

STATE
versus
RONALD KANYOWA

HIGH COURT OF ZIMBABWE
UCHENA J AND ASSESSORS
HARARE, 12, 13, 15 April, and 25 June 2010

Criminal Trial

E Nyazamba, for the State
J Mandevere, for the Accused

UCHENA J: Ronald Kanyowa was charged with the crime of murder in contravention of s 47 (1)(a) of the Criminal Law (Codification and Reform) Act [*Cap 9:23*] herein-after called the Code. He fought and killed his cousin Nigel Mashingaidze. He stabbed him in the stomach and chest with a ceremonial dagger. He pleaded not guilty to the charge and raised the defences, of, provocation and defence of person as provided in sections 239 and 253 of the Code.

The brief facts on which the charge is premised are as follows. On 16 September 2006 the accused person went to attend a church service. He came back at 21.00 hours. He found the residents of No 531 Makomo Area, Epworth fetching water from a water tap outside the house. The deceased, Tapfumaneyi Mbauya, Concillia Kanyowa and others were part of the group which was fetching water. Water was scarce, and was being erratically supplied. The accused observed how they were fetching water, and commented on the need for the deceased and Tapfumaneyi to give others a chance to fetch water. The deceased took offence. He commented that the accused was too young to control the goings on at No 531 Makomo Epworth. He advanced towards the accused and started assaulting him.

Tapfumaneyi Mbauya and Concillia Kanyowa, gave evidence for the state. They told the court that the deceased, who was heavily built and older than the accused, viciously assaulted the accused. The accused feebly retaliated but was no match to the deceased. Tapfumaneyi and Concillia tried to restrain the deceased but failed. They continued in their effort to restrain the deceased and free the accused, who, had fallen to the ground. They eventually succeeded. The deceased, went back to the water tap. Concillia took the accused into his bedroom, and left him there. They believed their intervention had settled the dispute.

The evidence narrated above is common cause. The accused agrees with it, but adds the following. He said when his mother took him to his bedroom he became afraid that the deceased would come and assault him there. He took a dagger which he knew was kept in a tools box under the bed. He came out of the house through another door. He went to where his grandmother was. She asked what was happening. He explained to her that he did not know why the deceased had assaulted him. The deceased then came and started assaulting him again. He defended himself by indiscriminately waving the dagger between him and the deceased. The deceased was thus stabbed in the stomach and the chest. He said he came out through another door to avoid the deceased whom he was afraid would assault him again. He could not run away as when he tried to, he bumped into his grandmother. He then had to defend himself with the dagger. He had then taken it out of the sheath. The deceased cried out that he had been stabbed. He dropped the dagger. The deceased walked into the house and slept on a sofa. He followed him and rendered assistance. He took off his shirt and bandaged the deceased's stomach.

The only evidence that calls for assessment is that on whether or not the accused came out and explained the previous incident to his grandmother. Tapfumaneyui said the accused came out and stood five meters away from the water tape, and asked why the deceased had assaulted him. That is different from standing a distance away talking to some-one else. Concillia the accused's own mother corroborated Tapfumaneyi's evidence. She confirmed that the accused stood a distance away and asked why the deceased had assaulted him. There is no doubt in my mind, that the two, state witness's, told the truth on this aspect. There is no reason why Concillia would agree with Tapfumaneyi on this detail if it was not the truth. She generally testified in a manner protective of her son. She must have told the truth when she said the accused came out stood at a distance and demanded to know why the deceased had assaulted him. The accused's own confirmed warned and cautioned statement which was produced as exhibit two, by consent, confirms that detail. He said:-

“I took a dagger and returned where the now deceased was. I asked the now deceased why he had assaulted me”.

His version in court is an obvious after-thought. I would in the result find that the accused came out through the other door armed with a dagger, stood at a distance and asked the deceased why he had assaulted him.

The accused was therefore not happy about what had happened in the previous encounter. He took a double edged ceremonial dagger, and came out through another door. The dagger belonged to his late father. He stood five meters from the water tape, and asked the deceased why he had assaulted him. The deceased advanced towards him. Tapfumaneyi tried to restrain the deceased. He was pushed away and he fell to the ground near the water tape. The deceased got to the accused and the fight resumed. The accused then inflicted the fatal stab wounds on him. The accused said he did not stab the deceased, but waved the dagger indiscriminately towards the deceased who was closing in on him to assault him. He said when he left the house the dagger was in its sheath. He pulled it out when the deceased advanced towards him from the water tape.

