

**THE STATE**

**Versus**

**HEROLD MOYO**

IN THE HIGH COURT OF ZIMBABWE  
MAKONESE J with Assessors Mr S. Hadebe & Mrs A. Moyo  
BULAWAYO 26 & 27 JANUARY 2017

**Criminal Trial**

*Mrs B. Mushaniga* for the state  
*T. Muduma* for the accused

**MAKONESE J:** On the 17<sup>th</sup> of April 2016 during the evening hours, the deceased was at Sisonke Quarter Bottle Store, Maphane Business Centre, Gwanda. The deceased was aged 29 years at the time he met his death and was employed by the Zimbabwe National Army as a soldier. The accused was also at the bottle store, drinking with his friends. The accused was 26 years old at the time of the offence.

The accused appears in this court facing a charge of murder. The state alleges that on the aforementioned date the accused did wrongfully and unlawfully and intentionally kill and murder Mthabisi Mthimkhulu (the deceased) by stabbing him with an okapi knife. The accused denies the charge and avers that he stabbed the deceased in self defence. The accused further raised the defence of provocation and stated that the deceased person subjected him to extreme provocation by attacking him with a beer bottle and fists and that his reaction to the attack was clouded by emotion and that he reasonably believed that his life was under threat. He went on to state that he acted in the heat of the moment and took such defensive action as was necessary to ward off the attack.

The state tendered into the record a summary of the outline of the state case (exhibit 1). It shall not be necessary to repeat the entire contents of the state outline which now forms part of the record. The accused tendered a defence outline (exhibit 2). At the heart of the accused's defence is the defence of provocation and self defence. It is not in dispute that the accused

stabbed the deceased with a knife on his back and shoulder inflicting fatal injuries that led to the death of the deceased. Accused fled the scene after the stabbing on a bicycle and disappeared into the darkness. Accused was to remain in hiding before his arrest on 28<sup>th</sup> May 2016.

The state produced a confirmed warned and cautioned statement recorded from the accused person at Gwanda and confirmed by a magistrate on 27 the June 2016. The English translation of the warned and cautioned statement is in the following terms:

*“I committed a crime of murder using a knife while drinking some beer. The name of the deceased is Mthabisi Ndlovu. When they started this misunderstanding they were three of them. I rebuked them and two of them took heed of what I was saying, but the deceased responded to say, who do I think I am. I then got hold of him intending to take him out, but the now deceased, again enquired as to who do I think I am. He threw a bottle at me and I ducked. I then produced a knife and stabbed him. The now deceased had earlier on got into the shop, and when he wanted to get to the shop once again, I again stabbed him and he died.”*

The post mortem report was tendered into the record by the state as exhibit 4. A duly registered medical practitioner employed as a pathologist at United Bulawayo Hospitals examined the remains of the deceased on the 18<sup>th</sup> April 2016. The post mortem report is filed under number 329/325/2016. As a result of an examination conducted on the body of the deceased the pathologist opined that the cause of death was;

- (a) Hypovolemic shock
- (b) Rupture of axillary and braquial arteries (right side) haemothorax
- (c) Stabbing injury

On external examination, the pathologist observed the following marks of violence.

1. Wound (9 x 3.5cm) on the right arm, with muscles exposition in this region
2. Wound (5 x 2cm) on the right back, to 8cm from right axillary region, to 17cm from the neck, to 7.5 cm from longitudinal axis
3. Wound (2.5 x 1cm) on the back of the left scapular to 22.5cm from longitudinal axis on the back

4. Abrasion on the left costal cage.

On internal examination, the pathologist made the following further observations;

Wound 1: Affected arteries on the right arm (braquial artery) right side

Wound 2: Affected axillary artery (right side)

Wound 3: Is penetrating inside thoracic cavity and affected superior lobe of left lung.

Haemothorax (approximately 200ml)

An examination of the lung/pleura revealed that there was a small rapture of the left lung (superior lobe) and haemothorax. These were the findings of the pathologist which were set out in some detail in the post mortem report. The findings are consistent with a knife stabbing. The accused does not deny the stabbing. It is his motivation and intention that has to be examined by the court taking into account the evidence placed before the court.

