

If not for love and art, Ndume Olatushani would have died on death row

Still Life

By LAURA HUTSON @HUTSONLAURA

NEWS » COVER STORY

May 23, 2013

Tweet

StumbleUpon

Email

Share

G+1 2

Last June, Ndume Olatushani bought a new suit. He wore it with a starched purple shirt and a gray tie, and he walked confidently into a Midtown Manhattan high-rise where he knew a team of high-powered attorneys would be waiting. The firm had flown him up from Nashville just for the occasion. But when he stepped out of the elevator, he had the distinct feeling nobody recognized him.

How could they? The last time they'd seen Olatushani, circumstances had been vastly different. His hair had been longer then, and his uniform had been less Brooks Brothers and more prison blues. In fact, the last time Olatushani had worn a suit had been in 1985, when he was on trial for felony murder.

Twenty-seven years later, as he walked into a room full of people who slowly began to realize who he was, Olatushani saw a girl he'd only seen in pictures. *She looks a lot like her dad*, he thought. Her dad was David Herrington, the defense attorney who had taken on the case in 1995, and who was being honored on this night with an award from the New York State Bar Association.

Under different circumstances, being introduced to the lanky 17-year-old brunette might not have moved the freed man quite so much. But she had been born while Olatushani was imprisoned, just a few months after Herrington had taken on his case. Standing before him, Ndume Olatushani saw 17 years that had slipped away, while he sat in a cell.

"For a person locked up, time just goes by," Olatushani now says, snapping his fingers in quick succession. "I didn't keep a calendar in my cell. Years go by, and it just doesn't seem like it. Your sense of time gets distorted. Maybe that's just part of the coping mechanism that I needed to keep going.

"But once I had the chance to meet his daughter, I was able to have this visual — that this is what 17 years actually looks like. That's a lifetime. It was a moment of real reflection for me, standing there while all this was going on, seeing how much time he had given from his life to my life, to actually save my life."

Today, Olatushani speaks with a mixture of philosophical insight and prison colloquialisms, as befits a man who's read more books than your average grad student, but who's lived most of his life behind bars. That reflects the terrible irony of his situation: The positive outcome of the life he has now — a loving wife, a new start, a growing career as an artist — came as the result of a death sentence.

That sentence no longer hangs over his head. But the cost of his new life was the 27-year stretch he lost to mind-boggling misfortune and staggering setbacks at every level of the legal system, not to mention his own early bad choices. In a series of interviews with the *Scene*, he relayed the tortuous path that led to his awaiting execution in a Tennessee cell, and the fight that brought his freedom — led by a woman so convinced of his innocence she literally learned the law to save his life.



PHOTO: ERIC ENGLAND
Ndume Olatushani



Ndume Olatushani was born Erskine Johnson. He grew up in the notorious Pruitt-Igoe public housing projects of St. Louis, at a time when only about a third of its 2,870 apartments were occupied. An architectural experiment led to "skip-stop" elevators that only stopped on every third floor, turning the stairwells into gauntlets of criminal activity.

"Everything from mayhem to murder would take place in those stairwells," he recalls, sitting at the dining room table in his Lockeland Springs home. "We used to play there as kids. We'd go up to the floor above the junkies shooting dope and throw water balloons at them and then run away. They'd scream at us, and sometimes chase us and try to get us, for real." It says something about the years that followed that he remembers this with a smile.

"But I never went without food," Olatushani adds, with a note of defiance. "Even though we were certainly poor, I never knew that as a child. I never went without shoes or food like a lot of people I saw."

Olatushani was the seventh of 11 children. Although he was raised among crime and poverty, he was far from unloved. His mother served as a well-intentioned den mother to the projects' crime-infested dysfunctional family. Her name was Florence, but nobody called her that.

"Everybody called her Moosie," Olatushani says. When he speaks of her, his eyes get wide and he adopts her cadences, as if it might conjure her up. "When she cooked, she wouldn't just cook to feed us, she'd cook to feed a lot of different people," he recalls. "And a lot of people who would be sitting down and eating meals with us would be some of these criminals."

His family moved out of the projects in the late 1960s, and into a St. Louis neighborhood that was predominantly white. The move proved to be the start of his troubles.

