THE STATE

Versus

XOLISANI SIZIBA

IN THE HIGH COURT OF ZIMBABWE
KABASA J with Assessors Mr Ndlovu and Mr Sobantu
BULAWAYO 6 & 7 FEBRUARY 2020

Criminal Trial

B Gundani, for the State
K.M Nxumalo, for the accused

KABASA J: The accused is charged with murder as defined in section 47 of the Criminal Law (Codification and Reform) Act Chapter 9:23, in that on 2nd October 2018 at Blue Lagoon beer hall the accused stabbed Sehlulekile Mlalazi with a screw driver once on the head, once on the left ear and once on the chest intending to kill Sehlulekile Mlalazi or realising that there is a risk or possibility that his conduct may cause the death of Sehlulekile Mlalazi continued to engage in that conduct despite the risk or possibility.

The State alleges that on 2nd October 2018 around 1500h the accused met the deceased at Blue Lagoon where they were both drinking beer. The now deceased was the accused's live-in girlfriend but had since deserted their home. The two had a brawl in full view of other patrons who restrained them. Later that same night at around 2300h the two met again at the same place whereupon a misunderstanding arose over infidelity issues. The misunderstanding escalated and culminated in the accused stabbing the deceased with a screw driver on the head, left ear and chest. The accused subsequently fled from the scene, leaving the deceased lying on the ground. The now deceased was found the following day, which was now the 3rd of October, lying unconscious behind the beer hall and was ferried to hospital where she died on 4th October 2018.

In denying the charge the accused explained that he had been living with the deceased as his live-in girlfriend but plans were afoot to marry her. She however fled from their rented accommodation after stealing from a tenant. He later met the deceased at a beerhall and confronted her about the issue. She fled and the accused reported the matter at Mzilikazi Police Station. The police arrested the now deceased and the now deceased was not amused. The now deceased threatened to cause the accused's assault. Two days later the two met at a beerhall and had a conversation. The accused's attempts to leave were thwarted by the now deceased who kept the accused waiting while she approached four men. On calling her the now deceased insulted the accused and the accused retaliated by slapping her. The accused however later apologized.

At around 2300 hours the accused was approached by one of the four men who wanted to know the nature of the accused's relationship with the now deceased. The accused responded that she was his wife and a misunderstanding ensued. The accused decided to leave out of fear that these were the men who were meant to assault him as per the now deceased's earlier threat. The accused's attempts to leave were again thwarted by the now deceased and the four men who blocked his way and started assaulting him. The deceased grabbed the accused by the neck and one of the men took out a screw driver intending to stab the accused. The accused wrestled it from this man and attempted to stab one of them as they advanced towards him. The attempt failed as the deceased was still holding him. He then stabbed the deceased who fell and the accused fled in panic. He did not intend to kill her and did not fully appreciate his actions due to intoxication.

The evidence showed that the now deceased died as a result of the injuries sustained with the cause of death given as:-

(a) Intracranial hemorrhage
(b) Skull burr hiding brown injury
(c) Callous murder

The State's case comprised of the postmortem report compiled by Doctor I Jekenya, the accused's confirmed warned and cautioned statement and the evidence of seven witnesses which was admitted into evidence as it appeared on the summary in terms of section 314 of the Criminal Procedure and Evidence Act, Chapter 9:07. The defence consented to the production of the post mortem; the confirmed warned and cautioned statement and the admission of the witnesses' summary of evidence.
With that the case for the state was closed.

The accused testified in his defence and had no witnesses to call. His evidence tallied with what he said in his defence outline and confirmed warned and cautioned statement.

From the evidence presented, the following is common cause:-

1. The accused and deceased were in a relationship until the fateful day.
2. The accused was attacked by the now deceased who was in the company of 4 men.
3. The accused wrestled a weapon from one of the men, which weapon turned out to be a screw driver.
4. The accused used that screw driver to stab the deceased who was grabbing the accused by the neck.
5. The deceased was stabbed once on the head, once on the left ear and once on the chest.
6. On 3rd October 2018 at around 0600 hours the deceased was found lying unconscious behind the beerhall where the assault occurred. The deceased was ferried to hospital but died on 4th October 2018 at about 1140 hours whilst admitted in the intensive care unit.

The issue is whether the defences of intoxication, provocation and self defence are available to the accused.

