THE STATE

versus

ANNA HUTEPASI

HIGH COURT OF ZIMBABWE

MUSAKWA J WITH ASSESSORS

HARARE, 3, 4 AND 5 JULY 2012

**Criminal Trial**

*E. Mungoni*, for the state

*T.K. Chamutsa*, for accused

MUSAKWA J: The accused pleaded not guilty to a charge of contravening s 47 of the Criminal Law (Codification and Reform) Act [*Cap 9:23*]. The charge alleges that on 23 January 2007 and at Gwina Farm, Banket the accused, intending to kill Regina Kapere and or realizing that her conduct might cause death, stabbed Regina Kapere twice on the back with a knife causing her death.

For such a straightforward case it is not clear why the accused has not been tried for five years. This compromises a suspect’s rights to a fair trial within a reasonable time. Even the overall administration of justice is also compromised. For example the doctor who conducted the autopsy is said to have left the country. If the matter had been tried early perhaps the doctor would have been available to elaborate on his very sparse report which does not even note any external wounds on the deceased.

The facts of the matter are largely common cause in as much as the details relating to the stabbing came from the accused.

The accused and the deceased were co-wives in a polygamous set-up. The coming in of the accused as a second wife was resisted by the deceased. Hence she always provoked the accused. This was despite the fact that they had separate residences. The rivalry could have been exacerbated by the fact that whereas the deceased had no children the accused was eight months pregnant at the material time. In fact she delivered three weeks after the incident.

On the fateful day the rival wives’ husband, Mlonyeni Mhlanga had gone to Banket town where he collected the accused. He did this in anticipation of the deceased’s absence as she was supposed to visit her rural home in Kazangarare. This was not to be as the deceased had not proceeded on the journey.

It was Mlonyeni Mhlanga’s testimony that the deceased used to be violent towards the accused. On the fateful day the deceased confronted the accused at her residence in the witness’s presence. The witness managed to persuade the deceased to return to her residence. However, this was at variance with the accused’s testimony which was to the effect that she and the deceased had a scuffle during which the accused sustained an injury to the mouth. In the process the accused managed to tear the deceased’s blouse. This lends credence to the fact that on the subsequent confrontation the deceased had changed into a “T” shirt and a tracksuit bottom.

On the second occasion the deceased had told the husband that she was calling on an aunt, a Mrs Nyathi who also resided at the farm. This turned out to be a ruse as the deceased went back to the accused’s residence. She budged in and again confronted the accused. When the accused entered the kitchen from her bedroom she was attacked with a knife which the deceased had armed herself with from the kitchen.

The accused blocked the blow with her right hand sustained an injury to the palm. An affidavit relating to the treatment rendered to the accused on 24 January 2007 which was produced as an exhibit noted a 2cm moderately deep cut on the right palm and a superficial cut on the left hand.

The two tussled for possession of the knife with the accused holding the blade. In the process the accused was kicked in the belly. She eventually wrested the knife and stabbed the deceased on the shoulder blade. She did this in the hope that the deceased would desist from attacking her. According to the accused the deceased intensified her attack and grabbed the knife. The accused fell down in the process. As she held on to the knife the deceased tugged and they eventually ended outside.

Whilst in the veranda the accused slipped on the polished floor. As she got up holding onto a pole deceased also slipped and lost balance. That gave the accused the chance to flee into the night. Before she went far she tripped and landed on her back. In no time the deceased was upon her. The deceased sat astride the accused and tried to stab her. The accused eventually grabbed the knife and stabbed the deceased on her side. Since the deceased remained on top of her the accused struck her with her elbow and she toppled over.

That is when the accused crawled until she managed to rise. She proceeded to her place where she retrieved her bag and jersey. She also took the deceased’s wig which had fallen off during the melee. She then sought Boyna Tafira a co-worker to whom she recounted the ordeal before they proceeded to the Police station where she surrendered the knife.

The accused’s defence outline tallies with the warned and cautioned statement which was produced by consent. Curiously though, the warned and cautioned statement is only in English. One would want to assume it must originally have been recorded in Shona.

