

THE STATE
versus
AUGUSTINE CHISWANDA

HIGH COURT OF ZIMBABWE
MUTEVEDZI J
HARARE, 7 September 2022 and 10 February 2023

Assessors: Mrs Chitsiga
Mr Chakuvinga

Criminal Trial

S Mutumbwa with M Moyo, for the accused
T M Havazvidi, for the State

MUTEVEDZI J: At the conclusion of this trial, our unanimous decision was that we must as we hereby do, find the accused not guilty and acquitted of the charge of murder he was facing.

The neutrality of the word homicide suggests the objectivity with which every killing must be treated. Law enforcement agents and other institutions responsible for the administration of criminal justice must never be swayed by courts of public opinion to determine whether to arrest and prosecute a man accused of murder where he is clearly innocent. The courts have repeatedly said a homicide may be justifiable, excusable or outright criminal. The facts of this case illustrate the torment, trials and tribulations of a man who was dragged through the rituals of a murder trial in circumstances where any reasonable man in his position would have acted in the manner he did if not worse.

The accused is Augustine Chiswanda. Before this incident his house had been a target of intruders on thirteen different occasions. Despite putting in place elaborate security measures which included a perimeter fence with spikes on top they were undeterred. He had reported all the incidents to the police who would simply take the reports but had never visited his premises. He claimed that even the shooting of the intruder on the day in question, as will be demonstrated later, failed to scare them off. They returned on the 15th occasion and literally cleaned his house by stealing television sets, stoves, gas cylinders and other

household effects. His trauma was palpable. In spite of all that he is the man who is charged with the murder of Takunda Nigel Ndengeya (the deceased) it being alleged that on 5 May 2017 at number 5194 18th Crescent, Budiro 3 in Harare he, with intent to kill shot the deceased once on the left leg with a firearm or realising that there was a real risk or possibility that his conduct may lead to death persisted with the conduct despite the presence of the risk or possibility. The deceased succumbed to the injuries resulting from the gunshot.

As can be discerned from the above excerpts the accused pleaded not guilty to the charge. His explanation was that on the fateful night he and his family retired to bed. In the dead of the night, in fact at around 0100 hours they were woken from sleep by noise coming from the family's carport. As expected, the accused woke up to check. The light bulb in the garage could be switched from his bedroom. When he peeped he noticed that several people were in the garage. He could not however ascertain their exact number. He armed himself with a 9mm Norinco pistol. He cautioned his wife to remain in the bedroom as he went out to investigate. He then proceeded to the lounge where he opened a window and fired two warning shots into the air at the same time calling for assistance from his neighbours. After a short while he then heard more noise coming from the direction of a storage room in his backyard. His daughter's bedroom is adjacent to that storage room. He went back to his bedroom and opened a window which led into the carport. He shouted a demand that whoever was in his premises must surrender themselves but the unknown persons did not heed his threat. Fearing for his and his family's safety he fired two more warning shots through the window. He then heard further noises which sounded like footsteps. A few minutes later he noticed that someone was trying to scale the durawall. He fired at the unknown intruder intending to immobilise him. The intruder was daring and despite the shot still managed to escape. Later on the accused left his house and went outside where he joined his neighbours who had woken up after hearing his cries for help and the gunshots. Together they tracked a spoor of blood from the accused's perimeter wall. The trail led them to an open space close to house number 5197 in the same neighbourhood. There they found the deceased tucked under some wooden pellets. He was lying prostate and groaning from injuries. At that time, one of the people in the crowd identified the injured person a boy from the neighbourhood. The person proceeded to call the boy's mother who arrived and identified him as her son Taku. They ferried him to hospital.

The accused further told the court that he is an engineer who runs an engineering company. He inevitably keeps at home company equipment and occasionally also keeps

some money. He rounded off his defence by alleging that he did not intend to kill the deceased. All he wanted was to immobilise the intruder especially given that he did not know whether his (intruder's) colleagues were still in the premises or not. He was defending himself, his family and his property.