### **The State Case**

The state led *viva voce* evidence from three witnesses. First to testify was Sincengani Dube. She is a female adult aged 35 years. She was at the material time employed as a shopkeeper at Sisonke Quarter Bottle Store. She knew the accused as a brother to the owner of the bottle store. On the fateful day she was at work. Around 7:30pm the deceased arrived at the bottle store in the company of his friends including one Nkosiyethu Tshalibe. The deceased asked the witness how many black label beers she had in stock. The witness went behind the counter and counted the beer bottles and confirmed that she had twenty-three black label beers. The witness narrated that whilst this conversation was going on the accused was standing in the shop on the other side of the counter. As the deceased was walking out of the shop the witness observed the accused grabbing the deceased by the neck and pulling him to the side of the shop. The witness said that she could not see what happened at that stage as her vision was obscured by a large speaker. A little while later, the witness heard the sound of beer bottles being

smashed. The sound originated from the direction where the deceased and accused were pushing and shoving. The witness then saw the accused stabbing the deceased once on the back just above the left shoulder. She also noticed that the deceased was bleeding profusely from the left arm. The deceased ran out of the shop with the accused in hot pursuit. After about 15 minutes accused returned to the shop and when the witness enquired why accused was behaving in such a manner, accused retorted that the deceased was disrespecting him. The accused was still brandishing a knife. The witness stated that there were several patrons in the bottle store. She testified that when the accused and deceased went behind the speaker and before she witnessed the stabbing she heard the accused utter the following remarks:

*“Ngizakuqeda isisoja sakho lesi,”* meaning I will end your career as a soldier.”

The witness was subjected to intensive cross-examination. She maintained her evidence and confirmed that she had observed the accused stabbing he deceased. In that regard she merely corroborated the accused’s version that accused indeed stabbed the deceased. The witness was not controverted in any material respects and her evidence reads well. We find that she was a credible witness and her evidence is accepted by the court. We did not detect any tinge of exaggeration in her testimony. She was prepared to concede that she did not witness what transpired when the accused and deceased went behind the speaker. The witness gave a clear and precise account of what she perceived.

### **Lungisani Mathema**

This witness resides at Agnes Mathema’s homestead in Gwanda. He knew both accused and deceased before this incident as locals in the area. He was at Sisonke Quarter Bottle Store on the day in question. He testified that he did not witness the stabbing of the deceased. He met the deceased after he had already been stabbed. The deceased was bleeding profusely and had a deep cut on the right arm. He also noticed that the deceased had another deep cut at the back above the shoulders. The witness stated that at that stage he heard someone screaming and when he sought to establish what was happening he met the accused person who was holding a knife. The witness ordered the accused to stop. The accused did not stop and was complaining that

deceased and his colleagues were not showing him respect. The witness then concerned himself with the injured deceased. The witness organised for a vehicle at his own expense for the ferrying of the deceased to hospital. At that stage the deceased was not able to speak. Mthabisi Ndlovu died at United Bulawayo Hospitals on the 18<sup>th</sup> of April 2016 as a result of stab wounds inflicted by the accused.

The evidence of this witness corroborated the first state witness. The witness met the accused after the stabbing. The accused reiterated that he had stabbed the deceased because he felt disrespected. It is not entirely clear how and why the accused felt humiliated to the extent of stabbing the deceased several times. The court accepts that the evidence of this witness is an accurate reflection of what transpired on the night in question. The accused was observed after the stabbing, still holding the murder weapon. He admitted the stabbing. We make a finding that the evidence of this witness is entirely credible. He narrated what he observed. He did not testify on what he did not witness.

### **Constable Robson Makwea**

The state called its third and last witness Constable Robson Makwea. He is a duly attested member of the Zimbabwe Republic Police based at Gwanda Rural. He testified that after receiving information about the whereabouts of the accused person who had gone into hiding after the stabbing of the deceased, he together with other police detectives were dispatched to go and effect an arrest of the accused. The witness stated that they located he accused at Simangele Dube's homestead where he had sought refuge. They arrested the accused who promptly admitted having committed the offence. We were not impressed by the evidence of this witness who appeared to have little or no information regarding the case. The court found his evidence to add very little weight to the state case. The court will therefore conclude that the testimony of this witness is relevant to the extent that it corroborates the fact that the accused has never disputed that he stabbed the deceased.

The state then sought and obtained authority to have the evidence of the under listed witnesses as it appears in the summary of the state case, introduced into the record by way of

formal admissions in terms of section 314 of the Criminal Procedure and Evidence Act (Chapter 9:07), namely:-

- (a) Nkosiyethu Tshalibe
- (b) Innocent Mpofu
- (c) Lloyd Makotore
- (d) Nicholas Paringira
- (e) Farai Nyakonda
- (f) Kudakwashe Victor Chivise
- (g) Dr I. Betancourt

The state closed its case.

