THE STATE
versus
TAPFUMANEYI NHIRA

HIGH COURT OF ZIMBABWE
MUSAKWA J
HARARE, 5 August 2015 and 4 March 2016

Assessors: 1. Mr Chivanda
2. Mr Mhandu

Criminal Trial

P. Chikangaise, for the State
T. L. Mapuranga, for the accused

MUSAKWA J: This is a typical case of hell having no fury like a woman spurned. The accused pleaded not guilty to a charge of culpable homicide in which it is alleged that on 9 September 2012 and at Chipinda village, Chief Nyoka, Featherstone the accused unlawfully and negligently caused the death of Anna Madhuze by striking her twice on the head with a hoe handle or realising that there was a real risk or possibility that his conduct might cause death but continued to engage in such conduct despite the real risk or possibility.

The charge was not properly drafted. It is an amalgam of elements of culpable homicide and murder.

It is common cause that the accused and the deceased were former lovers. On the fateful day the deceased sought the accused at his home. There was a confrontation during which the deceased got the better of the accused. After a brief lull there was another confrontation during which the accused struck the deceased with a hoe handle. The deceased went away and subsequently succumbed to the head injuries she had sustained.

In his defence outline the accused admits striking the deceased with a hoe handle in order to fend off an unlawful attack. The deceased was threatening to harm him and others. Hence his conduct was reasonable and necessary to ward off the attack.

Doctor Masamha was the first State witness to testify. He was previously stationed at Chivhu Hospital.

He conducted an autopsy on the deceased. He noted that the deceased had a communited fracture on the left temporal area which was 8cm by 5cm. There was blood in the nostrils. He concluded that the cause of death was severe head injury inflicted by a blunt object. The presence of blood in the nostrils was indicative of underlying injury to the base of the skull.

Doctor Masamha was of the view that severe force must have been used to inflict the head injury. This is because it is not easy to fracture the skull. Because the skull had multiple fragments considerable force would have been required to cause that.

During cross-examination he explained that he inspected the whole body and palpated the injured area. Whilst the majority of people who sustain such injuries die within a matter of hours, he also explained that a victim may die after a lapse of some weeks. He also conceded that in those cases where the victim dies much later, some other condition may have aggravated the injury. For example, a person with meningitis could have their condition worsened by injury to the head. Or, a person with HIV could have their condition worsened as well. This is because an internal injury may be aggravated by a minor force. Again he conceded that if the deceased had sought medical help early she could have survived. During the autopsy he did not look for any underlying condition.

Muchandifunga Mazarura is the accused's sister-in-law. She is married to the accused's elder brother. She said she knew the deceased as they lived in the same village. The deceased was the accused's girlfriend.

On the day of the incident she heard the accused calling out they had let him down. She rushed to the scene. She saw the deceased on top of the accused with her hands grabbing the accused's groin. As she cautioned the deceased the accused got up with the deceased still holding on. The accused's trousers were loose and he held them with one hand. Using the other hand the accused struck the deceased's hands with a hoe handle and she let go. When the deceased got up the witness told her to go home and that they would discuss the issue later. The witness tried to head off the deceased as the accused proceeded to his home.

Somehow the deceased sneaked behind the hut. The witness only realised that the deceased was now being assaulted by the accused. She heard that something was being struck. She rushed to investigate and held the accused from behind. She struggled with the accused who wanted her to let go of him. The accused was insisting that he could not be

attacked at his home. After a while she released the accused. She did not see the deceased. The accused had used a hoe handle.

The witness stated that she did not see where the accused struck the deceased. However, the accused was bleeding from the head.

During cross-examination it was put to the witness that her statement to Police stated that the accused struck the deceased twice on the head and she disputed. As to the relationship between the accused and the deceased, she stated that the two had had an affair in the past. The deceased would sometimes stay at accused's residence. At the time of the incident the deceased had taken away her personal effects. At some stage a fire had broken out at the accused's garden. Some shoes left at the scene were said to belong to the deceased. She confirmed that the deceased stayed some 7, 5 km away. The witness had retired to bed around 9 p.m. and this incident occurred after that.

With this evidence the state closed its case. The defence applied for discharge. The court was not convinced that there was no evidence on which a court might convict the accused and duly dismissed the application. Full reasons were given for dismissing the application.

In his defence the accused testified that he had affair with the deceased between 2007 and 2008. Having contracted herpes the accused suggested that he and the deceased go for medical tests but the deceased refused. Thus they parted ways. In 2012 he tested HIV positive. He started to take antiretroviral medication. He no longer interacted with the deceased.

Prior to the incident leading to the present charge the deceased had unlawfully entered the accused's house at night. The deceased took away the accused's clothes. The accused later traced footsteps that led to the accused's home.