None of the witnesses whose summary of evidence was admitted into evidence observed the assault. The accused's version of the events was all there was and his evidence was uncontroverted.

What came out from the accused's evidence and the subsequent cross-examination the accused was subjected to is that:-

1. The insult wherein the deceased had referred to the accused's mother's private parts had occurred much earlier that day, almost 6 hours before the stabbing and the two had made peace.
2. Although the accused had consumed alcohol and smoked dagga he was not so intoxicated to an extent of failing to appreciate what he was doing

In terms of section 238 of the Criminal Law (Codification and Reform) Act, Chapter 9:23:

> "Except as provided in section two hundred and thirty-nine and subject to any other enactment, provocation shall not be a defence to a crime but the court may regard it as mitigatory when assessing the sentence to be imposed for the crime."

And section two hundred and thirty-nine provides that:-

(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 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 realization referred to in section forty-seven; or

(b) He or she has the intention or realization 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."

This provision resonates with what LEWIS JA said in *State* v *George Tsiga* AD J No. 77/76

> "It is the essence of a defence of provocation that has the effect of reducing the crime from assault with intent to cause grievous bodily harm to common assault or murder to culpable homicide, that the reaction to the provocation must be sudden, in the sense that the person provoked acts on the spur of the moment and in circumstances where he has temporarily lost his power of self control and does not appreciate what he is doing."

Mr Gundani for the State submitted that provocation was not available to the accused as a defence as he had ample time to cool down. He therefore did not act on the spur of the moment and he therefore did not lose his power of self control.

Mr Nxumalo for the defence conceded this point and equally conceded the fact that the accused was not provoked by his girlfriend's conduct when the accused saw her with the four men. The accused himself stated in his evidence that he knew the deceased's lifestyle. The two actually met at a beerhall. He was therefore not fazed by the deceased's behavior.

That said, the defence of provocation is therefore not available to the accused.

Turning to the issue of intoxication, section 221 of the Criminal Law (Codification and Reform) Act, Chapter 9:23 states that:-

(1) "If a person charged with a crime requiring proof of intention, knowledge or the realization of a real risk or possibility –

(a) Was voluntarily or involuntarily intoxicated when he or she did or omitted to do anything which is an essential element of the crime; but

(b) The effect of the intoxication was not such that he or she lacked the requisite intention, knowledge or realization:-

such intoxication shall not be a defence to the crime, but the court may regard it as mitigatory when assessing the sentence to be imposed."

The following exchange between State counsel and the accused addressed this issue:-

"Q - You appreciated what you were doing despite taking the alcohol and dagga.

A - Yes I appreciated."

The accused's mental faculties were therefore not impaired by the consumption of alcohol and the smoking of dagga to such an extent as to render him incapable of appreciating his actions.

Mr Nxumalo for the defence equally conceded that the issue of intoxication had no bearing on the accused's conduct that night. Counsel agreed with State counsel's submissions and correctly acknowledged that the accused had shown and stated that he could appreciate and did appreciate what he was doing.

Turning now to the self defence, section 253 of the Criminal Law (Codification and Reform) Act, Chapter 9:23 provides that:-

(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.

The court must however guard against adopting an arm chair approach and to that end, subsection 2 of section 253 provides as follows:

(2) In determining whether or not the requirements specified in subsection (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 in his mind."

In casu the accused testified to the effect that:-

(a) The now deceased and four men were attacking him. The attack had therefore commenced.

(b) He had his back to the wall and his only avenue of escape was blocked by the deceased and the four men.

(c) One of the men was armed with what later turned out to be a screw driver and although he wrestled it from him and managed to make the men retreat, they however did not relent as they kept advancing and retreating.

(d) The deceased rendered him incapable of extricating himself as she was grabbing him by the collar and pulling him to where the men were. He put it thus:-

"The men did not flee leaving me with deceased. They would retreat as I charged towards them but when deceased was pulling me towards them they would also advance so I realised there was now danger as I did not know how they were armed."

As stated earlier, there was no evidence to controvert the accused's assertions. It is rather surprising that in a beerhall full of people no one observed what was going on and the police could not locate any witnesses who could shed light on what transpired at the time of the stabbing of the deceased. Whatever the reason for the lack of such witnesses, the fact is all there was, was the accused's version.

The issue however is whether the force used to avert the attack was not excessive in the circumstances?

