

THE STATE
versus
DONALD SIBANDA

HIGH COURT OF ZIMBABWE
MOYO J
HWANGE 16 AND 18 NOVEMBER 2015

Criminal Trial

Miss N. Ngwasha for the state
G. Muvhiringi for the accused

MOYO J: The accused person faces a charge of murder it being alleged that on 3 June 2015 at Peri One village in Insuza, Nyamandlovu, he killed Phathisani Ndlovu who was his son.

The state tendered the following evidence:

- The state summary was marked Exhibit 1, the accused person's confirmed warned and cautioned statement was marked Exhibit 3, the post mortem report was marked Exhibit 4.
- The spear and the knife that were allegedly used by the accused person were marked Exhibit 5 and 6 respectively.
- The accused person's defence outline was tendered by the defence and marked Exhibit 2.

The evidence of the following witnesses as contained in the state summary was admitted into the court record in terms of section 314 of the Criminal Procedure and Evidence Act.

Lovemore Tshuma and Clement Mudereri are the police officers who attended the crime scene and also recorded a warned and cautioned statement from the accused person. Dr I. Jekonya is the pathologist who examined deceased's body and prepared a post mortem report which is Exhibit 4.

The facts of this matter are largely common cause. The deceased was the accused person's son. He had a misunderstanding with his wife Solani Mwembe. She then fled to her father in laws' homestead. The father (who is accused) then sought mediation from the neighbourhood watch members, the deceased did not co-operate in that respect and the matter

remained unresolved. Later while, accused was harvesting millet in the fields, he saw his daughter in law arriving from fetching water with others, deceased intercepted her, caused her to put down the bucket, held her hand and they left. Accused immediately thought that deceased would harm the daughter in law who is accused's wife, he then thought of immediately following. He says they were about 100m from where he was so he could see them. He had a kitchen knife with him which he was using to harvest millet. He then put it in his pocket. He also says there was a spear that had been left by deceased some days prior to the day in question, it was by the gate. He took the spear also and he gives two explanations for taking the spear, firstly, he says it was deceased's and secondly, he says at the back of his head he feared that deceased could harm his daughter in law and himself so he also gives an impression that he sought to use it for protection.

He later followed the two and caught up with them when they had met the second state witness Pango Ndlovu, he arrived as they spoke to her. At this juncture the versions differ, the state version is that, accused uttered words charging towards them and deceased wielding the spear, which he aimed and thrust towards deceased's chest, but Pango Ndlovu intervened by holding the spear and disarming the accused. They say then accused drew a knife from the back pocket and Pango Ndlovu says then deceased cut a switch and hit accused, who then retreated, but timeously tripped deceased who fell facing upwards and accused then sat on his abdomen and stabbed him. Solani Mwembe, told the court that accused uttered some words, wielding the spear, which was snatched by Pango Ndlovu, then drew a knife and deceased then broke a switch and assaulted deceased, that the two wrestled, before falling down, thereafter accused sat on top of deceased and stabbed him.

The accused says, as he approached deceased broke a log from a nearby tree and he then also wielded the spear that Pango Ndlovu then disarmed him of and deceased then assaulted him with the log, that it is at this juncture that he became angry and he lost it. He says thereafter the devil took over until when he realized he had killed his son & tried to resuscitate him.

Defence counsel submitted that the state summary supports accused's version of events. This court finds that this is not so. What the court is interested in is at what stage the accused person drew the knife. The witness says it was soon after he was disarmed of the spear, but prior to being assaulted by the deceased with a log or switch. The state summary does not state at what

stage the knife was drawn, it only says accused tried to stab deceased with the spear, was disarmed, and then deceased assaulted accused, accused then tripped deceased who fell down and accused then stabbed him.

We are not going to try and reconcile these versions for it is the court's view that all the three witnesses before this court, seem to have told the truth (including the accused person). Witnesses are human beings and they do not have a photographic memory, when one is watching a fracas unfolding, they are bound to be mistaken on one point or two, or in their honest and recollection of a mayhem, they may miss a thing or two or get mixed up in the sequence of events. We cannot find that any witness lied in this respect as they told us that they were screaming and crying, at some point when you are crying your eyes will be closed and as a natural consequence of that you may miss a thing or two.

Again, the accused person did not seem to be on a mission to mislead this court either. The court observed that he wept in the dock as his daughter in law came in to testify. When he was put on his defence, he told the court that he erred, and had nothing to say as he was of the view that he would be wasting the court's time. He did not strike the court as a liar. For the mere fact that one is an accused person does not mean that he should be disbelieved, there should be reasons for such a finding. It is for the reasons that the court will not seek to reconcile the disparities in the version of events as they unfolded at the scene. This court will however make the following findings that are common cause.

