

THE STATE
versus
NEVER NGWENYA

HIGH COURT OF ZIMBABWE
MOYO J
HWANGE 8 NOVEMBER 2017

Criminal Trial

Miss N Munsaka for the state
T Nkala for the accused

MOYO J: The accused person faces a charge of murder. It being alleged that on 23 September 2016, he assaulted the deceased Japhet Moyo on the head with a log resulting in deceased's death on 24 September 2016. Documentary evidence in the form of a state summary, defence outline, accused's confirmed warned and cautioned statement post mortem report were tendered and duly marked. Also tendered was the log that was used in the assault.

The facts of this matter are largely common cause. The deceased, accused and others were at a beer drink at Evelyn Zulu's homestead. Deceased and accused are related. The deceased was pulling Milton Sibanda's private parts, while Milton Sibanda slept. Accused then brought deceased to order, telling him not to do that. The two (accused) and deceased had an altercation that almost degenerated into a fist fight. They were restrained by Rolani Zulu and Tendai Ngwenya. Accused left and went to his homestead. Deceased later on followed accused to his homestead to confront the accused person. Deceased was at the gate trying to open it when he asked accused's wife who was inside accused's yard next to the kitchen, about the whereabouts of the accused. Accused had gone behind the hut to hide from deceased and the wife said accused was not there. Deceased threatened to stab the wife and also burn down accused's huts. He also wanted to stab the accused. Accused hid behind the kitchen until when he heard noise to the effect that deceased was forcing open the gate. He then picked a log and threw it in the direction of the gate, in the result hitting deceased on the forehead. Deceased

sustained a laceration on the forehead and was also bleeding from the nose and mouth. He was ferried to the clinic where he later died the following day while being transferred to Victoria Falls hospital. The evidence of Nyashadzashe Zhou and Dr Ivan Betan court was admitted into the court record as it appears in the state summary.

Accused gave an account similar to that of the state and said deceased was drunk. He also said he acted in self defence and also acted in defence of his property. The only issue for determination here is whether the accused's conduct of assaulting the deceased in the circumstances was wrongful or whether it was justified as a defence at law.

In terms of section 253 of the Criminal Law Codification and Reform Act [Chapter 9:23] for the defence of self to be a complete defence it must meet the following criteria:

- 1) there must be an unlawful attack
- 2) upon the accused or a third party where accused intervenes to protect that third party.
- 3) the attack must have commenced or it must be imminent
- 4) the action taken must be necessary to avert the attack
- 5) the means used to avert the attack must be reasonable.

In this instance, deceased threatened accused initially at the beer drink, accused fled and went to his homestead, deceased followed, and continued to make threats of stabbing at his wife and also threatened to burn down accused's huts.

Accused then picked a log and threw it at the gate where deceased was in a bid to scare him away. The log hit deceased on the forehead injuring him. At the time accused threw the log, deceased had managed to open the gate.

In the case of *S v Maenda* HH 44/16, HUNGWE J, in dealing with facts that were almost similar held that the court in determining whether an accused has met the requirements for the defence of self it must always be borne in mind that the trial court must avoid taking an armchair approach in the assessment of the situation faced by an accused. That it is easy, after the event and far from the dust of the conflict in which the accused was involved, to find possible ways through which the accused could possibly have averted deceased's death.

In that case the accused had also been confronted by deceased, left with an escort to his homestead (like in this case) deceased nonetheless followed him and threatened him with an axe that he was carrying, accused subsequently stabbed the deceased resulting in his death. Commenting on the facts HUNGWE J, has this to say:

“The accused was faced with a drunk youngster, who was a sheer pest on that fateful day. He cautioned him about the folly of raising emotional issues. He decided to leave the beer drink in an effort to avoid deceased. He secured an escort to his homestead. All these efforts did not pay off. Instead he was attacked by a drunk and axe wielding youngster.”

The court in the *Maenda* case held that accused was justified in taking the action he did, that of stabbing the deceased. The court held that in its view, faced with an armed, and persistent, aggressive and drunken assailant the accused was justified to use the knife to put an end to the threat confronting him.

In the case before us, an unlawful attack, was imminent on the accused, his wife and his huts as deceased threatened to burn huts down as well.

Accused had already tried to avert the attack by the deceased by leaving the beer drink and being escorted to his homestead.

Deceased, who was drunk persisted and followed accused to his home. He made threats of stabbing accused and his wife with a knife and also to burn down their huts. He violently tried to open the gate. Accused hid behind the hut until when he felt deceased was succeeding in opening the gate. He then took a log and threw it in the direction of the deceased with the intention of scaring the deceased away.

Unfortunately the log hit the deceased on the forehead injuring him. One wonders what else accused could have done after fleeing from deceased from the beer drink in a bid to avert an attack. Deceased was drunk, clearly unruly on the day in question, he threatened to stab accused's wife meaning he gave the impression that he carried a lethal weapon. He also threatened to burn down the huts at accused's homestead. The state counsel says accused could have averted the attack by availing himself to the deceased. We find this submissions to be without substance for if accused had availed himself to deceased, deceased was obviously pursuing him to harm him, hence the hiding. How could he then avert the attack by going to the

same man he was hiding from fear of being harmed? Accused did all a reasonable person in his circumstances could have done, in that first he fled from the deceased at the beer drink, even when deceased trailed him to his homestead, he hid behind the hut. Deceased persisted and even threatened to burn down huts and stab accused's wife. What else could accused have done? Was he supposed to flee his homestead and leave his family and huts with all his property at the mercy of the deceased? Again, the state counsel submitted that deceased was drunk as if a drunk person is harmless. People are being killed day in and day out at these beer drinks by drunken people. So how was deceased's drunkenness supposed to mitigate the risk on accused's life? In fact we find that the fact that deceased was drunk made it more possible that he could perpetrate the threats he was making as he was acting in an unruly manner on the day in question. Drunken people are the irrational ones; it therefore is a lame argument that there is no threat of harm from a drunken person.

We accordingly find that accused's actions, unfortunate as they maybe since a life was unnecessarily lost, were however not wrongful as they were clearly justified in the circumstances. The accused person is accordingly found not guilty and is acquitted.

*National Prosecuting Authority, the state's legal practitioners
Dube and Company, accused's legal practitioners*