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AO 18/3/2015
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IN THE HIGH COURT OF BOTSWANA
HELD AT GABORONE

CTHLB - 000038 - 12

In the matter between:

THE STATE

and

DIPUO GABOREKWE ACCUSED

Mr. Mancwe, with Mr. Kapeko, representing the Director of Public Prosecutions, for the State
Mr. Modie, of BeganeModieAttorneys, as *pro deo* counsel, for the accused

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S E N T E N C E

NEWMAN J:

[1] The crime of manslaughter carries a maximum term of life imprisonment; accordingly, this Court has a wide sentencing discretion. In my assessment of an appropriate sentence to impose, I have had regard to all relevant factors, including the particular circumstances of the criminal and her crime, the sentencing parameters set out in section 200(1) of the Code, and sentencing trends pertaining to this type of offence. I have also endeavoured to take cognizance of any particular aggravating and mitigating features of this case.

[2] In his address to the Court, on behalf of the convict, Mr. Modie drew my attention to the fact that his client, who is now about 37 years of age, is responsible for looking after her six children, aged between 2 and 18 years of age, her mother, aunt and aged grandmother. With little formal education, she has been unable to secure permanent employment, and survives through Government hand-outs, and occasional temporary work under the drought relief programme. She has one previous conviction, for common nuisance, committed approximately two years before the current offence.

[3] Moving from the criminal to the crime, it is recognised that the deceased's provocative conduct, towards his sister, was a critical contributing factor to his own demise. He had been heavily intoxicated at the time, and had instigated the vocal, and physical, confrontation. Moreover, witnesses for the prosecution confirmed that the accused person was normally well-behaved, and not aggressive by nature. That is not to excuse her behaviour, but merely to explain it. Such behaviour is most certainly inexcusable, and the fact that the second blow, which ultimately resulted in death, was administered after her first strike had already felled her brother, should be treated as an aggravating feature.

[4] DIPUO GABOREKWE: I hereby sentence you to a term of 4 years' imprisonment, 3 years of which are suspended for a period of 3 years on condition that, during the period of suspension, you do not commit any offence of which violence to the person is an element. The

sentence shall be deemed to have commenced on 1 December 2012, in recognition of the time spent in custody, prior to your trial.

[5] You are hereby advised of your right of appeal to the Court of Appeal, against the decision of this Court, within six weeks from today.

[6] The axe handle, being Exhibit 'E', is declared to be forfeited to the State.

DELIVERED IN OPEN COURT AT LOBATSE THIS 19TH DAY OF APRIL 2013.

D. NEWMAN
JUDGE

JUDGE OF THE HIGH COURT
HIGH COURT OF BOTSWANA
19 APR 2013
PRIVATE BAG 220
GABORONE

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In the matter between:

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J U D G M E N T

NEWMAN J:

[1] At the status hearing, held on 30 August 2012, the accused person entered a plea of 'not guilty' to an indictment charging her with murder, contrary to section 202 of the Penal Code, Cap 08:01 ('the Code'). The particulars of offence alleged that she had murdered her brother, Ofentse Gaborekwe ('Shalala'), at Mabutsane on or about 30 October 2008.

[2] It was common cause at the trial that, during the night of 29 October 2008, Shalala sustained injuries at the hands of the

accused, and that he died from those injuries about four days later, while a patient at Princess Marina Hospital, Gaborone.

[3] Prior to the opening of the State's case, the defence sought to admit the summaries of evidence of 15 individuals proposed to be called as prosecution witnesses. Such summaries were duly admitted into evidence, in terms of section 273(1) of the Criminal Procedure and Evidence Act, Cap.08:02 ['the Act'], and deemed to have been read into the record. They included the accounts of persons who had observed the condition of Shalala, after he had sustained his injuries; two individuals who had heard the sounds of one person beating another, and the voice of the Shalala saying to the accused – "Intshwarele kgaitsadiaka, ke bakile", meaning, "I am sorry my sister, I will never do it again"; several police officers, including the one who took photographs at the scene of the incident and of the deceased during the post-mortem examination; a doctor at Jwaneng Mine Hospital, who examined Shalala on 31 October 2008 and completed a medical report form; and a senior consultant psychiatrist who examined the accused person at Sbrana Psychiatric Hospital, Lobatse, on 4 December 2008. In addition, certain documentary exhibits, associated with the evidence of three of those individuals, were admitted into evidence. They comprised the police officer's photograph album, the doctor's

medical report, and an affidavit setting out the psychiatrist's findings.

