THE STATE
versus
TAFIREI RUNESU

HIGH COURT OF ZIMBABWE
MAFUSIRE J
MASVINGO, 19 & 20 June 2017 & 14 July 2017

Criminal trial

Assessors: Messrs Mutomba & Dhauramanzi

Mr *B.E. Mathose*, for the State
Mr *D. Charamba, pro Deo*, for the accused

MAFUSIRE J:

[a] *Introduction*

[1] On 16 August 2016 the accused struck and killed the deceased. He was charged with murder. He pleaded self-defence. A trial ensued over two days. Only two witnesses gave oral testimony: the deceased's wife, Jennifer Mushandu ["Jennifer"], and the accused himself.

[2] Initially the State had lined up five witnesses. They were Jennifer; one Julius Gavure ["Julius"]; Tendai Mutovo ["Tendai"], the accused's wife; the police investigating officer, and the medical doctor who conducted the post mortem examination on the deceased's body and compiled a medical report.

[3] The State abandoned plans to call Tendai. She was not a compellable witness. The evidence of Julius, the police officer and the medical doctor was admitted without objection.

[4] In closing submissions after the trial, the State abandoned the charge of murder. It pressed for a conviction on culpable homicide. Here is our judgment.

[b] *The facts*

[5] The facts were largely common cause, or uncontroverted, either because both the State and the defence agreed to them, or they were not challenged by the one side when the other side presented them, or because there was some convergence on some aspects of the evidence of Jennifer and the accused. Areas of conflict will be indicated along.

[6] On the fateful day, the accused, a brother-in-law to the deceased, fought at a beer drink. They were separated by other imbibers. Each went their separate ways. Soon after, the deceased came back to the beer place. Jennifer was following behind. She was remonstrating with, and dissuading him from pursuing the accused.

[7] At the beer drinking place, the deceased demanded to see the accused. He was holding a knife. Jennifer denied the deceased had been holding a knife at that stage. But in the summary of her evidence, it had been stated in part that the deceased had shown the patrons at the beer place the knife that he had been carrying. Furthermore, Julius' summary of evidence that was admitted without objection, stated among other things, that he was the village head; that he had been present when the deceased and the accused had fought earlier on; that when the deceased had come back a little while later with Jennifer following behind, he had tried to stop him, but that the deceased had produced a knife.

[8] When he was told that the accused was not at the beer place, the deceased left for the accused's homestead. Jennifer followed. Accused's homestead was surrounded by a wooden fence. There was only one entrance. The deceased entered. Jennifer remained standing outside. She said as a sister-in-law to the accused, it was contrary to cultural norms for her to have entered the accused's yard.

[9] The accused saw the deceased entering his yard and holding a knife. It was a flick knife, 24 cm long. The blade alone was 11.2 cm long. It weighed 0.085 kilogrammes. The knife had been flicked open already. The accused ran inside his kitchen hut for shelter. The deceased followed. The accused came out running. His wife, Tendai, came out too. She was remonstrating with the deceased who was her half-brother.

[10] The accused ran behind his bedroom hut and sought shelter behind a tree. The deceased followed. He thrust the knife towards the accused but missed. The accused ran towards a scotch-cart that was parked between the kitchen and the bedroom. The deceased followed. He chased the accused round that scotch-cart twice. Again he thrust the knife towards the accused. Again he missed. Tendai continued to plead with the deceased. He threatened to attack her if she persisted.

[11] Initially, in her evidence-in-chief, Jennifer said as the deceased chased the accused round the scot-cart he was holding a knife. However, in cross-examination she denied that he had been at that stage holding a knife. She claimed it was inside the pocket of his jacket.

[12] The accused ran out of the yard and towards the entrance to the homestead. It was the only escape route. As the accused opened the wooden gate to get out, the deceased caught up with him. It was from this moment on that there were serious conflicts in some aspects of the evidence.

[13] The accused's version was that the deceased lunged forward and thrust the knife at the accused. He missed. The momentum brought him down. But though it missed the accused's body, the knife caught the accused's shirt and tore it. The accused pulled off the shirt hurriedly.

[14] The accused said once outside the gate, he ran towards the goat-pen. It was some twelve metres away from the entrance. The deceased got up and came after him. He chased the accused round the goat-pen twice.