- 1) There had been a prior misunderstanding between deceased and accused
- 2) Accused arrived at the scene, saw Pango Ndlovu and deceased, and Solani Mwembe he wielded a spear, Pango Ndlovu disarmed him.
- 3) Deceased attacked accused with a switch or log
- 4) A fight ensued that ended with deceased on the ground facing upwards and accused sitting on deceased's abdomen
- 5) Accused then fatally stabbed the deceased
- 6) He later sought to resuscitate the deceased when he realized that deceased had died.

It is our finding that the accused person fatally stabbed the deceased.

The accused has pleaded partial defence of provocation and self- defence. With regard to the partial defence of provocation, the Criminal Law Codification and Reform Act, [Chapter 9:23] provides as follows:

“23a(1)(b) If after being provoked, a person does or omits to do anything resulting in the death of a person which would be an essential element of the crime of murder, if done or omitted, as the case may be, with the intention or realization referred to in section 47, the person shall be guilty of culpable homicide if, as a result of the provocation, he or she has the intention or realization referred to in section 47 but has completely lost his or her self control, the provocation being sufficient to make a reasonable person in his or her position and circumstances lose his or her self-control ---.”

This section provides for an extreme provocation by the deceased, which would cause a reasonable person in accused’s shoes to lose his self-control and end up committing murder. In the facts before us, we are unable to pin point to this provocation, for at what stage was accused provoked? It would appear these two people had a simmering dispute regarding deceased’s ill-treatment of his wife and his reluctance to go for mediation and be assisted. We cannot find that there was extreme provocation in this whole transaction but what we can find is that the parties had a simmering misunderstanding and failed to reach common ground, resulting in the fight that later ensued. Deceased came and took his wife and he said nothing to accused, he did not provoke him on that day, accused should have sought dialogue with deceased through emissaries, he could send an aunt, or village elder or some church person to go and try to knock sense into deceased’s head and also assist the couple to find common ground. Following the deceased and the daughter in law, armed with a knife and a spear, could also have prompted the deceased to act in the manner that he did. It is thus difficult to find that a man who emerges armed with a spear and a knife was in fact provoked by the one who then sought a log. For what could deceased have done in the circumstances, as obviously these people had a verbal dispute and following deceased armed with a spear can actually be found to have been provocative in itself given the background. It is for these reasons that we find that the partial defence of provocation is excluded from these facts. For the same reasons the partial defence of self defence as provided for in section 253 of the Criminal Law Codification and Reform Act [Chapter 9:23] is not available to the accused person. The requirements in terms of section 253 are that:

- 1) There must be an unlawful attack, which should have commenced or is imminent, or he/she believed on reasonable grounds that the unlawful attack had commenced or was imminent.
- 2) His/her conduct was necessary to avert the attack and that he/she could not escape to avoid the attack and that he/she reasonably believed that the conduct was necessary to avert the attack or that she could not otherwise escape from or avert the attack.
- 3) The means that he used to avert the attack should have been reasonable in all the circumstances.
- 4) And that any harm or injury caused by him was on the attacker himself and was not grossly disproportionate to that liable to be caused by the unlawful attack.

The accused as he left his fields may well have thought that his daughter-in-law was under an attack, or that an attack on her was imminent, but having followed them and finding them talking to Pango Ndlovu with no visible harm, he should have calmed down. At that juncture clearly he could tell that the daughter-in-law was not being harmed so there was no danger to avert by him. In fact approaching three people, who are conversing and have no signs of a fight, wielding a spear cannot be held to be in reaction to an attack, imminent or otherwise. He now had a villager, Pango Ndlovu whom he could ask to mediate between the couple for the problem was not really between him and his son but between the son and his wife so mediation by a third party, could assist. He could have averted this attack which according to him was imminent on the daughter-in-law by asking Pango Ndlovu to mediate. He also could have run away after approaching and seeing deceased getting a log as he says deceased got a log.

Section 253, does not avail the defence of self defence to a party who can otherwise avert the attack or escape. Such defence is therefore not available to accused. The accused's assault on the deceased through stabbing him was the cause of the deceased's death. This is as per Exhibit 4, the post mortem report. The post mortem report gives the cause of death as:

- a) Haemorrhagic shock,
- b) Stabbed heart
- c) Chest stabbing
- 5) The Dr. noted a 2,5 cm wound on the left frontal region running from the outer to the inner part of the forehead. There is a 22mm about 3cm below the left nipple and 2cm

towards the midline. This wound makes a 20mm through and through wound of the left lower anterior ventricle wall of the heart.