"A block down from where we were living, there were small mansions," Olatushani remembers. "So I think that coming from where I came from, and then being exposed to something totally different in terms of how other people were living, and some of the privilege that I was seeing for the first time, that certainly had an effect on me. When I was living in the projects I was a child, and what's normal to you as a child is just normal.

"[My mother] was struggling, going to work every morning to make sure we had what we had. And now I saw something totally different from what my normal was."

"Normal" to the teenage Erskine Johnson became a life of petty crime. He was convicted of a burglary and possession of a firearm. His schoolmates and the police treated him like he'd been a criminal all along anyway, he says, so the leap to actually partaking in crimes was dangerously easy.

Even as he began drifting into criminal activity, he remained close to his family — especially Moosie. In the fall of 1983, the family began preparing for their annual tradition, Moosie's birthday party. It was hardly the biggest celebration they'd ever put together, but it definitely wasn't small. The party was held at his mother's home.

"There was chicken, steaks, seafood and so much more in between," Olatushani recalls. "You have to understand that food was being prepared Friday night, and we did not spare any expenses on the food. My mother did not drink or smoke so all we could ever do for her was make sure that she had some good food to enjoy with us and other family and friends."

The party took place on Oct. 1, 1983. "It was on a Saturday night," Olatushani says, "and after my mother went to bed some of us partied right on into the early morning hours. I stayed until about 4 in the morning myself, and I left a few of my relatives and family friends cleaning up while they partied on."

In years to come, Olatushani's life would literally hinge upon his whereabouts in those early morning hours. It would be two years before that part of his story would come to a head. In the meantime, his troubles worsened in 1984, when he went to visit family in California.

A cousin out West was going to confront a shady acquaintance, and he asked Olatushani if he'd ride along as backup. Shots were fired, both the cousin and the acquaintance were wounded, and Olatushani fled the scene. But when the cops caught up to his cousin, he told them that Olatushani had been the trigger man. He was picked up and charged with attempted murder.

At the trial, he maintained that he did not commit the shooting. The victim of the shooting even backed him up. "It would be a terrible injustice to convict this man," Olatushani remembers the victim telling the court. "He did not do it." But the jury was not convinced. Olatushani was convicted, and the California bench rapped out a strong sentence: 15 years. Only in his mid-20s, the man born Erskine Johnson found himself facing the foreseeable future in California's San Quentin State Prison.

Up to this point, Olatushani *had* committed minor crimes in his youth; he *had* accompanied his cousin to the site of the shooting. Not long after he began his prison sentence, though, Olatushani was accused of a far more serious crime — and to this day, he says, he has no idea how he came to be a suspect.

On Oct. 2, 1983 — the morning after Moosie's birthday party in St. Louis — a grocer named Joe Belenchia was working at the Food Rite supermarket he owned in Memphis. Sometime between 8:30 and 9 a.m., armed robbers entered the store. In the robbery attempt that followed, Belenchia was shot and killed.

Witnesses inside the store said the perpetrators drove away in a maroon station wagon. Police traced the license plate to the St. Louis airport. St. Louis is 283 miles from Memphis — meaning that for Olatushani to commit the murder, he would have had to make a four-and-a-half hour drive after a long night of partying to a city he'd never visited.

Olatushani later learned that the Memphis police came to his mother's house in St. Louis to talk about the case. "I didn't take it very seriously," he says, "because I knew I had never even been to Memphis. Obviously, it was a shock. But still, I thought it would somehow be resolved without my being brought to Tennessee, let alone being put on trial."

But police made a case against him based on two key pieces of evidence. The first was a palm print found on the maroon station wagon above the right rear door that police said belonged to Olatushani. The second, and more damning, was the testimony of a woman named Elizabeth Starks, who told police that Olatushani had confessed to the crime while he'd been at her house.

He was extradited from California to Shelby County to stand trial. It looked bad from the start. Olatushani's original trial attorney had never tried a death penalty case. He waived his opening statement at trial. He overlooked some of Olatushani's relatives who could have provided him a strong alibi — including his aunt, the wife of a police chief.

The jury found Olatushani guilty of first-degree murder. That left the penalty phase, with the convicted man's life in the balance. When his attorney got up to deliver his closing remarks, Olatushani says, they boiled down to, "It's not for me to say whether Erskine Johnson is a good enough man to live — that's up to you to decide."

And so the jury did. In 1985, at age 27, he was sentenced to death.

