

THE STATE

Versus

MASIMBA MAZENDAME

IN THE HIGH COURT OF ZIMBABWE

MOYO J with Assessors Mr A.B Mpofu and Mr W.T Matemba

GWERU 16 AND 17 MAY 2022

Criminal Trial

M Shumba, for the state

T. Kamwemba, for the accused

MOYO J: The accused person faces a charge of murder it being alleged that on the 1st of April 2021 at about 0300 hours the accused fired a rifle and shot deceased Clearance Mhanga on the forehead, neck and shoulders thereby causing his death. The accused person denies the charge.

The following were tendered into the court record as exhibits and they were all duly marked

- the state summary
- the defence outline
- the accused's confirmed warned and cautioned statement
- the post mortem report
- the firearm allegedly used

The state led evidence from 3 witnesses and the accused gave evidence for the defence. That is Tinotenda Makonese, Tafara Makonese and Simon Mutseta.

The evidence of the following witnesses was admitted into the court record as it appeared in the state summary in accordance with the law. The evidence of

- Daniel Muwala
- Richard Mazvawidza
- Brighton Batai
- Leonard Kauteno
- Sharon Nyoni
- Dr Juano Rodriguez Gregori

The evidence of Sifelani Dhauya was expunged from the court record.

The state led *viva voce* evidence from 3 witnesses. Unfortunately, the evidence of these 3 witnesses is after the fact. They did not witness what happened before and during the shooting. They all come in after the fact. The accused's version is the only version relating to the events before and during the shooting incident.

Tinotenda Makonese was the first to testify, all he told the court is that he lives at No. 14 Hudson Road Lundi Park Gweru where accused was employed as a Security Guard. At around 3 am he heard a gunshot and an alarm. He checked the CCTV and saw a person over the durawall exiting. Accused later told him that he had seen a dead body while checking the perimeter fence. The dead body was on a yard adjacent to their yard. He said he could not dispute that there were many intruders as during those times there had been a lot of intruders in the area.

Tafara Makonese was the next to testify, his testimony was basically similar to that of the previous witness but, he confirmed that accused told him that there were many people that had intruded. He said he told the police about the CCTV footage which they also viewed.

Simon Mutseta was the next to testify and he told the court that on the fateful day he was on duty with the accused and that he went to sleep when it was his turn to sleep. At around 1 – 2 am he heard some noise and woke up, accused told him that a person had intruded and he fired a gun. In the morning he saw the deceased's body but he stood at a distance. He did not observe any weapons or stones at the scene. Questioned as to the fact that accused saw 3 – 4 people, he said he could not dispute that but accused told him that he had seen a person as in one person.

The accused gave evidence for the defence. He told the court that he is employed as a Security Guard and that he was so employed at the material time. He told the court that on that fateful morning, as he guarded the premises some stones were thrown, and the dogs were running away and scared. He said he was seated opposite where these people were coming from. They came in and he could see that they were people. The area was not well lit. He cocked the gun and then fired a warning shot towards their direction as he wanted to scare and disperse them. They were armed although he could not clearly see what they were armed with. Asked under cross-examination that he aimed at the deceased and in the direction of the noise, he told the court that the firearm faced upwards whilst he was in a seated position. Asked further, why he did not fire in the air he replied by saying he aimed into the air whilst in a seated position. He was asked to explain how the bullet hit the deceased on the forehead and he replied by saying he was not sure because he had seen these other 3 intruders and not the deceased. He told the court that there had been a spate of intruders and robberies

in the area and that he had previously fired in the same direction but no one had been injured. He said he could not see clearly what they carried but they had weapons. It was put to him that he shot deceased in full view and he disputed that. He also demonstrated to the court that he sat down and pointed the firearm upwards but facing the direction where the intruders were coming from.

The state counsel submitted that the accused's actions should be found to be wrongful and negligent in the circumstances for the following reasons:-

- 1) That Simon Mutseta said accused told him about only one intruder and that therefore accused is lying when he says there were more.
- This court is unable to make this finding because the other state witness Tafara Makonese said the accused person told him that there were many people that had intruded. It then becomes difficult to use Simon Mutseta's version on what he was told by accused yet the other state witness does confirm the accused's version on that point. In that respect, the accused should get the benefit of the doubt on that point as this court cannot accept Mutseta's evidence and reject accused's evidence yet the other state witness confirms it. An accused's version is not rejected for the simple reason that he is an accused. The state must rebut it and show beyond a reasonable doubt that it is false.

The state counsel also submitted that we should find that the accused deliberately lied in his defence outline on a material point regarding whether the intruders were armed with machetes or not. Since in his evidence in chief he was saying they were armed without specifying the weapons. Clearly, from the accused's version, intruders had come to this area before armed with machetes etc obviously as a human being he cannot be penalized for having assumed what

he was accustomed to. This court is not satisfied that there was a deliberate lie in this respect in a bid to mislead the court.

At this juncture I would also comment on the demeanor of the accused person in the witness box. He did not strike the court as someone bent on lying at all costs. In fact he appeared to be telling the court the truth. There is nothing both in the court record and in his demeanor that would make this court doubt his version for an accused's version is not doubted or rejected for the simple reason that he is an accused. There must be more to such a finding than minor imperfections in his testimony.

The state counsel further submitted that the absence of weapons at the scene the following morning should also point to the fact that these people were not armed at all. However, it would be very dangerous in my view for the court to make such an assumption since there are allegedly other 3 intruders that fled. What if they fled with the weapons? It would be stretching it too far to hold that their mere absence the following morning would mean that they were never there, as the intruders could have fled with the weapons. It is simply unknown what could have become of the weapons if they were there, this is a grey area that the state itself has no evidence to shed light on. It is trite that in our criminal justice system no factual findings can be made where there is a gap evidentially, in that instance the accused benefits.