[4] Shalala's body was subjected to a post-mortem examination several days after his death by Dr Prabhakar, a Government forensic pathologist, who was called by the prosecution as an expert witness. By reference to a contemporaneous report prepared by him, and admitted into evidence without objection, the doctor presented a detailed account of the injuries sustained by the deceased, and furnished reasons for his opinion that death was due to generalized peritonitis.

[5] Externally, the pathologist observed abrasions on the left side of the deceased's forehead and chest, and lacerated wounds on the inside of his left leg and palm of his left hand. Another external wound, visible to the witness, was a vertical sutured surgical wound on the front of the deceased's abdomen, resulting from an operation performed by a hospital surgeon to repair intestinal perforation. Death, opined the doctor, had resulted from inflammation of the lining of the abdominal cavity, caused by infection and irritation from leakage of the contents of the small intestine.

[6] As to possible causes of the injuries sustained by the deceased, the witness expressed the view, under cross-examination, that it was

possible that the deceased's abdominal injury had resulted from a violent fall onto a projecting surface. Under subsequent questioning from the Court, he opined that the deceased's injuries were consistent with having been struck with the axe handle that was shown to the witness, and later admitted into evidence by consent.

[7] Of the witnesses who gave *viva voce* evidence on behalf of the State, only two were able to shed light on the material events of 29 October 2008. Ishmael Gaelesiwe who testified as PW2, was entertaining himself at a shebeen, when he heard the accused, Dipuo, and her brother quarrelling in the neighbouring property. This was at about 11 pm. The quarrel concerned a plate of food, prepared by Dipuo for her boyfriend, but taken by her brother. At the time, Dipuo had been inside her house, while Shalala stood outside, noisily complaining that she had been giving their grandmother's rations to her boyfriend. The witness moved closer to the intervening fence, and, by the light of the moon, saw Dipuo come out of her house while carrying a wooden axe handle. She proceeded to strike Shalala on his forehead with the instrument, and he fell down. By the time PW2 reached the scene, Dipuo had struck her brother again – this time on the stomach – as he lay on the sandy ground. The witness then instructed the accused to desist, and she duly complied. It was at this point, said Ishmael,

that Shalala uttered the apology to his sister, that I have already alluded to. The matter ended, with Dipuo walking normally back to her house, while Shahala crawled to his.

[8] PW2 testified that he saw no injuries on the accused person, nor she complain of any. He also said that he did not see Shalala behave physically towards his sister, and that, had this occurred, he would have seen it. According to the witness, Dipuo had an angry demeanour, and Shalala had appeared drunk, which, to his knowledge, was not unusual.

[9] Keabetswe Mosope, who testified as PW3, had been with Ishmael when the argument broke out between Dipou and Shalala, and had followed his friend to the neighbouring yard to investigate. As he stood by the fence adjoining the two properties, about 10 metres away from the scene, he saw Dipuo strike her brother twice with a wooden object. The witness also said that he heard Dipuo threaten to kill Shahala, who begged for his sister's forgiveness. After Ishmael had separated them, Dipuo walked back to her house, and Shahala crawled towards his place before managing to stand up.

[10] According to PW3, it was not uncommon for the siblings to quarrel, after one or other had been drinking alcohol. He also said that he had seen Dipuo slap her brother occasionally, but that Shahala had not struck back, as he was not that sort of person. The

witness described both individuals as well-mannered, for the most part, though Shahala became too talkative after imbibing alcohol.