Throughout it all, his mother was supportive.

One day, two years into his sentence, he remembers telling her in a joking way, "Oh girl, I wouldn't know what to do if I didn't have you." She looked back at him and said, "Yeah, you're going to know exactly what to do when the time comes."

It was the last conversation they ever had. A call arrived at the prison in 1987. His sister was on the line. Moosie had been on her way to a church function when the church van she was riding in pulled over to the side of the road. In a freak accident, a car careened off the road and broadsided the van. Moosie was gone.

"That for me was the lowest I've ever been," Olatushani says, recalling the period today. It would be five years before another woman entered his life as convinced as his mother that he wasn't a killer.

Anne-Marie Moyes grew up far from Memphis, and even farther away from the impoverished life Olatushani had in St. Louis. She was raised in the New York suburbs and later the Bay Area by her parents, both native New Yorkers. After graduating from Johns Hopkins with an international studies degree, Moyes spent a year teaching in Germany.

Observing life abroad, Moyes says, gave her a different perspective on American society. She saw that the gap between the richest and poorest citizens wasn't as wide as it is here. Reflecting today on that period, she considers it the pivotal experience that led to her interest in law. That, and meeting Ndume Olatushani.

When she moved back to the U.S., Moyes dedicated herself to social justice issues. She started working with Death Penalty Focus, a California-based nonprofit that Moyes compares to Tennesseans for Alternatives to the Death Penalty. She was working there in 1991 when she received a letter from Olatushani, then serving his California sentence. He had taught himself to paint while he was on death row, and he'd heard Moyes was facilitating a prison art show to raise awareness of the issue.

They exchanged letters about politics and ideas for several months before their first meeting. When they did meet, Moyes describes the scene as if it were a movie.

"There was just this feeling," says Moyes, tall and thin, who grew up in predominantly white neighborhoods unaccustomed to financial hardship. "It was indescribable, and it actually kind of scared me."

During their initial correspondence, a romantic relationship didn't even enter Moyes' mind. She was grounded, even at 26 — and besides, she imagined that he was much older, and probably bald. Another inmate penpal, it seems, had given Moyes a less-than-flattering picture of Olatushani in his own letters — probably out of jealousy, she suspects.

"When I met him in person, I realized for the first time that there might be something there," she says today, in the East Nashville home they share. "I kept looking at him, because he didn't seem to belong there. He seemed to have this light emanating from him," she elaborates, apologizing if her description sounds contrived. "He had this positive energy that seemed so unusual under the circumstances."

For his part, Olatushani sensed something was different about her. He waited for her to approach him — one of the side effects of life on the inside is that it forces you to be extremely passive in social settings, he explains, and you don't talk to someone unless they come to you. But after sufficient time had gone by, he walked up and asked if her name was Anne-Marie.

Their friendship grew from there. Although Olatushani teases her about how quickly she responded to his charms, the more reserved Moyes took their romance extremely seriously — and slowly.

"I guess in some way I knew I was starting to have feelings for him," she says. "But you know, it's never anywhere I imagined I would be willing to go in life, do you know what I mean? It was scary to even have the feeling, and even scarier to think about acting on it. It seemed like total insanity to get in a relationship with somebody in that situation.

"The only way I can kind of describe it is that it's fate. Some forces that are bigger than us were going on."

Just before Moyes' 30th birthday, Olatushani was transferred to Riverbend Maximum Security Institution in West Nashville, and she followed him here. Convinced as she was that he was innocent, she thought persuading an appellate court would be easy.

"With some naïveté I thought the situation would reconcile," Moyes says. "I had a naive sense of the system, and thought it had a much bigger capacity to correct errors than it really does. I never thought it would take 20 years."

There were levels of incarceration, even on death row, and Olatushani quickly rose from Level C — 23 hours a day in forced solitude, with hands and feet shackled during the remaining hour — to Level A, which allowed up to three hours a week for visitations, outdoor time with other convicts in a 12-by-12 cage, and the opportunity to have odd jobs like data entry or cleaning.

Today, Olatushani talks about prison life as if it was a particularly regimented boot camp, with inedible mystery meat and a tightly controlled routine. But at times his smiling face drops — such as when he recalls conversations he had with his friends on death row moments before their execution.

