HB 206/16
HC (CRB) 95/16

THE STATE

And

PROSPER NCUBE

IN THE HIGH COURT OF ZIMBABWE
BERE J with Assessors Mr J. Sobantu and Mr Hadebe
BULAWAYO 14 & 15 JULY 2016

Criminal Trial

K. Ndlovu for the state
Mrs S. Munherendi & Miss N. Sandi

BERE J: The dispute that took the deceased's life started as a very simple one and no one in his sober senses would have thought such a misunderstanding would end up with such tragic consequences.

What we now accept as a court is that the deceased picked up a quarrel with the accused over the latter's alleged bullying of him during the two's schooling days years back. The argument degenerated into a fist fight between the two and the accused appeared to have fared worse in that fight. Efforts were made to restrain the two, and the fight appeared to have briefly stopped before it resumed again resulting in the deceased being hit on the head with exhibit 3 (a broken cement brick weighing 0,900 kgs). The assault on the deceased tragically ended his life as confirmed by the post mortem report (exhibit 2) which gave the cause of death as severe cerebral oedema which put simply implies swollen brain caused by subarchnoid haemorrhage which in turn was caused by a fractured skull.

The enquiry in these proceeding was made simple by the admission made by the accused person of the assault on the deceased. The accused's defence was built around the defence of person or self-defence. The accused's refined explanation in court when the court sought clarification from him was that as he was running away from the deceased who had already injured him he felt the deceased was closing the gap behind him, he responded by picking up the murder item with a view of hitting the deceased on the shoulders, but somehow the brick ended

up on the deceased's head thereby ending the deceased's life. The accused was adamant that when this assault on the deceased took place there was no one present except himself and the deceased.

To counter the accused explanation the state sought to rely on the evidence of the deceased's biological sibling one Elias Ntini who claimed in his evidence to have witnessed the fight that led to the death of the deceased. We were urged to accept the evidence of this witness in its entirety. State Counsel felt quite passionately that this witness' evidence was credible enough to secure the conviction of the accused. The defence argued to the contrary and urged us to acquit the accused person. I will attempt in this judgment to deal with these two diametrically opposed or conflicting views espoused by both counsel.

In urging us to find in favour of the credibility of Elias's evidence, the State Counsel sought to rely on the provisions of section 269[1] which no doubt supports the conviction of an accused person on the strength of a single but competent and credible witness. We have no doubt that this is the correct exposition of the law. The only challenge which the court had to grapple with was in applying this provision of our law to the evidence given by Elias.

Elias Ntini is the sole witness who was called by the state who claimed to have been present and witnessed how the deceased was injured. The following is the extract of his evidence in chief when he was asked by the State Counsel to explain what happened leading to the death of the deceased.

> "Prosper and Collen (the deceased) went towards where the scotch cart was. I then saw Kholisani saying there were people who were fighting outside and he asked me to go and restrain them. I ran and jumped over the durawall. When I got there I awoke Khulani and asked him to restrain the two.
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> Q who is Khulani?
> A Khulani Ndlovu
> Q Where was he when you awoke him?

1. Criminal procedure and Evidence Act [Chapter 9:07]

A He was close to where the scotch cart was and asleep as he had taken some Alcohol
Q Who was fighting?
A Prosper Ncube and the deceased
Q Go on
A We remonstrated them with Khulani and Collen (deceased) understood and left saying he was going to sleep. Prosper picked up two stones and chased after him saying "Today, I want to kill this one." Collen was heard crying saying "Maye" and I told Khulani these people had injured one another. I went to where Collen had fallen with Khulani and met the accused person. I asked the accused what had happened and he shrugged us off with his head. We went to where the deceased was …" my emphasis.

Two critical issues arise from the narration of events as given by Elias in this extract. If indeed this witness was following the fight between the accused and the deceased to the point where the deceased was hit with a brick, this witness would not have heard Collen crying saying he had been injured, he would have seen him getting injured.

Secondly, the witness would not have asked the accused what had happened because he would have actually seen what had happened.

Our firm view is that contrary to his testimony that he was there following the fight and saw how the deceased was injured may not be entirely an accurate summary of what happened. Our view is that he must have reacted to the cry made by the deceased after he was hit by the accused. In such circumstances the witness' testimony is tainted.

Compare the version of Elias with the accused's explanation that he was overpowered by the deceased who then ran after him as he was bleeding from the nose (the bleeding which was confirmed even by Elias himself).

The accused's explanation sounds quite probable or reasonably possible. It is highly improbable that having been seriously injured by the deceased who from the accepted evidence appeared to have been heavily built in comparison with the accused, the accused would have attempted to chase after him in the manner suggested by Elias.