[11] The police investing officer, who was the fourth, and final, witness for the prosecution, testified that he had attended at the post-mortem examination, interviewed Dipuo, and taken her for psychiatric examination. It was through this witness that the wooden axe handle, that had been used by Dipuo against her brother, was admitted into evidence. Under cross-examination, PW4 acknowledged that Dipuo had recorded two statements with one of his colleagues, the first of which was made shortly after the incident, and the other following Shalala's death. After the witness had confirmed that those statements had been misplaced, it was put to him that those statements made reference to Shalala having threatened Dipuo with a knife. PW4's response was that he had read both statements, and emphatically denied that Dipuo had made any such allegation in either statement, or, indeed, during his interview with her.

[12] At the close of the prosecution's case, I ruled that there was a case to answer against the accused person, whereupon she was advised of the various options available to her. She elected to give evidence under oath, and to call no witnesses.

[13] In her evidence in-chief, the accused person described the physical confrontation between Shalala and herself, and the events leading up to it. She said that, on the evening of 29 October 2008, Shalala had entered her house, while she and her boyfriend lay naked on a bed in the sitting room, and young children lay asleep on the floor. Using his torch to light the way, Shalala took a plate of food from a cabinet, that the accused had prepared for her boyfriend, and attempted to leave the house with it. After the accused had told him to leave her boyfriend's food:

> "He said to me that it was not my food, it was for the old lady, and he wondered why I had refused to dish for him but instead dished for Motlalepule. He attempted to leave with the plate. I stood up with the intention of getting the plate from him. He dropped the plate on the floor and was preparing to fight me. At that point, he took out a knife and was trying to stab me. I pushed him and the knife fell near to where the children were sleeping.
>
> He went outside and headed to his house. When he came from his house quarrelling, I went out, and ran to my aunt's place so that she could reprimand him. He followed me holding two half-bricks. He tried to hit me by throwing one of the bricks at me. After he missed, he went inside his house. I also went into my house to look for something I could use to defend myself. I took an axe handle and went back to my aunt's place.
>
> He came again following me, and when he got there he hit me on the head with the other brick. As he did so, I stood up to run away from him. He threw the brick at me while he shone a torch in my eyes. I dodged, and as I attempted to take cover, he was already close to me. I hit him with the axe handle on the arm and leg. We both fell to the ground while holding each other. I was on top of him and pinned him to the ground by holding his arms. He was pleading with me, that I should forgive him and he will never mess with me. I released him, and went into my house to sleep, and he returned to his house to sleep."

[14] Under cross-examination, and in response to questions from the Court, the accused person conceded that she had sustained no injuries on the night in question, and that she had forgotten to make any mention of her brother's knife in her statement to a judicial officer. She also acknowledged that she may have struck her brother on the chest, but denied the admitted evidence of two relatives that, when asked about Shalala's condition the next day, her response had been that she did not care about him. According to her testimony, her brother had been in a very aggressive mood on the night of the incident, and this had not been the first time that Shalala's drunken behavior had resulted in them quarreling, and fighting each other.

[15] To establish the offence of murder under section 202 of the Code, the State bears the onus of proving three key elements, namely, the commission of an unlawful act by the accused person, which was accompanied by malice aforethought on her part, and which in fact caused the death of the deceased.

[16] The standard of proof required of the prosecution, to discharge its legal burden, is 'beyond any reasonable doubt'. This Court must, therefore, acquit the accused person if satisfied that the evidence before the Court, whether adduced by the prosecution or the defence, creates a reasonable doubt as to her guilt. It must also not

be forgotten that the *onus* of proof, resting on the State in this case, is unaltered by the fact that certain defences have been raised on behalf of the accused person. Accordingly, for a murder conviction to eventuate, it is for the prosecution to establish all the elements of murder, and to invalidate those defences.

[17] In his closing submissions, Mr. Modie conceded that his client's actions had been the cause of her brother's death, and had been accompanied by malice aforethought, in the sense that she must have intended to do grievous harm, within the meaning ascribed to that term in section 2(1) of the Code. What counsel for the defence did challenge, however, was the prosecution's claim that it had been able to prove the unlawfulness of the accused person's actions.