"Amazingly, they were people who had made peace with the situation," Olatushani says. "Their outward demeanor didn't give any indication of how heavy it really was. I don't really know how to explain it. You're walking around with these people every day, and you see that they're full of life, but you know that in a few hours that life won't be in existence anymore."

He says he never felt hopeless. "If you can't muster up some hope, you can't function," he says, opening his eyes wide like a much younger man. "There were fleeting moments of despair, sure, but it never seeped into my core."

Throughout his time in prison, Olatushani says he strived to maintain that positive attitude. He taught himself how to paint. If you didn't know it, you'd never guess his paintings — windswept African plains, women clamoring over fish at open-air marketplaces — were the work of a man who hadn't been outside prison walls since 1985. Behind bars, his brushes had to be cut in half, so they couldn't be used as weapons.

"I was trying to take this image and encapsulate the range of emotions that are inside of all of us," he says, describing a portrait of an African woman with high cheekbones and a Zulu-style headdress. "I used to tell people all the time that anger is a human emotion — and it's a good thing! Because there's a lot of stuff going on that should make us mad. As long as you know how to direct your anger in a positive way."

Olatushani thus directed the anger he felt at the Shelby County prosecutors, and the larger prison and policing system of which they're merely a part, into his studies, his art, and into being a role model to younger kids facing the same risks he did.

In 1995, he legally changed his name to Ndume Olatushani. Ndume is a Swahili word for masculinity, and Olatushani means "unifier." It suits him. He looks directly into your eyes when he speaks, and he has the posture of an undefeated soldier.

Despite his intelligence and good humor, though, Olatushani was serving hard time. And Moyes had only begun to explore his case in earnest. Moyes and Olatushani pored over his case like determined chess players preparing for a match that would span decades. And unlike many death penalty appeals, there was no biological evidence to rely on.

"What it takes to get somebody out of prison in those cases [with DNA evidence] is pretty linear and clear," Moyes explains, "and despite barriers that come up, that can happen in some sort of a reasonable timeframe. But when there's not any biological evidence to test, what it takes to crack it open is incredibly labor-intensive and time-consuming."

That means being able to keep straight a brain-fogging amount of detail: maiden names mixed with aliases mixed with street names where certain people grew up. Such a case, Moyes says, almost has to become your life's work — an obsession. After moving to Nashville, it became hers. To help with his defense, she took the step of enrolling in Vanderbilt Law School.

She proved to have acumen for the ins and outs of legal study. In 2002 she was awarded the law school's Founder's Medal — the highest honor bestowed on a single graduate out of every graduating class.

In the meantime, a skilled attorney had begun examining Olatushani's case. Before she'd even entered law school, Moyes had sent the case to David Herrington, of the large international firm Cleary Gottlieb Steen & Hamilton LLP. In the mid-'90s, the firm's New York branch decided for the first time to take on a death penalty case. Herrington says they grew increasingly despondent in the face of file after file of seemingly hopeless cases. After a certain point, though, the attorneys realized that they were going to have to pick up the next case that came through, no matter what.

Maybe fate made Olatushani's that next case. Regardless, Herrington remembers being immediately excited by its prospects.

"Two things stood out right away," he says. "The first was the withheld evidence that pointed [in another direction]. What one might suspect is that they consciously or unconsciously disregarded leads for other ones. It was a pretty blatant and clear-cut violation of the Brady Rule." The Brady Rule, named for *Brady v. Maryland*, 373 U.S. 83 (1963), requires prosecutors to disclose exculpatory evidence in the government's possession to the defense.

The second thing that signaled potential, Herrington says, is that the jury that condemned Olatushani, a black man, for murdering Belenchia, a white man, was made up exclusively of white jurors. Since the population of Memphis is roughly 50 percent African-American, an all-white jury is an anomaly.

The more Herrington began to dig into police records and the details of the initial trial, the more convinced he became that Olatushani had gotten a raw deal. Two independent eyewitnesses identified the perpetrator to police as one Michael Brown, whose criminal record included ties to a group of associates known as the Brown Gang. One of these eyewitnesses also identified another Brown Gang member, Charles Keller, as a participant in the crime.

At the original trial, the prosecution called one of these eyewitnesses to testify that he had seen two individuals changing license plates on the getaway car just before the crime. "But, remarkably," the Cleary team's 2011 brief states, "the prosecution never disclosed, and so the jury never learned, that [the witness] in fact had identified 'without any hesitation' two men he saw changing the license plates, Michael Brown and Charles Keller — and *not* Erskine Johnson."