In his closing submissions Mr *Mungoni* urged the court not to adopt an armchair approach. He cited the case of *R v Mathlau* 1958 AD (1) 350 as authority for the proposition that where an accused exceeds the bounds of self-defence the court must return a verdict of culpable homicide. He also referred to the case of *S v Banana* 1994 (2) ZLR 271 (S) in which the defence was fully applied.

Mr *Mungoni* also referred to s 253 of the Code which outlines the requirements for the defence. Having submitted that it was the second stabbing that resulted in the deceased’s death Mr *Mungoni* urged the court to return a verdict of culpable homicide.

On the other hand defence counsel Mr *Chamutsa* referred to the same authorities cited by Mr *Mungoni* but sought that they be applied differently in order to reach a verdict of not guilty. Applying the provisions of s 253 he submitted how all the requirements for a complete defence of person have been met by the accused.

Section 252 of the Code provides that:

“unlawful attack” means any unlawful conduct which endangers a person’s life, bodily integrity or freedom”.

On the other hand s 253provides that:

“(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:

1. 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
2. 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 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
3. 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 subs (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 the case of *S v Banana* *supra* the appellant who was an Air Force Officer was at home during the night when he was besieged by intruders who were armed with a variety of weapons. As the intruders tried to break into the house the appellant fired warning shots from his service pistol to no avail. He eventually fired a shot through the window which killed one of the attackers. This court convicted him of culpable homicide and he noted an appeal.

This is what McNALLY JA had to say at p. 274:

“I begin with the text-book. Burchell and Hunt South African Criminal Law and Procedure 2 ed vol 1 at p 326 et seq sets out the three criteria for the C exclusion of criminal liability. They are:

1. the defence must be directed against the attacker;

2. the defence must be necessary to avert the attack;

3. the means used must be reasonable in the circumstances”

Where the self-defence involves excessive or disproportionate force there may be a

finding of guilty of culpable homicide. This is on the basis that the accused was mistaken in thinking himself justified in killing. As TROLLIP JA put it in *S v Ngomane* 1979 (3) SA 859 (A):

"... although he acted in self-defence, he ought reasonably to have realised that he was acting too precipitately and using excessive force, and that, by stabbing the deceased with such a lethal weapon on the upper part of the body, he might unnecessarily kill him."

But also, as HOLMES JA said in *S v Ntuli* 1975 (1) SA 429 (A):

". . . the court adopts a robust approach, not seeking to measure with nice intellectual callipers the precise bounds of legitimate self-defence."

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See also *S v Nicolle* 1991 (1) ZLR 211 (S) at 217B-D, and the judgment of the CHIEF JUSTICE in *S v Mandizha* S-200-91, which dealt specifically with the question whether the self-defence was excessive. It repeated the point, made earlier in *S v Phiri* S- 190-82, that one cannot take an armchair view of events. They must be seen and judged in the light of the circumstances of the occasion. Finally, I refer to *S v Moyo* S-45-84 where the then CHIEF JUSTICE, DUMBUTSHENA CJ, stressed the fact that it was for the State to negative the plea of self-defence.

Learned judge did so, with some care. He referred to *S v Phiri* *supra* and to *R v Dotsera* 1958 R & N 51 (FS). …………………………………………………………………………”

In the case of *Charles Moyo v S* S-45-84 the appellant was convicted of two counts of murder with extenuating circumstances. He was sentenced to fifteen years imprisonment.

The appellant had stabbed the two deceased with a knife he had picked from a drawer in the kitchen of a house where he sought refuge from attack. Following some drinks with friends the appellant had had an altercation with occupants of a motor vehicle. After he had smashed the vehicle’s windscreen he and his colleagues ran away in different directions. The appellant had subsequent encounters with the same vehicle. In the process of escaping from his pursuers he eventually scaled the wall of the yard into which the fatal stabbing took place.

