

**THE STATE**

**Versus**

**SAMBULO MASUKU**

IN THE HIGH COURT OF ZIMBABWE

MAKONESE J with Assessors Mr T. E. Ndlovu and Mr J. Sobantu

HWANGE 9 & 10 JULY 2019

**Criminal Trial**

*B Tshabalala for the state*

*E Mashindi for the Accused*

**MAKONESE J:** On the 31st August 2018 and at around 20:00 hours the accused, the deceased and one Abongile Ndatshana were drinking opaque beer at Umguza beer garden, Fingo Business Center. Later that night, the 18 year old accused and the deceased who was aged 17 years at the time he met his death, together with other young men were to proceed for an Umguyo circumcision ceremony. The Xhosa male circumcision is a ritual that has been practiced for several centuries by the Xhosa people. It serves as a passage from boyhood to manhood.

The accused has been arraigned in this court on a charge of murder. It being alleged that on the 31st August 2018 and along a footpath at Mabhaleni village, Mbembesi the accused unlawfully and intentionally killed Antony Ginya by striking him with a machete three times on the head. The accused denies the charge and pleads self defence. The accused contends that he was entitled to defend himself and ought to be acquitted.

The circumstances leading to the death of the deceased are summarized in the outline of the state case. The bulk of the facts are common cause and beyond dispute. Around midnight on the fateful day the accused was involved in an altercation with one Melusi Zondeka. The deceased was brandishing a machete while Melusi had a chain and knobkerrie. The accused intervened and thereafter Melusi Zondeka left. On their way to the circumcision ceremony the accused and the deceased had a misunderstanding. The deceased was in possession of a

machete. He tried to strike the accused with the machete but was restrained by Abongile Ndatshana.

When the accused and his colleagues reached a footpath in Mabhaleni village accused had a further misunderstanding with the deceased. Deceased tried to attack the accused with the machete but accused disarmed him. At that stage things became heated, the accused was now in possession of the machete and a stick used in “war games” by young Xhosa men. From this point, the version of the accused and that of the state witnesses becomes disputed. The accused alleges that the deceased picked up a stone and struck him on the left knee. The accused’s version is that after he was struck with a stone, the deceased came charging towards him threatening to strike him with a stone. The accused avers that fearing for his life and in an act of self defence he raised the machete and struck the deceased on the frontal region of the head. The accused alleges that he delivered a second blow using the machete on the left side of the head. On the accused’s own version after the second blow, the deceased had his back turned and was falling to the ground. The third blow landed on the back of the deceased’s head in the occipital region.

The single witness for the state **Abongile** who narrated his eye witness account of what he observed denied that after the first blow had been delivered the deceased was threatening the accused with another stone. The witness, a juvenile aged 17 years gave a convincing account of the events. He observed that even as the deceased was turning away and falling, the accused had delivered a crushing blow to the back of deceased’s head. At that stage the deceased collapsed to the ground and was bleeding profusely from deep chop wounds. The accused and Abongile made some attempt to render first aid to the injured deceased to no avail. The accused and Abongile went to their respective homesteads, leaving the deceased lying on the ground. The body of the deceased was discovered by a passer-by John Dywlli in the early hours of the following morning.

**Dr Sanganai Pesanai** is a registered medical practitioner based at United Bulawayo Hospitals. On the 3rd of September, 2018 during the course of his duties he examined the

remains of the deceased and recorded his findings in a post mortem report number 843/842/2018. The pathologist opined that the cause of death was:

- (a) Brain laceration
- (b) Skull fractures
- (c) Chop wound
- (d) Assault

On marks of violence the pathologist made the following observations:

- (i) Laceration on the left occipital region (5 x 1cm).
- (ii) Chop wound from right to left (5 x 1cm).
- (iii) blood covering the head and face.

The home made machete was produced and tendered as an exhibit. Its dimensions are as follows:

- (a) Length of blade 5 cm.
- (b) Width of blade on its narrow end 4.8 cm.
- (c) Width of blade on its widest point 8.2cm.
- (d) Length of handle 15.5cm.

The machete weighs 843 grams.

### **Whether the defence of self defence is available to the accused**

The issue for determination by this court is whether, on the established facts, the defence of self defence is available to the accused, and whether the accused would be entitled to an acquittal. In his book, *South African Criminal Law Procedure*, Jonathan Burchell 4th edition, at page 417 the author sets out the requirements of the defence as follows:

*“ The objective of private defence has the consequence that the court may decide that although the defender is believed that he is entitled to engage in a defensive attack, objectively viewed the situation was not one in which he is justified in resorting to a defence or, if he was, the steps taken in defence exceeded what was necessary to repel the attack.*

*In either case, the result is that the defence must fail and the defender’s killing, assault or damage will be considered to have been unlawfully done.”*

In our law the requirements for self-defence have now been codified under section 253 of the Criminal Law Codification and Reform Act, (Chapter 9:23). The requirements may be summed up as follows:

- (a) The accused was under imminent attack.
- (b) The unlawful attack had commenced or was imminent.
- (c) The accused’s conduct was necessary to avert the unlawful attack.
- (d) The means used to avert the unlawful attack was reasonable in all the circumstances.  
(underlined for emphasis)
- (e) The harm or injury caused to the attacker was not grossly disproportionate to the unlawful attack.

