

THE STATE
versus
NQOBANI NXUMALO

HIGH COURT OF ZIMBABWE
MOYO J
BULAWAYO 6 AND 7 MARCH 2018

Criminal Trial

T Hove for the state
Mrs B Mushaninga for the accused person

MOYO J: The accused person faces a charge of murder, it being alleged that on 25 November 2017, at Esigodini, he stabbed the deceased Mthulisi Ncube resulting in the deceased's death later at Esigodini Hospital from the assault.

Documentary exhibits were tendered in the form of the state summary, defence outline, affidavit of the police officer who identified deceased's body to the pathologist, accused's confirmed warned and cautioned statement, and the post mortem report. They were all duly marked.

The facts of the matter are fairly straightforward, this is one of the cases where patrons instead of drinking beer they venture into violent behaviour that results in the death of one of them. The state called Babongile Khumalo, Ignatius Ncube and Tichaona Gwatiringa to give viva voce evidence on its behalf. The accused person gave evidence on his own behalf. The evidence of Nqobizitha Ncube, Casto M Sibanda, Nicodemus Chaneta and Dr S Pesanai was admitted into the court record in terms of section 314 of the Criminal procedure and Evidence Act [Chapter 9:07].

According to the state case, Ignatius Ncube stood outside the bar talking to Babongile Khumalo about his missing cellphone. Accused came and enquired as to whether anything was wrong. Accused struck the ground with his okapi knife swearing at Babongile Khumalo that he would kill someone. Ignatius thought accused was being hostile to Babongile and he explained

that him and Babongile were related. As he explained, deceased came and pulled away Babongile. Accused then chased after the deceased and stabbed him once on the chest with an okapi knife.

Accused denies this version and says he went out and merely enquired as to whether there was a fight, deceased then answered by saying even if there was a fight what would accused do? Then deceased, Babongile and others, then mobbed accused, he fell to the ground, they beat him up first with fist behind the ear and with a bottle on the mouth causing him to lose a front tooth. Accused pleads self defence and says he just thrust the knife and did not even know that he had stabbed the deceased but that he just stabbed. Accused also says deceased's prior behaviour pointed to violence.

The version of the state witnesses has to be juxtaposed with that of the accused person for the court to find exactly what transpired on this day in question. The following are our findings;

- 1) The version of Babongile Khumalo is corroborated by Ignatius Ncube who was apparently accused's friend at the material time and was in fact drinking beer with accused prior to this occurrence.
- 2) Ignatius Ncube struck the court as an honest and fair witness as he clearly told the court that he last saw accused chasing after deceased and did not see what later ensued.
- 3) Tichaona Gwatiringa a police officer who arrested accused did not observe any injuries on the accused neither did accused report any to him.
- 4) The post mortem report shows that the stab wound went through the second intercostal space cutting through the second left rib. It then perforated the lung. This in essence means that the knife was thrust with excessive force. This is consistent with the version of the witness that accused stabbed deceased as they were both standing as it is illogical that a person who is lying down, suffering blows from all directions would manage to thrust a knife that deep into the deceased's chest as accused would want us to believe.
- 5) The previous incident where deceased was allegedly locked in by the security guard, we have no precise facts as to what had happened resulting in that. We are also not told how it then relates to the current events that led to the deceased's death.

Whether it occurred or did not occur, it is irrelevant in our view to the determination of the issue before this court, neither has the defence shown of what relevance it is for even if deceased had caused trouble to whoever prior to this incident, this court has direct facts that show how this incident occurred and has no reason to infer.

- 6) Accused's version differs as between the confirmed warned and cautioned statement and the defence outline. In the confirmed warned and cautioned he says after the altercation where Ignatius was asking about his cellphone, Ignatius went back into the bar and Babongile and deceased also left, and that he remained standing. They then came back, one of them then hit him with a fist behind the ear and he fell down. He then took out his okapi knife and stabbed the deceased as they continued to attack him. In his defence outline however, he says that one of the deceased's friends hit him with a fist behind the ear and the deceased then struck the accused with a beer bottle and he broke his front tooth. (My emphasis) This is a discrepancy on a material point for it is his explanation for attacking the deceased. He could not have left out the bottle attack by the deceased from his confirmed warned and cautioned statement, as his memory then was still fresh. It is precisely the reason why he attacked deceased in particular, but it is not there in the statement meaning that its presence in the defence outline merely shows that accused is being untruthful about this whole matter and he is trying to build his defence as he goes. It is for these reasons that we reject accused's version of events and we accept the state case. Having rejected the accused's version, the issue of self defence consequently falls away.

Verdict

We then proceed to find what the accused is guilty of. The accused person thrust an okapi knife, a lethal weapon into the deceased's chest, a vulnerable part of the human body, and broke a rib in the process as well as piercing through the lung. Severe force was obviously used. This is inferred from the injuries as stated in the post mortem report. Professor Feltoe in his guide to the Zimbabwe Criminal Law 2005 edition at page 96, states that intention may be inferred from the facts and the circumstances of the case.

He states thus:

“Where it is alleged that accused had legal intention to kill accused will usually deny that he foresaw that his actions would result in death. The question then is whether, as a matter of inference, he did have such foresight despite his denial. He can only be convicted of murder if the only reasonable inference that can be drawn from the facts is that he had legal intention to kill.”

In this case, accused used a lethal weapon, thrust it into the chest which is a vulnerable part of the body, and he thrust it with severe force as inferred from the injuries. In these circumstances, he must have foreseen the real possibility of death. He is accordingly convicted of murder with constructive intent.

Sentence

The accused person stands convicted of murder. He is a youthful unsophisticated, first offender. He is also an orphan. He contributed something towards the deceased's burial showing that he regrets the deceased's death. He however, started offending at the very deep end. He carried a lethal weapon, he behaved irrationally on the night in question leading to an unnecessary loss of life. These courts have time and again frowned at the loss of life through violence. This court notes however, that lack of life skills in these youths from destitute backgrounds in the communities leads the youth to just loaf around, to be idle and to resort to alcohol abuse as the only available “sport” in the communities. It is a very unfortunate scenario. Under normal circumstances the accused would have been given a sentence of 18 – 20 years imprisonment, but because of his youthfulness and his unfortunate background, the court will discount that sentence. The accused person is accordingly sentenced to 15 years imprisonment.

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