The state counsel further submitted that the accused must have aimed the gun at the deceased resulting in him being struck on the forehead as it would have been impossible for him to be struck on the forehead if accused had pointed the gun upwards. Again, this court is of the view that such a finding cannot be made in the circumstances of this case as there is no evidence that was led from a ballistic expert to tell the court the characteristics of the firearm tendered before

this court. How and under what circumstances it would shoot. Whether it is possible to fire a warning shot seated in the manner that accused was seated and how the bullet was then likely to travel. Also, on the scientific possibilities of how deceased could have been shot on the forehead considering where accused was in relation to where deceased was and whether accused should have foreseen as a firearm user how the bullet would travel. All these questions should have been answered through expert evidence wherein the court would appreciate the whole issue as well as be able to assess if accused's version is not reasonably possibly true in the circumstances? There is a gap without the ballistic expert's testimony for, this court cannot make a finding that the manner in which the warning shot was fired was wrong yet it does not appreciate the specifics on the science related to the usage of firearms, this particular firearm's characteristics and what the user is expected to do in using or handling it. The court is just blank in this regard and is handicapped in fully assessing the accused's version and being able to sift through it. Again, this inadequacy benefits the accused person as the court cannot draw conclusion against him where the court itself does not have knowledge.

This is worsened by the fact that the accused was guarding property and persons, he was on duty. He did not just indiscriminately fire a gun with no just cause. He fired according to him a warning shot when he realized that a number of intruders had trespassed into the yard he was guarding. This was at 3 am and obviously one will not have expected the accused to sit back and see how dangerous the intruders would become at that hour. He had a duty to act. His own life could be on the line as well. This court takes judicial notice of the spates of armed robberies in the recent years in the country. Accused told the court that the area he was guarding was no exception as it had also been subjected to them. To then take an armchair approach and say you should have done something else

other than what you did would be unfair to the accused. He told the court that to him he was firing a warning shot, his gun was pointed upwards but in the direction of the intruders. There is no other evidence for this court to find otherwise.

The case of *S v Mpofo* that the state counsel alluded to is in fact, different from the current case as in the current case, the accused and the property he was guarding were under an unlawful attack wherein he had a duty to defend, himself, others and the property. In the Mpofo case, there was negligence in shooting at a fleeing van in a bid to enforce the law where no one was in danger of anything. The circumstances of the 2 cases thus differ in perspective in our view.

In this court's view, accused acted in self defence of himself, others in that household and the property that he was guarding in terms of both section 253 and section 257 of the Criminal Law Codification and Reform Act Chapter 9:23. In terms of section 252 of the Code an unlawful attack means any unlawful conduct which endangers a person's life, bodily freedom or integrity. In terms of section 253 the fact that a person accused of a crime was defending himself or herself or another person against an unlawful attack when he 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 did or omitted to do the thing, the unlawful attack had commenced or was imminent, and he or she behaved on reasonable grounds that the unlawful attack had commenced or was imminent:

(In this instance, intruders, armed, scaling a durawall at 3 am do amount to an unlawful attack as they are obviously trespassing with an intent to commit a crime as no one would scale a durawall at 3 am when the intention is good and not harmful.)

- b) that his or her conduct was necessary to avert the unlawful attack and he or she could not otherwise escape from, or avert the unlawful attack, or if he or she believed on reasonable grounds that his or her conduct was necessary to avert the unlawful attack and that she could not otherwise escape from or avert the unlawful attack and that the means he used to avert the unlawful attack were reasonable in all the circumstances and that any harm or injury caused by his conduct was caused to the attacker and not any innocent 3rd party and that it was not grossly disproportionate to that liable to be caused by the unlawful attack.

Obviously, intruders, armed, coming in and scaling a durawall in the wee hours of the morning, armed with whatever weapons, do not mean well for the occupants of the household under attack. Anything can happen while they are in a bid to achieve their unlawful intentions. The accused reasonably assumed that an unlawful attack was imminent in the circumstances, he fired what was according to him a warning shot. He could not otherwise avert the unlawful attack through any other means like fleeing as he could not flee (himself being the armed guard) so that he leaves the other guard and the occupants of the house at the mercy of the intruders. Had he fled he would have failed in his duty to guard the premises. As a guard, it is reasonably expected that he can be harmed by intruders and therefore his life, together with the rest of the occupants of that household was under threat. He did what according to him would scare the intruders, but unfortunately the deceased was then fatally injured. The wrongfulness and unlawfulness of accused's actions in the circumstances that he was in becomes very difficult to conclude.

The same applies to the requirements of section 258 under the defence of property. I will not repeat the requirements for that section as they are somewhat similar to the requirements under section 253.

Section 259 which the state counsel alluded to as the applicable section, is in fact not the relevant section in this matter as it is only applicable if the person was defending property but has been found to satisfy all the requirements in section 257 and 258 except that the means used to avert the unlawful attack, were not reasonable in the circumstances. It has been our finding that there is no evidence that accused deliberately fired at the intruders and that there is no evidence of what would happen if he fired the firearm at the angle that he did. It therefore becomes difficult to find that he should have acted in any other way other than the one in which he acted. The moment the fatal shot came from what the accused believed to be a warning shot it then becomes difficult for the court to find that in fact it was not a warning shot and to find otherwise as already explained in this judgment.

This is one unfortunate case where the loss of a life cannot be attributed to both intent and negligence on the accused's part as such evidence has not been presented before the court. It is for these reasons that the accused person is found Not Guilty of murder and is acquitted.

National Prosecuting Authority, state's legal practitioners
Tavenhave & Machingauta, accused's legal practitioners