

THE STATE
versus
JOHANNES MOYO

HIGH COURT OF ZIMBABWE
MOYO J
BULAWAYO 22-23 NOVEMBER 2016 AND 1 DECEMBER 2016

Criminal Trial

T Muduma for the state
Ms T Nyathi for the accused

MOYO J: The accused person in this matter faces a charge of murder. It being alleged that on the 25th of May 2002 the accused person, together with his accomplices fatally assaulted the deceased Japhet Sithole.

The state summary was admitted and marked Exhibit 1. The defence outline was also admitted and marked Exhibit 2.

The accused's confirmed warned and cautioned statement was admitted and marked Exhibit 3.

The post mortem report was admitted and marked Exhibit 4. The knife that was allegedly used to stab the deceased was marked Exhibit 5. The defence produced a knife that was allegedly used to stab accused and was marked Exhibit 6.

The facts of the matter are largely common cause. The accused and his accomplices were drinking beer at Ndabankulu bar in Kezi on the fateful day. Also present were some other patrons. The deceased walked in carrying a hammer, the evidence of some of the witness accounts namely Nkanyiso Ndlovu, as it appears in the state summary shows that the deceased intended to hand over the hammer for safe keeping with the bar lady. The accused person and his two accomplices were riled by the deceased's conduct and they took issue with him, resulting in the accused person snatching the hammer from the deceased and later accused's brother, the first state witness Raphael Moyo also snatching the hammer and giving it to the bar lady. A

scuffle ensued as deceased was assaulted by accused and his friends and dragged outside the bar. While outside the accused screamed to say he had been stabbed by the deceased. His two accomplices chased after the deceased and caught up with him, started assaulting him while he lay on the ground. The accused person followed to where deceased was and stabbed him five times in the chest and abdomen as evidenced by the post mortem report.

The evidence of Nkanyiso Ndlovu, Saziso Moyo, Sinanisile Dube, Denias Sibanda and Dr S Pesanai was admitted into the court record as it appears in the state summary in terms of section 314 of the Criminal Procedure and Evidence Act [Chapter 9:07].

The accused person in his defence outline pleads provocation in that he had an altercation with deceased which ended and then later the deceased just stabbed him as he went out of the bar for no reason whatsoever. He states that he committed the offence in anger since deceased had stabbed him. The post mortem report gives the cause of death as haemorrhagic shock, multiple stab wounds, assault. The totality of the evidence before us leads us to make the following conclusions:

- (1) The deceased quietly walked into the bar carrying a hammer, he did not confront anyone. It is the accused person and his accomplices who decided to act out of character and confront the deceased for no apparent reason whatsoever. Carrying a hammer is not an offence and the deceased as it would appear from Nkanyiso Ndlovu's evidence, intended to give it to the bar lady for safekeeping.
- (2) The accused person, although in court he sought to underplay his role in the confrontation of the deceased and the scuffle that ensued, the admitted evidence of Nkanyiso Ndlovu is clear in this respect and I quote at page 4 of the state summary.

“The accused confronted the deceased over the hammer, the deceased explained that he had not come with the hammer to fight anyone but wanted to hand over to the bar lady for safe keeping.”

It is also Nkanyiso Ndlovu's evidence that the accused's accomplices hit deceased who then fell down and then the accused person pulled him outside the bar. Raphael Moyo intervened to stop the fight, after a short while the accused person and his accomplices resumed

their assault on the deceased. The witness heard accused screaming that he had been stabbed by the deceased. Deceased ran away. Accused's accomplices chased after the deceased, they then called out that they had caught the deceased. The witness ran to the scene and found the two accomplices assaulting deceased with fists and booted feet. The accused also arrived at the scene and joined in assaulting the deceased.

The accused person in his confirmed warned and cautioned statement, which he gave while his memory was still fresh, confirms that he accosted the deceased for carrying the hammer, and was not happy about deceased's response then he stood up and tried to take away the hammer wherein a scuffle then ensued. It is not in dispute that accused stabbed deceased as alleged on the day in question thereby causing his death.

It would appear counsel for the accused in her closing submissions tried to plead provocation as a partial defence to murder. She referred to the accused person being in a fit of rage and therefore that he should be convicted of the lesser charge of culpable homicide. The evidence in the court record as given by the accused persons himself does not support this contention by defence counsel.

