

THE STATE  
**versus**  
ONIAS MAHEWU

HIGH COURT OF ZIMBABWE  
MOYO J  
BULAWAYO 23 AND 24 MARCH 2017

### **Criminal Trial**

*S Ndlovu* for the state  
*S Mawere* for the accused

**MOYO J:** The accused person faces a charge of murder as defined in section 47 of the Criminal Law Codification and Reform Act [Chapter 9:53]. The facts are that the accused person is employed as a ranger at Umzingwane farm. The first state witness Wonder Hlabathi is also employed at the same farm. On the fateful day, the two were on patrol at the farm about 0240 hours. Accused was armed with Exhibit 6 (a shotgun). They had previously heard some barking dogs. They later came across the dogs which started barking at them. The first state witness, ran towards the bush and then suddenly a male adult emerged and dashed towards the witness wielding a spear. The witness screamed for help. It is at this juncture that the accused fired one shot in reaction to the witness's screams as he was about to be attacked with a spear. The now deceased fell down still holding the spear. They then reported the matter to their boss who in turn notified the police. The deceased was later certified dead at Beitbridge district hospital. The accused person filed a defence outline to the effect that he acted in self defence as the deceased was about to attack his colleague (the first state witness) with a spear.

The post mortem report, by Dr S Pesanai confirms that the deceased dies as a result of brain damage skull fracture, multiple gunshot wounds.

The ballistic expert Inspector Mutizwa, the second state witness explained to the court that despite the deceased's body having four gunshot wounds, the gun could indeed have been shot once, as it would release several pellets at one go which would then proceed indiscriminately and those that meet the target would then injure him.

At the close of the state case, defence counsel applied for discharge in terms of section 198 (3) of the Criminal Procedure and Evidence Act [Chapter 9:07] which provides this:

“If at the close of the case for the prosecution the court considers that there is no evidence that the accused committed the offence charged in the indictment, summons, or charge, or any other offence of which he might be convicted thereon, it shall return a verdict of not guilty.”

The state counsel conceded to the application made by the defence in that she held the view that the state had failed to bring up evidence that would counter the defence of self.

Section 253 of the Code (*supra*) deals with the requirements for defence of person to be a complete defence. In summary, the provisions of section 253 are to the effect that:

- 1) an unlawful attack must have commenced or was imminent
- 2) the accused’s conduct was necessary to avert the unlawful attack and that he could not otherwise escape.
- 3) the means used to avert the attack should have been reasonable in the circumstances.
- 4) the harm caused by the accused person should have been on the attacker not an innocent third party, and it should not be grossly disproportionate to the harm liable to be caused by the unlawful attack. The unlawful attack should be on the accused or another person.

We then take the facts of this matter through these requirements.

#### Whether an unlawful attack had commenced or was imminent?

- 1) The first state witness told the court in no uncertain terms that the deceased was attacking him wielding a spear, forcing him to scream resulting in the intervention of the accused through firing the gunshot. There was indeed on unlawful attack.
- 2) Whether his conduct was necessary to avert the attack and that he could not otherwise escape.

The accused and his colleague, the first state witness were only armed with the gun, it was in the middle of the night, the deceased was about to strike, the first state witness with a spear, something had to be done, or else the first state witness could have met the same fate that deceased later met. Accused could not escape to avert the attack, as that would mean deceased would then attack the first state witness. The first state witness was not armed and could have

been easily harmed by the deceased as it would appear the deceased was close. The first state witness says all he could do in the circumstances was to scream as he sensed death. Accused's conduct was therefore justified in the circumstances, he used the only weapon he had, against an equally lethal weapon as a spear thrust at close range could result in death.

3) Whether accused used reasonable means in the circumstances.

Indeed the reasonable used were reasonable as firstly they were the only means available and secondly a spear is an equally lethal weapon.

4a) whether the harm he caused was to the attacker.

This is obviously so as deceased is the one who was about to attack the first state witness with a spear at close range.

4b) whether the harm caused was not grossly disproportionate to the one liable to be caused by the attacker.

The harm caused by the deceased on the deceased was proportionate to the harm that could have been caused by the deceased to the first state witness as a spear thrust at close range on equally lethal weapon. The court has also factored in the following aspects

- 1) that the accused and the first state witness were on duty doing their work of antipoaching activities.
- 2) the deceased was most probably a poacher and a trespasser at this farm.
- 3) It was in the middle of the night at about 0300 hours.
- 4) the deceased was armed with a lethal weapon, not only did he trespass but he also was the aggressor on that day. He reacted violently to the first witness's instruction to stand still.

In the circumstances, the concession by the state counsel was proper in our view. The state has failed to adduce evidence upon which any reasonable court could convict. It is for these reasons that the application for discharge at the close of the state case succeeds and the accused person is accordingly found not guilty and is acquitted.

*National Prosecuting Authority*, the state's legal practitioners  
*Morris-Davies & Company*, accused's legal practitioners

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