[18] It was, accordingly, for this Court to determine, firstly, whether the State had successfully negated the defence raised, of self-defence, and thereby proved that the accused person's conduct was unlawful.

[19] The validity of self-defence, as a complete defence to a criminal charge, is recognised in section 4(2)[a] of our Constitution, and its two key components are set out in section 16 of the Code. In *casu*, the first consideration is whether the accused person acted in necessary defence of her person, and, if such was the case, the

remaining issue would be whether the means and degree of force, used by her, exceeded what was reasonably necessary in all the circumstances.

[20] When considering the first question, it has been consistently held that a trial court should not adopt an 'armchair' approach, or the benefit of hindsight, in assessing the state of mind of an accused person at a particular time. In *State v. Ramaisho* [2001] 1 B.L.R 14 (HC), at p.23, Nganunu CJ explained that:

> "The question . . . is whether the accused thought and could reasonably have thought that he was facing an emergency out of which he could not avoid serious injury or even death unless he took the action he did. Thus formulated the question involves both a subjective and objective test."

[See also, *State v. Sekgobokgobo* [1972] 2 B.L.R 71 (HC), at p.73, *per* Aguda CJ.]

[21] According to settled law, if the accused person had been under threat from her brother, she would not have been obliged to take to her heels in flight; nevertheless, she should have demonstrated, by her conduct, that she had no desire to fight and was prepared to take avoiding action if the opportunity presented itself. (See *Kenosi v. The State* [1993] B.L.R. 268 (CA), at p.272; *State v. Mokgosana* [2001] 1 B.L.R. 291 (HC), at p.300.)

[22] Our courts have also consistently acknowledged that a practical, common sense approach should be taken by this Court, in determining whether the measures adopted by the accused person, to defend herself, were commensurate with the seriousness of the attack against her. As Aguda CJ observed, in *Sekgobokgobo's* case, *supra*, at p.75:

> " . . . a person who is violently attacked cannot be expected to weigh the force of his blows in defence of himself 'in golden scales' and to adjudicate with great nicety as to the exact amount of force which would be justified . . . however, the law is clear in that if an accused used violence far in excess of what is necessary, then he would be guilty . . ."

[23] Tebbutt JP made a similar point, in *Magula v. The State* [2006] 1 B.L.R. 209 (CA), at p.212, when remarking that:

> " It is all very well, sitting in the cool, calm atmosphere of the court to opine that the accused should have taken this step or that when faced with an unlawful attack upon him. The trier of fact must, however, try to place himself in the position of the accused in the circumstances that existed at the time. . .
> It must also be remembered that it is not necessary that the accused person should have feared for his life. He can act in self-defence if he had a reasonable apprehension that the aggressor intended to inflict grievous harm on him."

[See also, *Senao v. The State* [2006] 2 B.L.R. 491 (CA), at pp.508-9; *Shimane v. The State* CLCGB-048-12 (CA), unreported; *State v. Lesogo* [1999] 1 B.L.R. 506 (HC), at pp.514-515.]

[24] Mr. Modie's fall-back position, if I may call it that, was that even if the prosecution had managed to prove the offence of murder, his client should, by reason of the provisions of sections 205 and 206 of the Code, be convicted of the lesser offence of manslaughter.

[25] The components of the legal defence of provocation are set out in those sections of the Code, the former of which states that:

> [1] When a person who unlawfully kills another under circumstances which, but for the provisions of this section, would constitute murder, does the act which causes death in the heat of passion caused by sudden provocation as hereinafter defined, and before there is time for his passion to cool, he is guilty of manslaughter only.
>
> [2] The provisions of this section shall not apply unless the court is satisfied that the act which causes death bears a reasonable relationship to the provocation. (*my emphasis*)

[26] To have amounted to provocative conduct, within the terms of section 206, there should be evidence that Shalala directed a wrongful act or insult at his sister, which was of such a nature as to be likely, when done or offered to an ordinary person of the class and community to which the accused person belongs, to deprive her of the power of self-control and to induce her to assault him.

