

Summary

Criminal Law – Murder – Self defence – Whether self defence established _ To constitute self defence the force used must be reasonably necessary in the circumstances for the accused to protect himself against an unlawful attack and must be commensurate with the danger apprehended – Provocation – Effect of provocation in law and on the current charge – Whether or not case proved against the accused.

JUDGMENT

[1] The accused person has been indicted for murder, it being contended that on the 5th September 2014 and at or near Emantimandze Butchery in Nhlangano, he the said accused, did unlawfully and intentionally kill one Xolani Mndzawe by stabbing him several times on the upper part of his body such as the right hand side part of the neck, the right chest upper region; the outer third of the left clavicle thus penetrating into the upper part of the deceased's lung as well as another one involving the muscles over the clavicle above the chest cavity.

[2] When the charges were put to the accused person, he pleaded not guilty to them. The Crown led a total of five witnesses. These witnesses included PW1 Selby Mfanukwente Thwala, PW2 Sonnyboy Lubhoko Khumalo, PW

3 Sicelo Mavimbela, PW4, 4131 Detective Assistant Inspector Tsabedze and PW 5, 5626 Detective Constable Simphiwe Ndlangamandla.

[3] The evidence by the crown witnesses was to the effect that the deceased was in the company of PW 1 and PW3 at a Butchery called Emantimandze, which was situated next to Phoenix Hotel and Bar in Nhlangano. Even though not accompanying the deceased like PW2 and PW3, there was PW 2 Sonnyboy Lubhoko Khumalo. He was employed at the butchery where his duties included braing meat for customers in need of such a service. These witnesses were part of the many people said to have been present at the butchery at the time the incident giving rise to the charges occurred on the fateful day. They each tried to give an account of how the events leading to the death of the deceased unfolded.

[4] The evidence of Selby Thwala and that of Sicelo corroborated each other whilst that of Sonnyboy Lubhoko Khumalo differed somewhat from that of the two which is a matter that has merited a comment as shall be seen later on in this judgment.

[5] The evidence of PW1 and PW3 was to the effect that they, whilst in the company of the deceased who was their close friend, went to the butchery in question to braai some meat. It was whilst enjoying their meat that the accused, who happened to be a former friend of theirs walked in. It is apparent that the said friendship was soured by the deceased and the accused's habit of exchanging one another's girlfriends in the past. There were in fact exchanged accusations in court where some witnesses told the court that the accused had at some point impregnated the girlfriend of the accused only for the latter to retort and said that he impregnated the said deceased's girlfriend in revenge over the latter's having impregnated his girlfriend some time earlier.

[6] The evidence given by the two witnesses whose evidence corroborated each other in material respects was that as soon as the accused arrived at Emantimandze Butchery; an argument ensued between him and the deceased. In fact the accused had demanded a certain cloak card that PW3 Sicelo Mavimbela had forcefully taken from one Titi Mdluli, who the accused claimed was his girlfriend. The deceased protested against the accused demanding the said cloak card. As the argument developed, the deceased ended up uttering derogatory statements among others against the

accused where he said he should be happy with his dating girls they had rejected. It was apparently as such words were being uttered that the deceased allegedly splashed some porridge onto the face of the accused. This angered the accused who however, before he could respond or react thereto, his cellphone rang causing him to go outside the butchery to attend to it.

[7] These witnesses contended that without introducing his return after having attended to his cellphone outside, the accused entered the butchery walking very fast after he had taken a knife from one of the tables, went straight for the deceased and stabbed him twice. The deceased reacted thereto by running out of the butchery with the accused giving chase whereupon catching up with the deceased, he stabbed him twice again causing him to fall. It was from this fall that the evidence reveals he never recovered as he was certified dead upon arrival at the Nhlngano Health Centre, hence the murder charge against the accused which this matter is about.

