THE STATE
versus
GERALD MABVUMBE

HIGH COURT OF ZIMBABWE
HUNGWE J
MUTARE, 27 & 30 October 2015 & 4 November 2015

Assessors: 1. Mr Rajah
                        2. Mr Chipere

Criminal Trial

Mrs *J Matsikidze*, for the state
F Matinhure, for the defence

HUNGWE J: The accused pleaded not guilty to a charge of murder as defined in s 47 (1) of the Criminal Law (Codification and Reform) Act, [*Chapter 9:23*]. The state alleges that at Hartzell High School, Old Mutare, Penhalonga, on 11 October 2008 with actual intent, or realising the real risk or probability of death occurring the accused stabbed Raynot Museta once on the back with a screw-driver, thereby inflicting injuries from which the said Raynot Museta died.

The following sequence of events is common cause or not in serious dispute.

The accused's uncle was at the time the Headmaster at Hartzell High School, Old Mutare. Although the accused had been employed as a school teacher, by October 2008 he was no longer employed as such. Most of his former work-mates were still in the employ of the school. He interacted with both students and teachers alike. On the day in question he had been at the class-room blocks together with his friend, one Charles Makadzange ("Charles"). He had a misunderstanding with one of the students Takudzwa Nyamangodo. After this misunderstanding he and Charles left and proceeded to his place of residence.

What transpired after they got home is a matter of some dispute. There is agreement amongst the witnesses that the accused had agreed to download music onto some media device provided by the two students who had accompanied him and Charles. On the other hand he says whilst he was engaged in the task, he decided to fix or repair an old radio.

It is not in dispute however, that he had locked himself inside his house whilst Charles and the students remained outside by the window. It is also common cause that whilst so occupied a group of students descended onto the residence and knocked at his door.

The accused asked Charles to attend to the knock. The emissary Charles came back and advised him that the students required his presence outside. It is also not in dispute that the crowd of students was outside. After some hesitation, he eventually came out to meet the crowd. The crowd appeared agitated. There is no agreement as to how the discussion proceeded besides what the accused himself told the court.

There is agreement however that the students were not patient with the manner in which the accused was conducting himself with their spokesperson. There is agreement too that one of the students who was not identified either by the state witness or by the accused, initiated an assault on the accused by striking him with a weapon below the waist.

This led to the accused hitting back. Thereafter, there was a melee as more students joined the fracas. As to how this melee proceeded, there are various versions given depending on where the narrator stood and his power of observation. The scene was fluid, so were the events and the emotions.

Faced with this situation, the accused, tried to fight off the attack by striking wildly with the screw-driver which he had brought from inside the house. That blow found its mark on the left back of Raynot Museta and punctured his internal organs. Upon realising that the accused was armed the students broke up and fled from the scene. Deceased fell after running a few paces.

He was later carried away but it was clear immediately that the blow was fatal as the deceased could not speak upon being rescued by his fellow students. There is no dispute as to how the assault on the deceased occurred.

On the one hand the state alleges that when the accused came out of the house, there was no indication that he was armed with a lethal tool as a screw driver.

In our law the defence of private defence, that is, self-defence of third person and property is one which excludes unlawfulness and excuses or justifies the actions of the accused.

G Feltoe in his book *A Guide to Commercial Law-Zimbabwe* explains that defence at p 42 as follows;

"The law provides that a person is entitled to take reasonable steps to defend himself against an unlawful attack or take reasonable steps to defend another against an unlawful attack. Harm or even death may be inflicted on the assault in order to ward off the attack."

The requirements for the defence are:

a) an unlawful attack;

b) upon accused or upon a third party where accused intervenes to protect that third party;

c) the attack must have commenced or be imminent;

d) the action taken must be necessary to avert the attack;

e) the means used to avert the attack must be reasonable.

In the present case the accused was besieged by a group of 40-50 students whilst he was within his house. They called him out and engaged him in an animated discussion.

They formed a crescent shaped circle around him; thereby closing his access to escape to safety should the need arise.

The situation was admittedly volatile and the students initiated an attack on him without warning by a strike below the belt leading to what a witness described as chaos and confusion. Accused says he was felled in the melee that followed and to rescue himself he accidentally used the screw driver to ward off the attack.

See *S* v *Magoge* 1988 (1) ZLR 163 (SC); *S* v *Nicolle* 1991 (1) ZLR 211 (SC)

Even if the use of the screw driver was not accidental, in our view, the accused was entitled to resort to its use in the agony of the moment. A group of 40 to 50 students threatened his own life. It was in our view kill or be killed. He did not have the luxury of the opportunity to decide how he was going to survive an attack with sticks and stones.

The use of the screw driver, in the particular circumstance of this case, was reasonable in order for him to avert the ongoing attack.

In our view his actions were justifiable and therefore excusable and the defence of self-defence is available to him.

He is accordingly found not guilty and acquitted.

National Prosecuting Authority, state's legal practitioners
Gonese & Ndhlovu, defence's legal practitioners