In upholding the appeal DUMBUTSHENA CJ had this to say at p 10 of the cyclostyled judgment:

“The factors that a court has to consider and the attitude that the court should take when the plea of self-defence is at issue, and where there is evidence in support of that plea, were succinctlyset out by Lord MORRIS in *Palmer v* *R* [1971] 1 ALL ER 1077 at 1088 c-g. He said this:

“In their Lordships’ view the defence of self-defence is one which can and will be readily understood by any jury. It is a straightforward conception. It requires no abstruse legal thought. It requires no set words by way of explanation. No formula need be employed in reference to it. Only common sense is needed for its understanding. It is both good law and good sense that a man who is attacked may defend himself. It is both good law and good sense that he may do, but may only do, what is reasonably necessary. But everything will depend on the particular facts and circumstances. Of these a jury can decide. It may in some cases be only sensible and clearly possible to take some simple avoiding action. Some attacks may be serious and dangerous. Others may not be. If there is some relatively minor attack it would not be common sense to permit some action of retaliation which was wholly out of proportion to the necessities of the situation. If an attack is serious so that it puts someone in immediate defensive peril then immediate defensive action may be necessary. If the moment is one of crisis for someone in immediate danger he may have to avert the danger by some instant reaction. If the attack is all over and no sort of peril remains then the employment of force may be by way of revenge or punishment or by way of paying off an old score or may be pure aggression. There may no longer be any link with a necessity of defence. Of all these matters the good sense of a jury will be the arbiter. There are no prescribed words which must be employed in or adopted in a summing-up. All that is needed is a clear exposition, in relation to the particular facts of the case, of the conception of necessary self-defence. If there has been attack so that defence is reasonably necessary it will be recognised that a person himself cannot weigh to a nicety the exact measure of his necessary defensive action. If a jury thought that in a moment of unexpected anguish a person had only done what he honestly and instinctively thought was necessary that would be most potent evidence that only reasonable defensive action had been taken. A jury will be told that the defence of self-defence, where the evidence makes its raising possible, will only fail if the prosecution show beyond doubt that what the accused did was not by way of self-defence. But their Lordships consider in agreement with the approach in *De Freitas v R* ((1960) 2 WIR 523) that if the prosecution have shown that what ‘was done was not done in self-defence then that issue is eliminated from the case. If the jury consider that an accused acted in self-defence or if the jury are in doubt as to this then they will acquit. The defence of self-defence either succeeds so as to result in an acquittal or it is disproved in which case as a defence it is rejected.”

Coming to the present matter, there is no doubt that the accused person was under a sustained attack by the deceased. She was injured in her hands as she tried to wrest the knife from the deceased. There is medical evidence which confirms the injuries she sustained. She was entitled to use reasonable means to ward off the attack against herself and the unborn child. It is pertinent to note that the accused testified that before the physical confrontation she had even apologised to the deceased in the hope that she would be pacified. She explained that the apology related to her marrying the husband they had to share.

The accused testified well despite the enormity of the charge. She did not appear to exaggerate anything. Her failure to fully explain how the first stabbing of the deceased at the back of the shoulder took place whilst the two were supposed to be facing each other cannot justify the conclusion that she needlessly injured the deceased. In any event this does not appear to have been the fatal wound. The court does not even know the exact nature of the wounds sustained by the deceased.

The post-mortem report only noted the following-

“Collapsed right lower lung and +- 1500 mls blood in left thoracic cavity”

The cause of death was given as internal haemorrhage.

It must also be noted that the onus to prove that the accused person exceeded the limits of self-defence rested on the State. This is in accordance with s 18 (4) of the Code which states that:

“Except where this Code or any other enactment expressly imposes the burden of proof of any particular fact or circumstance upon a person charged with a crime, once there is some evidence before the court which raises a defence to the charge, whether or not the evidence has been introduced by the accused, the burden shall rest upon the prosecution to prove beyond a reasonable doubt that the defence does not apply:

Provided that where an accused pleads that, at the time of the commission of a crime, he or she was suffering from a mental disorder or defect as defined in section *two hundred and twenty-six*, or a partial mental disorder or defect as defined in section *two hundred and seventeen*, or acute mental or emotional stress, the burden shall rest upon the accused to prove, on a balance of probabilities, that he or she was suffering from such mental disorder or defect or acute mental or emotional stress.”

We are therefore satisfied that in the circumstances of the present matter the accused did not exceed the bounds of self-defence. She is accordingly found not guilty.

*Attorney-General’s Office Criminal Division*, State Counsel

*Chamutsa & Partners*, accused’s Counsel