

THE STATE
versus
JAMES BRIGHT MADZIVABENDE

HIGH COURT OF ZIMBABWE
HUNGWE J & ASSESSORS
MUTARE, 27 & 28 February 2014 and 3,4,5, & 6 March 2014

Trial Cause

Mrs J. Matsikidze, for the State
Mr V. Chinzamba, for the Defence

The accused faced a charge of murder as defined in s 47(1) of the Criminal Law (Codification and Reform) Act [*Cap 9:23*], in that at Nyamaropa Business Centre, Nyanga he unlawfully and intentionally or realising the real risk or possibility that death may result, assaulted Stewart Nyabaze with an iron bar and a pick axe handled all over the body hereby inflicting injuries from which the said Stewart Nyabaze died.

The brief facts of this case are that on the early hours of 17 March 2012 he got a call on his wife's mobile number from his tenant at the business premises. He was advised that there was an intruder inside his shop.

He drove to his shop in haste.

He arrived, parked his truck and disembarked from his truck armed with a wheel spanner.

He used the back entrance which incidentally had been broken down by the intruder.

What transpired when he got inside the shop is a matter of great dispute between the State and the defence.

The State's version is that when he saw the intruder the accused embarked upon a murderous assault of this poor fellow who was desperately drunk and could not avoid the attack.

It is said the accused struck the deceased with a wheel spanner, then an iron bar then an axe handle.

The assault began inside the shop and continued outside the rear verandah

State witnesses say that the accused's wife, his father and friend all tried to restrain the accused without success.

Police were informed as the assault became more fatal. Police took time to respond. A team was despatched to fetch a local police officer resident at the centre.

By the time the police arrived, deceased had been pulverised single handedly by the accused. Deceased was soaked in his own blood and tied to the pillar of the front verandah.

He was in serious pain.

He later died from a head injury sustained in the assault.

The defence on the other hand does not deny assaulting the deceased but raised a defence of property.

The accused explained that when he arrived he armed himself with a wheel spanner and entered his shop.

He saw the now deceased but was unable to recognise him as a local resident. This person, charged at him with an iron bar.

He avoided and threw the wheel spanner at him

That person fell down and hit against the band saw inside the shop.

He then jumped on to the deceased and dragged him out after an exchange of blows.

Deceased was bleeding.

He further assaulted the deceased seeking to extract confirmation regarding anything he may have stolen.

Deceased stated that he had not stolen anything but agreed to compensate accused with a bovine for having broken into his shop.

He left the deceased with the group which had gathered as he went into his shop to check on his day's takings which he had not collected.

He established that nothing had been taken.

He brought out of the shop a rope with which he tied deceased to a pillar to await police arrival.

The State led evidence from six witnesses and produced the iron bar, axe handle the wheel spanner and the clothes worn by deceased at the time.

It also produced the medical affidavit which showed that deceased had a 2 cm deep laceration on the occipit

- “1. A 2 cm deep laceration on occipit
2. Right upper arm has extensive bruising and swollen.

3. Left leg has a deep cut about 5 cm
4. Right leg has extensive bruising”.

The doctor who carried out the post mortem concluded that the deceased had died due to head injury.

At common law the defence of self-defence operates in three spheres. It allows a person to use reasonable force to

- (a) defend himself from an attack;
- (b) prevent an attack on another person and;
- (c) defend ones property.

In addition the Criminal Procedure & Evidence Act [*Cap 9:07*] in s 42 permits the use of force to effect an arrest. The section provides that a person who is authorised to or required under the Act or any other enactment to arrest or assist in arresting another person attempts to make an arrest and the person whose arrest is attempted

- (a) resist the arrest and cannot be arrested without the use of force or
- (b) flees when it is clear, that an attempt to arrest him is being made or resists and flees;

the person attempting the arrest may, in order to effect the arrest, use such force as is reasonably justifiable on the circumstances of the case to overcome the resistance or to prevent the person accused from escaping.

The constitution permits the use of reasonably justifiable force in order to protect property.

However, if the accused use excessive force this indicates that he had acted unreasonably in the circumstance. There will therefore be no valid defence.

The general principle is that the law allows only reasonable force to be used in the circumstances and what is reasonable in the circumstances, is to be judged in the light of the facts of each case as the accused believed them to be (whether reasonably or not).

I am satisfied therefore that the concession by Mrs *Matsikidze* that this case fell to be decided under s 257 of the Criminal Law Code as, on the facts, the accused has properly raised the defence of property.

The facts relevant to the determination of this case can be summarized as follows:-

Accused had been advised of an intruder

- No one advised him that in fact the intruder was a known local person who was hopelessly drunk and was just wondering inside the shop.
- Accused believed that his property was in danger of being stolen.
- He armed and prepared to defend himself from a possible attack by the intruder.
- He then attacks the intruder.
- The attack consists in jumping on him, using the axe handle and the fan belt all over his body.

Mr *Chinzamba* argued that there was no causal link between the accused's conduct and the death of the deceased.

I disagree. On his own admission the accused jumped into the deceased as he lay on the floor. He used the axe handle as well as the fan belt and the wheel spanner.

In short he cannot escape a finding that he caused the injuries found to have led to deceased's death.

By virtue of the concession that he had no intention to kill the accused ought to be found guilty of culpable homicide as he used excessive force to either effect the arrest or defend his property.

In other words the means he used to prevent the unlawful attack on his property or effect an arrest were not reasonable in all the circumstances of this case.

I came to this conclusion because the accused could have asked for help from the others to effect an arrest.

He could have, allowed his emotions to clear when upon recognising deceased as a local and listen to the exhortations from those present.

In light of the above I find the accused not guilty of murder but guilty of culpable homicide as defined in s 49(1) of the Code.

Mugadza Chinzamba & Partners, accused's legal practitioners