

THE STATE

Versus

BONGILE GINYA

IN THE HIGH COURT OF ZIMBABWE
KABASA J with Assessors Mr E Mashingaidze and Mr J Sobantu
BULAWAYO 30 MARCH 2023

Criminal Trial

D.E Kanengoni, for the state
T. Tavengwa, for the accused

KABASA J: The accused is charged with murder as defined in section 47 of the Criminal Law (Codification and Reform) Act, Chapter 9:23. He pleaded not guilty.

The state alleges that on 2nd October 2015 at around 0200 hours the accused was awakened by the barking of dogs. He went to investigate and found that his 2 goats had been stolen. He tracked the footprints and caught up with the now deceased along the Gweru-Bulawayo Road. The now deceased was in possession of two slaughtered and skinned goats. The accused proceeded to strike the now deceased with a knobkerrie on the head, knees and left side of the stomach. The now deceased succumbed to the injuries.

In his defence the accused admitted assaulting the now deceased. He however explained that he was acting in self-defence. When he tracked the now deceased with his dogs after discovering the theft he caught up with him and confronted him. The now deceased became violent and attacked him. He then struck him once on the head with a knobkerrie in order to defend himself.

To prove its case the state produced the post mortem report which was compiled by Doctor Roberto Trecu, the knobkerrie which was allegedly used in the assault, the accused's confirmed warned and cautioned statement and the evidence of seven witnesses was admitted in terms of section 314 of the Criminal Procedure and Evidence Act, Chapter 9:07.

The state then led evidence from one Crispin Mpofu. His evidence was however largely common cause. All he did was visit the scene on learning of the now deceased's plight.

The accused testified in his defence and had no witnesses to call. In his evidence he maintained that he acted in self-defence.

From the evidence led, the following is common cause:-

1. The now deceased went to the accused's home in the early hours of the 2nd of October 2015. He stole 2 goats from the accused's goat pen.
2. The accused was awakened by the dogs which were barking and went out to investigate. He then saw that his goat pen was not secured and goats were missing.
3. The accused tracked the culprit with the aid of his dogs and caught up with him.
4. The now deceased was assaulted by the accused and sustained injuries from which he subsequently died.
5. On 8th October 2015 Doctor Roberto Trecu conducted a post mortem on the remains of the deceased and established that the cause of death was:-
 - a) Severe cerebral oedema
 - b) Skull bone fractures
 - c) Head trauma unknown circumstances

The issue is under what circumstances were these injuries inflicted and was the intention to kill or did the perpetrator realise that his conduct could result in death but continued nonetheless.

Upon his arrest the accused gave a warned and cautioned statement which was subsequently confirmed. In it he said:-

"I assaulted him trying to defend myself because he was fighting me with his weapons."

In terms of section 253 of the Criminal Law Code one who pleads self-defence has to meet a set of requirements. These are:-

1. The accused must be under an unlawful attack.

2. Such attack must have commenced or was imminent.
3. The accused's conduct must be necessary to avert the attack after exploring all avenues of escape.
4. The means used to avert the attack must be reasonable in all the circumstances.
5. The harm or injury caused to the attacker must not be grossly disproportionate to that liable to be caused by the unlawful attack.

Turning to the facts of this case, the events which occurred leading to the infliction of the fatal injuries were largely based on the accused's version. This is so because no one else witnessed what happened.

The accused may have sought to take advantage of the fact that it was only his version that was available as the deceased did not live to tell his story but ultimately the court must be satisfied that the state has discharged the onus upon it to prove the accused's guilt beyond a reasonable doubt.

There is no doubt the now deceased stole the accused's goats in the very early hours of the morning. There is also no doubt he posed a threat to the accused. Can it be said the accused ought not to have followed in an attempt to recover his goats? Can it also be said once he followed and realised that the now deceased was aggressive he ought to have turned back?

