

THE STATE
versus
LOVEMORE MASAUKI
and
NAISON MASAUKI
and
ELLIN JOE

HIGH COURT OF ZIMBABWE
MUREMBA J
HARARE; 17, 18, 19 & 20 June & 2 August 2024

Assessors: Mrs. *Chitsiga*
Mrs. *Mawoneke*

Criminal Trial

B Murevanhema, for the State
B Maruva & Ms. G Mudzamiri, for the 1st accused
M K Chigudu, for the 2nd accused
Ms M Simango, for the 3rd accused

MUREMBA J: The three accused persons, Lovemore Masauki, Naison Masauki, and Ellin Joe, were arraigned before this court on a charge of murder as defined in section 47(1) of the Criminal Law Code [*Chapter 9:23*]. They all pleaded not guilty. The state presented *viva voce* evidence and produced exhibits to support its case against the accused. The accused gave their defences but did not call any other witnesses, relying solely on their own testimonies.

From the evidence presented by both sides, it is established that the deceased and the accused were not related but were panning for gold at Ruya River in Mozambique. On October 25, 2022, the deceased left the panning site and headed to Ndundu village, Chief Nyakusengwa, Rushinga in Mt Darwin. After his departure, the second and third accused discovered that their money, amounting to USD 165.00 and 2200 Metcash, was missing. Suspecting the deceased, they followed him, accompanied by the first accused and two other accomplices, Sam Chibanda and Takudzwa Kachere, who later absconded after their arrest. The accused caught up with the

deceased at Kasika business centre in Mt Darwin where he was drinking beer. State witnesses, Mharidzo Mazengera and Wellington Chipfunde, who had interacted with the deceased at the business centre, confirmed that the deceased had a significant amount of money which they suspected he had stolen and was buying beer for people. Wellington Chipfunde who was a shop owner at this business centre described to the first accused the USD 100 note that the deceased was unable to find change for. From this description, the first accused confirmed that it was part of the money that had been stolen. This left no doubt that the deceased had stolen the accused persons' money. The accused persons then confronted the deceased but the deceased denied stealing their money. The deceased became aggressive and this resulted in a scuffle ensuing.

The first accused explained in his defence that he asked the deceased to empty his pockets to prove he did not have the stolen money. The deceased complied, revealing no money. The deceased then grabbed the first accused by the shoulders and attempted to punch him. As the first accused dodged the punches, his co-accused intervened and manhandled the deceased, bringing him to the ground in an attempt to tie his hands. Unable to find a rope, they removed the deceased's belt. As the first accused was about to tie the deceased's hands with the belt, Mharidzo Mazengera who is also known as Captain and Wellington Chipfunde intervened to stop him. At that moment, the deceased bit the first accused's leg. In response, the first accused punched the deceased three times until for him to release his bite. Due to the intervention of bystanders, the accused persons let go of the deceased, who then escaped.

The second accused stated in his defence that he only manhandled the deceased to prevent further attacks on the first accused, who is his father. He explained that they brought the deceased to the ground with his hands behind his back to tie him. After failing to find a rope, they decided to use the deceased's belt. As the first was trying to tie him, people gathered, including Captain. At that point, the deceased bit the first accused, who cried out in pain and slapped the deceased three times, but the deceased did not release his bite. The second accused said that he and the first accused then grabbed the deceased's jaws to make him release the bite. The gathered crowd pulled the accused away from the deceased, who then escaped.

The third accused's account of the events at the business centre was consistent with the explanations provided by the first and second accused. We will therefore not repeat what the third accused said in his defence.

