

STATE  
versus  
BOWEN SAMASUWO

HIGH COURT OF ZIMBABWE  
TSANGA J  
HARARE 22, 23, 24, 26 May 15 & 19 June & 30 August 2017

Assessors: 1. Mr Chidyausiku  
2. Mr Shenje

### **Criminal Trial**

*I Kasema*, for the State  
*R Venge*, the accused

TSANGA J: The accused Bowen Samasuwo pleaded not guilty to murder. The allegation by the state was that on the 18<sup>th</sup> of August 2009, at Bury hill farm in Banket, he unlawfully and with intent to kill, or realising that his conduct might cause death had stabbed one Noah Dennias with a knife on the back right side of his chest. The stabbing had caused injuries from which he died. The accused pleaded complete self-defence in that he was under an unlawful attack at the time.

#### The State's evidence

The deceased's mother Edith Dennias gave evidence. Her version in evidence and cross examination was that she had been harvesting beans in a field destroyed by fire and was on her way home when the accused that was on a motor bike had seen her and stopped her. He had assaulted her. It was not her field. She was the in the company of her child who was also assaulted with a switch. The accused had told her to go back where she had come from. It was also not his field. She had hidden at Machisa's plot before heading home. When she arrived home she had told her three sons, Noah, Benson and Norman about the assault. The accused had come twice to the compound and had moved around looking for an elderly woman whom he had assaulted. He had wanted to apologise. The chairperson had sent

someone to tell her that she should come to his residence. She had proceeded there with her son Noah who was ahead of her. The next thing she had seen him coming towards her saying he had been stabbed by the accused. She had not witnessed the fight between the accused and the deceased. Her sons Benson and Norman, had only come to the scene after their brother had been stabbed and had arrived when she was crying. The accused had run away after the stabbing.

In cross examination, it was put to her that the reason why the accused was at the compound was to make a report about a veld fire. She denied that the accused had mentioned anything about a veld fire and that the first time she heard him mention the fire was at Banket Police when accused stated that he had assaulted her because she refused to assist in fighting the fire. She maintained that the accused had summoned her because he had wanted to apologise for his assault. She had not reported the assault. When she had told her sons about it she had not expected them to do anything. She had advised them merely because she was visiting them from her rural area. In fact when she advised them of the assault, the deceased son had gone to sleep in his room and the other two had proceeded to their residences. In cross examination she said that she was unaware that her sons had at any point during that day visited the accused's residence after advising them of the assault.

The deceased's brother Norman Dennias also gave evidence. He told the court that whilst at the chairperson's residence, the deceased had a misunderstanding with the accused over the assault of his mother. This was after the deceased had asked the accused what had transpired that had led to the assault of their mother. A scuffle had ensued and the deceased had fallen down. The accused had produced a knife and it was whilst the deceased was trying to take the knife away that he had been stabbed. After stabbing the deceased, the accused had also tried to chase the other two brothers whilst wielding his knife.

He told the court he had witnessed the stabbing and had seen the knife and that the deceased had been stabbed on the back and on his neck. When their mother arrived they had been at the back playing games. When told of the assault earlier in the day they had not done anything. He confirmed that when they had seen the accused at the chairperson's house, that is when his brother confronted him about the assault. In cross examination, he denied that the brothers at any time assaulted the accused. He also denied throwing stones. He refuted that the accused had been stabbed above the knee during the scuffle. He equally denied that they had gone to the accused's residence earlier that day.

Benson Dennias, also the deceased's brother equally gave evidence. When his mother had initially reported the assault to the deceased, himself and his brother the last witness, were not at home. They had been playing "drafts" at the compound and had learnt from the chairperson about the assault. That afternoon the deceased had gotten to the chairperson place first with their mother and had asked the accused about the assault. A scuffle ensued. He corroborated the evidence that the accused had produced the knife in the ensuing altercation, which knife the deceased had tried to grab from him. His version was that the two had both fallen to the ground and when they tried to rise, the accused had got up first and had stabbed the deceased. The deceased had walked about 10 meters and had asked for some water to drink before collapsing. He also reiterated the fact that the accused had come after them with the knife. His explanation was that the accused probably thought that they wanted to surround him and would assault him. He also denied that the accused had at all been assaulted. He too had witnessed the deceased being stabbed at least twice by the accused. In cross examination he denied he had pelted the accused with stones. He equally denied that the accused had come in a conciliatory mood as he had a switch on his motor bike.