### **Defence Case**

The state led evidence from the accused, Herold Moyo. His version of events is that he arrived at Sisonke Quarter Bottle Store around 7:00 pm. He requested for a jersey from the first state witness Sincengani Dube. He was given a jersey and went out of the bottle store for about 45 minutes to an hour. He came back in the company of a group of people. They sat down in a corner and started drinking opaque beer commonly referred to as “calabash” (a term derived from the type of container that resembles a bottle gourd in which this type of beer is packaged). The accused indicated that at the time of the incident he was not yet drunk. He was in control of his mental faculties to the extent that he did not attribute his conduct to the consumption of the alcoholic beverage. The accused testified that as they were enjoying their drinks they observed that the deceased and his associates were entangled in a misunderstanding with one Bheki of Gwanda Vale. The accused stated that he immediately intervened and remonstrated with Nkosiyethu and Nosizwe who were involved in the pushing and shoving. Accused said that he had succeeded in defusing the fracas when the deceased stood up and grabbed him by his hand and collar pushing against a wall. The deceased asked the accused who he thought he was. The accused says the deceased who was holding two beer bottles in one hand then threw one bottle at him and he ducked. The accused contends that they exchanged blows and he felt that he was

being overpowered. Accused said that in the heat of the moment he produced a knife to defend himself. He stabbed the deceased above the shoulders on three occasions. Accused averred that he stabbed the deceased in random fashion and that he felt that he was under imminent danger. He did not realize that he could cause the death of the deceased. He acted in self defence and under serious provocation. He admitted that he was overwhelmed by anger, but did not intend to cause serious harm to the deceased. The accused confirmed that upon realizing that deceased was injured and bleeding profusely, he jumped on to a bicycle and fled the scene. Accused later learnt that the injured person had succumbed to the stab wounds and died. He decided to go into hiding. He was arrested a month after the incident at Simangele Dube's homestead.

We found the accused's version of events improbable for a number of reasons. Firstly, it is not clear from the evidence why the accused was angered by the deceased. It is also not clear why he felt that he was not being respected. He appeared to have been harbouring some grudge against the deceased. Secondly, the accused gave the impression that he was a peacemaker who was protecting Bheki. The evidence from the state witness shows that accused was in a violent mood. He was alleging that he was not being respected. He was the initial aggressor in that he blocked the deceased's path and told him not to go behind the counter. Thirdly, the accused was not provoked to such a degree that he would reasonably be expected to produce a knife. The accused was heard saying that he wanted to end the life of the soldier. He therefore clearly intended the consequences before the alleged fight. Fourthly, the accused claims that he acted in self defence. He was under attack and wanted to extricate himself from deceased's hold. There is no credible explanation why accused stabbed the deceased three times in the back and on the left arm. The stab wounds were deep and penetrating. One of the stab wound caused a rupture of the deceased's left lung. The post mortem report shows beyond any doubt that the force used in plunging the knife into the deceased's body was excessive. The deceased evidently suffered serious wounds. After the stabbing the deceased was chased around by accused like a wounded chicken and eventually bled until he died.

We totally reject the accused's version. The evidence of Sincengani Dube shows that the accused was the aggressor. There was no reasonable cause for the accused to use a deadly

weapon such as a knife. The accused repeatedly and randomly attacked the deceased. He did not stop to render assistance. He fled the scene.

### **The Law**

In his book *The Guide to Zimbabwean Criminal Law*, Professor G. Feltoe discusses the distinction between positive or actual intent and constructive intent or legal intent in a lucid manner. The author characterises the distinctions as follows:

#### Actual intention

- (a) Desires death. Death is the aim and object; or
- (b) Death is not the aim and object but in the process of engaging in some activity foresees death as a substantially certain result of that activity and proceeds regardless as to whether this consequence ensues.

#### Legal intention

Does not mean to bring about death but foresees it as a possibility whilst engaged in some activity regardless as to whether death ensues

- (a) Subjective foresight
- (b) As to possibility not probability
- (c) Recklessness

For the court to return a verdict of murder with actual intent the court must be satisfied beyond reasonable doubt that:-

- (a) the accused's fixed and settled intention was to bring about the death of his victim
- (b) while pursuing another, the objective he foresees death of his victim as a substantially certain result and proceeds with his conduct recklessly.

See the case of *Robert Mugwanda v The State* SC 19/02

## **Provocation**

In certain circumstances the law recognizes that certain situations may arise where a person is provoked to such an extent that he loses self control. In other words to provide or act as a partial defence, it must be established, on the facts that the provocation resulted in the accused failing to control his mental faculties. Short of that, it constitutes no defence. Section 239 of the Criminal Law (Codification and Reform) Act (Chapter 9:23) codifies the common law position as follows:

“239 When provocation a partial defence to murder

(1) ...

