82; *S v Mashingaidze* SC-79-84; *S v Mandizha* SC 200-91; *S v Banana* 1994 (2) ZLR 271 (S).

Another relevant section in respect of this defence is s 255 which basically provides that if an accused is genuinely and on reasonable grounds, but mistakenly believes that he or she is defending himself or herself or another person against an unlawful attack, he or she shall be entitled to a complete or partial defence to any criminal charge in all respects as if his or her belief were in fact correct.

Note: For the defence to avail, the mistake must not only be genuine but also it must be reasonable - *S v Moyo* SC-45-84. Before applying these principles to the facts before us we must state facts that are common cause. They are the following:

- (a) accused and deceased were related and living under one roof.
- (b) on the fateful day deceased and accused had an argument over accused's late arrival from school.
- (c) deceased screamed calling out Tapelo Ndlovu's name.
- (d) there were blood stains on the sofa and floor in the sitting room.
- (e) accused stabbed the deceased with Ex 8 causing all the injuries observed on deceased's body.
- (f) all these injuries were inflicted on deceased's chest, neck, head and face.
- (g) deceased died as a result of these injuries.

Applying the principles of law to the above facts we make the following findings (giving accused the benefit of doubt)

- (a) That deceased used an ordinary cooking stick to assault accused and not the "big cooking stick" accused alluded to.
- (b) That this assault did not present a threat to accused's life as deceased was merely chastising accused for coming home late.
- (c) The accused did not sustain serious injuries from this assault (admitted)
- (d) Accused's conduct was not necessary to merit this attack.
- (e) The means used by the accused were totally unreasonable in all the circumstances of this case.
- (f) The injuries caused were grossly disproportionate to that liable to have been caused by the deceased.
- (g) That as a result of the foregoing the requirements of self defence have not been met.

In casu we find accused to have acted with actual intent to kill. We say so for the following reasons:

- 1) Accused stabbed deceased with a big sharp knife on numerous occasions.
- 2) He aimed at the deceased's chest, neck, face and head.
- 3) He inflicted very serious and fatal injuries on the deceased.
- 4) Deceased died from these injuries
- 5) Provocation has not been proved a defence in that a reasonable person in accused's position would not have lost his self control.

Consequently we agree with Miss *Ngwenya* for the state that the accused be found guilty of murder with actual intent.

Verdict – Guilty of murder with actual intent.

Sentence

The mental process in which courts engage in, when considering questions of sentence depends upon the task at hand. Subject of course to any limitations imposed by legislation or binding judicial precedent, a trial court will consider the particular circumstances of the case in the light of the well known tried factors relevant to sentence and impose what it considers to be a just and appropriate sentence – *S v Malgas* 2001 (1) SACD 469 (SCA).

In casu we will consider the submissions in mitigation submitted by the defence. Counsel as well submissions in aggravation which were submitted by the state counsel.

On the mitigation side we will of course consider the fact that the accused is a youthful first offender. In fact the accused is just below the legal age of majority. He is 17 years 10 months to be exact. The courts have always treated youthfulness as a strong mitigating factor. The courts have also time and again stated that when possible youthful offenders should not be sent to prison. We will also consider that there was an element of provocation in this case.

Further, we will also take into account the sorry background from which accused comes which must have had an effect on his character and therefore on the eventual commission of an offence such as this one. According to John Bowby, “Maternal deprivation” plays a critical role in the development of personality deviations. In his report to the World Health Organisation (1952) he concluded that prolonged separation of a child from his mother (or mother substitute) during the first five years of life stands foremost among the causes of delinquent character development. On the other hand there are other theories of causes of crime like the “biological inferiority theory” and the “humanistic theory” – sick etc.

In this case, the accused we were told stayed with the grandmother who later sent him to an aunt whom he later murdered. That’s all we could find in mitigation. On the aggravation side as Miss *Ngwenya* for the state has pointed out, we must take into account, not just the conditions of the offender but the offence that he had committed in order to search and arrive at what is referred to as an appropriate form of punishment. That punishment must suit both the offender as well as the offence. The question is usually how to balance the principle of retribution with that of rehabilitation. In other words should retribution be minimized and rehabilitation maximized in the sentencing process? Put simply, a court imposes a sentence as a deterrent to demonstrate to others, who might be inclined to commit similar offences that this was the punishment they would get. Put differently, the court would be addressing to the larger segment of society and reinforce its view that the particular offence was unacceptable. It is in a sense a process of moral education. In this regard, the effectiveness of deterrence should not be underestimated.

The offence of murder is the most serious offence in the book. The courts have no other way of showing their aversion to murder and their determination to stamp out this kind of crime than by punishing severely the perpetrators of the offence – See MUBAKO J’s comments in *S v Dzaro* 1996 (2) ZLR 541 (H). As I said, the punishment is aimed at correcting the offender as well as deterring other from committing similar crimes. The trend is that such brutal crimes are committed by young people. Deter this group from committing such crimes. In this particular

case the accused killed the deceased in the most brutal and callous manner. The killing was totally uncalled for as the accused could have simply ran out of the house. The nature of the blows shows that the accused was determined to finish the deceased's life. He used excessive force to murder his aunt who was in loco parentis after his biological mother had refused to stay with him. He mercilessly butchered the only person who had shown him love. We agree with the state counsel that the cases she cited reflect the sentencing policy relating to juvenile offenders who commit murder in such a horrific manner.

We must warn that the accused would have deserved very stiff sentence indeed, many more years than we are going to sentence him to had he not been a minor. The accused is sentenced to 20 years imprisonment of which 3 years imprisonment is suspended for 5 years on condition accused is not within that period convicted of an offence involving violence upon the person of another for which upon conviction shall be sentenced to imprisonment without the option of a fine.

Prosecutor General, state's legal practitioners
Masawi & Partners, accused's legal practitioners