The evidence of the Onias Sagwati the chairperson at the compound was that the accused had come to his place on the 18<sup>th</sup> of August 2009 and told him that he had beaten the deceased's mother. He also told him he wanted to ask for forgiveness. He had asked him to come the following day when he had heard the other side of the story and done his assessment. The three brothers had also come. They had asked the accused why he had assaulted their mother. There had been a quarrel. The accused was pushed by the three brothers and had fallen to the ground. When he got up he had produced the knife and at that point Benson and Norman had run away. The deceased had tried to wrest the knife from the accused and that is when the accused had stabbed him. The chairperson had not seen if the knife had been used on the accused at any stage. What he had witnessed was the deceased trying to wrest the knife from the accused. In that wrestling for the knife, he was definite that it was when the accused fell to the ground and rose that he had produced a bloodied knife. The two brothers had followed the accused who was then running away from the scene.

In cross examination, he said he had not been told about the veld fire by the accused. He had also not seen the policeman whom the accused had brought who was not in uniform. He had only learnt of the policeman's presence after the incident. He surmised that the three brothers had come after they had heard the accused's motorbike as he had not summoned

them, having wanted to fully investigate the matter first. He confirmed that when the fight started, it had been three people against one but that when the knife was produced the others had definitely run away. He had not witnessed the accused being pelted with stones at any point. He agreed in cross examination that the accused did have every reason to worry about his safety but not to the extent of killing someone as he ultimately did. He had not seen a police man at the scene but opined that things would not have gotten out of hand if the policeman had identified himself and played his role. He had only gotten to know of the plain clothes police man, one Sixpence Magago said to have been present, when he had read the docket. He had also been told that the three brothers had been to accused's house earlier that day.

Sixpence Magago the part time plain clothed constabulary told the court that he was employed as a senior guard in Banket. The accused had told him that he had found the deceased's mother picking beans and had told her to stop and assist with switching off a fire which had started. She had run away instead. He had followed her and assaulted her. The accused had asked him to accompany him to the chairperson's house. They had also intended to fetch a backup police man who was not at home when they got there. Within minutes of getting to the chairperson's residence a fracas between the accused and the deceased and his brothers had ensued over the alleged assault. He told the court that the accused had been pelted with stones and bricks and that the accused had in return threatened them with his knife. Two of the brothers had indeed run away. The deceased and the accused had fallen and when the accused rose he was holding a blood stained knife.

He also told the court that he had gone there as a police officer and had tried to stop the fight but the deceased had told him to back away as it was his mother who had been assaulted. He had backed away as it was not possible to intervene as both parties were pelting each other with stones. His view was that if no bricks had been hurled, the accused would have stood a chance. The accused, he said, had already produced a knife when he fell to the ground. He had not seen any blood from the accused.

Tsvakisayi Masiya the investigation officer also gave evidence. He had done the indications after the murder. The accused had complained of pain in his thigh when he was arrested. Whilst there were half bricks and debris at the compound these had not formed part of the investigation. None of the witnesses had mentioned stones being used. He too

confirmed unearthing that the brothers and the accused had indeed been involved in a struggle.

#### The accused's evidence

He denied assaulting the deceased's mother. He had indeed seen her in the company of another woman and a child when he was going to attend to the fire. It was the two women who had been hostile to him after he told them that there was a veld fire which required their assistance. He had taken his hunting knife with him as he needed to cut branches for putting out the fire. Later that day when he arrived home his wife had told him that the accused and their mother had come looking for him. They had uprooted vegetables from his garden. He had proceeded to the Chairpersons' residence at Buryhill farm with Sixpence Magago because he considered it important to take a police officer. He had realised that the knife was still tied to his bike. He had removed it and put it inside his trousers and covered it with his shirt having deemed it unfit to leave it tied to his bike which he had parked at a homestead. It was sheathed. He had gone to the compound not to apologise but to tell people about the hazards of veld fires and that they should not start fires when picking beans.

When he arrived at the chairperson's residence he had briefed him about the fire and whilst so doing had noticed the three brothers advancing towards him. They had enquired about the assault. They told him they knew he had a knife. He surmised that may be they had seen him remove it from the motor bike. One of them had head butted him and had gone to his waist to remove the knife and stabbed the accused on his thigh. At the same time he was also being assaulted with bricks on his chest and shoulders by the brothers. He had repossessed the knife. The accused said he had not actually stabbed the deceased but that as he pushed him that is when he might have been stabbed. His clinic card showing that he sustained some injuries was admitted into evidence. In his view his reaction was reasonable under the circumstances as he was in a tight spot. He had not formed an intention to injure any one.