(2) For the avoidance of doubt it is declared that if a court finds that a person accused of murder was provoked but that –

(a) he or she did not have the intention or realization referred to in section forty-seven; or

(b) the provocation was not sufficient to make a reasonable person in the accused’s position and circumstances lose his or her self control;

the accused shall not be entitled to a partial defence in terms of subsection (1) but the court may regard the provocation as mitigatory as provided in section two hundred and thirty-eight.”

In my view, the circumstances of this case clearly show that the conduct of the accused was disproportionate to the provocation alleged. If anything, the accused was the aggressor. The defence of provocation is therefore rejected by the court.

## **Self defence**

In our law the law of private defence, that is, self defence and defence of third persons and defence of property provides that a person is entitled to take reasonable steps to defend himself against an unlawful attack.

G. Feltoe, in his book, *Guide to Criminal Law of Zimbabwe*, at page 45 states as follows:

“The requirements for this defence are:

(a) An unlawful attack

(b) Upon X

(c) The attack must have commenced or be imminent

(d) The action must be necessary to avert the attack

(e) The means to avert the attack must be reasonable.”

In deciding whether the defence of self defence, is available to an accused person, the court must be satisfied that the accused was under attack and that he was in imminent danger. The court examines all the available evidence placed before it. The court must not adopt an arm-chair approach but must carefully consider all the circumstances of the case. In the instant case it is not disputed that the accused was seen by Sincengani Dube blocking the path of the deceased and challenging him as to why he was going behind a counter. The accused was observed pulling the deceased by the neck. Moments later, Sincengani Dube heard the noise of breaking beer bottles. It is not disputed that the deceased suffered stab wounds inflicted by the accused. On his own version, the accused stated that he stabbed the deceased three or four times on the back above the shoulder. The nature of the stab wounds are described in detail in the post mortem report. The accused could not explain why he stabbed the deceased several times if he was just defending himself. It is clear that accused exceeded the bounds of self defence. Accused said when he attacked the deceased he was overpowered by anger. We reject the notion that accused was acting in self defence, because he was clearly the aggressor. He threatened to end the life of a soldier. He achieved his purpose.

In terms of our law the defence of self defence has been codified under section 253 of the Criminal Law Codification and Reform Act, (Chapter 9:23), which provides as follows:

“253. Requirements for defence of person to be a 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 an 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, he or she believed on reasonable grounds that the unlawful attack had commenced or was imminent; and
  - (b) 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.”

The means used by the accused to avert the unlawful attack was not reasonable. The manner of the attack shows a repeated stabbing using excessive force. The accused was determined to inflict serious injuries upon the deceased. Even after the deceased had escaped and was bleeding, the accused pursued him, whilst brandishing the knife. The circumstances of the case clearly indicate that the defence of self defence is not available to the accused. We accordingly reject that defence. See the cases of *Sibanda v The State* SC-7-87; *State v Kanyowa* HH-10-04.

We are however, not satisfied that the state proved beyond reasonable doubt an actual intention to cause death. The accused acted recklessly and foresaw death as a real possibility of his conduct but proceeded regardless. The accused must be found guilty of murder with constructive intent.

In the result, the accused is found guilty of murder with constructive intent.

### **Sentence**

In assessing an appropriate sentence the court takes into consideration all the mitigating features of the case as highlighted by accused’s legal counsel. The accused is aged 26 years. He is not married. He has no children. He is not employed and has no savings. He has no assets of value. The court takes into account that accused is a first offender and that he has remained in remand custody for the past 9 months. He has therefore served part of his sentence. The court takes into account the fact that accused admitted stabbing the deceased. He did not totally deny responsibility for his conduct. He did appear somewhat remorseful for his actions. On the other hand, the court views with a dim view the fact that this was a barbaric and savage attack upon the victim. After stabbing the deceased accused chased him around like a wounded chicken. There was no justification for such reprehensible conduct. The court frowns upon persons who choose to use violence as a way of life. This primitive behaviour must be punished heavily by the courts. The court views seriously, the loss of any life. The accused was clearly the aggressor

and yet he pretended to have played the role of a peacemaker who was wronged by the deceased. The deceased who was employed as a soldier lost his life at a time when he was at the prime of his life. These courts will continue to impose severe penalties on persons who act violently and recklessly towards others. Bottle stores and bars are places where people are supposed to drink peacefully and yet these places are turning to be dangerous battle grounds where people are stabbed and killed in violent fashion. The moral blameworthiness of the accused is extremely high and that should reflect in the sentence imposed by this court.

The following sentence is appropriate in all the circumstances of this case and the following is ordered:

“Accused is sentenced to 25 years imprisonment.”

*National Prosecuting Authority, state’s legal practitioners*  
*Legal Aid Directorate, accused’s legal practitioners*