

THE STATE

AND

SIKHULULIWE NCUBE

IN THE HIGH COURT OF ZIMBABWE
MATHONSI J
BULAWAYO 19, 20 May 2011 AND 26 MAY 2011

Ms N. Ndlovu for the state

Ms C. Mudenda for the accused

Criminal Trial

MATHONSI J: The accused, who was aged 33 at the time of the alleged offence, is charged with murder it being alleged that on 26 June 2010 at house No. 59616/2 Iminyela, Bulawayo she wrongfully, unlawfully and intentionally killed her husband, Lovemore Ndlovu, who was aged 36 when he met his death.

In her defence outline, the accused person alleged that while her actions caused the death of her husband, this occurred when she was under severe attack from the deceased. For that reason she pleaded self defence against imminent danger praying that she be found not guilty and acquitted for that reason.

The evidence led on behalf of the state from Samuel Shoniwa, a 15 year old nephew of the couple, who witnessed the events, is to the effect that the deceased was a very abusive husband who regularly battered the accused each time he got money to buy alcohol and got drunk.

The witness stated that invariably when the deceased got home drunk he would pick a quarrel with the accused and then severely assault her. It is only when he had no money that he would not assault the accused.

This testimony was corroborated by the evidence of the investigating officer, Assistant Inspector Claude Fombe who testified that police at Western Commonage had received numerous reports from the accused dating back to 2008. On a number of occasions the

accused would come to report cases of assault by the deceased and their community relations office attended to those matters. Invariably, it was not a question of who started the fight, but the extent to which the accused had been assaulted by the deceased, who was always the aggressor.

Assistant Inspector Fombe testified further that when he investigated the matter his inquiries from the neighbourhood revealed that the couple's house had been christened "DRC" because of the endless combat action that was obtaining there.

According to the only eye witness who testified on behalf of the state, on the fateful day, the deceased had arrived home from selling his wares in town at 1930 hours. He was staggering drunk. Finding the accused not home, he inquired of her whereabouts only to be told that she was visiting their neighbour.

When the accused returned home, she started ironing clothes. After some time, the deceased interrogated her as to what she had been doing next door. He became very harsh, told his young brother who was staying with them that he would relocate to Botswana and that the brother should remain vacating the house.

After a while, the deceased got up and started attacking the accused with clenched fists, and booted feet in the presence of the children. When they tried to leave the house, the deceased locked the door and continued battering the accused. At some point Mkhululi, one of the children, unlocked the door for them to run out. The witness was not so lucky because before he could leave, the deceased pushed the door closed and used his body to block it as he continued assaulting the accused.

According to the witness, the deceased picked up a knife intending to stab the accused who was then forced to grab the knife to prevent the stabbing. The two then grappled over the knife while the deceased continued to kick and generally assault the accused. At one stage the witness observed that the knife was pointing in the direction of the deceased as both of them held onto it.

He did not see the stabbing itself but only observed the deceased removing the knife from the right side of his neck. He later died.

At the close of the state case, *Ms Ndlovu*, appearing for the state conceded that the state had failed to set out a prima facie case for a charge of murder. In our view, the concession was proper in the circumstances especially as the evidence suggested that not only was self- defence available as a defence to the accused but also that the fatal injury to the deceased, may have been an accident.

In our law the defence of Private Defence, that is self-defence, defence of third persons and property, is one which excludes unlawfulness and excuses or justifies the action of the accused.

G. Feltoe, in his book, A Guide to Criminal Law in Zimbabwe explains that defence at page 42 as follows:-

“The law provides that a person is entitled to take reasonable steps to defend himself against an unlawful attack or to take reasonable steps to defend another against an unlawful attack. Harm, and even sometimes death, may be inflicted on the assailant in order to ward off the attack.

The requirements for this defence are:

- an unlawful attack.
- upon x or upon a third party, where x intervenes to protect that third party.
- the attack must have commenced or be imminent.
- the action taken must be necessary to avert attack.
- the means used to avert attack must be reasonable.”

In casu, the accused was under a sustained and vicious attack from her abusive husband who seemed to derive recreational satisfaction from attacking his wife each time he had consumed alcohol.

The deceased had cornered the accused having first locked the door and when it was opened, blocked it with his body to prevent the accused from escaping. The deceased had armed himself with a knife intending to stab the accused when she got hold of the same knife.

Even if she had used the knife against the deceased, which is not clear given that the way they grappled for it may have resulted in an accidental stabbing, the accused was entitled to do so in order to avert the attack with a knife.

Using the same knife, meant to be used against the accused cannot be said to be use of unreasonable means to avert the attack. In the agony of the moment, the accused was entitled to conduct herself the way she did.

Her actions are excusable and the defence of self-defence is available to her.
Accordingly the accused is found not guilty and acquitted.

*Criminal Division, Attorney General's Office, applicant's legal practitioners
Messrs Mudenda Attorneys, accused's legal practitioners.*