[8] Both PW1 and PW3 testified that whereas the deceased and the accused were once close friends who actually shared a room, such had deteriorated to a point of their becoming enemies. This was allegedly brought about by their rivalry brought about by their dating each other's girlfriends. These girlfriends were said to be Tadzile Dlamini who was allegedly the accused's girlfriend. She was however allegedly impregnated by the deceased. On the other hand Nothando Nkonyane was said to be the deceased's girlfriend who was impregnated by the accused. Titi Mdluli was the girl whose cloak card had been forcefully taken by PW3. Although PW3 denied it, the deceased was in the company of PW1 and PW3 when the latter forcefully took away Titi Mdluli's cloak card. In fact the accused had allegedly gone to the butchery in question to fetch his alleged girlfriend's cloak card from PW3 when he quarrelled with the deceased, leading to the latter's death.

[9] Sonnyboy Lubhoko Khumalo testified under oath and said that he was roasting meat for the customers of the butchery on the fateful day. In fact PW1, PW3 and the deceased had asked him to roast their meet when the accused arrived at the butchery. There soon ensued an argument between the deceased and the accused which culminated in the deceased throwing or

splashing porridge on the accused's face. According to this witness, after doing that to the accused, the deceased challenged him to do what he thought he needed to do. This witness testified that all three of the deceased's companions attacked the accused thereafter causing him to fall on to one of the tables nearby. PW1 had allegedly kicked him as he fell thereon. According to this witness the accused picked up a knife from the table he had fallen on and used that knife to stab the deceased who then bolted out of the butchery. He claims not to have seen anything after that. It shall be noted that this witness's testimony is for a number of reasons suspect. I shall address this later on in this judgment.

[10] PW4 and PW5 are Police Officers who attended to the matter in their respective capacities as the Scenes of Crime expert and the principal investigator or the investigating officer in the matter. According to PW4, the Scenes of Crime expert, he had attended to the deceased's corpse at the Nhlanguano Health Centre after having been called there to by the Police officers who had attended to the matter of the deceased. The deceased had been confirmed dead on arrival at the Health Centre. This witness handed into court an album he had prepared to show the stab wounds the deceased had sustained from the stabbing. The stab wounds shown on the photographs

were consistent with the evidence of the pathologist as confirmed in the postmortem report. The album was handed into court and was marked as Exhibit A.

[11] PW5, 5626 Detective Constable Simphiwe Ndlangamandla, testified that he was the investigating officer in the matter. He told the court how he and his colleagues had received a report about the deceased having been stabbed at Emantimandze Butchery in Nhlango. The deceased had thereafter been transferred to the Nhlango Health Centre on an apparent emergency basis. Although they had found the deceased already dead; they had called the Scenes of Crime expert in PW4, 4131 Detective Assistant Inspector Tsabedze, to come and take the necessary photographs including preserving the necessary evidence.

[12] When they got to the butchery where the deceased had been stabbed, they were able to observe the scene and further to obtain statements from eye witnesses. They then started looking for the suspect who had already been identified as the current accused person. Although the accused was at first

difficult to get, they eventually managed to talk to him over the phone whereupon an arrangement for him to surrender himself was made.

[13] This witness further testified on how he had cautioned the accused person in terms of the Judge's Rules. From there the accused allegedly surrendered the knife used in stabbing the deceased. This was produced after another caution had been administered on him advising him that he was not obliged to produce anything and that if he had produced any such it would be recorded and could eventually be used as evidence in Court. The accused allegedly pointed out the knife he had used in stabbing the deceased. It was marked as Exhibit 6.

[14] The confession made by the accused before Magistrate M. Z. Nxumalo in Nhlanguano was handed into court by consent. In it the accused person had said that on the day of the incident forming the basis of the charge he had received a call from a certain girlfriend of his called Gloria, who told him that she had been assaulted by her former boyfriend known as Sicelo who was said to have gone to Emantimandze Butchery. It further revealed that when he got to Emantimandze Butchery he had found Sicelo in the company

of Selby Thwala (PW1 herein) and Xolani Mndzawe the deceased. An exchange is reported as having ensued between him and the deceased who likened him to a dog whose mother was allegedly failing to keep on the leash. The deceased had allegedly asserted that he was going to do what his mother was allegedly failing to do. The deceased then threw or splashed porridge on the accused's face as the latter allegedly protested against his being referred to as a dog.