In fact during cross examination the accused was asked the following questions

Q: Did deceased talk to anyone

A: No

Q: He never provoked anyone

A: No

Q: You were never provoked in any way by the deceased

A: No

Q: So your attack was unwarranted as you were never provoked

A: I agree

Q: You did an unnecessary brutal attack on the deceased

A: I was drunk

I formulated the opinion that counsel for the defence, kept on referring to a fit of rage meaning that after the by stabbing the deceased, accused then went into a fit of rage and thereby committed the offence.

I will hasten to state that although an accused person does not need to prove the truthfulness of his defence, it still has to be found by the court to be reasonably possibly true. The deceased never fought with the accused person and his accomplices as per the witnesses who were present including the accused's own brother. The whole chain of events took about 5-7 minutes according to Raphael Moyo (accused's brother), meaning , it would be very difficult if not possible to accommodate the initial scuffle inside the bar, which then ended and a subsequent scuffle following after accused had gone out to relieve himself. The time span simply does not accommodate the accused's version, also the behaviour of the deceased on the day in question as given by the witnesses and the accused person himself is inconsistent with the attack on the accused with a knife. Again, no one saw any injuries on the accused person, including his own brother with whom he subsequently went home. Neither was blood seen on the accused's clothes as per Egnat Moyo's testimony. Egnat Moyo says there was moonlight on the day in question. It is for these reasons that the court is inclined to dismiss the fact that accused was indeed stabbed by the deceased as he alleges. However, since he was indeed heard screaming that he had been stabbed, we will still proceed to analyse his defence of provocation as if indeed he had been stabbed by the deceased.

Section 239 of the Criminal Law Codification and Reform Act [Chapter 9:23] provides for the partial defence of provocation to a charge of murder. That section provides and I quote:

- (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 realization referred to in section 47, the person shall be guilty of culpable homicide, as a result of the provocation:
 - (a) he or she does not have the intention or realization referred to in section 47 or,

- (b) 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.

Section 239 demands that facts be present where firstly, provocation exists, and secondly, where facts also exist that show that the accused lost his or her self-control. Thirdly, that the provocation must be held as a matter of fact to be sufficient to make a reasonable person in that position to lose his or her self-control.

It was incumbent therefore, on the defence, to establish factually that provocation existed and that it was sufficient to cause one to lose self-control as well as that indeed the accused person lost self-control as a result. I say so for whether deceased did stab accused or not, even if the accused is given the benefit of the doubt to say that he may have been stabbed by the deceased, who was the aggressor on this day in question? Here is a peaceful man, entering a bar to hand over his hammer for safe keeping, he is accosted by the accused and his accomplices, man handled, assaulted and pushed outside. If he indeed when outside stabbed the accused can this court make a finding that the deceased provoked the accused person and yet clearly this was a chain of events set into motion by the accused's own aggression?

On this day in question the accused person was the aggressor as he set into motion the chain of events that eventually led to him fatally assaulting the deceased.

It is for the reasons detailed herein that we find that the accused person did act unlawfully and wrongfully on the day in question and because we have dismissed the partial defence of provocation we hold that the accused person in stabbing a defenceless man who was lying down being held and assaulted by his accomplices, five times in the abdomen, piercing vital organs as a result, realized that death was certain and that it would ensue from his actions but nonetheless persisted. Accordingly the accused person is found guilty of murder with actual intent.

Sentence

The accused person is convicted of murder. He is a first offender. He is a widower. He is the breadwinner in his family. He is of ill-health. Although the matter comes up after 14 years, it would appear it was not due to the state's fault; as accused was at large. This is one of the most

unfortunate of events where a man is killed from merely walking into a bar carrying his hammer for safe keeping with the bar lady. Although the accused person maintained he was provoked by the deceased, the facts point to him acting out of character and provoking the deceased instead. The deceased died an unnecessary and painful death being held by the accused's accomplices as the accused person stabbed him in the chest and abdomen five times. The interests of justice demand that where life has been lost, the court shows its displeasure through passing sentences that befit the offender as well as the offence itself.

Murder is a serious offence, and in this case, it was committed in totally unwarranted circumstances. There is now a trend out there not to uphold the sanctity of life and that is very worrying to the courts. A life was needlessly lost under very painful circumstances.

It is for these reasons that the accused person will be sentenced to 30 years imprisonment.

National Prosecuting Authority, state's legal practitioners
Vundhla Phulu and Partners, accused's legal practitioners