State case

The state commenced its case by applying to tender the post mortem report compiled by the pathologist who examined the remains of the deceased. The report was uncontentious. The conclusion was that the deceased died from hypovolemic shock due to gunshot wound, rupture and damage of arteries of lower limb. The prosecutor also applied to tender the ballistic report concerning the firearm. The issues to do with the gun were equally common cause. The accused admitted having fired the bullet which hit the deceased from the firearm in question. The report was nothing but an overkill by the prosecutor. Thereafter, the state called oral testimonies from three witnesses whose evidence is summarised below.

Simbarashe Gwasira

His testimony was terse. It did not take the prosecutor's case further than the beginning. The witness said he resides in the same neighbourhood with the accused. He has known the accused for ten years. On the night in question he heard gunshots but could not pin his mind where the sound was coming from. Later he heard voices and realised that someone was being searched for. He peeped outside and saw light which resembled the beam of a torch. His wife urged him to go out to investigate but he refused. When he realised that there was a multitude of people outside he finally gathered the courage to also go out. He saw the deceased who was crying out that he was injured. Someone amongst the crowd recognised him. His mother was later called. What was critical was the witness's evidence that when the boy's mother arrived she cried saying the boy had gotten what he was looking for. Together with some of the people in the crowd he proceeded to the accused's house where he noted that the door to the carport was open. He said he had heard three shots. Even more importantly, the witness said he believed that the deceased was not alone at the time he was in accused's premises. His conviction was based on the fact that it appeared impossible that the deceased had dragged himself from accused's perimeter fence to the witness's house given the injury he had and the fact that there was no blood spoor between the two houses. In addition he had also heard sounds of footsteps leaving his premises at the time the groaning

had started. He further confirmed the allegations that there had been several break-ins at accused's house.

Sibongile Mutengo

She epitomised a grieving mother. Taking to the witness stand in the trial of her son's alleged killer no doubt made her relive the events of the horror night when her son was shot. Yet she was still courageous enough to admit that her son was troublesome; that he took to drinking at the tender age of sixteen; that he had many friends good and bad from school, church and the neighbourhood and that she indeed had said that is '*what you wanted*' when she arrived at accused's durawall where the deceased had been shot. She completely broke down at the end of her testimony.

Arnold Dzvova

He investigated the murder. His findings supported the accused's version of events. In relation to the deceased, the officer said he gathered information that the deceased was a child who took drugs and was involved in the commission of violent crimes such as housebreakings.

Analysis of the state witnesses' evidence

As already indicated, the evidence of all the three witness largely supported the claim by the accused person that the deceased possibly with a number of accomplices had broken into the accused's premises. The confrontation explained by the accused in his defence outline then ensued resulting in the deceased being shot and injured. Their stories fitted squarely into the accused person's version of events. Critically, even the deceased's mother refused to blame the accused for the death of her son. What this means is that there are no disputes of fact in this case. The evidence of the witnesses has been restated for purposes of analysing whether the defence being proffered by the accused remained within the bounds of the law.

The accused's case

The accused's story was as he put it in his defence outline. He simply added detail to it. What is important from his testimony is that he said he had significant property in his house. In the garage there were two cars. At the time he confronted the intruders and fired warning shots he was shouting to his neighbours to come to his rescue but no one came out. The ordeal lasted more than half an hour. The fear that may have gripped the neighbours is exemplified by Simbarashe Gwasira who indicated that despite his wife's exhortations to him to go out he had flatly refused. The lack of help could have only served to increase the

adrenalin in the accused. He maintained that he did not intend to kill the deceased because if he did, he could have done it earlier when he had a better chance to take a more lethal shot at the intruders when they were in the garage. Instead he aimed at the deceased's lower limb. He added that from his carport some stainless steel sheets, a car radio and what he described as 300mm callipers which he used in his engineering trade were stolen. That those things were not recovered from the deceased is what convinced him that the deceased wasn't working alone.

