

THE STATE
versus
TINASHE MUGARISANWA

HIGH COURT OF ZIMBABWE
MUREMBA J
HARARE, 3 and 5 November 2022

Trial

P Gumbo, for the State
W Musengwa, for the accused

MUREMBA J: The accused is facing a charge of murder as defined in s 47(1) of the Criminal Law (Codification and Reform Act) [*Chapter 9:23*], (the Criminal Law Code). It is alleged that on 11 November 2021 at or near Shamva Gold Mine, Shamva, the accused unlawfully and intentionally or realizing that there was a real risk or possibility that death would result, shot Remember Musariri (hereinafter called the deceased) with a 12 bore Beretta shot gun thereby causing injuries from which the said Remember Musariri died.

The accused who is a security guard pleaded not guilty to the charge raising the defence that he shot the deceased in self defence and in the defence of his fellow security guards. The defence was raised in terms of s 253 of the Criminal Law Code. The State led evidence from four witnesses, namely Chenjerai Chigumbu, Leonard Karemba, Nyasha Chagutira and Doctor Pesanai. Leonard Karemba and Nyasha Chagutira gave *viva voce* evidence whilst the evidence of Chenjerai Chigumbu and Doctor Pesanai was admitted in terms of s 314 of the Criminal Procedure and Evidence Act (the CPEA) [*Chapter 9:07*].

Leonard Karemba and Chenjerai Chigumbu were eye witnesses to the shooting of the deceased by the accused. Nyasha Chagutira was the investigating officer whilst Doctor Pesanai examined the remains of the deceased and compiled the post mortem report which states that death was due to haemopneumothorax and gunshot wound chest. The deceased was 32 years old.

The accused was the sole witness for his case. However, his evidence and that of the 2 State witnesses who witnessed the shooting was similar. We will outline the evidence as follows. Leonard Karemba who is a senior security officer at Shamva Mine was the State's key witness. He began by giving context to the events that led to the shooting of the deceased on 11 November 2021. He said that on 8 November 2021 some illegal gold panners unlawfully entered a mining shaft at Shamva Mine. When the mine security guards tried to apprehend the illegal gold panners, the illegal gold panners threw some explosives at them. Some of the security guards got injured and had to be hospitalized. Three days later, on 11 November 2021, the same illegal gold panners who had entered the mining shaft on 8 November 2021, made their way out by blasting some explosives again thereby dispersing the security guards who were manning the mine entrance. A radio communication was then made to that effect to the senior security officers who were at the offices. The senior security officers included the witness and the accused.

Two teams/groups of security officers/guards were created. They had instructions to chase after the illegal gold panners and apprehend them. One team was led by the accused who was armed with a 12 bore Beretta shot gun. Leonard Karemba was in the other team. The two teams took different directions as they tracked the illegal gold panners. They could see the illegal gold panners as they tracked them. In each team there were some security guards who had guns. Those security guards who had guns were firing warning shots in the air in a bid to stop the illegal gold panners. Several warning shots were fired, but the illegal gold panners did not stop. In the group that Leonard Karemba was, two security guards had guns but Leonard Karemba did not have. In the group that the accused was, it was only the accused who had a gun. However, Leonard Karemba could not tell how many warning shots were fired by the accused since the two were in different groups.

The two groups/teams later converged in Chibuku river where they had seen the illegal gold panners going to hide. As the security guards were searching for them, the illegal gold panners then emerged from their hide-out. They emerged at a distance of 10 – 12 metres away from where the accused and his team were. They emerged facing the accused's team. This was happening on the river bank. Leonard Karemba and his team were not on the river bank but across the river, on top and about 4-5 m away from the river bank where the accused's team and the illegal

gold panners were. Leonard Karemba and his team were very close and could see what was happening down the river bank across the river.

When the illegal gold panners emerged, they were four and the deceased formed part of the group. They were ordered by the accused's team to sit down and surrender so that they could be arrested, but they did not take heed. Instead they started advancing towards the accused's team. The two opponent teams were facing each other. The deceased and two of his members were wielding machetes. It is only the fourth member who had no machete. As the deceased's team continued to advance, security guards who had guns fired warning shots. Leonard Karemba said that he could not tell which security guards had fired. However, despite the warning shots the illegal gold panners continued to advance towards accused's team as they made utterances that they were not afraid of security guards. When the deceased and his team were 4-5m away from the accused's team that is when the accused fired the fatal shot. It is not in dispute that the deceased was shot on the left chest, on the fourth and fifth ribs and on the left hand. He died at the scene some minutes later.

