

THE STATE
versus
SIMBARASHE LEONARD MUPAWAENDA

HIGH COURT OF ZIMBABWE
HUNGWE J
MUTARE, 27 October 2015; 2, 3 & 4 November 2015

Assessors 1. Mr Rajah
 2. Mr Chipere

Criminal Trial

M Musarurwa, for the state
P Rajah/D Tandiri, for the defence

HUNGWE J: The accused shot an illegal diamond panner at night within a fenced and protected area in Marange diamond fields on 3 July 2014.

He now faces a charge of murder it being alleged that he unlawfully and with intent to kill, shot Farai Madenga with a shot-gun rifle on the head thereby causing injuries from which the said Farai Madenga died.

The facts are not in dispute. The issue raised by this matter is whether the guard on duty under an unlawful attack can successfully raise the defence of private defence and or the defence of property.

The facts which are common cause are as follows:

1. The accused was employed by a private security company as a security guard. He was deployed at Marange Resources diamond fields, Chiadzwa, Marange.
2. On 3 July 2014 around 19h00 the accused was on duty together with his patrol team-mate. He was armed with a 12-bore shot-gun rifle. His team mate was a canine handler with his patrol dog.

3. It was a dark night. Visibility was good only at 5 metres and poor at 10 metres none beyond 15 metres. They heard the sound of illegal panning activity in their area of jurisdiction.
4. They decided to approach the scene at the same time sending a radio message for reinforcements. Before help arrived they came under attack from a stone throwing mob.
5. The attackers yelled and shouted that they will kill the accused and his work-mate. They were encircled.
6. The accused fired a warning shot to persuade the illegal panners to disperse and desist from attacking them. The dog got too timid to act, bark or engage the hostile mob.
7. He fired the second shot as the attacking mob persisted. Deceased was hit and the mob dispersed.

Section 257 of the Criminal Law (Codification and Reform) Act, [*Chapter 9:23*] provides that defence of property will be a complete defence to a crime which an accused is charged if the accused is charged with a crime for his actions in defending his or her property if all of the following requirements are satisfied:

- a) When the accused did or omitted to do the thing, the unlawful act had commenced or was imminent;
- b) Accused's conduct was necessary to avert the unlawful attack;
- c) The means used to avert the attack, unlawful attack were reasonable in all the circumstances;
- d) Any harm or injury caused by accused's conduct;
 - (i) was caused to the attacker and not to any imminent third party; and
 - (ii) was not grossly disproportionate to that liable to be caused by the unlawful attack.

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

Section 258 provides the more stringent requirements where there is a killing in defence of property.

Where an accused is charged with the crime involving the killing of another person that accused is not entitled to rely upon the defence of property unless the following requirements are all satisfied.

- (a) The accused resorted to killing after taking all other possible steps to protect the property concerned.
- (b) The property concerned could not have been defended by any other means except killing,
- (c) The property concerned was of vital importance to accused;
- (d) The accused reasonably believed that he or she would not receive adequate compensation for any destruction, damage or injury caused to the property concerned by the unlawful attack;

In determining whether or not these requirements 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 capacity in which he or she may have had and any stress or fear that may have been operating on his or her mind.

In determining whether or not any means used by a person to avert an unlawful attack were reasonable, or whether or not any harm or injury caused to an attacker was proportionate to liable to be caused by an unlawful attack, a court will have regard to the nature of the property which the person was trying to protect and its value to him or her.

In light of the above this court has determined that not only was the accused lawfully employed to protect the employer's assets from theft, he was also entitled by law to protect himself in the event that during his call of duty he is personally attacked. The events of 3 July 2014 show that the accused suddenly found himself under an unlawful attack from sources unknown but whose threats to life were quite loudly and clearly stated.

It was a case on kill or be killed as the illegal panners, instead of complying with a warning to disperse, actually announced their intention to kill the guards. In our view had the deceased not taken the step he took, he may have featured in this case as the deceased.

The illegal panners approached a fenced-off mining location by night with the full knowledge that they may encounter armed guards. When they did encounter them, they did not flee but began aggressive and attacked the guards first.

Visibility was poor. Their number was unknown; help was late in coming; the dog had been cowed into submission by the atmosphere of gunshot and noise.

In our view, the accused has met the requirements met out in both s 257 and 258 of the Criminal Law Code.

He is entitled to his acquittal. He is therefore found not guilty and is acquitted.

Prosecutor General's Office, state's legal practitioners
Tandiri Law Chambers, defence's legal practitioners