The second chunk of suppressed evidence connected the Brown Gang to the getaway car — a 1982 maroon station wagon. A teenager at the store that morning before the crime took place saw the perpetrators changing the license plate on the getaway car. When he told his mother, she urged him to go back and to really pay attention to what they were doing, in case something criminal was going on. When police showed him a photo array of suspects, he immediately picked out two people — Michael Brown and his cousin Charles Keller.

Still another eyewitness was able to connect the Brown Gang with the getaway car. A neighbor was able to describe the maroon wagon, which was distinctive because a piece of chrome was missing from the left rear side. He said he saw members of the Brown Gang driving it weeks before the crime. When police took him to the lot where they were storing the car, he made a positive ID.

A third piece of suppressed evidence undermined the only physical evidence against Olatushani that the jury saw — his palm print on the getaway car. In the original trial, police offered evidence that Olatushani's print had been lifted from a specific vector of the getaway car. But according to their own report, they didn't lift a print from that part of the car.

There remained one key piece of information the defense team couldn't unlock: the testimony of Elizabeth Starks, who had testified that Olatushani had been at her house, and had confessed to the crime.

It was Moyes who found the missing piece in Olatushani's defense.

"The police had gotten this tip," Moyes explains, "that whomever the perpetrators were, they were cousins of Elizabeth Starks and they had been staying with her that weekend. And so she also ended up saying that it was Ndume who was staying with her that weekend. But first, she said it was a woman named Shirley and some of Shirley's friends. And then at trial she testified that she identified Ndume, but only after the police kept putting his picture in front of her repeatedly.

"At some point — again, this is where the mastery of the police reports come in, and how invested in the case you are — but at some point, I was reading the police report and I was reading about this woman whose name was Betty Jo Ford, and she was a member of the Brown Gang. And I noticed that one of the addresses that she'd given police as her former address was familiar. I said, 'Wait a second, Dison is the name of the street that Elizabeth's mother lives on.' "

She looked up a map online and discovered that the distance was only a matter of blocks. In other words, Elizabeth and Betty Jo had lived within blocks of each other.

"I had this moment like, 'Oh my God, they know each other.' Because that would kind of explain everything. That they were, the Browns were, the people who were at her house that weekend."

So Moyes went back and examined the original case. "Prosecution withheld this information as well," she explains, "but when Elizabeth had first talked to the police, she told them that it had been this woman Shirley who had been at her house. It ends up that Betty Jo Ford, her alias is Shirley Banks. When I went looking for Betty Jo, nobody knew her as Betty. You had to ask for Shirley if you wanted people to know you were talking about Betty Jo."

As one witness at the hearing put it, "Mostly every time I seen Betty I'll see Liz, or if I see Liz, Betty ain't too far away."

"Finding the address felt like I was cracking the case open," Moyes says. "Before, you had all of this evidence about the Browns, but there was also all of this evidence against Ndume. But then, all of a sudden, one of the most critical pieces of evidence against him — this woman who puts him in Memphis and in the getaway car — all of a sudden it becomes clear that you can't possibly believe her."

But part of what was so alarming about Moyes' discovery is that it had taken so long to uncover it. All of that evidence — from Starks' testimony about Shirley to the absent palm print to the Brown Gang — was in the original police reports. The jury that convicted Olatushani just didn't hear it.

"The way they do things is brazen in a way," Moyes says. "It's all right there in the police reports, and then ten years later they hand it over to you. And within that they note the different things they found against the Browns. And it's in black-and-white — it's not hidden."

On the strength of this evidence, Herrington was able to bring new scrutiny to Olatushani's case. In 1999, the Tennessee Court of Criminal Appeals found that the prosecution had indeed violated the Brady Rule and suppressed evidence. The court vacated his death sentence, and in 2004 he was resentenced to life with possibility for parole.

That only began seven frustrating years of legal maneuvering, as the defense worked to get him a new trial. When victory finally came, in 2012, it was bittersweet. In the end, Olatushani accepted a somewhat controversial deal known as an Alford plea, little known until it was used to free the West Memphis Three.