In considering the defence of person the court ought not to adopt an armchair approach. In *S v Kapenya & Anor* HH 14-2018 HUNGWE J (as he then was) articulated this as follows:-

“The question whether an accused can successfully claim the defence of private defence is determined by examining objectively the nature of the attack and defence to determine whether they conform to the principles of law that are set out above. This means that each requirement of the attack and defence must be judged from an external perspective rather than in terms of the accused's perceptions and his assessment of the position at the time he resorted to private defence. In applying the test the court must be careful to avoid the role of armchair critic ... weighing the matter in the secluded security of the room. Instead the court must adopt a robust attitude, not seeking to measure with nice intellectual calipers the precise bounds of legitimate self-defence. See *State v Ntuli* 1975 (1) SA 42 (A) at 436 D.”

One of the witnesses whose evidence was admitted in terms of section 314 is a Police Officer who attended the scene. He recovered a blue mountain bike, a sack which contained 2 goat carcasses, a knife and a black satchel.

In describing the fight which ensued when he confronted the now deceased the accused said the now deceased threw stones at him and he believed he had a knife as he had skinned the goats so when during the fight, the now deceased bent down and appeared to be picking something from the ground he believed he was under danger of being harmed, possibly with a knife and he then used the knobkerrie to hit the now deceased once on the head.

Yes a knobkerrie used on the head can cause fatal injuries but with nothing to controvert the accused's story as to the circumstances surrounding the use of that knobkerrie can it be said the accused was not acting in self-defence? If the now deceased became aggressive which is reasonably possibly true given that he had just stolen 2 goats in the dead of night, can one say the accused ought to have fled?

It is our considered view that to suggest that the accused ought to have fled is adopting an arm chair approach. The belief that the now deceased had a knife and could inflict injuries on the accused cannot be said to have been fanciful in the circumstances.

The state sought to suggest that the fact that the fight occurred some distance from where the now deceased's items were recovered shows that the accused pursued him instead of fleeing but is this not an unrealistic expectation and a failure to appreciate the circumstances under which the accused confronted the now deceased? We think it is.

The strike with the knobkerrie was once and yes it was directed at the head with enough force to cause fracture of the skull bone but it is our considered view that without any evidence to controvert the circumstances under which this blow was struck as described by the accused, we cannot say the force used was excessive in the circumstances.

Granted the accused's story that the knobkerrie produced in court was not the one he used sounds very contrived but the issue still is has his story been shown to be not only improbable but beyond doubt false?

As was stated in the seminal case of *R v Difford* 1937 AD 370

"The accused need not convince the court as to the truthfulness of his story, whatever explanation he gives no matter how improbable it may be, the court cannot dismiss it unless it has been shown to be not only improbable but beyond doubt false." (*S v Kurauone* HH 961-15)

We are unable to dismiss the accused's story as not only improbable but beyond doubt false. We have already alluded to the fact that he appeared to be exaggerating here and there

and not being completely honest regarding the knobkerrie which was produced and marked as exhibit 4 but all this notwithstanding his story is reasonably possibly true.

The defence of private defence affords an accused a complete defence if all the requirements for such defence are met.

We are of the view that such requirements have been met. The attack was unlawful and it had commenced. The accused's conduct in averting that attack cannot be said to have been unreasonable in the circumstances and the means used to avert such attack cannot be said to have been unreasonable either.

Victims of thefts have been killed whilst trying to defend their property or to apprehend the thief. The accused said the thefts had been occurring for quite a while and given the time this occurred on the fateful day, the means used to avert the attack was reasonable in all the circumstances.

Whether the accused was not completely candid with the court is not the issue. The issue is whether his story can be discarded as beyond doubt false.

Where there is some doubt as to what exactly happened the benefit ought to be given to the accused. And so it must be in this case. The accused is entitled to the benefit of the doubt.

That said the evidence against him consequently did not prove the crime of murder nor did it prove the lesser offence of culpable homicide.

The state has therefore failed to prove its case beyond a reasonable doubt. The accused is consequently found not guilty and acquitted.

*National Prosecuting Authority, state's legal practitioners
Mutuso, Taruvinga & Mhiribidi, accused's legal practitioners*