The issues

The only issue which emerges from the above common cause facts is whether the accused is entitled to:

- a. the defence of person and
- b. the defence of property which he pleaded.

Put bluntly, the question is when is a homeowner allowed to shoot and kill a burglar?

The defences of person and property

The advent of the Criminal Law Code resulted in the codification of the hitherto common law defences to criminal conduct.¹ Admittedly those common law defences which were not made part of the statute are still applicable by virtue of s 214² but those which were codified lost their common law identity. Their requirements are as set out in the statute. I must also hasten to point out what I perceive as a fundamental omission from the Constitution of Zimbabwe, 2013 (hereinafter the Constitution) which creates a serious incongruity between it and the Criminal Law Code in relation to killing in defence of person and defence of property. Section 12 of the old constitution provided as follows:

12 Protection of right to life

(1) No person shall be deprived of his life intentionally save in execution of the sentence of a court in respect of a criminal offence of which he has been convicted.

(2) A person shall not be regarded as having been deprived of his life in contravention of subsection (1) if he dies as the result of the use, to such extent and in such circumstances as are permitted by law, of such force as is reasonably justifiable in the circumstances of the case—

- (a) for the defence of any person from violence or for the defence of property;
- (b)...
- (c)... or

¹ See CHAPTER XIV PART I of The Criminal Law Code

² **214 Defences and mitigating factors not limited to those mentioned in Chapter XIV**

The defences and mitigating factors which an accused may successfully raise are not limited to those set out in this Chapter

(d)...

(3) It shall be sufficient justification for the purposes of subsection (2) in any case to which that subsection applies if it is shown that the force used did not exceed that which might lawfully have been used in the circumstances of that case under the law in force immediately before the appointed day.

For inexplicable reasons, the above provision disappeared from the current Constitution. S 86(3) of the Constitution prescribes that the right to life is an absolute one. It cannot be limited except as specified in s 48. For purposes of contextualising the issue I restate s 86 (3) of the Constitution. It provides that:

86 Limitation of rights and freedoms

(1)...

(2)...

(3) No law may limit the following rights enshrined in this Chapter, and no person may violate them—

(a) the right to life, except to the extent specified in section 48;

(b) ...

(c) ...

(d)...

(e)...

(f)...

Section 48 is in turn equally instructive. It singles out the only instance under which it is legally permissible to take away life in the following terms:

48 Right to life

(1) Every person has the right to life.

(2) A law may permit the death penalty to be imposed only on a person convicted of murder committed in aggravating circumstances

The above provisions ss 86 (3) and 48(1) & (2) in the absence of a clause similar to s 12 of the old constitution make s 253 and s 258 of the Criminal Law Code potentially unconstitutional. Both sections allow the killing of another human being in circumstances outside those permitted by the Constitution. To begin with s 253 affords a person accused of any crime including murder to call to his/her aid as a complete defence the fact that he/she committed the offence when he/she was defending himself/herself or another person from an unlawful attack. Section 253 is couched in the following terms:

253 Requirements for defence of person to be complete defence

(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.

There is no argument therefore that in terms of this provision, the defence of person is a complete defence to a charge of murder provided the stated requirements are all satisfied.

The omission I which pointed out above appears to open a minefield but the result of viewing ss 253 and 258 of the Criminal Law Code as *ultra vires* ss 48 and 86 of the Constitution would create an unconscionable absurdity. Although I wish to leave it open for debate because I did not have the benefit of counsels' argument my preliminary view is that accepting it would imply that an accused person, who equally has a right to life must stand idle whilst his life or that of his family is under threat. The right to life necessarily means every person has a corresponding right to protect that life in instances where it is subjected to an unlawful attack. That protection may extend to the extreme of taking away the life of the aggressor as long as the defender remains within the bounds required by law. The only time one is not allowed to defend his/her right to life is when the threat to life is in furtherance of the limitations imposed by s 48 of the Constitution. The rationale behind self-defence is basic and deep-rooted. Unlike other criminal defences it courts very little disagreement if any. Put differently, it is generally a non-controversial component of the criminal law. Surely, a person who intends to kill another suspends his/her own right not to be killed. To some, that understanding of the right to life may sound too robust but to others it entails the very essence of life which would be meaningless if citizens were not allowed to guard their lives to those extreme lengths. The law reports are replete with cases where persons accused of murder were acquitted on the basis that they were defending themselves or defending others.³