[15] When he (the accused) asked for Gloria's cloak card from Sicelo, the latter had told him to tell Gloria to fetch the cloak card herself. He said the deceased had then pushed him away from Sicelo. He said he then noticed a knife which he then picked up and used to stab the deceased once. When the deceased ran away, he gave chase and allegedly managed to stab him around the waist and also at the back causing him to fall.

[16] The post mortem report was handed in by consent. It was compiled by Dr R.M. Reddy who states therein that he is a Police Pathologist. It stated that the cause of death was "due to a penetrating injury to the left lung". Describing the antemortem injuries it stated the following:-

- (i) *Cut wound over the rightside outer neck aspect, 3 cm x 0.6 cm muscle deep, present.*
- (ii) *Cut wound over the back of the right chest upper region 3.5 cm x 0.7 cm present, muscle deep.*
- (iii) *Penetrating wound over the outer third of left clavicle obliquely present 15.1 cm above nipple 3.2 cm x 1 cm lung. It involved muscles over clavicle involving pleura, intercostal structure, upper lobe of lung (1.7 cm x 0.6 cm) edges clean cut, angle sharp front to back downwards, pleural cavity contained about 1200 ml blood.*

[17] The case put to the crown witnesses, particularly PW1, PW2 and PW 3 was that the deceased was the aggressor, that he had provoked the accused by making derogatory remarks against him and also by splashing him with porridge. It was further contended that besides the apparent provocation the accused had killed the deceased in self defence. The rationale behind this contention was that the deceased had, together with his companions, attacked the accused prompting him to allegedly take and use the knife to allegedly ward off the deceased.

[18] At the close of the crown's case, the Defence called its witness, DW1, who was the accused himself. He was sworn before he tendered his testimony. In his evidence he testified how he had gone to town in Nhlango to meet his girlfriend, Titi Mdluli. He found her in a bad state, he claimed. He established that she had been assaulted by one Sicelo Mavimbela, PW 3. She had gone on to inform him that her assailant had also confiscated her work cloak card after assaulting her. She tasked him with recovering her cloak card from the said Sicelo Mavimbela, who had indicated he was going to Emantimandze Butchery next to Phoenix Hotel and Bar in Nhlango.

[19] At Emantimandze Butchery where he was also to roast some meat for their supper with his said girlfriend, he found the said Sicelo Mavimbela in the company of Selby Thwala and Xolani Mndzawe, the deceased. He had engaged Sicelo Mavimbela about Titi's cloak card when the deceased interjected and insulted or made some derogatory remarks about him. These included the following:- his being ordered by the deceased to leave as the cloak card was not his; his being told he always dated girls they had

rejected; he was allegedly a mongrel without a leash who was going to be put on the leash by the deceased.

[20] Further to these derogatory statements, the accused alleges that he was splashed with porridge on the face by the deceased, prompting a reaction from him. His phone rang at that time and whilst trying to pick it up, he was allegedly attacked by the deceased acting in consort with PW1 and PW3. Notably, he says nothing about whether or not he did pick the cellphone and how long it had taken him to converse thereon if he had picked it.

[21] During the scuffle that he says ensued, he allegedly fell onto an item he allegedly could not tell what it was; which he used to hit at random so as to pave a way for himself to escape the torture he was allegedly subjected to, he says. He remembered hitting the deceased once with same after which he allegedly managed to escape and ran away. The injuries found on the deceased were however more than one and were, according to the pathologist, consistent with stabbing than with hitting.

[22] It was put to the accused by Counsel for the crown that whereas he had been provoked by the deceased through the passing of the derogatory words referred to above and through being splashed with porridge by the same person, he had however not been attacked by the deceased or any of his friends. It was also put to him that there was no justification for him to have stabbed the deceased with the knife. It was further put to him that when he stabbed the deceased, he was under neither imminent danger nor did he act in the heat of passion. It was further put to him that the version he was trying to advance was not correct.

[23] In my assessment of the evidence, it is clear that the deceased had provoked the accused in at least two ways which were through passing derogatory remarks against him to the effect that he targeted women who had been rejected by them and that he was a mongrel with no one to keep him under leash as well as humiliating him through splashing porridge over him.