Mr *Mandevere* for the accused submitted that the accused should be acquitted as he acted in self-defense, and had been provoked. Mr *Nyazamba* for the State submitted that the defence of provocation cannot succeed because the accused was taken into a room from which he deliberately armed himself with the dagger and came out to reengage the deceased.

The accused is therefore relying on the defences of provocation and self defence. An analysis of the evidence against these defences will determine whether the accused can succeed on both or one of them.

Provocation

The defence of provocation is provided for in s 239 of the Code. It provides as follows.

- “(1) 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 realisation referred to in section *forty-seven*, the person shall be guilty of culpable homicide if, as a result of the provocation
- (a) he or she does not have the intention or realisation referred to in section *forty-seven*; or
 - (b) he or she has the intention or realisation referred to in section *forty-seven* 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.
- (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 have the intention or realisation 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*."

Provocation can only be a partial defence to the crime of murder. It reduces murder to culpable homicide. It does so if the accused acts after being provoked, and causes death, with the intention or realization referred to in section forty seven. Section 47 (1)(a) and (b) of the Code, provides for the intention required for one to be convicted of murder as follows,;

"(1) Any person who causes the death of another person

(a) intending to kill the other person; or

(b) realising that there is a real risk or possibility that his or her conduct may cause death, and continues to engage in that conduct despite the risk or possibility; shall be guilty of murder."

The accused must therefore intent to kill the deceased, or realize the presence of the real risk or possibility that his conduct may cause the deceased's death but nevertheless continues to engage in that conduct, despite the realization of that possibility. It is therefore necessary to examine the accused's conduct. He was, taken to his bedroom after the first encounter with the deceased. His mother who took him in said she left him in his bedroom. He remained there for two to three minutes. He took a double edged dagger, and come out of the house through another door. The dagger was in its sheath. He advanced towards the water tape where the deceased was. He stood five meters away and asked the deceased why he had assaulted him. He obviously knew that another encounter would ensue. He knew the deceased had objected to being challenged by him. Coming out and standing five meters away, and asking the question he did was a daring act spurred on only by the weapon which was in his hand. If another encounter ensued the accused already knew, from the first encounter that he would not be able to match the deceased. He therefore had put his trust in the dagger. When deceased advanced he removed the dagger from its sheath and used it. What he had realised, happened. He stabbed the deceased, who subsequently died.

The next question which arises for consideration is whether the accused had "completely lost his self-control". In my view he had not. He while in his room decided to arm himself with a double edged dagger, before coming out. He had obviously weighed his chances of a second encounter with clenched fists, and decided against it. He was able to carefully decide, on how he would come out, and came out through a safer exit. He avoided

the door through which he had been taken into the house. The deceased would quickly see him and take from him the element of a surprise appearance, and the advantage of positioning himself where he thought was an opportune place for the second encounter. When he had taken his stand five meters from the water tape where the deceased was he announced his presence, by asking the deceased why he had assaulted him. He let the deceased advance towards him. All he had to do was to wave the dagger between them. The deceased walked into the trap, to his death.

The above shows the accused had the intention or realisation referred to in section *forty-seven*; and had not completely lost his self control. The defence of provocation needs no further consideration. It cannot succeed in this case. I therefore need not give a detailed consideration to whether the provocation was sufficient to make a reasonable person in the accused's position and circumstances lose his self-control. A reasonable man would not have wanted a second encounter. He would if he had to come out do so in a manner that did not attract the deceased's attention. He would avoid the deceased and would not taunt him to a second encounter.

We are therefore satisfied that the defence of provocation cannot, succeed in this case. The accused may not have intended to kill the deceased. He however clearly realised that there was a real risk or possibility that his conduct may cause death, and continued to engage in that conduct despite his realization of that risk or possibility.

Self defence

The defence of defence of person is provided for in s 253 of the Code. It provides as follows;

- “(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, 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 subs (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 capability he or she may have had and any stress or fear that may have been operating on his or her mind.”