I have already alluded to the requirements which an accused must satisfy to lay a basis for the defence of person which was previously called self-defence. As held in *S v Moyo*⁴ the accused has no obligation to prove the defence. He must simply lay a basis for it and the onus remains on the state to negative the defence. What remains is therefore for us to examine each of the requirements of self defence against the facts of this case.

³ In *S v Maende* HH-44-16; *S v Shavi* HH-124-17; *S v Sibanda* HB-333-16; *S v Manzonza* HMA-02-16 among many others.

⁴ SC 45/84

a. The unlawful attack had commenced or was imminent

The interlopers broke into the accused person's house in the dead of the night. His uncontroverted testimony was that it was at about 0100 hours. There were several of them who did not only get into the premises but right into a part of the house. The accused must have been terrified and his decision to confront a group of burglars who were so daring to enter his house at that odd hour puts him in the league of courageous men. There is therefore no question to us that the attack on the accused and his family had commenced. A man in his house with two vulnerable women (his wife and daughter) looking up to his protection is not expected to wait until he sees one of them drop dead to jolt him into action. In any case, if the attack had not started then it was certainly imminent. See the case of *S v Banana*.⁵

b. His conduct was necessary to avert the unlawful attack and he could not otherwise escape from or avert the attack

When he was disturbed from his sleep and woke up, the accused did not jump into shooting the deceased. He was careful to first find out the cause of the noise. He saw intruders in his carport. He proceeded to his lounge where he opened a window and fired two warning shots into the air whilst at the same time shouting to his neighbours to come to his aid. The shots were apparently a non-issue to the intruders. They appeared unperturbed. Instead either all or some of them moved to the back of the house where there was a storage room. The accused became even more worried because his minor daughter's bedroom was located in that part of the house. He rushed back to his bedroom where he opened a window which led into the carport. He shouted a demand to the intruders to surrender themselves. Still gripped with fear and when no one responded he fired two more shots into the air. He then heard further noises which sounded like footsteps. A while later he noticed someone trying to scale the perimeter wall. He was aware that there was more than one intruder in the house. He fired a shot aimed at the lower limb of the intruder on the durawall. It was his fifth shot of the night. It hit him on the leg.

The above are the circumstances from which we must assess whether the accused's conduct was necessary to avert the attack and whether he could have otherwise escaped from or averted the attack. In *S v Banana (supra)*, the Supreme Court once again implored judicial officers to take a robust view of the events, and cautioned against taking an armchair approach and seeking to measure with nice intellectual callipers the precise bounds of self-

⁵ 1994(2) ZLR 271(S)

defence. In these circumstances the question whether the accused could escape from the attack does not arise. This is a man who was being attacked in his own habitat. No man is expected to bolt from his house in order to evade an unlawful invasion of his home for the sake of satisfying this requirement. A burglar who breaks into a home is prepared to do anything. The rights of robbers and thieves who violently break into their victims' homes cannot supplant those of their victims. This court takes judicial notice of the many instances in which the courts deal with intruders who enter their victims' houses and therein commit heinous crimes such as aggravated indecent assault, rape and murder. Villains who get killed or hurt whilst committing violent crimes must expect very little sympathy if any from the courts.