- 6) There is a 22mm wound on the right side just below the end of the sternum. It makes a 22mm through and through hole from the top to the under surface of the liver. The post mortem report also concludes that severe force was used in the attack and that the stab wound in the heart is the one which caused deceased's death.

It is our finding that accused acted wrongfully and unlawfully on the day in question. We then move to decided what then the accused person is guilty of.

Murder with actual intent

For this verdict to be passed there must be actual intention to kill. In this verdict, accused must be found to have desired deceased's death, death should have been his aim or object. There will also be actual intention where death is not accused's aim or object but accused continues to engage in an activity which he realizes will almost certainly result in death. Per Professor G. Feltoe *A Guide to Zimbabwean Criminal Law* page 96. With the second leg of actual intention, death must be a substantial result of the accused's actions. In the case of *S v Mugwanda* SC 215/01, the Honourable Chief Justice CHIDYAUŠIKU CJ expanded on these legal principles as follows:

For a trial court to return a verdict of murder with actual intent, it must be satisfied beyond reasonable doubt that:

- 1) Either the accused desired to bring about the death of his victim and succeeded in so doing, or
- 2) That while pursuing another objective, he foresees the death of his victim as a substantially certain result of the activity and proceeds regardless. In that case, the learned chief Justice goes further to state that:-

“The fact that objectively the accused ought to have foreseen such possibility is not sufficient. The distinction must be observed between what actually went on in the mind of the accused person and what would have gone on in the mind of a reasonable person in the position of the accused. In other words, the distinction between subjective foresight and objective foreseeability must not become blurred. Subjective foresight like any other factual issues may be proved by inference. To constitute proof beyond reasonable doubt the inference must be the only one which can reasonably be drawn.

It cannot be so drawn if there is a reasonable possibility that subjectively the accused did not foresee, even if he ought reasonably to have done so and ----.”

Now the accused’s explanation of what transpired at the scene where deceased died, as well as the witness’s accounts, cannot lead us to draw only one inference, that is he had the requisite actual intention to cause deceased’s death. These people had a misunderstanding and went the wrong way in trying to resolve it. Accused and deceased fought resulting in deceased hitting accused with a log and accused then stabbing deceased. All this happened in a moment from the witnesses. Accused says he got angry and lost self-control and did not realize what then ensued as he stabbed deceased. The witnesses agree that there was indeed mayhem prior to deceased being stabbed and that in fact the dispute had been between deceased and his wife. Accused’s motive, his prior efforts, his concern for his daughter-in-law, the fact that he did not arm himself with a knife but had been using it in the fields, the fact that him and deceased fought and the fact that he later tried to resuscitate deceased after realizing that he had killed him, all preclude this court from making a finding that the only reasonable inference that can be drawn from these facts is that accused intended to kill the deceased.

A verdict of murder with actual intent cannot be passed in our view for the state has not proven beyond reasonable doubt that that was the accused person’s sole intention.

We now move to consider the verdict of murder with constructive intent. Professor G. Feltoe in his *Guide to Zimbabwean Criminal Law* 2005, Edition page 96 states with regard to this charge thus:

“Accused does not mean to bring about the death but he continues to engage in an activity after he foresees there is a real risk that the activity will result in the death of a person.”

There are thus three elements

- 7) Subjective foresight
- 8) Of the real possibility of death and
- 9) Recklessness.

The facts before us, however, when one looks at the aspect of the deceased falling down, facing upwards and accused sitting on his abdomen, then stabbing him three times would be sufficient to show that the accused person did foresee the possibility of the death of the deceased for he stabbed him in the head (according to accused’s own version) then deceased fell to the

ground, accused instead of leaving deceased who was already injured, decided to sit on him and persisted with the stabbing in the process stabbing deceased on the left side of the chest where the heart is, and also on the centre of the chest beneath the sternum. This stab wound went as far as the liver. The accused at this stage foresaw that death was a reasonable possibility for the blows were aimed at the chest the most vulnerable part of the body. He continued with the stabbing regardless. It is for this reason that this court finds that the accused person is guilty of murder with constructive intent.

Sentence: Accused is sentenced to 10 years imprisonment.

National Prosecuting Authority, the state's legal practitioners
Dube & Company, accused's legal practitioners