On another occasion his garden caught fire when he was asleep. He managed to put out the fire. He suspected that the deceased was responsible. This is because he saw sandals belonging to the deceased at the scene.

On the fateful day at about 10 p.m. there was a forceful knock on his door. Upon enquiry someone responded that they were the Madhuzes. He had previously reported the unlawful entry at Shambara Police Base and he assumed that his stolen items were being returned.

When he went outside he saw someone standing about two metres away. He left the door open, with a shaft of light emanating from the room. He called out for his brother to

come and witness. His brother and sister-in-law came with the sister-in-law leading the way. He explained that he called for his brother and sister to attend because he thought the Madhuzes had brought back the items the deceased had previously taken. Therefore he wanted them to witness the event. As he turned back to his house he was struck twice on the head with a hoe handle and he fell down. The attacker sat on him and pulled down his trousers. He was grabbed by the genitals. When his sister-in-law intervened and pulled off the deceased. The accused got up as he held his trousers with one hand. He picked up a hoe handle and struck the deceased's hands and she then let go of him.

Muchandifunga Mazarura dragged the deceased away. The accused could feel blood flowing down his face and he could hardly see. He walked towards the kitchen as he held to the trousers whilst the other hand held the hoe handle. He stated that he feared another attack.

Whilst wiping away blood and calling out he saw the deceased emerging from behind the hut. The deceased arrived at some grape tree where there was a stack of fire wood. The accused then threw the hoe handle. He did not see where it struck. He claimed to have been in a state of confusion. Later the accused's mother arrived and led the deceased away.

On the following morning the accused followed up on the deceased at his mother's home. He learnt that the deceased had gone to her home. He later made a report at the Police Base. The officers derided him for being beaten by a woman. He experienced pain in the head and body. He was subsequently arrested. Several statements were recorded from him. Whilst in jail he was approached and hurriedly made to sign a warned and cautioned statement.

Concerning the statement that was produced in court the accused explained that he was told to see Sergeant Chiketa at Featherstone Police Station. When he got into the office Sergeant Chiketa and another officer called Gwabada told him to sign as others had already signed. The accused only read the portion that was written in Shona as he was told to hurry. He then signed and went away. Although he read the statement the bit he recalls relates to him throwing the hoe handle.

About throwing the hoe handle he stated that he was in pain and could hardly walk. He had blood in his eyes. He thought of scaring the deceased as he feared he could be killed. The deceased was about to pick a piece of fire wood. Thus he threw the hoe handle in self-defence.

Whilst conceding that the deceased was initially the aggressor, Ms *Chikangaise* submitted that after Muchandifunga Mazarura's intervention the accused was no longer in danger. Thus the requirements of s 253 of the Code were not met. What is in issue is the use

of excessive force by the accused. She further submitted that the accused's explanation of how he injured the deceased is incredible. As for authorities in which private defence was considered she referred to *S* v *Onismo Fichani* HB-33-14, *S* v *Moyo* SC 45-84 and *S* v *Sibange* HH-70-15.

Mr *Mapuranga* submitted that the medical evidence revealed only one wound, which suggests that the deceased was struck once. This was corroborated by Muchandifunga Mazarura who stated that she only heard the sound of one blow. The accused also said that he only struck the deceased once. Mr *Mapuranga* further submitted that the unlawful attack by the deceased had not ended when Muchandifunga Mazarura interposed. If so, why would the deceased have gone behind the accused's hut. He thus submitted that it was reasonable for the accused to believe that he was under attack again. This is because the deceased was close to the accused and the latter had no opportunity to escape. Mr *Mapuranga* also submitted that had the deceased been taken to hospital she might not have died.

In support of the submission regarding putative private defence, Mr *Mapuranga* referred to *S* v *Mapfumo* 1983 (1) ZLR 250, *S* v *Moyo* (*supra)* and *S* v *Kuiper* 2000 (1) ZLR 113. He further submitted that there being no onus placed on the accused, if anything is not clear the proper verdict should be an acquittal.

The confirmed warned and cautioned statement that was recorded from the accused and was produced by consent reads as follows:

> "I have understood the caution. I admit that I assaulted the now deceased with a hoe handle which the now deceased had used to assault me. I managed to take the hoe handle as I was defending myself. I cannot exactly remember the position where I struck the now deceased two times since I was still in a state of confusion as result of the assault that had been perpetrated against me. Though I am not sure but, it was somewhere around the head of the now deceased. I deny the charge of murder. I was only informed 5 days after the incident that Annah Madhuze the now deceased had passed away. I never killed the now deceased, I was defending myself."

