

THE STATE

versus

AUSTIN NCUBE

IN THE HIGH COURT OF ZIMBABWE
MOYO J
BULAWAYO8 AND 9 JULY 2014

N. Ngwenya with *S. Ndlovu* for the state
Mrs T. Dube for the accused

Judgment

MOYO J: The accused person faces a charge of murder in that it is alleged that on the 30th of December 2012, he stabbed and killed Zenzo Ncube. The facts of the case which are mostly common cause are as follows.

The accused person who was with others, amongst them his younger brother Nkosiyalinda Ngwenya (the second state witness), were at a borehole in the Ngoma area of Gwanda. They were looking for their donkeys. The deceased arrived at the borehole in the company of Honest Siziba (the first state witness). Honest Siziba and the deceased were also looking for their donkeys. They found accused and the other boys including the accused's younger brother Nkosiyalinda at the borehole. They asked them if they had seen their donkeys to which accused and the others who were in accused's company answered in the negative. The two, that is, the deceased and Honest Siziba then left the borehole. After walking for some distance the deceased and Honest Siziba heard sounds of bells that resembled the sound of the bell of their donkey. The sound came from the direction of the borehole. They then went back to the borehole to check on this lead. At the borehole they realised that the sound they were tracking in fact was not for their donkey's bell. Honest Siziba then asked the accused to pump water for him from the borehole so that he could drink. Accused did. Deceased drank water and as he was leaving he called accused's younger brother Nkosiyalinda. Nkosiyalinda refused as he was on a mission looking for donkeys. The deceased then chased Nkosiyalinda, caught up with him and fell him down, whereupon he then pulled him by the leg and in so doing dragged him. The accused then intervened. He queried as to why the deceased did that and the deceased then asked him (the

accused) what he intended to do about it. When deceased walked away, accused then decided to confront him and they came face to face. The accused then acted as if he was walking away for some short distance, when accused was now behind deceased, he drew out an okapi knife and stabbed the deceased from the back at the back of the neck. He pulled out the knife and fled from the scene. At the time the accused approached the deceased, when the deceased asked him what he intended to do, accused and deceased were standing close to each other facing each other. It is at that juncture that accused then acted as if he was going away, that is passing the deceased walking towards the direction that deceased had his back on. He then turned after passing the deceased and then stabbed him once at the back of the neck. Honest Siziba then assisted deceased to get to the nearest homestead. He left deceased at that homestead in the company of the resident of that homestead and went to call deceased's relatives. At the time he came back, that is when he discovered that deceased had passed on.

It was also the evidence of Nkosiyalinda that Honest Siziba was carrying a stick at the time all this happened but that he did not use on anyone. Nkosiyalinda estimated the size of the stick to be about 40cm long and about 10cm thick. He said nonetheless Honest Siziba had just been carrying that stick when all this was happening and did not use it to strike anyone or threaten anyone including the accused person.

It is also common cause that at that time Nkosiyalinda had burn injuries from a previous unrelated incident on his tummy and thighs. Both state witnesses who gave *viva voce* evidence, that is Nkosiyalinda Ngwenya and Honest Siziba, told the court that there was never a fight between the deceased and the accused. The evidence of the rest of the witnesses as indicated in the summary of the state case Exhibit I was admitted in terms of section 314 of the Criminal Procedure and Evidence Act [Chapter 9:07] with the consent of the defence counsel.

The defence outline was read and tendered and it was marked Exhibit II. In the defence outline the accused's version is primarily similar to that of the state case, the only difference being in paragraph 4 there of which reads as follows:

“He will further state that the deceased and his friend started fighting with the accused and they hit him with a stick. In self defence, he drew an okapi knife from his pocket and stabbed the deceased once on the right side of the neck.”

It is crucial at this juncture to mention that in his evidence-in-chief the accused abandoned this assertion as clearly he did not tell the court that the deceased and his friend fought with him

or that they hit him with a stick, he in fact stated a version similar to that of the state witness and only added on the aspects of his own apprehension in that he felt angry and threatened by deceased's conduct. He also told them that in fact he had a grudge with deceased in that on Christmas day (approximately 5 days prior to the fateful day), the deceased had insulted him and he was restrained by his (accused's older brother) who was present then. He went on to tell the court that in fact when the deceased started harassing him (accused) he actually thought that the deceased was continuing in his conduct as he had previously insulted him days prior to the fateful day. The affidavit of Constable Pascal Max Ndlovu was marked Exhibit III and its significance is that he is the police officer who identified the body of the deceased to the pathologist.

The post mortem report was marked Exhibit IV. It gives the cause of death as spinal cord injury, stab wound on the neck, homicide. It also states that the deceased had a stab wound on the right back of the neck (the dimensions of the wound are given as (2 x 1 x 7 cm). Other remarks are given as cervical spine cord injury C1, C2.

The weapon itself an okapi knife was marked Exhibit V. It is 23,5cm in total length. The blade is 12cm, the sharp edge is 9,5cm and its weight was given as 0,065kgs.