The following is undisputed. When the deceased escaped, he fled from the shops to the nearby village with the accused persons in pursuit. Upon arriving at Farai Madya's homestead, the deceased sought refuge in the kitchen. The third accused, who was ahead of his co-accused, entered Farai Madya's yard first. When the other accused learned that the deceased was hiding in the kitchen, they began searching for tree fibre at Farai Madya's kraal, approximately 40-50 meters from the homestead, intending to use it to tie up the deceased upon capture. The deceased then bolted from the kitchen and ran back towards the business centre. The third accused pursued him, and the others, who were at the kraal, joined the chase upon seeing him. When the deceased reached the business centre, he was walking and returned to the spot where he had been assaulted. He cried out that he had been injured and collapsed between the shops of Runhare and Wellington Chipfunde, bleeding from a back injury. He asked to be taken to the hospital. State witnesses Mharidzo Mazengera and Wellington Chipfunde observed the first accused, who was following the deceased at a distance of 15 meters, arrive at the scene holding a stone. The first accused continued to demand the return of their money. When bystanders questioned how he could demand money from a severely injured person, the first accused appeared genuinely shocked. He exclaimed that he was unaware the deceased had been injured and threw down the stone. Arrangements were then made to transport the deceased to the hospital, where he was pronounced dead on arrival. An autopsy revealed that the cause of death was internal bleeding from penetrating abdominal trauma.

It is clear that the fatal injury was the one sustained on the deceased's back, as witnessed when he returned to the shops, cried out in pain, and asked to be taken to the hospital. This indicates that the earlier assault, before the deceased fled to the nearby village, was not significant in causing his death.

It turned out that the fatal injury was inflicted solely by the third accused at Farai Madya's homestead while the other accused were at the kraal, searching for tree fibre to tie up the deceased. The third accused, who was alone in Farai Madya's yard, admitted to striking the deceased with an axe as he bolted from the kitchen back to the business centre. The other accused persons who were at the kraal searching for fibre joined the chase unaware that the deceased had been struck with an axe by the third accused. This explains why the first accused was shocked to learn of the severe injury the deceased had sustained when he arrived at the shops and continued to demand the return of their money. He was genuinely unaware of the deceased's condition.

The State correctly conceded that, under the circumstances, the first and second accused cannot be held responsible for the death of the deceased. They were not present when the third accused struck the deceased with an axe and were unaware of what transpired between the deceased and the third accused at Farai Madya's homestead. Their intention in searching for fibre was to apprehend and tie up the deceased, with the stated aim of taking him to the police station. There is no evidence to suggest that the accused persons had a shared criminal objective to kill the deceased during the pursuit. Consequently, the first and second accused cannot be held liable for the actions of the third accused, as there is no indication they foresaw the possibility of the third accused striking the deceased with an axe.

As a result, the first and second accused are found not guilty and acquitted of murder. However, the State requested that they be found guilty of assault for attacking the deceased before he fled from the shops. It is undisputed that when the first accused confronted the deceased at the shops and demanded the return of stolen money, the deceased responded aggressively. State witnesses Mharidzo Mazengera and Wellington Chipfunde and the accused persons testified to this. They also testified that the deceased was known to be violent and a bully in the area. It is common cause that when the first accused demanded the stolen money, the deceased removed his shirt, ready to fight, and threw punches, which the first accused dodged. At this point, the other accused joined in, manhandled the deceased, and brought him to the ground, assaulting him with clenched fists and booted feet in an attempt to subdue him. The first accused removed his belt, intending to tie up the deceased while the others held him down. The deceased then bit the first accused, who cried out in pain. In response, the accused persons assaulted the deceased to make him release his grip. Bystanders came to the deceased's rescue by pulling the accused persons from him. He then managed to escape.

Mr. *Murevanhema*, representing the State, argued that the accused's conduct of assaulting the deceased with clenched fists and booted feet was unwarranted, as they had already subdued him. He noted that the post-mortem report indicated blood from the nostrils and mouth, suggesting injuries.

However, we take note that the post-mortem report did not specify injuries to the nostrils or mouth, only mentioning "blood-stained fluid from nostril and mouth." The State did not call the doctor to explain the source of this fluid. Without expert medical evidence, it is speculative to

assume the fluid was from injuries to the nostrils or mouth. The deceased suffered a ruptured spleen from the axe, leading to internal bleeding. It is possible that the blood-stained fluid was a result of this internal bleeding. It was therefore wrong for Mr. *Murevanhema* to submit that the deceased sustained injuries to the nostril and the mouth as a result of the assault by the accused persons at the shops.