[24] I however, cannot say that from my understanding of the evidence, he was entitled to stab the deceased in the manner he did or even to say that he was justified to stab the deceased, and kill him in the process.

[25] Starting with whether or not there was a justification for the stabbing, which can only be if it was agreed that he acted under self defence, it would depend on which one of the two versions put by the witnesses for the crown on the one hand and the accused person on the other, does this court accept. Put differently such a finding would have to depend on how I find the accused to have been stabbed. According to PW1 and PW3, the exchange between the accused and deceased was interrupted by the ringing of the accused's cellphone which forced him to go out of the butchery as he attended to it. He only stabbed the deceased on his return from outside and it was without him having uttered a word to the deceased. It happened very fast when the accused returned from attending to his cellphone. The version by the accused person on the other hand is that there was no break between their heated exchange of words and the eventual stabbing of the deceased.

[26] The version of the accused has a fundamental flaw or shortcoming in my view. It does not acknowledge the ringing of the accused's phone and how he reacted to it before stabbing the deceased. This version now ignores what was put to the crown witnesses, particularly PW1, by the defence counsel. The latter had put to PW1 the following questions on the issue of the cell phone that allegedly rang before the stabbing concerned which had solicited the answers thereto as recorded next to the questions put:-

“Q. I am instructed that he spoke to Xolani and that whilst doing so, his (the accused's) phone rang?”

A. He did eventually speak to Xolani but that was after Xolani had interjected in what he and Sicelo were talking about. Their conversation with Xolani was disrupted by the ringing phone.

Q. Before the phone rang, I am instructed that during the altercation between the two, Xolani and Sanele the deceased told the accused in Siswati that “ Nangabe make wakho uyehluleka kutikhungela lesigolwane sakhe lesinguwe, ngitatikhungela mine (if your mother is failing to put the mongrel of hers, who is you, on a leash, then I

will have to put it on the leash myself.” Did you hear that.”

A. No I never did.”

[27] This extract I have referred to because it has this portion where the accused acknowledges the ringing of the cellphone during the heated exchange after the accused had already been splashed with some porridge on the face. The ringing of the phone and its being picked up and attended to outside the butchery by the accused, has become crucial because it provides the break in the chain of events between the two, particularly that it had led to the accused having had to leave the butchery only for him to return and stab the deceased without any word being uttered. Crucially is the fact that other than acknowledging that it did ring, the accused says nothing about disputing it through putting it to the crown witnesses that it had led to the altercation being disrupted between the two.

[28] If that is the case, I cannot help but accept that the crown’s version was the correct one which means that. I have to accept that the altercation between the deceased and the accused was disrupted by the cellphone when it rang

and forced the deceased to go outside the butchery to attend to. It should then follow that the version by the crown witnesses to the effect that when he came back, he did not utter any word but simply attacked the deceased by fatally stabbing him twice at that point before the deceased ran out of the butchery where he was further stabbed at least twice, should also stand. I accept as well that the accused gave chase and stabbed the deceased at least twice as he ran away causing him to fall.

[29] Whereas the evidence of PW2 deviates somewhat from the evidence of the crown witnesses on what happened during the stabbing of the deceased; it is not reliable and it cannot do damage to the crown's case on what happened during the stabbing because of what I have said above. This witness sought to paint a picture of the deceased and his companions having jointly attacked the accused. In his say so, he does not mention the ringing of the cellphone which both parties had accepted did occur. Furtherstill he does not want to confirm that the accused stabbed the deceased as he pursued him outside the butchery. He was in my view fixated about the deceased and his companions having attacked the accused which is not confirmed by the other witnesses in the same manner as he puts it. This shows that his testimony is not reliable and not credible.

[30] In fact the version of this witness is contradicted by the confession made by the accused. In it the accused makes no mention of the deceased and his friends having attacked him, thus causing him to fall onto the knife he allegedly used to hit the deceased as opposed to stabbing as he puts it in the confession. It is inconsistent with the confession in that it also does not confirm what the confession does, namely that the accused pursued the deceased as he ran and stabbed him at least twice as he ran away outside the butchery.