[15] The accused randomly picked a log from several of them at the goat-pen. The log, when measured and weighed subsequently, turned out to be 1.56 metres long and 1.815 kilogrammes in weight.

[16] On the other hand, Jennifer's version on that point was that she did not see the episode by the gate where the deceased had lunged forward and thrust the knife at the deceased. But she admitted the deceased had been following the accused, "…*still holding the knife*." She admitted at some stage the deceased had fallen down and that when the accused had come out of the homestead he had no shirt. She said she did not know why. Even though she denied seeing the deceased trying to stab the accused, she admitted later on that he had *missed*. "*Missed what*", asked State Counsel? "*He just fell down*", she replied.

[17] Around the goat-pen, Jennifer said the accused was walking *briskly*, not running, but with the deceased following behind.

[18] Regarding the crucial moment when he struck and killed the deceased, the accused said after picking the log, his hope had been that the deceased would realise that he was now armed and so would relent. However, the deceased had continued to come after him. It was only when the deceased had caught up with him again that he turned round and struck him with the log, once on the head. He claimed he had become exhausted and could run no further or no more.

[19] This version is consistent with that in his warned and cautioned statement that was recorded some three days after the incident. He wrote: "*I then picked a log which was at the goat pen <u>and continued running away holding it</u>* [my emphasis]. *He kept chasing after me for a distance of about 40 metres. I then stooped, turned back and struck him once with a log on his head and he fell down to the ground*."

[20] On the other hand, Jennifer, at first in evidence-in-chief, said after picking up the log, the accused turned round to face the deceased, shouting; "*Now I am going to kill*

you!" Seeing that the log the accused had now armed himself with was a more dangerous weapon than the knife the deceased was holding, she and Tendai, despite initial misgivings about touching a shirtless brother-in-law, physically pushed the accused back for some thirty metres or so. However, the accused overpowered them. At that moment the deceased, whose fall earlier on had stalled him, arrived. The accused struck him a single blow to the head. The deceased fell down and lay still. The accused shouted, "*You will die for nothing*!" He then threw down the log and just walked away.

[21] Led by State Counsel, Jennifer said there had been ample opportunity for the accused to have continued running away from the goat-pen. She said he could have run along the road that passed through the area, or entered the nearby bush. She denied that the accused could have been so exhausted as to have been unable to run away any further.

[22] Under cross-examination, the accused claimed that after leaving the scene, he had walked some seventy kilometres to the police station to make a report.

[23] From the post mortem report, the cause of death was massive head injury and intracranial bleeding.

[24] After all her evidence, but before she was excused, State Counsel asked Jennifer if the accused had paid compensation for the death of the deceased. Her answer was a flat no. However, in cross-examination on this point, she admitted that he had paid "*misodzi*", a form of compensation under traditional African custom. This was in the form of five head of cattle. Four had been retained by the deceased's extended family. The fifth had been slaughtered for food at the funeral.

[c] *The law on self-defence*

[25] A person who is the victim of an unlawful attack is entitled to resort to force to repel such an attack. Any harm or damage inflicted on the aggressor in the course of such an attack, or when it is imminent, is not unlawful.

[26] By an unwritten social contract, the State takes it upon itself to protect private citizens from unlawful attacks by others. In return, the citizens refrain from retaliating, or resorting to self-help, or to private vengeance, as these threaten good order and the rule of law.

[27] However, since it is not altogether possible for the State's law enforcement agencies to be always around each and every citizen to render the necessary protection round the clock, the law allows, out of necessity, private citizens to take the law into their own hands and resort to self-help to quell the unlawful attack by any means necessary, including killing the assailant. But concerned with the need to preserve human life, and to avoid indiscriminate killing under the guise of private defence, most legal systems impose some restrictions on the defence of self.

[28] In Zimbabwe, self-defence is governed by s 253[1] of the Criminal Law [Codification and Reform] Act, [*Cap 9:23*] ["the Code"]. It reads:

> "[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 [*emphasis added for discussion later on*] 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."

[29] The above requirements are conjunctive, not disjunctive. In other words, a person pleading self-defence must meet all of them in order for the defence to be available to him as a complete defence. If not, and in terms of s 254 of the Code, the person may escape a verdict of murder but may be convicted of culpable homicide. In other words, if it is shown that the accused did, or omitted to do anything that is an essential element of the crime of murder, he shall be guilty of culpable homicide if all the circumstances for self-defence are satisfied except if the means he used to avert the unlawful attack were not reasonable in all the circumstances – for example, hitting back instead of running away, if he could. We have reached a verdict.