The scenario described by State witnesses and the accused persons indicates that the deceased was the initial aggressor. He responded aggressively when the first accused asked for the return of stolen money, removing his shirt and starting a fight. The other accused intervened to protect the first accused, which they were entitled to do. According to section 253(1) of the Criminal Law Code, a person is permitted to act in defense of another, provided they use reasonable force. However, if the force used is excessive or disproportionate to the threat, the individuals involved can still be found guilty of assault. In this case the State presented evidence showing that the accused exceeded the necessary force to protect the first accused.

As correctly noted by the State counsel, after subduing the deceased, the accused continued to assault him with clenched fists and booted feet indiscriminately. This prompted State witnesses Mharidzo Mazengera and Wellington Chipfunde to intervene and restrain the accused. The accused do not dispute that they were pulled away from the deceased by these witnesses, indicating that the force used was no longer proportionate to the threat, especially considering there were five accused. Consequently, the first and second accused are found guilty of assault as defined in section 89(1) of the Criminal Law Code.

The next question is whether the third accused is guilty of murder. To answer this question, it is important to examine the circumstances that led him to strike the deceased with an axe at Farai Madya's homestead. According to Farai Madya's testimony, on October 26, 2022, around 5 pm, he was seated outside the kitchen with his wife and children when the deceased ran into his yard. The deceased, without a shirt and holding a stone in each hand, sought refuge and offered to pay USD 10.00. Despite Farai refusing to shelter him, the deceased proceeded into the kitchen. All the kitchen property, including two axes, was outside under a tree about 7 meters away, as they had been taken out to spray the kitchen for mosquitoes. After the deceased entered the kitchen, the third accused arrived and asked Farai if he had seen the person they were chasing. Farai confirmed

and allowed him to retrieve the deceased from the kitchen hut. Overhearing the conversation, the deceased bolted out of the kitchen, throwing stones at the third accused.

Farai Madya stated that, fearing the stones, he and his family fled to the kraal for safety. They did not witness what transpired between the third accused and the deceased. The kraal is 40-50 meters away from the homestead. At the kraal, Farai saw the other accused searching for tree fibre, presumably to tie up the deceased. While at the kraal, Farai observed the deceased fleeing towards the business centre with the third accused in pursuit. The business centre is about 100 meters away. When the other accused saw the deceased running, they abandoned the search for fibre and joined the chase. Farai noted that everything happened very quickly. He then returned to his homestead with his family. While putting their property back into the kitchen, he noticed that the larger axe had moved about 3 metres from its original position. He did not think much of it at the time. It was only after the police arrived with the accused for indications that he learned the third accused had used the axe in question to strike the deceased.

The third accused testified that when Farai Madya informed him the deceased was in the kitchen hut, he decided to shut the door. However, as he approached the kitchen door, the deceased bolted out and started throwing stones at him. As he dodged the stones, he fell onto Madya's property, which was heaped outside. He said he picked up an axe from where he fell and threw it towards the deceased, striking him on the side as he tried to dodge it. The axe struck him and fell to the ground. The deceased then started to run towards the shops, pursued by the third accused and the others who were at Farai Madya's kraal. The third accused stated that he was pricked by a thorn and had to stop to remove it before resuming his pursuit. When he reached the shops, he found the deceased lying down, claiming he had been injured. A mob was now pursuing the first accused, accusing him and his co-accused of injuring the deceased. Fearing the mob, they fled to Mozambique, where they were arrested by the police the next day.

The defence counsel for the third accused argued that the third accused should be acquitted of murder because he was acting in self-defence when he struck the deceased with an axe. The State conceded that the charge of murder was not tenable under the circumstances but prayed for a conviction of culpable homicide. Mr. *Murevanhema* argued that when the third accused picked up the axe and struck the deceased, he was not under attack, as he had managed to evade the stones thrown by the deceased. Mr. *Murevanhema* submitted that even if it is accepted that the deceased

fell and appeared to be picking up more stones, the third accused was not under immediate threat when he struck the deceased with an axe. He argued that the fear the third accused experienced could have been subjective. He used unreasonable force, which was not commensurate with the threat, by attacking the deceased with a lethal weapon from a distance of 5 meters. Mr. *Murevanhema* submitted that a reasonable person would have foreseen the possibility of death.