An unlawful attack is defined to include *any conduct which endangers a person's life, bodily integrity or freedom*. The accused in this instance was justified to think that the intruders could kill him or any other member of his family. He was within his rights to suspect that the intruders could rape his wife or his daughter; that they could restrict his and his family's freedom. I would suggest that the mention of '*bodily integrity*' serves to extend the definition of an unlawful attack to also include emotional stress and trauma which the accused or another person may be subjected to as a result of the attack. An attack such as the one that the accused and his family were under surely suppressed their cognitive liberty. Cognitive liberty has been defined as the "right to mental self-determination, the freedom of an individual to control their own mental processes⁶, cognition, and consciousness. Some scholars posit that it is both an extension of, and the principle underlying, the right to freedom of thought.⁷ A conclusion that a hostile environment where interlopers invade one's home would restrict the mentioned freedoms is inescapable. Clearly in this instance, the accused and his family were already under physical attack. They were prisoners in their own house. Their cognitive liberties were equally curtailed by the violence going on around them. The accused therefore had the right to defend himself and defend his family from the unlawful attacks. In view of these facts we must find as we hereby do, that in addition to it being impossible to escape and run away from his own home, the accused's conduct was necessary to avert the unlawful attack.

⁶ See Sententia, Wrye (2004). "Neuroethical Considerations: Cognitive Liberty and Converging Technologies for Improving Human Cognition". *Annals of the New York Academy of Sciences*. **1013** (1): 221–

⁷ See also Bublitz, Jan Christoph; Merkel, Reinhard (2014). "Crime Against Minds: On Mental Manipulations, Harms and a Human Right to Mental Self-Determination". *Criminal Law and Philosophy*.

c. the means he used to avert the unlawful attack were reasonable in all the circumstances

The accused shot the deceased who was part of the marauders who had overrun his property. He was not aware whether they were armed or not. He did not know who they were. The court is aware from the evidence placed before it that the accused was right not to have taken the intruders for granted because the deceased was known to abuse alcohol, drugs and other substances. It was more than likely that the company he kept may have also been into such habits. They were dangerous. It would have been foolish if the accused had stood back to carefully analyse which weapon to use. If the assailants did not fear the many shots which the accused fired warning them of the attendant danger and that he was armed with a fire arm, there was no chance they would have flinched on seeing him holding an axe, a knobkerrie or a catapult. The accused and his family were in grave if not mortal danger. There is therefore no question of the reasonableness of the choice of the weapon.

d. harm or injury caused by his conduct was caused to the attacker and not to any innocent third party

As already said the deceased was part of the gang which attacked the accused's home. The bullets which were fired into the air as warning shots did not injure anybody. The shot which hit the deceased injured him only. No innocent third party suffered harm as a result of the accused's actions.

e. Harm caused was not grossly disproportionate to that liable to be caused by the unlawful attack

When he shot at the deceased, the accused's explanation was that he did not intend to kill him. He only wanted to immobilise the deceased whose intentions he was not sure about given that he believed that the deceased's colleagues were still in his premises. The accused's story is reasonably possible. It is true that there was an opportunity when he could have aimed to kill any of the intruders. The fact that he aimed the bullet at the deceased's lower limbs supports his version of events. It was unfortunate that the deceased died from the wounds inflicted by the gunshot. Given the scare, the fear inflicted and the numerous break-ins at his premises the accused had the right to believe that the intruders were out to kill him, rape his wife or daughter or cause some other serious harm as already discussed. Once again, this is an aspect of the defence which is not possible to put on a scale and take the side on

which the scale tips in measuring whether the harm caused was grossly disproportionate to that which may have been caused by the deceased.

Given the dispositive nature of the defence of person where it is successfully pleaded such as in this case, it is academic for the court to proceed to deal with the further issues which arise from the of defence of property which the accused pleaded.

It is against the above background that we were convinced that the state failed to prove its case against the accused beyond reasonable doubt as required by law. It is for the same reasons that we pronounced at the beginning of this judgment that the accused is found not guilty and is acquitted of the charge of murder.

National Prosecuting Authority, state's legal practitioners
Mutumbwa Mugabe and Partners, applicant's legal practitioners