[d] *Reasons for the verdict*

[30] Jennifer's testimony was riddled with contradictions. We found it unsafe to rely on it. A few examples will suffice:

- She denied the deceased was holding the knife when he entered the accused's yard. Yet, according to Julius, and even in the summary of her evidence, by the time the deceased came back to the beer place, with herself following behind, he had already pulled out the knife. Furthermore, she later on conceded that as he chased after the accused out of the yard, the deceased *was still holding the knife*.

- She did not see the deceased lunging at the accused and thrusting the knife. She did not see the knife catching the accused's shirt. She did not see how and why the deceased had fallen down. But she subsequently admitted that the deceased had *missed*. She was vague about what it is he had *missed*.

- The picture that she graphically painted in her evidence-in-chief was of the accused picking up a log from the goat-pen, turning back to face the deceased and announcing his intention to kill him, which he instantly proceeded to fulfil. However, she conceded in cross-examination and, in the process, corroborated a crucial aspect of the accused's evidence, that he did not immediately confront the decease after picking the log, but that he had continued to move away from the deceased.

- She nearly misled the court that the accused had not paid some form of compensation for the death of the deceased.

[31] In this matter, virtually all the material facts are common cause. They are these:

- The deceased was armed with a dangerous and wicked weapon.

- The deceased was determined to use that weapon. He did try, not once, not twice, but three times. The third time was too close. The knife tore up the accused's shirt.

- The accused was constantly running away, with the deceased in hot pursuit. For example, he ran away from his hut. He ran round his bedroom. He ran round his scotch-cart, not once, but twice. He ran completely out of the yard and of the homestead enclosure. He ran round the goat-pen outside the homestead, not once, but twice. Finally, he picked and armed himself with a log from the goat pen, at least to try and balance the odds. Even then, he did not immediately turn to confront the deceased. But the deceased was undeterred. He continued to come after the accused.

[32] The accused said he had become exhausted. That was when he had eventually turned round and struck a single blow on the deceased's head. Unfortunately, it had proved fatal.

[33] After the third thrust of the knife by the deceased, there can be no telling what could have happened on the fourth and or subsequent times. Probably, the accused might not have been the one in the dock, but the one in the box. Conversely, the deceased might not have been the one in the box but the one in the dock.

[34] We discount some aspects of Jennifer's evidence, denied by the accused, on the basis of self-interest. We do not blame or condemn her. She was the deceased's wife. Not unnaturally, she seeks retributive justice. But even the State, in the closing submissions, fairly concedes that there was a "… *tinge of exaggeration* …" in her evidence because she had tried to tone down the deceased's own role. Furthermore, early in her evidence-in-chief, State Counsel had had to remind her that it was common cause that her husband had been the aggressor. He had to caution her that there was no need to try and defend him posthumously.

[35] In addition to the aspects pointed out above, we have further discounted Jennifer's evidence for self-interest, and for being incompatible with probability, on the following aspects:

- that she and the accused's wife, at the crucial moment, pushed the accused away and thereby bought him enough time to escape;

- that the accused ought to have continued to run away along the road or to enter a nearby bush;

- that after grabbing the log from the goat-pen, the accused had turned round and confronted the deceased, shouting, "*Now I am going to kill you!*"

- that after striking the fatal blow, the accused had shouted to the deceased, who had fallen down and gone limp, "*You will die for nothing*!"

[36] Undoubtedly, except for para [*b*] of sub-section [1] of s 253 of the Code, that says that the accused must have believed, on reasonable grounds, that his conduct was necessary to avert the unlawful attack and that he could not otherwise escape from or avert the attack, there is no debate on all the other elements of self-defence. They have been completely satisfied.

[37] But even with para [*b*] above, we believe the law is not exacting an impossible standard of human behaviour. Armchair criticism of an accused's reaction many days, or weeks, or months or even years after the event, and in the comfort of the court-room, and which ignores the exigencies of the occasion, is to be avoided. The accused is not to be judged as if he had both the time and the opportunity to weigh calmly the pros and cons in the sudden emergency created by the unlawful attack: see *Union Government [Minister of Railways & Harbours] v Buur*[1]. The law does not demand a detached reflection in the face of an up-lifted knife: see *Brown v United States*[2].