It is undisputed that the third accused was under attack by the deceased, as confirmed by both the third accused and Farai Madya. The throwing of stones at the third accused even prompted Farai Madya and his family to flee their homestead for the kraal. The deceased and the third accused were in close proximity, with Farai Madya's property heaped just 7 metres from the kitchen. A person under attack at such a short distance is entitled to protect themselves as it is not feasible for the person to turn his back and run for dear life. Section 253(1) of the Criminal Law Code provides for the defence of self-defence as follows.

“Requirements for defence of person to be complete defence

- (1) Subject to this Part, the fact that a person accused of a crime was defending himself or herself or another person against an unlawful attack when he or she did or omitted to do anything which is an essential element of the crime shall be a complete defence to the charge if
- (a) when he or she did or omitted to do the thing, the unlawful attack had commenced or was imminent or he or she believed on reasonable grounds that the unlawful attack had commenced or was imminent; and
 - (b) his or her conduct was necessary to avert the unlawful attack and he or she could not otherwise escape from or avert the attack or he or she believed on reasonable grounds that 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 he or she used to avert the unlawful attack were reasonable in all the circumstances; and
 - (d) any harm or injury caused by his or her conduct
 - (i) was caused to the attacker and not to any innocent third party; and
 - (ii) was not grossly disproportionate to that liable to be caused by the unlawful attack.
- (2) In determining whether or not the requirements specified in subsection (1) have been satisfied in any case, a court shall take due account of the circumstances in which the accused found himself or herself, including any knowledge or capability he or she may have had and any stress or fear that may have been operating on his or her mind.”

In terms of this provision an accused person can claim self-defence if they were defending themselves against an unlawful attack when they committed the act they are charged with. For the defence to be valid, in terms of s 253(1)(a), the unlawful attack must have commenced or was imminent or the accused must have believed on reasonable grounds that the unlawful attack had commenced or was imminent. In this case, the third accused was already under attack, with stones

being hurled at him by the deceased, who was less than 7 meters away. The third accused stated that although he had dodged two stones, the deceased was in the process of picking up more. Additionally, he said he had fallen onto Farai Madya's property while dodging the stones, indicating an imminent threat of continued attack while he was on the ground.

It is also a requirement of s 253 (1)(b) that the action taken by the accused be necessary to avert the attack. If there were other reasonable means to avoid the threat, the defence might not hold. In this case, the third accused said, while in a fallen state, he reached for the axe that was nearby. He stated that he threw it towards the deceased, who, in an attempt to dodge it, was struck on the side of his body. We take note that the State counsel misunderstood the third accused; he did not claim that the deceased fell to the ground. Instead, he stated that he himself fell and, while on the ground, reached for the axe and threw it towards the deceased. Considering the position of the third accused and the imminent danger he faced, we believe that grabbing an axe and throwing it at the deceased was necessary to prevent harm to himself. The third accused had no other means of defence while on the ground. He was in a vulnerable position, and using the axe, which was within reach, was a desperate measure to protect himself from the deceased, who had bolted out of the hut, hurling stones at him. Additionally, the deceased was known to be violent in the area, as confirmed by Farai Madya as well. This could have intensified the third accused's perceived threat. The deceased was also of a larger stature compared to the third accused according to the evidence led. The necessity of the action taken by the third accused was justified given the imminent danger and lack of other reasonable means to avoid the threat.

It is also a requirement of s 253(1)(c) that the means used to avert the unlawful attack be reasonable. This means that the response by the accused must be proportional to the threat faced. Excessive force beyond what is necessary to repel the attack may invalidate the defence. The court assesses whether the means was proportional or excessive by considering several factors such as the following:

1. **The nature of the threat:** The severity and immediacy of the threat faced by the accused. A more severe or immediate threat might justify a stronger response.
2. **The type of weapon used by the attacker:** For example, responding to a knife attack with a similar level of force might be seen as proportional.

3. **Opportunity to retreat:** Whether the accused had a reasonable opportunity to retreat or avoid the confrontation without using force.
4. **The circumstances of the encounter:** The overall context, including the physical condition and position of both parties, such as whether the accused was on the ground or cornered.
5. **The accused's state of mind:** The accused's state of mind at the time of the incident. If the accused genuinely believed they were in imminent danger, this belief is taken into account.