Mr Gundani for the State submitted that the force was excessive. The accused stabbed the deceased three times, on the head, ear and chest. The post mortem shows that the force used was severe. The delivery of 3 stab wounds was not commensurate with the harm that was sought to be averted.

If the intention was only to cause pain so that the deceased would release her grip the blows to the head, ear and chest with such severe force as to cause a

"(a) 4 mm hole in the left sixth inter costal space in the mid-clavicular line.

(b) 4 mm diameter hole 4cm above the left ear.

(c) few bruises of the right neck, left chest and occipital area," were excessive in the circumstances.

Mr Nxumalo conceded as much. Both the State and defence counsel were agreed that the means used were excessive and to that end the accused is not entitled to the benefit of a complete defence which self defence provides when all the requirements are met.

In *State* v *Tevedzay*i HH 206-18 where the accused brutally killed his wife and in his defence claimed provocation, intoxication and self defence, evidence was led from witnesses which showed that the self defence was but a ploy by the accused to escape the consequences of his actions. The couple's son had testified to the effect that there had not been any other adult man at the house the night of the deceased's death except his father.

In analyzing the legal position TSANGA J had this to say:-

'The accused relied on three primary defences for his actions that night. He relied on self defence arising from the fact that he was defending himself from an attack by his wife and her lover. He also relied on provocation in that he caught his wife with a lover when he abruptly returned home that night. He also drew on intoxication in that he had consumed alcohol that night before he returned home.

In terms of section 253 of the Criminal Code (Chapter 9:23) self defence and defence of another can be a complete defence where an unlawful attack had commenced or was imminent, or, where the accused believed on reasonable grounds that the unlawful attack had commenced or was imminent. Other conditions must be fulfilled. The conduct must be necessary to avert the attack or the accused must believe as such and that they could not otherwise escape from or avert the attack. The means used to avert the unlawful attack must be reasonable in the circumstances."

After analyzing the evidence from the witnesses and noting the accused's inconsistencies in the story he gave to the police in his warned and cautioned statement and what he subsequently said in his defence outline, the learned judge concluded that:-

"His added motive which he presented only at the trial being that he acted in self-defence against an assault by his wife and her lover was clearly an afterthought. ……. The only person armed that night was the accused."

The learned judge went further to say:-

> "We are in agreement with the state that the defence of self defence as a whole is merely calculated to send the court on a wild goose chase."

In casu, the paucity of evidence to controvert the accused's story, leaving only his version of the nature of the attack he was under and the lack of any other avenue of escape distinguishes this case from the Tevedzayi circumstances. The State, unlike in the Tevedzayi case, had very little to go on to disprove the accused's version, making it nigh impossible to dismiss the story as coming from the figment of his imagination and meant to "send the court on a wild goose chase."

In *State* **v** *Shavi* HB 124-17, a case where the accused also killed his wife and pleaded self defence, MAKONESE J in applying the law to the facts of that case, had this to say:-

> "The court's approach to this defence should be as objective as possible. The court must take into account the circumstances of the victim and all the emotional pressures which the accused was subjected to. The court must assess the threat that was directed at the accused and the possibility of a fatality arising therefrom.
>
> See the cases of the *State* v *Nkululeko Nleya* HB 138-02 and *Ntsoni* v *Minister of Law and Order* 1990 (1) SA 572."

After going through the facts which had been established the learned judge concluded that the force used to avert the danger was exceedingly disproportionate, the accused acted recklessly and proceeded with his conduct regardless of the consequences

The learned judge thereafter proceeded to return a verdict of guilty to murder with constructive intent. *In casu* whilst the force used to avert the attack was excessive, the evidence did not show or prove that the accused subsequently foresaw death as a substantial possibility and unlike in the Shavi case, the evidence did not show that he had averted the danger but continued to strike the deceased.

The lack of evidence is attributable to the absence of witnesses who observed the incident that night. The court is therefore unable to dismiss the accused's story as not only improbable but beyond doubt false, a position state counsel also found himself in and consequently conceded that the self defence raised by the accused, whilst not available to him as a complete defence, was however available to the extent of reducing the charge of murder to culpable homicide, as defined in section 49 of the Criminal Law (Codification and Reform) Act, Chapter 9.23.

In the result the accused is accordingly found guilty of culpable homicide as defined in section 49 of the Criminal Code.

National Prosecuting Authority, State's legal practitioners
Ncube Attorneys, accused's legal practitioners