Under its terms — which allow a defendant to plead guilty yet assert his innocence, while conceding that sufficient evidence exists for a conviction — Ndume Olatushani is now a free man. The downside is that no one will ever be held accountable for the years he unjustly served for Joe Belenchia's murder.

"It wasn't a hearing about them and their conduct," Moyes says. "It was a hearing about whether the absence of that evidence at Ndume's trial might have made a difference. That's one thing that's so troubling — that even in passing there was never a court that scolded them for it, even tangentially."

No member of the Brown Gang was ever formally accused.

Last June, as he was 17 years ago, Ndume Olatushani was brought into a holding cell at a prison in Shelby County. This time, though, there was a marked difference: He wasn't coming in. He was going out.

Anne-Marie Moyes didn't expect to show much reaction to Olatushani's release. She'd played that sequence through in her mind almost every day for 20 years. Sitting at their living room table now, Olatushani teases her, saying that the moment she saw him on the outside, she dropped to her knees crying.

It was a mixture of exhaustion and relief, Moyes says. The look they exchange speaks volumes.

In prison, the condemned man wore his hair in long braids. "It would have been rather easy for me to get a haircut," Olatushani says, "but for me, my hair was a symbol of defiance. Oftentimes, particularity black people are made to try to fit into these boxes that I think the larger dominant culture seems comfortable with. But for me, I shouldn't have been in there, and I wasn't going to conform to make you feel good about yourself with respect to how I present myself."

Soon after he was released, though, he decided to cut it. He handed Moyes the clippers.

"I felt like it was time for a change, and I no longer had those reasons to feel like I needed to [defy]," he explains, smiling. "And I was putting on a suit for the first time in a long time, and I felt like that was important as well to look presentable. I wanted to set the right example."

As a victory present, during the couple's New York stay, Herrington's firm offered to send them to a Broadway show. They ended up delegating the task of getting tickets to one of the firm's secretaries, Moyes says. Without any knowledge of the case's details, she brought back tickets to a play she'd picked at random. It turned out to be *Memphis* — a musical that broaches themes of injustice, interracial romance and civil rights. Olatushani and Moyes sat in the third row.

"The play is about the Memphis music scene and how black music crossed over to the white audience," Moyes remembers. "It was awesome, it was perfect. It was this super high-energy upbeat musical, with a fast pace, totally captivating. If you wanted to see one show on Broadway, this was the one. We were really glad that it worked out."

"But they were worried that we'd be traumatized or offended," Moyes adds, laughing at the absurdity of the situation. She takes out a photograph of the couple. They stand smiling like young lovers on their first big date, posed under the giant Broadway marquee reading "MEMPHIS."

Both of them are flipping the bird.

NDUME OLATUSHANI TIMELINE OF EVENTS

Oct. 2, 1983

Joseph Belenchia murdered in Memphis

Dec. 7, 1985

Ndume Olatushani convicted of felony murder; returns to California to serve prior sentence

Oct. 3, 1988

Tennessee Supreme Court affirms conviction

March 20, 1989

U.S. Supreme Court denies petition for a writ of certiorari

April 22, 1997

Post-conviction trial court denies request for relief

Aug. 12, 1999

Tennessee Court of Criminal Appeals finds prosecution violated Brady Rule by suppressing evidence, vacates death sentence

Jan. 19, 2001

Tennessee Supreme Court affirms decision to vacate death sentence, and remands for new sentencing hearing

Nov. 15, 2004

Olatushani resentenced to life with the possibility for parole

April 22, 2005

Olatushani files petition for writ of error coram nobis in Shelby County

March 14, 2006

Shelby County Criminal Court Judge John P. Colton Jr. grants motion for evidentiary hearing

May 31, 2007

Judge Colton holds hearing, denies petition

June 11, 2007

Olatushani files timely notice of appeal

Sept. 30, 2009

Court reverses Judge Colton's petition denial, remands case for reconsideration

August 11, 2010

Judge Colton again enters order denying petition's writ of error coram nobis

August 19, 2010

Olatushani files timely notice of appeal

Jan. 10, 2011

Olatushani files appeal of order denying petition for writ of error coram nobis

Dec. 9, 2011

Tennessee Court of Criminal Appeals grants petition for writ of error coram nobis, overturning murder conviction and remanding for a new trial

June 2012

Ndume Olatushani released

Email editor@nashvillescene.com.