#### The credibility of witnesses

The focus of the two brothers and their mother as State witnesses was on the fact that the accused had killed a person and not the circumstances that led to the killing. There was a concerted family effort to conceal the involvement of the brothers in the dispute that had ensued. We found the evidence of the Onias Sagwati the most balanced and credible regarding the events of the fateful afternoon. He did not try to take sides as he described to

the court what exactly had been the role of the brothers leading to the fatal stabbing. Having said that, the evidence of the State's six witnesses largely corroborated each other save on certain crucial aspects.

A point of consensus was that the accused had indeed assaulted the deceased's mother earlier that day. Whilst the two brothers and their mother in giving their evidence denied that the brothers had participated in a brawl over their mother's assault we found that three other state witnesses were very clear that the all three brothers had been involved. Onias Sagwati the Chairperson, Sixpence Magago the police constable, and Tsvakisayi Masiya the police officer who investigated the matter, all testified to the brothers being involved in the brawl. It also emerged from the evidence that the brothers had initiated the attack at the Chairpersons residence that afternoon over the assault of their mother earlier that day. We also found that the two brothers and their mother in their evidence had definitely tried to hide the fact that the brothers had indeed visited the accused's house that day after hearing about their mother's assault. We also found from the State witnesses that the accused was the one who had drawn out a knife at the time that he was being attacked by the three brothers. Two brothers had run away at the production of the knife and the deceased had fought him for the control of the knife. We accepted the evidence of the state witnesses that after the knife was produced there had been a serious scuffle over the knife.

The post-mortem report was clear he had been stabbed once. It was clear that the family thought the deceased had been stabbed twice because at the time of the trial they had not yet seen the post mortem report. We however did not find that they said this to mislead the court. The stabbing would have been very traumatic for the family and it could not have been expected that they would have checked the body themselves for the number of stab wounds in order to be certain. After all the deceased had died on the spot. Indeed the document they wanted to see was the post-mortem report.

As for the accused, there were marked inconsistencies in his own evidence. He lied that he had not assaulted the deceased's mother when he clearly had from the evidence of all state witnesses, including Sixpence Magago who was clearly on his side when he gave his evidence. The accused had clearly told Sixpence of the assault in as much as he had also told the Chairperson. It was clear that the accused sought to distance himself from any assault to deliberately avoid putting any semblance of justification to the brother's actions against him at the time. There was a chilling lack of empathy from the defence with the family's

experience of loss that resulted from that assault. Acknowledging the assault would at the very least have been respectful of her experience and ultimate loss which had its roots in that assault. We did not find as he claimed to the court, that the deceased's mother had deliberately manufactured the assault at the time to avoid the fact that she had been caught stealing beans from a field. Labelling the mother a thief was equally heartless. If the accused had indeed caught her stealing he should simply have reported her to the police.

We also rejected the evidence that the deceased had knowledge of the knife and had pulled it from the accused waist as untruthful as only the accused appeared to have heard that conversation. If the deceased and his brothers knew he had a knife it was because the accused had produced it. Regarding the evidence that the accused had been attacked with bricks, we noted that this evidence came only from Sixpence Magago and the accused himself. The investigation officer had not picked this up during his investigations. However, what we accepted as most likely was that once the accused himself had produced his knife there was some stone throwing. As to whether the deceased had indeed accidentally fallen on the knife that the accused was holding, in our view remained moot as this occurred in the heat of the moment. It was very well possible that this could have been what occurred. We accepted the accused's evidence that he had sustained some injuries though minor during the fight over the knife.

What is crucial overall is whether the accused given the circumstances he found himself, acted in self-defence and whether in so doing he acted proportionately.

#### Legal position on self defence

For self-defence to be a complete defence in terms of s 253 of the Criminal Law Codification and Reform Act [*Chapter 9:23*], an unlawful attack should have commenced or been imminent at the time the accused took the unlawful action. The action taken must have been necessary to avert the unlawful attack and the person must have believed that escape was not possible to avert the attack. Also, the means used to avert the attack should have been reasonable. As for the harm inflicted, it should not be grossly disproportionate to that liable to be caused by the unlawful attack. To explain this:

"The principle of proportionality...requires a rough approximation between the apparent gravity of the attack or threatened attack and the style and severity of the defensive actions. This restriction is important because, if necessity were the sole requirement, the infliction of

death or serious injury might in theory be justifiable if it were the only way of preventing a relatively trivial assault".<sup>1</sup>

See *S v Banana 1994 (2) ZLR 271 (S)* at p 274 for a discussion of self-defence and proportionality. The court is also enjoined to take into account circumstances in which the accused found himself or herself, including any particular stress or fear that may have been operating on his or her mind.