Our view is that the approach urged upon us to adopt by the State is typical of the "boxing match approach" which has been condemned by the Supreme Court. This is the approach where the accused's testimony is pitted against that of a single witness in criminal proceedings I could not express it in a better way than to borrow the eloquent expression of MCNALLY JA when he put it in the following words:

> "I have drawn attention before to the tendency of prosecutors and investigating officers to adopt what I have called the "boxing match approach" to criminal prosecutions. By this I mean the tendency, especially in assault cases, to throw the two protagonists into the ring with the magistrate as referee. At the end of the bout the magistrate awards points for demeanour and probability, and names the winner, who is usually the complainant. One suspects that the unspoken reasoning behind the conviction is "why would the police have charged the accused if he was not the guilty one?
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> This is a very dangerous approach, more especially in assault cases … It is almost impossible to decide, without evidence from bystanders which version is true. But it is even more complicated than that. Usually neither version is entirely true. Each party will tend to minimize his own role and exaggerate that of his opponent. So it is not just a question of who is telling the truth but how much of the truth is being told by each of the two conflicting stories."[2]

There is virtually nothing to choose between the accused's evidence in this case and that of Elias Ntini whose evidence must have been recorded whilst he was still mourning the death of his brother, the deceased. Without the benefit of by-standers it would be dangerous in my view to religiously accept any of the pieces of evidence as representing the entire truth in this case. It is possible that both parties may have exaggerated parts of their testimony. It is human nature. In such cases, corroboration by a by-stander or other independent witness remains a safety valve.

Having said this I must proceed to deal with the legal requirements of the defence of self-defence raised by the accused in this case. The defence raised by the accused person in this case is recognized in section 253 of our codified law.[3]

2. Sunface Bhaudhi Temba v The State judgment No. SC-81-91 at p 2

3. Criminal Law (Codification and Reform) Act [Chapter 9:23)

The section in question re-states the common law position of this defence and the section cautions us against adopting a liberal approach of this defence. In order for this defence to succeed, it must be demonstrated among other things that when the accused acted in the manner he did, he had exhausted all the other avenues of escape available to him and that he believed on reasonable grounds that he was under unlawful attack. It is also a requirement of this defence that the action taken by the accused must not have been disproportionate to the situation that he found himself in. Section 253 (2) urges the court to take due account of the circumstances in which the accused found himself or herself.

The accused's story is that he had been punished by the deceased and he then ran away from his assailant. When his assailant was 15 or so metres away from him he had the luxury of picking up the murder item, aimed it at the shoulders of the deceased but somehow it landed on the deceased's head and killed him.

Therein lies the problem in our view. The accused falls on his own sword. The mere act of flunging an item like exhibit 3 in the dark and claim that one entertained the idea that he would not in those circumstances end up causing the death of the deceased is a lazy way to look at the situation.

We do not see how at a distance of 15 metres the deceased would have continued to pause a serious threat to the person of the accused warranting the accused to react in the manner that he did. The accused had the opportunity to scream to alert others and guarantee his safety but he chose not to because he preferred his disposition to violence as a means to get out of trouble. The accused could have fled to any of the houses close by, he did not need to exclusively seek protection from his relatives if indeed he was under threat.

Our unanimous view is that the action and means the accused used to deal with the deceased were unreasonable in all the circumstances of his situation. The accused must have foreseen the real likelihood of him causing serious harm or death to the deceased as a result of is conduct.

Consequently the accused is found guilty of culpable homicide in accordance with section 254 of the Code.[4]

Sentence

In our approach to sentence we will be guided by the following factors:

In mitigation we accept that the accused is a first offender with the usual demanding family responsibilities. He was kept in custody for 7 months before being released on bail whilst awaiting the conclusion of this case. The accused was barely 22 years at the time he committed this case, a youthful offender by any standard.

We accept that the accused appears to be genuinely sorry for what he did as he personally stated so during the cause of the trial. His counsel repeated the remorsefulness of the accused in her submissions.

It is of particular significance that the accused was not the aggressor on the day in question. The deceased started the whole issue by opening the old pages of their school days years back and sought to punish the accused for his alleged bullying them of him then.

The accused was severely punished by the deceased who despite seeing the accused bleeding continued to pursue or chase after him. It is not normal to condemn a deceased person but in this case the deceased appeared to have gone too far in his dealing with the accused person.

In aggravation, we are concerned with the unnecessary loss of life that occurred in this case. We are concerned with the ease with which the accused opted to use violence to get out of the situation that he found himself in. He could have easily explored and taken other avenues of escape as outlined in this judgment.

4. Criminal Law (Codification and Reform) Act [Chapter 9:23]

Given the age of the accused person and the situation that informed his actions in this case we feel that the accused deserves a second chance. Consequently the accused is sentenced as follows:

> 3 years imprisonment wholly suspended for 5 years on condition the accused does not within that period commit any offence involving violence upon the person of another and for which upon conviction he will be sentenced to a term of imprisonment without the option of a fine.

National Prosecuting Authority, state's legal practitioners
Mathonsi Ncube Law Chamber, accused's legal practitioners