[27] Having given careful consideration to the evidence of the witnesses of fact, including that of the accused person, this Court makes the following findings:

(i) On the evening of 29 October 2008, the deceased entered the house occupied by his sister, the accused person, while she lay sleeping with her boyfriend and children, and attempted to leave with a plate of food that she had prepared for the boyfriend;

(ii) When challenged by the accused, the deceased became quarrelsome, and belligerent. He did not threaten her, or attempt to stab her, with a knife, as alleged by the accused in her evidence. Not only was the existence of a knife not raised until the cross-examination of PW4, I find it inconceivable that the accused would have omitted any reference to a knife in her statement to a judicial officer, or when interviewed by the investigating officer, had she been attacked in that manner;

(iii) PW2 and PW3 were credible witnesses, and their description of the manner in which the accused struck her brother with an axe handle – initially with a blow to his forehead, and then with a blow to his chest as he lay on the ground – is consistent with the testimony of the pathologist as to the deceased's injuries. Those injuries were not at all consistent with the accused's version of material events, which fall to be rejected;

(iv) Other than to hear the noise of the two siblings quarrelling from the next yard, PW2 and PW3 were not eye-witnesses to what may have transpired prior to the final confrontation. So, although I find that the accused was in no immediate danger of sustaining serious harm at the hands of the deceased, at the time she inflicted the injuries that proved fatal – and therefore did not act in necessary defence of her person - I cannot rule out the reasonable possibility that, a little earlier, he had threatened her while holding a stone. Unlike her testimony pertaining to the knife, the deceased's threatening behavior with a stone had featured in her statement to the judicial officer. Moreover, her assertion that it was also mentioned in her two police statements cannot be gainsaid, given that both of them have been misplaced by the State.

[28] Accordingly, while I am satisfied that the prosecution has successfully negated the accused person's claim of having acted in self-defence, the accepted facts point to her having wielded the axe handle in the heat of anger, caused by sudden provocation, and before there was time for that anger to subside.

[29] The question remains whether the disparity, between the deceased's provocative conduct and the measure of the accused's actions, was such that the proportionality requirement of section

205(2) was exceeded. In *State v. Motukwa* [2006] 2 B.L.R. 313 (HC), at p.326, I had occasion to remark that:

> " . . . I also have some difficulty with the 'reasonable relationship' principle, as applied to the legal defence of provocation. The legislature has seen fit to create a partial defence to the offence of murder, out of a recognition that, in certain circumstances, an accused's emotions may be stretched to such an extent by the provocative conduct of another that he loses, albeit temporarily, his powers of self-control and kills his provoker. Should that occur, in circumstances where an ordinary person of the accused's class in his community would, in all likelihood, also have been so affected, at least to the extent of assaulting the author of the provocative act or insult, then the components of the defence, save for s 205(2) of the Penal Code, will have been met.
>
> Whilst it is undeniably right and proper for the 'reasonable relationship' element to be an essential requirement in respect of self-defence which is, after all, a complete defence and renders the actions of a person lawful, to impose the same restriction, as s 205(2) seeks to do, on a person who has lost his powers of self-control - indeed, he is required to have done so in order for the defence of provocation to have any foundation - may be said to be an 'unreasonable' requirement. That said, it is the duty of this court to apply the provisions of s 205(2), which are clear and unambiguous, for so long as it remains on our statute books."

[30] For the reasons expressed in *Motukwa's* case, *supra*, I remain of the opinion that a Court, when giving consideration to the provisions of section 205(2) of the Code, should apply a less stringent test than when called upon to apply the proportionality test for, say, self-defence. Having applied such a test to the proven facts of this case, I am not satisfied that the prosecution has negated the onus placed upon it.

[31] In the result, the accused person is found not-guilty of the offence of murder, but guilty of the lesser offence of manslaughter, contrary to section 200(1), read with section 205(1), of the Penal Code.

DELIVERED IN OPEN COURT AT GABORONE THIS 19TH DAY OF MARCH 2013.

D. NEWMAN
JUDGE

JUDGE OF THE HIGH COURT
HIGH COURT OF BOTSWANA
19 APR 2013
PRIVATE BAG 220
GABORONE