[31] Whereas the accused sought to rely on self defence, the version of the accused does not support such a defence. This is because I have made a finding of fact that the accused was coming from attending his cellphone outside when he attacked and stabbed the deceased without uttering a word. At that point and in line with the finding of fact I have made, the accused was not warding off any imminent danger to him which is what would have had to be established for self defence to be sustained. Secondly the deceased has not been shown to have been armed with any weapon let alone a lethal

one, which would have justified the accused to attack and stab him in the manner he did.

[32] In **R V John Ndlovu 1970 – 76 SLR 389**, the position of the law with regards self – defence was stated as follows per the headnote:-

“A person acting in self – defence may apply such force as is reasonably necessary in the circumstances to protect himself against an unlawful threatened or actual attack. The test whether a person acts reasonably in self – defence is an objective one. The force used must be commensurate with the danger apprehended; and if excessive force is used the plea of self – defence will not be upheld.”

[33] Even if I were to agree that the accused was being attacked by the deceased and his companions, I do not think that speaking objectively, the accused would have been entitled to stab the deceased four times on delicate parts of the body. Clearly the force used by the accused cannot be said to have been reasonably necessary to protect his person. In the circumstances I am of the firm view that the force used was not commensurate with the danger

apprehended. I have no hesitation to conclude that from the facts of the matter the accused acted in revenge for the direction of humiliating words to him by the deceased as well as the humiliation the deceased had caused him when he splashed him with porridge. This was further complicated by their proven rivalry over several mutual girlfriends.

[34] For the foregoing reasons self defence as a total defence cannot avail the accused person, which means that it should be rejected as a defence in this matter.

[35] It was also contended that if self defence did not succeed as a defence then provocation should avail the accused as the facts establish the said provocation. What is undeniable is the fact that several derogatory words or statements of and concerning the accused were made by the deceased before he was stabbed by the accused. These words were accompanied by the act of splashing the accused with porridge on the face. Clearly these acts were prima facie provocative. The only question is whether they do satisfy the elements of provocation in law.

[36] It seems to me that this is a question to answer on two fronts; namely on the common law front as well as from the front of the Homicide Act 44 of 1959.

[37] In Gardner and Lansdown's book titled, **The South African Criminal Law and Procedure, Volume 1 General Principles and Procedure, Juta and Company**, page 101 the Common Law position with regards provocation and its effect on a charge of murder, among others, was captured as follows:-

“On a charge of murder or assault with intent to murder or do grievous bodily harm, the presumption of intention of reasonable and probable consequences may be negated by evidence that the accused was subjected by his victim to provocation which:-

(a) Was such as to upset the balance of mind of a reasonable man and deprive him, for the time being, of the power of self control or of the faculty of realizing the probable consequences of his act; and

(b) Did in fact, exercise such an influence on the mind of the accused;

(c) provided it be proved that the conduct of the accused immediately supervened upon the provocation, was the natural reaction to it, and was not disproportionate to the provocation.

[38] In my view it cannot possibly be argued otherwise than that the accused was provoked, if not by the various derogatory statements attributable to the deceased, then by the deceased's act of splashing the accused with porridge on the face. The only question is whether given the fact that at some point during the altercation and after he had already splashed the deceased with the porridge on the face, the accused left the butchery for a while to attend to his phone, it cannot be said that the accused had had a cool of. In other words can it not be said that his eventual stabbing of the deceased as he returned from attending to his cellphone was no longer immediate so as to negate his ability to control himself.

[39] It is unclear from the evidence how long a time the accused took as he attended to his cellphone outside the butchery. It seems to me that I have to construe this aspect to the accused's benefit that it was for a short space of

time so much so that the accused could not have cooled off. In other words his attending to his cellphone outside could not have removed the immediate reaction to the provocation necessary on the part of an accused to found such a defence in law, on the part of the accused. I therefore have to find that the accused was provoked and that the said provocation had deprived him of the power of self control. In this sense I have to find that the accused acted in the manner he did under provocation and that such had the effect of depriving the crime of the particular intention attaching to it with the effect that the crime of murder has been reduced to culpable homicide.