The provision in s 253 (1)(C) states that the means used must be reasonable in all the circumstances. This aligns with what a reasonable person would consider necessary and proportionate under similar circumstances. The court therefore aims to determine if a reasonable person in the same situation would have acted similarly. A “reasonable person” is a hypothetical individual who exercises average care, skill, and judgment in conduct. The reasonable person is expected to have the average judgment and sensibilities of a typical member of society. The reasonable person acts prudently and with ordinary care, avoiding actions that would foreseeably harm others. In *casu* the third accused's response of throwing an axe could be seen as disproportionate to the threat posed by stones. However, given that the third accused had fallen and the deceased was picking up more stones, the third accused was in a vulnerable position. This is more so considering the short distance of less than 7 metres between the third accused and the deceased. The third accused was under immediate threat of being struck with stones by the deceased who was a known violent man. The third accused was suddenly attacked with stones as he was walking towards the door to shut it. He had no reasonable opportunity to retreat and avoid a confrontation without using force. Besides, he had literally fallen where the axe was, reached for it while on the ground and threw it at the deceased. The third accused's use of the axe was proportional, given the circumstances he found himself in. In light of the enumerated factors, a reasonable person in the same situation might have acted similarly to protect themselves.

It is also a requirement of s 253 (1)(d) that the harm caused by the accused be inflicted only on the attacker. This was the case in the present matter, where the third accused's attacker was the deceased. The third accused inflicted harm on the deceased and nobody else.

In view of the foregoing, the defence of self-defence suffices for the third accused. We thus find him not guilty and acquit him of murder. However, we find him guilty of assault as defined in section 89(1) of the Criminal Law Code for the same reasons we have found the first and second accused guilty of assault.

Sentencing judgment

The accused persons stand convicted of assault as defined in section 89(1) of the Criminal Law Code. They were initially charged with murder, to which they pleaded not guilty. They were acquitted of murder but found guilty of assault as a permissible verdict.

The statutory penalty for assault is a level 14 fine/10 years' imprisonment. The presumptive penalty for an assault with mitigating factors as in this case is a level 4 fine. The accused persons did not use any weapons, and the deceased was the aggressor. As a result, the accused persons' moral blameworthiness is not high. The accused were merely asking for their money, which the deceased had stolen. Instead of responding calmly, the deceased removed his shirt and began throwing punches at the first accused. The other accused joined in to defend the first accused. However, they exceeded reasonable force in their defence of the first accused, kicking the deceased with booted feet and clenched fists indiscriminately when he was on the ground. They had to be restrained by bystanders who came and testified as State witnesses.

The accused persons are male first offenders. The first accused is 51 years old, a family man with a wife and five children, three of whom are minors. The first accused is the sole breadwinner for his family. The second accused, aged 19, is the son of the first accused and is single. The third accused is 23 years old and single. The accused persons have no significant assets and are involved in artisanal mining. They do not have any money on their persons and neither do they have any savings at home. It was submitted on their behalf that if they are to be sentenced to pay fines, they would ask for time to pay the fines.

We take note that the deceased did not sustain any visible injuries from the assault. However, it is aggravating that the accused persons took the law into their own hands by confronting the deceased instead of reporting the theft to the police. This confrontation with the deceased led to the subsequent events.

In view of the above mitigating circumstances and the fact that the accused persons have already spent 2 months in custody before bail was granted and after bail was revoked, we are inclined to impose a wholly suspended sentence to act as a deterrent to them in future. As the State correctly noted, they have already served their punishment for this offence of assault.

Accordingly, each accused is sentenced to 2 months' imprisonment, wholly suspended for 5 years, on condition that the accused does not, within that period, commit an offence involving violence against the person of another, and for which, upon conviction, the accused is sentenced to imprisonment without the option of a fine.

National Prosecuting authority, the State's legal practitioner
Zuze Law Chambers, first accused's legal practitioners
Zinyengere Rupapa Legal Practitioners, second accused's legal practitioners
Tarugarira Sande Attorneys, third accused's legal practitioners