The evidence of Leonard Karemba was uncontroverted by the defence. In his testimony the accused confirmed the incident of 8 November 2021 which led to the events of 11 November 2021. He confirmed that on 11 November 2021 he was leading his team as they were tracking the illegal gold panners. In the process, his team saw the illegal gold panners and shouted for them to stop but they did not. Instead they started running. This caused the accused to fire 3 warning shots as he ordered them to stop and surrender. The illegal gold panners continued to run until they reached the river bank of Chibuku river and hid in the trees. The accused and his team started to search for them. They saw 4 whom they ordered to come out. The illegal gold panners emerged at a distance of about 8 to 10m away from where the accused and his team were. The accused said that he ordered them to stop and surrender but they did not take heed. Instead they started advancing towards him and his team as 3 of them were wielding machetes. The one who had no machete was walking behind the three who were armed. Accused said that when the illegal gold panners were about 6-7m away from him and his team he fired a warning shot, but they did not stop. At a distance of 5m, the accused fired the second warning shot. Still the deceased and his team did not stop. At a distance of 3-4m, the accused fired the fatal shot that hit the deceased. That is when the deceased's colleagues scattered and ran away.

That the accused fired two more warning shots at the river before he fired the fatal shot is confirmed by Chenjerai Chigumbu who is a State witness. He also confirmed the story that the deceased and his colleagues continued advancing towards the accused and team as they were wielding machetes.

As already stated elsewhere above, the accused's defence is simply that he was acting in self defence and in defence of his group/team members who were not armed. The defence is in terms of s 253 of the Criminal Law Code. It is titled 'defence of person'. He tendered this as a complete defence to the murder charge. In terms of s 253 of the Criminal Law Code, self defence or defence of another is a complete defence if all the requirements that are spelt out in the provision are met. For the defence to suffice it should be shown that:

- a) the accused acted believing on reasonable grounds that the unlawful attack had commenced or was imminent; and
- b) the accused believed on reasonable grounds that his or her conduct was necessary to avert the unlawful attack and that he or she could not otherwise escape from or avert the attack; and
- c) the means accused used to avert the unlawful attack were reasonable in all the circumstances; and
- d) the harm or injury caused by the accused was caused to the attacker and not to any innocent third party and was not grossly disproportionate to that to be caused by the unlawful attack.

From these requirements it is clear that for the accused to raise this defence he or she needs to show that he or she or another person whom the accused was defending was under unlawful attack. "Unlawful attack" is defined in s 252 of the said Act as any lawful conduct which endangers a person's life, bodily integrity or freedom.

The use of the word "and" after each requirement means that the requirements should be taken cumulatively and should all be met. If one requirement is not met it means the defence does not suffice as a complete defence. If the above requirements are all met except that the means used by the accused to avert the unlawful attack were not reasonable in all the circumstances, the accused will have a partial defence to a murder charge and will be found guilty of culpable homicide. See s 254 of the Criminal Law Code.

In determining whether or not the requirements have been satisfied in any case, the court is mandated to take due account of the circumstances of the case and any knowledge or capability the accused may have had and any stress or fear that may have been operating on his or her mind. See S 253(2) of the said Act.

We now turn to deal with each of the requirements in the circumstances of the present case.

Whether the accused acted believing on reasonable grounds that the unlawful attack had commenced or was imminent

In *casu* the evidence of the two eye witnesses, Leonard Karemba and Chenjerai Chigumbu, and that of the accused is that at the river bank when the deceased and his colleagues emerged from their hide out, they advanced towards the accused and his team. Despite being given orders to sit down and surrender and two warning shots being fired by the accused from a distance of 7m and 5m, the deceased and his colleagues continued to advance towards the accused and his team. Three were wielding machetes while they were shielding the one who had no machete behind them. They continued to advance until they were 3-5m away from the accused and his team. The accused's undisputed evidence was that when he then shot the deceased, the deceased's right hand was holding the machete in a raised position. The deceased was ready to strike. It is clear that although the unlawful attack by the deceased and his team had not yet commenced, it was imminent. The deceased and his colleagues had not been perturbed by the several warning shots that had been fired. Besides, they could see that the rest of the accused's team members had no weapons. Leonard Karemba who was standing 4-5m across the river confirmed that an unlawful and dangerous attack was imminent. In *Mahingaidze v The State S-79-84* the conviction of a policeman who had shot a youth brigade leader in the stomach was set aside on appeal by the Supreme Court. Youth brigade members had surrounded the policeman and uttered threats against his life. The policeman had fired two warning shots before shooting the leader in the stomach. The conviction of attempted murder was overturned. The scenario in the *Mahingaidze* case resonates with the scenario in the present case. The actions of the deceased and his colleagues made the accused to believe on reasonable grounds that an unlawful attack on him and his colleagues was imminent.

