

THE STATE**Versus****QHUBEKANI NCUBE**

IN THE HIGH COURT OF ZIMBABWE

DUBE-BANDA J with Assessors Mr. Ndubiwa and Mr. Ndlovu

HWANGE 7 & 8 March 2024

Criminal trial

M. Dube for the State

B. Siansole for the accused

DUBE-BANDA J:

[1] The accused is appearing before this court charged with the crime of murder as defined in s 47 of the Criminal Law (Codification and Reform) Act [Chapter 9:23]. It being alleged that on 2 April 2023 he unlawfully caused the death of Mthetho Khumalo referred as the deceased by striking him twice on the head with a snooker stick, intending to kill him or realizing that there was a real risk or possibility that his conduct may cause the death of the deceased and continued to engage in that conduct despite the risk or possibility.

[2] The accused, who was legally represented throughout the trial pleaded not guilty to the charge. The State tendered an outline of the summary of the State case (Annexure A), and the accused tendered his defence outline (Annexure B) and are now part of the record. In his defence outline the accused stated that he struck the deceased with a snooker stick in self-defence. He denied that he struck him on the head.

[3] The accused made admissions in terms of s 314 of the Criminal Procedure and Evidence Act [Chapter 9:07] (CP & E Act). The admissions relate to the evidence of the following witnesses as it appears in the summary of the State case.

[3.1] The evidence of Shelton Muhlwa. His evidence is that the accused is a local villager and the deceased was also a local villager. On 2 April 2023 at 1700 hours, he

was at Mbonani bottle store where he was drinking beer with the deceased while watching a game of snooker. He restrained the deceased and one Liphat Mpofu from fighting. The witnesses left the bottle and returned at 2200 hours, and on his return, he found that one Prince had been injured on the leg and Orchard was injured on the head. He accompanied the two injured persons to the police station to make a report. The deceased was no longer at the bottle store.

[3.2] The evidence of Liphat Mpofu. His evidence is that on 2 April 2023 at 1800 hours he was at Mbonani bottle store drinking beer when the deceased walked in. The deceased was drunk and he pulled out a knife and pointed it at the witness and said he wanted to kill someone. Shelton Muhlwa restrained the deceased from being violent. This witness left the bottle store because of the conduct of the deceased.

[3.3] The evidence of Sergeant Muririmi. His evidence is that he is the investigating officer in this matter. He recovered three broken pieces of a snooker stick. He took the accused for indications and recorded a warned and cautioned statement from him.

[3.4] The evidence of Doctor Jekonya. His evidence is that he is a registered medical doctor stationed at Mpilo Hospital in Bulawayo. On 5 April 2023 he examined the remains of the deceased and compiled his findings in a post mortem report number 77/56/2023.

[4] The State with the consent of the accused tendered into evidence the following exhibits: a Post Mortem Report No. 77/56/2023 exhibit 3 compiled by Dr. I. Jekonya who concluded that the cause of death was a subdural haematoma; traumatic brain injury; skull assault and severe head injury. A confirmed warned and cautioned statement of the accused exhibit 1; a sketch plan of the scene exhibit 2; and three pieces of a broken snooker tackle stick. The first piece exhibit 4(a) has the following measurements: length 91cm; circumference wide end 7.5cm; circumference tip 4.5cm; weight 150g. The second piece exhibit 4(b) has the following measurements: length 42cm; circumference 9cm; weight 112g. The third piece exhibit 4(c) has the following measurements: length 25cm; circumference 10.4cm; weight 200g.

[5] The State called two *viva voce* witness and the accused testified in his own defence. The evidence of the witnesses will be summarised briefly.

[6] The first to testify was Real Khumalo. The deceased was his father and the accused is a neighbour. He testified that on 2 April 2023 he was at Mbonani bottle store in the company of the deceased. The deceased produced a knife and stabbed one Prince Mpofu. The accused came out of the shop and asked the deceased as to what he was doing. When the deceased raised his head, the accused struck him on the head with a snooker stick. The deceased fell on the ground, stood up and ran away into the bush. He testified that the deceased had a knife in his pocket but did not produce it against the accused. He did not see the deceased charging towards the accused holding a knife. Under cross examination this witness testified that the deceased also stabbed one Orchard Mpofu. The court is of the view that Real Khumalo lied when he said he did not see the deceased charging towards the accused holding a knife. He lied because in his statement he gave to the police he said the deceased advanced towards the accused armed with a knife, the accused then struck him with a snooker stick. He also did not disclose to the court that he was also a victim of stabbing by the deceased. It is on this basis that his evidence must be treated with circumspection and caution, particularly where it is at variance with the established facts.