Given that in assessing the availability of the defence of self-defence an important consideration is whether the person had a reasonable cause of apprehension of danger, we find in this case that the three brothers lunging at the accused suddenly by way of an attack as they did would have caused a reasonable apprehension of danger.

The need to be cautious and not to fall into the trap of expecting an accused to have been able to exercise a calm mind in weighing his options is one that has been expressed in several cases. See *S v Ntuli 1975 (1) SA 429 A*. It is from the perspective of the accused that the issue of reasonable apprehension of danger is to be looked at having regard to all the circumstances. Granted, the deceased and his brothers were not in possession of any weapon but they clearly outnumbered the accused. The sudden lunge by all three of them at him at once would have made an escape impossible.

The absence of a weapon on their part would also not have allayed his fears. It was in fact the possession of a weapon which he had put under the waist of his trousers that he had resorted to for a sense of security. Two brothers had indeed run away while the third had chosen to aggressively fight to wrest control of the knife from him. That much, even the brothers conceded that there had been a fight for the weapon. As such, as long as the tussle for the weapon continued, the danger that the accused perceived himself to be in would evidently have continued rather than abated. In such circumstances, the fact that the accused was the one with the knife in his hand is neither here nor there for the reason that it cannot be said with certainty that the deceased would not himself have used the knife against the accused had he been successful in getting control of it from the accused. This is especially so given that the three brothers had lunged at the accused combatively.

Bearing in mind that the critical question remains at all times whether the accused perceived any critical danger to himself, we find in this case that even though the accused had the knife in his possession the danger of being attacked by the three brothers had remained as

---

<sup>1</sup> Andrew Ashworth "Self- Defence and the Right to Life" (1975) **C.L.J.** 282 at 296 as cited by *James Slater Making Sense of Self-Defence* in 5 Nottingham L.J. 140 1996 at p 145

the deceased had tried to get the knife away from him. The facts placed before the court speaks for themselves. It is vital that self-defence remains real and usable and that as courts we do not fall into the trap of interpreting it in such a way that it becomes impossible to rely on by those who genuinely find themselves in critical self - defence situations.

To the extent that the court is enjoined to look at the accused's state of mind and all the surrounding circumstances we find that the accused was indeed gripped by fear and that he was caught in a do or die situation. He acted in self-defence.

On proportionality the weapon in question was a hunters knife which the accused said he had been using earlier in the day to cut branches for people he had mobilised to put out the veld fire. The knife was produced in court as an exhibit. It was menacing and as a hunters knife was designed to inflict deadly harm. We therefore had a lot of difficulty on the issue of whether the accused had exceeded reasonable bounds in utilising it. It was the weapon he had at that time. Indeed he may even have taken it with him because he sensed danger having learnt that the brothers had visited his homestead in an extremely combative mood.

As he stated, he had not removed it from his motor bike and when he got to the compound he had hidden the knife inside his trousers because he said it was unsafe to leave it on the motor bike. It was the instrument that he had at the time and which he had used it in the face of real danger. In finally reaching our conclusion that he had no choice and that the attack was not disproportionate we ultimately bore in mind the exhortation in *S v Ntuli* (supra) that the under such circumstances it is best if the "...court adopts a robust approach not seeking to measure with nice callipers the precise bounds of legitimate self-defence."

See also *S v Maenda* HH 44-16 for an example of an acquittal of murder where a knife was used in self-defence. Ultimately, this case is another unfortunate example of the consequences of a culture of resolving conflicts through violence. See *S v Chayambuka* HH-133-17. If the deceased's mother was stealing beans the proper procedure would have been to report the theft and not to assault her. In return if the brothers were displeased as they had a right to be with the assault on their mother, they too should have reported the case to the police instead of taking the law into their hands.

In the final analysis we find that the accused acted in self-defence and that under the circumstances he found himself and the defence means was proportionate to the threat that he faced at the time.

Accordingly the accused is found not guilty and is acquitted of murder.

*National Prosecuting Authority: State's Legal Practitioners*  
*Mambosasa Legal Practitioners: Accused's Legal Practitioners*