The provisions of s 253 (1)(a) to (d) of the Code, must all be satisfied before the defence of person can succeed as a complete defence. This is because the word “and” is used to link the subsections to each other. The word “and” is a conjunctive. It joins the requirements of subs (1) (a) to subs (1) (b), and subs (1) (b) to subs (1) (c), and carries on with the same arrangement to subs (1) (d) (ii). The joinder of the requirements means they should all be satisfied for the defence to succeed as a complete defence. Section 253 (2) of the Code, confirms this by pointing out that the court must determine whether or not the requirements specified in subs (1) have been satisfied. This means they must all be satisfied other wise the legislature would have said the court should determine whether some of the requirements have been satisfied.

In terms of s 253 (1) (a) of the Code one can kill in self defence, against an unlawful attack, if he does or omits to do anything which is an essential element to the crime of murder, when the unlawful attack had commenced or was imminent or the accused on reasonable grounds believed that the unlawful attack had commenced or was imminent. If the unlawful attack has not commenced and is not imminent, as was the case when the accused armed himself and positioned himself for a second encounter, the provisions of section 253 (1)(a) of the Code can not be said to have been satisfied. If one gets away from a n unlawful attack and comes back to initiate another attack in which he hopes to defend himself, the defence of defence of person will not be available because in terms of section 253 (1)(b) of the Code his conduct was not necessary to avert the unlawful attack. The unlawful attack had been stopped. The accused had been assisted by Tapfumaneyi and Concilia to escape from it. He cannot say he had no means of escaping because he came back to purposefully place himself in danger for the second time. He could not reasonably, have believed that his conduct in coming out was necessary to avert an unlawful attack and that he could not otherwise escape from or avert the

attack. The initial attack had ceased and the accused had been taken to the safety of his bedroom. He was safe to leave his bedroom as demonstrated by his leaving it without being attacked. He could have gone away to a place of safety. There was no need for him to challenge the deceased, or draw his attention to his having come out of the house. A reasonable man could have quietly gone to report the incident to the police.

Even if he had been under an unlawful attack the means he used to avert the purported unlawful attack was not reasonable in all the circumstances. He came out with a double edged ceremonial dagger to fight the deceased who was not armed. The supremacy of his weapon, far out weighed the deceased's ability to beat him with his bare hands and feet. The harm he caused was grossly disproportionate to that the deceased could have caused on him using his hands and booted feet.

The inquiry, into the accused's conduct, cannot be complete, without considering the circumstances in which he found himself, including any knowledge or capability he may have had and any stress or fear that may have been operating on his mind. As already said, the accused, deliberately, created the circumstances, in which he stabbed the deceased. He had been taken away from a fight with the deceased. He chose to come out, and position himself for a second encounter, which he was sure to win. The knowledge, capabilities, and the stress or fear he might, have had, cannot assist him. He knew the deceased was able to beat him, so he should not have come out. Mr Mandevere said he was afraid to remain in the house fearing the deceased could come and beat him there. If that was so he could have come out through another door as he did and left the house, to report the case to the police or to seek safe shelter elsewhere. It is also common cause that there was a locking device which the accused could have used to lock himself inside his bedroom. He therefore came out because he wanted a second encounter with the deceased.

It is apparent that the accused's claim to the defence of person has failed on many aspects. His failure to satisfy the requirements of s 253 (1) of the Code is therefore clear evidence that his defence of self defence has dismally failed.

In terms of s 254 of the Code an accused person charged with the crime of murder can be found guilty of culpable homicide if "all the requirements for defence of person specified in section *two hundred and fifty-three* are satisfied except that the means he used to avert the unlawful attack were not reasonable in all the circumstances."

Section 254 of the Code provides as follows;

“If a person accused of murder was defending himself or herself or another person against an unlawful attack when he or she did or omitted to do anything that is an essential element of the crime, he or she shall be guilty of culpable homicide if all the requirements for defence of person specified in section *two hundred and fifty-three* are satisfied in the case except that the means he or she used to avert the unlawful attack were not reasonable in all the circumstances.”

In this case the accused failed to satisfy the requirements of the defence of person. If he had satisfied all of them “except that the means he used to avert the unlawful attack were not reasonable in all the circumstances” he would have succeeded in relying on the defence of person as a partial defence to the charge of murder. He would have been found not guilty of murder but guilty of culpable homicide. The fact that he failed on all of the requirements of s 253 (1) of the Code means, the partial defence provided in s 254 of the Code is also not available to him.

He is therefore found guilty of murder with constructive intent.

Attorney- General's Criminal Division, legal practitioners for the State
Sawyer and Mkushi, legal practitioners for the accused