[40] I am of the view that from the facts of this matter, even if it can be said that I have erroneously come to the conclusion that the accused had been provoked at common law by the deceased to act in the manner he did, it seems to me that the conclusion I have come to cannot be faulted on the basis of The Homicide Act of 1959.

[41] Sections 2 and 3 of the Homicide Act, 1959 provide as follows:-

Killing on provocation

“2(1) a person who:-

(a) Unlawfully kills another under circumstances which but for this section would constitute murder and

(b) Does the act which causes the death in the heat of passion caused by sudden provocation as defined in Section 3 and before there is time for his passion to cool;

Shall only be guilty of culpable homicide.

(2) This section shall not apply unless the court is satisfied that the act which causes death bears a reasonable relationship to the provocation.

Provocation defined

(3)(1) Subject to this section “provocation” means and includes any wrongful act or insult of such a nature as to be likely, when done or offered to an ordinary person or in the presence of an ordinary person to another who is under his immediate care or to whom he stands in a conjugal, parental, filial or fraternal relation or in the relation of master or servant, to deprive him of the power of self control and to induce him to assault the person by whom such act or insult is done or offered.”

[42] The main purpose of the homicide act is to ensure that an act which would otherwise amount to murder would, if it occurred under the circumstances described in the Act, be deemed to be Culpable Homicide despite what it would naturally have amounted to. What the section provides for is that a person who unlawfully kills another whilst acting under a heat of passion as a result of provocation by the deceased in circumstances where the said person has not had time to cool shall be guilty of culpable homicide.

[43] The provocation contemplated in the section means and includes, at least for purposes of the matter at hand, any wrongful act or insult of such a nature when offered or done to the person concerned as to be likely to deprive him of the power of self control and to induce him to assault the person by whom such an act or insult is done or offered.

[44] Whether or not The Homicide Act is applicable in the present matter is dependent on whether when the accused killed the deceased he was acting under a heat of passion as a result of provocation by the deceased and whether in those circumstances it could be said that the accused had not had

time to cool. This question could only be determined after ascertaining at first whether or not the accused was provoked.

[45] I have no hesitation that to throw or splash porridge on someone's face during a heated argument is an act of extreme provocation which would deprive a normal person of the power of self control. The words of referring to the accused as a mongrel whose owner was failing to keep on the leash as well as those of referring to that person as one who enjoyed picking up or dating women rejected by them was also provocative in my view particularly if it was acted upon immediately after their uttering.

[46] I therefore find that the accused was provoked both in terms of the act of splashing him with porridge on the face during a heated argument just as is the case with the passing or making of the derogatory statements referred to above. I also find as a fact that the act and the words were acted upon immediately in the heat of passion and before there was any time for the accused to cool.

[47] I am therefore convinced that in the circumstances of the matter, the accused should be found guilty of culpable homicide given that the circumstances justify a conclusion in that regard.

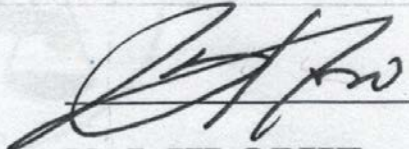
[48] Counsel for the crown had argued forcefully that the circumstances of the accused's action were indicative of *dolus eventualis* (legal intention) for murder when considering the weapon used and the part of the body on which the blow was inflicted. In this regard the crown was relying on the authority of such cases as **R V Jabulane Philemon Mngomezulu 1970 - SLR B – C and R VS AD 176 at 187** where the intention to found murder was defined as follows:-

“The intention of an accused person is to be ascertained from his acts and conduct. If a man without legal excuse uses a deadly weapon on another resulting in his death, the inference is that he intended to kill the deceased.”

[50] Perhaps as stated above, there is no dispute that the finding of culpable homicide herein is not because murder could not be proved but it is because

of the effect of provocation on what would have been an act of murder, which is reduced to culpable homicide.

[51] Consequently and for the foregoing reasons I have come to the conclusion that the accused in the present circumstances cannot possibly be found guilty of murder although he at the same time cannot avoid being convicted of culpable homicide in our law. Accordingly, I find the accused guilty of culpable homicide and I convict him of same.



N. J. HLOPHE
JUDGE – HIGH COURT