[8] The second witness to testify for the State was Prince Mpofu. His evidence was that the accused is a neighbor at the village and the deceased was his brother-in-law. On 2 April 2023 at 1800 he was at Ntobi Business Centre. He was drinking beer in the company of one Orchard Mpofu. Orchard got drunk and slept on the ground near a wooden bench where this witness was seated. He heard deceased making noise in the bottle store. After a while the deceased came out of the bottle store threatening and insulting and opened a knife and stabbed the witness on the right thigh. The accused then came out of the bottle store carrying a snooker stick and asked the deceased the reason why he was stabbing people, and at that moment the deceased turned towards the accused charging and brandishing a knife. The accused turned to escape, but the deceased was too close and the accused then struck him twice on the head with the stick he was holding. The deceased fell down, stood up and ran away. This witness testified that the deceased stabbed four people, including his son Real Khumalo who testified as the first

witness for the State. Under cross examination he testified that if the accused had not struck the deceased with a stick and proceeded trying to run away, he could have been stabbed. Mr Mpofo came across as a witness who had a reasonable recall of events. His evidence was not challenged in any material respects and there is no reason not to accept it.

[9] At the conclusion of the testimony of Prince Mpofo the prosecution closed the State case.

[10] The accused testified in his defence. He testified that on 2 April 2023 he was at Mbonani bottle store drinking beer and playing snooker. He left the bottle store to answer to the call of nature and that is when he saw the deceased stabbing people outside the bottle store. He walked to where the deceased was and asked him “what are you doing killing people,” and the deceased replied saying “you also want to die.” The deceased turned and advanced towards him armed with a knife, and it is at that point that he struck the hand that was holding the knife. He denied that he struck the head. Under cross examination he testified that he struck deceased on the hand two times. He insisted that he did not strike the head of the deceased.

[10] Overall the accused was not a bad witness but lied when he testified that he struck the deceased on the hand that was holding the knife. But the court is not entitled to say that because he lied on this issue, he is therefore likely to be a criminal. It is possible that an innocent person may put up a lie because he thinks that the truth is unlikely to be sufficiently plausible. See *Tumahole Bereng v R* [1949] AC 253 (PC); *R v Rama* 1966 (2) SA 395 (A). This is the position in this case, he lied because he thought if he admits that he struck the head, he will be convicted. He struck the head twice with a snooker stick. This is so because the witnesses testified that he struck deceased on the head twice and post mortem report does not speak of an injury on the hand. It shows that the deceased suffered head injuries i.e., subdural haematoma, traumatic brain injury and skull assault and severe head injury.

[11] The following facts are either common cause or established by evidence. The deceased was intoxicated and armed with a knife. He was causing trouble at the bottle store, and as a result he stabbed four people including his own son. The accused moved out of the bottle store and asked the deceased why he was conducting himself in the manner he was doing. The

deceased turned and charged towards the accused brandishing his knife. At this moment the accused struck him twice on the head with a snooker stick. The deceased fell down and thereafter stood up and managed to escape. Efforts to locate him that night failed, he was found in the following morning in the bush and he was unconscious. He died on 3 April 2023. The facts and the evidence show that the injuries inflicted on the deceased were caused by the accused. The post mortem report shows that the injuries inflicted by the accused caused the death of the deceased.

[12] The accused raised the plea of self defence. In terms of the law in this jurisdiction the defence of “self-defence” has been codified in s 253 of the Criminal Law (Codification and Reform) Act [Chapter 9:23]. In respect of the attack, it is required that the attack must be unlawful, must have commenced or was imminent, while the defensive act must be directed against the attacker and necessary to avert the attack. It is further required that the means used must be necessary in the circumstances. The *onus* is on the State to prove beyond reasonable doubt that the requirements for self-defence did not exist, or that the bounds of self-defence had been exceeded.

[13] In his book, *A Guide to the Criminal Law of Zimbabwe*, at page 45, the author Prof. G. Feltoe states as follows:

“The law provides that a person is entitled to take reasonable steps to defend himself against an unlawful attack. Harm, and sometimes death, may be inflicted on the assailant in order to wade off the attack.” (My emphasis).

[14] In determining whether an accused has met the requirements for the defence of self defence it must always be borne in mind that the trial court must avoid taking an armchair approach in the assessment of the situation faced by the accused. It is easy, after the event and far from the dust of the conflict in which the accused was involved, to find possible ways and means through which the accused could possibly have averted the deceased’s death. See *S v Manyekete* HS -386-81. The court must in its examination of the evidence and the facts factor into the equation that the accused had no luxury to rationale and he had to act and act immediately. See *S v Mpofo* 1969 (1) SA 334.

[15] In *casu* the accused was under an unlawful and imminent attack. The deceased was charging towards the accused armed with a knife. The accused was aware of the fact that the deceased had already stabbed other four people, therefore the threat was real. If the accused had continued trying to escape, he was going to be stabbed. To say he should not have struck the head is to assume he had time to rationalize, he did not. The means used to avert the attack were in the necessary in the circumstances. He used a snooker stick he was using to play a game of snooker. The court is of the view that faced with an armed and persistent, aggressive and a drunken assailant, the accused was quite entitled to use the snooker stick to put an end to the threat confronting him. The accused's action of striking the deceased twice on the head with a snooker stick was not unlawful. See *S v Maenda* HH 44/16. This is a text book case where a plea self defence must succeed. The State failed to prove that the requirements for self-defence did not exist, or that the bounds of self-defence had been exceeded. Therefore, the State has failed to prove its case beyond a reasonable doubt as required by the law.

In the result, the accused is found not guilty and acquitted.

National Prosecuting Authority, state's legal practitioners
Mhaka Attorneys, accused's legal practitioners