Whether the accused believed on reasonable grounds that his conduct was necessary to avert the unlawful attack and that he could not escape from or avert the attack

It is not disputed that when the accused fired the fatal shot, the deceased and his team were 3-5m away from the accused and his team. A suggestion was made by Mr. *Gumbo* for the State that the accused could have fled. However, the key witness for the State, Leonard Karemba said that there was no room for the accused to flee because of the nature of the space and terrain he and his colleagues were in. The distance between the two opponent groups was too short and the place was rocky. Leonard Karemba also said that the deceased's group was dangerous. The accused said that the distance that was between his team and that of the deceased was too short for him and his colleagues to flee. Besides, he was the only one who was armed. He said that what made the situation worse was that at that time he was only left with one bullet. All in all, he had loaded 6 bullets in the gun. He had already fired 5 as warning shots. The accused said that he realized that his life and the lives of his colleagues were now in danger. He said that as the deceased and his colleagues were getting closer and closer, his own colleagues were now looking desperate and scared. The court agrees that a distance of 3-5m is too short for anyone to turn their back to a person who is wielding a machete and is about to attack them. To expect a person to do so under the undisputed circumstances described by the accused would be taking an armchair approach. Clearly from the way the deceased and his colleagues were advancing despite several warning shots having been fired shows that if the accused and his team had attempted to flee, they would have been attacked. The accused and his colleagues were in a very dangerous situation. The only choice that a person who is in a dangerous situation has is to take immediate defensive measure. The conduct taken by the accused of firing at the deceased was necessary in the circumstances of this case. The accused thus believed on reasonable grounds that his conduct was necessary to avert the unlawful attack that was imminent on them.

Whether the means used by the accused to avert the unlawful attack was reasonable

The only weapon that the accused's team had was the gun that the accused had. Because of the proximity of the deceased and his team, the accused was entitled to take immediate defensive

measure to protect himself and his colleagues. They were under a terrifying situation. The deceased and his colleagues were 3-5m away wielding machetes and ready to strike. It was suggested by the State counsel that the accused could have shot the deceased's leg to immobilize him instead of killing him. The accused explained that the area they were at had rocks. He said that there was a risk that if he aimed for the lower part of the deceased's leg, the bullet could hit a rock and ricochet and harm any of his team members. He said resultantly he chose to aim above the knee. However, because of the imminence of the attack by the deceased, he had no time or the leisure to steady the gun using his shoulder. He quickly shot from his waist level and because of the initial jump which this particular weapon normally does upon being fired, a fatal shot that hit the chest and the hand of deceased ended up being delivered. The proximity of the deceased worsened things because ordinarily this type of gun does not kill but injure. The gun normally discharges a full or one bullet which later opens up and sprays several pellets at a distance of 20-25m thereby injuring several people. He said that these several pellets do not kill. Unfortunately, in *casu* the full bullet hit the deceased at a distance of 3-5m before it opened up into several pellets. Mr. *Musengwa* submitted that under the circumstances the accused used reasonable means to protect himself and his colleagues. He had not aimed at killing the deceased, but as Leonard Karemba the State witness said, the melee happened so fast in 10-15 seconds from the time the deceased and his colleagues emerged from their hide out up to the time the deceased was shot. We are in agreement that in the circumstances of this case the means used by the accused to avert the unlawful attack which was imminent were reasonable.

Whether the harm or injury caused by the accused was caused to the attacker and not to any innocent third party and was not grossly disproportionate to that to be caused by the unlawful attack.

The accused killed the deceased a person who was part of the illegal gold panners who were about to attack him and his group. The deceased was not an innocent third party and the harm that was caused to him was proportionate to that liable to be caused by the imminent unlawful attack by the deceased. There is no doubt that if the deceased and his colleagues had had a chance to attack the accused and his colleagues with the machetes that they were wielding, they could have caused them very serious injuries and even death.

In view of the foregoing, we are satisfied that the accused's defence of self defence and defence of another is a complete defence in the circumstances of this case. The defence satisfies all the requirements spelt out in s 253(1) of the Criminal Law Code.

In the result, the accused is found not guilty and acquitted.

National Prosecuting Authority, Counsel for the State
Chimuka Mafunga Commercial Attorneys, pro deo Counsel for the accused