The evidence of Muchandifunga Mazarura was not summarised in the summary of state case. She was expected to testify in the same manner as Rachel Murombo and Manyowa Nhira whom the state did not call. The essence of those witnesses' evidence was that the accused struck the deceased as she grabbed him by the genitals. But, going by Muchandifunga Mazarura's *viva voce* evidence that is not what happened. We can now accept that after the initial confrontation the accused made his way towards the hut whilst the deceased sneaked around the hut. It is apparent that Muchandifunga Mazarura departed from her previous statement as evidenced by the vagueness in her testimony regarding what

actually transpired during the second confrontation between the accused and the deceased. What we only have from her is that she restrained the accused as he attacked a person whom she believed to be the deceased.

Significantly, Muchandifunga Mazarura testified that when she restrained the accused, he was holding the hoe handle. That puts paid to the accused's testimony that he threw the hoe handle at the deceased. Muchandifunga Mazarura was not challenged on this aspect. Even in the confirmed warned and cautioned statement there is no suggestion that the accused threw the hoe handle.

The requirements for self-defence are provided in s 253 of the Code as follows:

> "(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:
> (*a*) 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
> (*b*) 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
> (*c*) 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 subsection (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."

The accused's defence was at variance with his testimony. Given the accused's testimony and barring any other factors, when the deceased sneaked behind the hut, it could only have been accepted that the accused reasonably believed that another attack was imminent. Considering the first incident it could not have been held against the accused that he entertained such a belief. In any event, it being at night and the deceased having travelled a considerable distance, her sudden appearance on the second occasion could not have been peaceful. Account would also have been taken that Muchandifunga Mazarura had tried to lead the deceased away.

It is the other requirements of the defence that would have merited further consideration. These are that the accused's conduct was necessary to avert the attack, that the

means used were reasonable and that they were not disproportionate to that liable to be caused by the deceased.

The case of *S* v *Moyo* (*supra)* is illustrative of the considerations at play in such situations. The case involved the appellant being pursued until he sought refuge in a house where he then procured a knife with which he stabbed one of his pursuers. 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 succinctly set 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."

We hold that the accused anticipated an attack by the deceased. He had been injured. He was at his home. The deceased was unarmed.

A similar situation arose in *S* v *Ngomane* 1979 (3) SA 859 (A). In that case, the appellant, a young man aged twenty years was locked up in a hut with a woman at night. The

deceased, a well-built man of 50 years knocked on the door and asked for cigarettes. When the appellant replied that he had none the deceased told him to open the door. When the appellant refused the deceased threatened to burn down the hut and he proceeded to fasten the door with wire. The appellant pleaded with the deceased to open the door and not to set the hut alight.

As the door opened the lamp went out. As the deceased entered the hut the appellant stabbed him with an assegai. The deceased's jugular vein was severed and the heart penetrated. The appellant and the woman then ran out.

The appellant's defence was defence of person. He believed in the deceased's threats. His intention was to escape from the hut when the door was opened. The trial court convicted him of murder with extenuating circumstances and sentenced him to seven years' imprisonment.

On appeal the appellate court found that there was no evidence that the appellant deliberately stabbed the deceased. Regarding self-defence, it was held that the question was whether the appellant acted reasonably and legitimately in order to protect himself against the deceased. The onus was always on the state to prove that the appellant exceeded the legitimate bounds of self-defence.

Although the appellate court noted that the trial court shifted the onus on the appellant to prove the existence of self-defence, the proved facts were found to negate that defence. It was thus held that the appellant acted too precipitately or used excessive force to effect his escape. A reasonable person would have first ascertained what the deceased's intention was before stabbing him. The conviction for murder was reduced to that of culpable homicide.

Coming to the present case, the accused's defence was to the effect that he struck the deceased because he was under attack. The deceased was threatening to harm him and others. The warned and cautioned statement gives the impression that after he was attacked with a hoe handle, the accused disarmed the deceased. Thereafter he struck the deceased with the hoe handle. We now know from the evidence led that the attack by the deceased was not continuous. There was a break in the attack by the deceased. The accused eventually attacked the deceased on the head when he believed he would be attacked again.

In such a situation one might say that the accused could have mistakenly believed that he was under further attack. This would invoke s 257 of the Code which states that:

> "If a person genuinely and on reasonable grounds, but mistakenly, believes that he or she is defending himself or herself or another person against an unlawful attack, he or she shall be

> entitled to a complete or partial defence in terms of this Part to any criminal charge in all respects as if his or her belief were in fact correct."

The accused's defence outline is not to that effect. It was not amended to reflect that he mistakenly but genuinely believed that he was under further unlawful attack. The accused only brought this up during the course of his testimony. The issue at this stage is not to pity the accused for the provocation that he endured at the hands of the deceased. To do so would lead to loss of focus on the defence of self-defence and the evidence before the court.

Accordingly, the accused is found guilty as charged.

National Prosecuting Authority, legal practitioners for the State
Chihambakwe Mutizwa & Partners, accused's legal practitioners