

THE STATE  
versus  
ELIAS SEDZE

HIGH COURT OF ZIMBABWE  
HUNGWE J  
MUTARE, 4 March 2014 and 6 March 2014

**Trial cause**

Assessors 1. Chidawanyika                      2. Rajah

*Ms C. Sungayi*, for the State  
*Ms T. Gutuza*, for the Accused

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 [*Cap* 9:23].

The charge arose out of the events of the night of 7 April 2011 at Village A, Nyahukwe, Rusape where it is alleged that the accused unlawfully and without intent to kill or realising that there is a real risk or possibility that death may result, struck Columbus Sedze with an axe once on the neck thereby causing injuries from which he died.

Most of the facts, if not all, in this case are common cause or are not subject of serious dispute. I will set them out as follows,

1. The deceased and accused are blood brothers, deceased being the younger of the two. He is married. He shared the same homestead with his younger brother who was single.
2. The homestead was bequeathed to the siblings by their late parents.
3. On the day or rather night in question, the accused had retired to bed when his younger brother arrived home and asked for a matches to use.

4. It is not clear whether it is due to the fact that it was not given this matches or the words used by the deceased's wife in the denial of this item which triggered an outburst against the woman.
5. The accused asked his wife not to escalate the exchange and offered to calm his young brother instead. He got out of their bedroom hut to do so.
6. He did not meet with success as the deceased redirected his insults at his older brother, triggering a first fight.
7. That fight saw the siblings engage in a mortal fight. From the entrance of the couple's bedroom hut, the action moved towards the centre of the yard to a point near a fowl run under construction.
8. By then the accused felt he was losing the fight to his younger brother. He was under his brother's crushing grip.
9. The area around the construction site was at the time littered with off cuts of poles used in the construction of the fowl run. The accused hoped to make use of one such off cut. He reached out for a piece he had come across and swung it in the direction of his brother's left shoulder.
10. Suddenly his brother cried out that he had been struck. Accused's hands were wet with blood spurting from the snapped artery to the neck.
11. Deceased ran away to their neighbour and reported that accused had struck him with an axe. Accused realised that what he had picked up was not a log but an axe.

The deceased died soon after.

These are facts not in dispute.

What this court has been asked to determine is whether, on these facts, the accused should be found guilty of murder as defined in s 47 (1) of the Criminal Law Code.

The evidence in our view shows that the deceased had initially picked a quarrel with accused's wife. When accused went out to calm down deceased, he was assaulted by the deceased thereby starting a fight.

Clearly the attack on the accused by the deceased was unlawful.

Accused was entitled to defend himself against such an unlawful attack.

However where the accused raised a defence of self defence, the question which arises is whether a reasonable person, in the position of the accused and in light of the circumstances of the particular case, would have acted in the way the accused acted. In other

words for the defence to succeed on a charge of murder the question must be decided objectively.

The requirements for the defence of self are well settled. The onus remains on the State to prove beyond a reasonable doubt, that the accused acted unlawfully and that the accused realised or ought to have realised that he was exceeding the bonds of self-defence.

See *S v Ntuli* 1975 (1) S.A 429 at 436 where HOLMES JA says;

- “(i) A may intentionally and unlawfully apply such force as is reasonably necessary in the circumstances to protect himself against an unlawful threatened or actual attack at the hands of B. The test whether A acts reasonably in defence is objective.
- (ii) If A’s defence, so tested, is reasonable, both his application of force and intention to apply it, are lawful, so there is no question of death or assault on his part.”

At p 437 he went on

“In applying these formalities to the flesh and blood facts, the court adopts the best approach, not seeking to measure with nice intellectual callipers the precise bounds of legitimate self-defence or to the foreseeability or foresight of the resultant death.”

Mr Nyakumuka urged this court to find that the accused who suddenly found himself in the clutches of a murderous attack by his brother acted reasonably in resorting to the use of a log which turned out to be an axe and find him not guilty of the charge of murder but just assault.

There is no doubt in my mind that Mr Nyamhuka is correct in his submission that the accused had no intention to act unlawfully in so far as the resultant death is concerned. However, I do not think, even when one adopts a robust approach, that one can ignore the fact that the accused decided to resort to the use of a weapon can be ignored where death has resulted from a decision to resort to the very weapon that caused the death or serious injuries.

It was unreasonable in the circumstances to resort to the use of an axe whether accused noticed it before or soon after he struck, in my view, the result must be the same.

The accused exceeded the bounds of self-defence because the other party was not armed.

As such whilst the accused is not guilty of murder, he is guilty of culpable homicide as defined in s 49 (1) of the Criminal Law (Codification and Reform) Act [*Cap* 9:23].

*National Prosecuting Authority*, the State's legal practitioners  
*Chibaya & Partners*, the accused's legal practitioners