The accused person himself says at the time that the deceased dragged Nkosiyalinda, he queried this and the deceased asked him what he was going to do about it. He then says when deceased walked away, he decided to confront him and they come face to face. He then indicated to the deceased that what he was doing was wrong and that he (accused) was not pleased with it. He then says he got angry at the time that he confronted deceased and he ended up stabbing him. Under cross-examination he said he decided to use a knife as he feared that deceased and Honest Siziba would overpower him.

He confirmed that deceased and Honest Siziba did not attack him in any way but that he thought because of the pending grudge maybe they had come to attack him. Under cross-examination he said he did not intend to kill the deceased but that at the stage when he walked past deceased to the back of the deceased, it was at that stage that he was overcome by anger. He also said he stabbed the deceased as he wanted him to flee and leave his young brother alone.

The court has to make a finding at this stage if at all the accused person acted in self defence on these facts.

Section 253 of the Criminal Law Codification and Reform Act [Chapter 9:23] provides on

self defence as follows:

253(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/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,
 - ii) was not grossly disproportionate to that liable to be caused by the unlawful attack.

In this case, the accused person's young brother was attacked by the deceased. The first requirement of section 253 that there should be an unlawful attack on the accused or a third party is satisfied.

The accused person states in his own evidence that at the time that the deceased attacked Nkosiyalinda, he queried this and the deceased then asked him what he would do about it. He then says when deceased walked away, he decided to confront him and they came face to face. It is important to note that in his own words, the accused queried the deceased's conduct and although deceased responded with disdain, deceased however started walking away, meaning that deceased had at that stage abandoned the attack on Nkosiyalinda.

The second requirement for self defence in section 253 of the code is not satisfied from these facts as it clearly provides that the accused's conduct should be necessary to avert the attack and it should be in such circumstances as accused can not escape from. But it is clear from the facts that at the stage accused approached the deceased and stood before him face to face, the deceased had already abandoned the attack and was already walking away. From accused's own

evidence, the deceased had heeded the accused's query although he commented as to what the accused would do about it, he then let go as he was walking away. What then prompted the accused to confront the deceased in the manner that he did is no longer what Section 253 (b) envisages as section 253(b) does not avail itself to a person who attacks another when in fact the attack has ended and the attacker is retreating from the unlawful action. Section 253(c) stipulates that the means used to avert the attack must have been reasonable in the circumstances. Clearly the accused was unarmed and although Honest was armed with a stick, as stated by Nkosiyalinda, Honest was never part of the attack although he was in deceased's company. So why would the accused use a knife on an unarmed man who had since stopped the unlawful attack on accused's brother? It can thus not be found that the accused's conduct was necessary in the circumstances. What makes matters worse is that the attack had ended so where would the necessity to avert the attack then come from?

Section 253(d) is to the effect that the harm caused must be on the attacker and it should not be grossly disproportionate to that liable to be caused by the unlawful attack. The deceased dragged Nkosiyalinda with his hands, the accused queried, the deceased started walking away. The decision to then attack the deceased with an okapi knife in the circumstances is certainly grossly disproportionate to the harm the deceased was likely to cause or had already caused to Nkosiyalinda (since the attack was over). So accused's reaction was grossly disproportionate to the harm already caused by the deceased to Nkosiyalinda as deceased had already stopped and was walking away. Clearly there was no more impending harm as the deceased who was unarmed was now walking away.

For the aforesaid reasons it is our finding that self defence is not available to the accused on these facts.

The accused person acted wrongfully in the circumstances. I now move on to deal with the guilt. What is the accused person guilty of? Did the accused person have actual or legal intention?

Actual intention to kill is defined as follows:

- a) That the accused desires to bring death. Death is his aim and object.
- b) That the aim or object of the accused person is not death 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 as per Feltore's Guide to Criminal Law in

Zimbabwe pp 110. See also *S v Mugwanda* SC 19/02. Our view is that the accused person queried the deceased's conduct, the deceased, then uttered words to the effect of challenging the accused on what he would do about it, and then walked away. At the time the accused confronted the deceased' the deceased had already stopped the unlawful attack on accused's brother and was walking away. The accused then came face to face with the deceased and then pretended to be walking away only to turn back, pull out an okapi knife and stab the deceased on the back side of the neck. The weapon used, the amount of force exerted as inferred from the size of the wound which the post mortem gives as 2 x 1 x 7 cm, the injury to the spinal cord, on an unarmed deceased who had ceased the attack and was in fact walking away, can only lead to one conclusion that the accused's conduct was clearly the one which whilst death was not his aim and objective, in the process of engaging in this activity accused foresaw death as a substantially certain result but nonetheless proceeded regardless of the consequences. A 7cm laceration at the back of the neck which goes in and injures the spinal cord can only be expected as a matter of certainty to be fatal. We accordingly for the aforementioned reasons find the accused person guilty of murder with actual intent.

Sentence

The accused person was 17 years at the time he committed this offence, the deceased had attacked the accused person's younger brother. The accused has already spent one (1) and half years in remand prison. His version of events is primarily similar to that of the state witnesses, meaning he told the truth and is contrite. The accused is sentenced to 8 years imprisonment.

Criminal Division, Prosecutor General's Office' the applicant's legal practitioners
T. Hara and partners, respondent's legal practitioners