[38] In applying the requirements of self-defence to the flesh and blood facts, courts adopt a robust attitude. They do not seek to measure with nice intellectual callipers the precise bounds of legitimate self-defence; see *S v Ntuli*[3] and *S v Banana*[4].

[39] The import of para [*b*] is that self-defence ceases to be a complete defence if the accused could have run away to avert the attack on himself and to avoid killing the deceased. But obviously this duty to retreat or flee is insisted upon only if it is possible or safe to do so, without exposing oneself to even greater danger. A man is

[1] 1914 AD 273, at p 286
[2] 256 USR 335 at p 343
[3] 1975 [1] SA 429 [A] at p 437E
[4] 1994 [2] ZLR 271 [S] at p 274F - H

not obliged to gamble with his life by exposing himself to the risk of a stab in the back: see *S v Steyn*[5]. The law will excuse him if by killing his assailant, he secures his own safety, if there is no other way.

[40] In *S v Zakalala*[6] the deceased, supported by a number of friends, launched a murderous attack on the accused with a long knife. The accused avoided two thrusts of the knife by dodging and jumping over a bench. They were in a crowded beer-hall. To repel a further attack, the accused opened a small pocket knife then in his possession and stabbed the deceased. The trial court dismissed the accused's claim to self-defence on the basis that he had gone too far, and that if he had once jumped over one bench, he ought to have kept on jumping over other benches. However, on appeal the conviction was overturned on the basis that the accused could not be obliged to have borne the risk of stumbling over the other benches just in order to get away.

[41] In the present case, the State says the accused should have continued to run away. The accused says he had grown tired and could go no further. The State says that is a lie because after striking the deceased, the accused, per his own admission, still had enough stamina to walk a whopping seventy kilometres to the police station to make a report.

[42] However, there are some flaws in the reasoning by the State:

- Firstly, the distance of seventy kilometres was just a thumb-suck by the accused under a barrage of questions in the heat of cross-examination, and was never tested for accuracy or reasonableness. We find it unfair to hold it against him.

- Secondly, that he was tired and could run no further away from the unrelenting and prolonged pursuit at the goat-pen does not mean that afterwards he could not have walked that long distance to the police station. Walking freely at one's own pace is different from being forced to run for fear of an attack, especially after what the accused had been through.

[5] 2010 [1] SACR 411 [SCA], para 21
[6] 1953 [2] SA 568 [A]

- Thirdly, in terms of sub-section [2] of s 253 of the Code, in determining whether or not the requirements of self-defence have been satisfied in any given case, the court is obliged to take into account the circumstances in which the accused finds himself, including any knowledge or capability he may have and any stress or fear that may have been operating on his mind [*my emphasis*].

[43] Applying this particular requirement for self-defence to the facts of this case, we note the following:

- The accused was a person who, for the greater part of the time, had been running away from a murderous brother-in-law;
- He was a person who had run for shelter into his own kitchen but who the unrelenting deceased had dislodged him from there;
- A person who each time he put distance between himself and his assailant, the latter would always catch up with him;
- A person whose shirt had been caught by the third thrust of the knife;
- A person whose wife and the deceased's wife, the only people present at the crucial moment, had been totally ineffective in restraining or remonstrating with the deceased;

[44] What guarantee then, in his subjective state of mind, did the accused have that he was now going to outpace the deceased if he had continued to run away from the little barrier that the goat-pen had provided?

[45] The State, basing on Jennifer's jaundiced opinion, argued that the accused should have aimed the blow away from the head, admittedly a delicate part. However, as already been stated, the accused, under such circumstances, should not be adjudged as if he had the opportunity and the time to weigh, with mental calmness, the pros and cons in the sudden emergency. We are satisfied by his explanation that he just swung the log and struck the deceased indiscriminately.

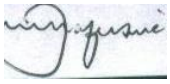
[46] To convict under such circumstances would bring the law and the justice delivery system under ridicule. The standards of behaviour set by the law must be attainable.

The accused was entitled to defend himself in the manner he did. The deceased was the author of his demise.

[e] *The verdict*

[47] The accused is found not guilty of murder, as charged, or of any other offence. He is hereby discharged.

14 July 2017



National Prosecuting Authority, legal practitioners for the State;
Mutendi, Mudisi & Shumba, legal practitioners for the first accused, *pro Deo*