Section 254 of the Criminal Code provides as follows:

“If a person accused of murder was defending himself or herself or another person against an unlawful attack when he or she did or committed to do anything that is essential element of crime, he or she shall be guilty of culpable homicide if all the requirements for defence of person specified in section two hundred and fifty three are satisfied in the case except that the means he or she used to avert the unlawful attack were not reasonable in all the circumstances.”

*Mr Mashindi*, appearing for the accused implored this court to acquit the accused person. He referred the court to the case of *State v Maenda* HH- 44-16, where the court upheld the defence of person. A close scrutiny of the case reveals that the circumstances of the present case are different. In the case referred to the court found that there was no evidence to controvert the accused’s version of events. There was no independent eye witness account. The court made a

specific finding that in the absence of any evidence contradicting the accused's version, one must rely on the probabilities of the matter and decide whether the accused's version is reasonably possibly true. It was on that basis that the court was unable to discount the version proffered by the accused in that matter and acquitted him. In this matter there is sufficient and credible evidence from Abongile Ndatshana who testified that even as the deceased was falling, the accused had struck him on the back of the head with a machete.

From the evidence before the court, it is not in dispute that the deceased was the aggressor. On two separate occasions he attempted to attack the accused with a machete. This was clearly an unlawful attack and the accused had the right to defend himself. It is the conduct of the accused in defending himself that was disproportionate to the initial attack. The accused had wrestled the machete from the deceased. At that point, the accused was not in danger. The two blows on the deceased's head had critically put him down. He was falling. He posed no further danger to the accused. The accused clearly exceeded the bounds of self defence.

*Mr Tshabalala*, appearing for the state argued that the accused acted unreasonably in all the circumstances of the case. He argued that to strike a falling man with a machete at the back of the head, was by any stretch of imagination exceeding the bounds of self defence. That attack was not all reasonably necessary to ward off an unlawful attack. The court must not take an arm chair approach but look objectively at the established facts.

We are satisfied that from the injuries reflected in the post mortem report excessive force was applied in striking the deceased. The accused directed his blows at the head of the deceased. The deceased sustained a brain laceration and a fractured skull. Such injuries could only have been the result of excessive force have been applied. The accused person acted recklessly. The state did not prove that accused intended to cause the death of the victim. The state, however, proved that accused acted negligently. He used disproportionate force and must be found guilty of the lesser charge.

Accordingly, and in the result the accused is acquitted on the charge of murder. The accused is found guilty of culpable homicide.

## **Sentence**

It is quite disheartening to note that young offenders between the ages of 16 years and 21 years are resorting to the use of machetes causing unnecessary loss of life. The behavior and conduct of young offenders who roam around carrying lethal weapons has to be checked. Violence of any form is not countenanced by these courts. Whilst it is the duty of the courts to keep young first offenders away from the polluting environment of prison conditions, the courts must ensure that sentences imposed in every case meets the interests of the accused and the societal expectations. If the courts pass sentences that tend to trivialise serious offences, they will quickly lose credibility. The ends of justice will not be met.

In this matter the accused has been convicted of a serious offence. There are weighty mitigating features of the case which this court cannot ignore. The deceased was the aggressor throughout. On three separate occasions the deceased exhibited aggressive tendencies and was restrained by his friends. The deceased continued to provoke the accused who to a large extent had exercised restraint. The court notes that the accused had every right to defend himself. He did not however have the right to exceed the bounds of self defence. The court takes into account the fact that accused acted recklessly and out of immaturity. He and the deceased had taken alcohol on the night in question. As they proceeded to the circumcision ceremony there were singing and there was a measure of excitement in that some of them were moving from boyhood to manhood. I must indicate that to allow young persons to consume alcohol at young ages and to leave them to their own devices is an indictment on the elders in our societies. The sentence this court shall impose shall endeavor to be rehabilitative to the extent that accused must, after serving his sentence, reflect on his deeds. A lengthy custodial

Sentence is not appropriate where young offenders are involved. To sentence the accused to a wholly suspended sentence on the other hand would trivalise the offence. A life has been lost and the courts have the duty to protect the sanctity of human life.

In the circumstances accused is sentenced as follows:

“3 years imprisonment of which 1 year is suspended for 5 years on condition accused is not within that period convicted of an offence involving violence and for which is sentenced to imprisonment without the option of a fine.”

**Effective sentence: 2 years.**

*National Prosecuting Authority, state's legal practitioner  
Mashindi and Associates, accused's legal practitioner*