

IN THE HIGH COURT OF ZAMBIA
HOLDEN AT CHIPATA
(Criminal Jurisdiction)

HJ/02/2011

BETWEEN:

THE PEOPLE

AND

ABEL ZIMBA

Before the Hon. Mr. Justice Dr. P. Matibini, SC, this 25th day of February, 2011.

For the People: Ms. Soko, State Advocate, in the Director of Public Prosecutions Chambers.

For the Defence: Mr. S. S. Zulu, SC, of Messrs Zulu and Company, on behalf of the Legal Aid Board.

JUDGMENT

Cases referred to:

1. R V Lobell [1957] I Q.B, 547
2. *Mwale v R* [1958] R.N.L.R. 530.
3. *R v Howe* [1958] 100 C.L.R. 448; 32 H.L.J.R 212.
4. *De Festas v R* [1960] 2 W.L.R. 523.
5. *Jackson v R* 1962 R and N 157.
6. *Mulenga v The People* (1966) Z.R. 118.
7. *Lee Chun-Chuen v R* [1963] 1 ALL E.R. 73.
8. *The People v Njovu* [1968] Z.R. 123.
9. *R v Julien* [1969] 2 ALL E.R. 856.
10. *Walker v R* [1969], 53 Cr. App 195.
11. *Phillips v R* [1969] 53 Cr. App R. 135.

12. *Palmer v R* [1971] 1 ALL E.R. 1088.
13. *R v Mc Innes* [1971] 3 ALL E.R. 295.
14. *Simatenda v The People* (1975) Z.R. 294.
15. *The People v Lewis* (1975) Z.R. 43.
16. *Liyambi v The People* (1978) Z.R. 25.
17. *Mwandama v The People* (1995-1997) Z.R. 133.
18. *DPP (Jamaica) V Bailey* [1995] 1 Cr APP. R.257
19. *R v Deana* 2 Cr App. R 75 CA
20. *R V Bird (D)*, 81 Cr. App, R. II0 CA
21. *R V Roshford* [2006] Crim L.R. 547 CA

Legislation referred to:

Penal Code, Cap 87, ss. 17, and 200.

Work referred to:

Archbold, Criminal Pleading, Evidence and Practice 2010 (Thomson Reuters (Legal Limited), 2010)

The facts of this matter are that Abel Zimba stands charged with the offence of murder contrary to section 200 of the Penal Code, chapter 87 of the laws of Zambia. For convenience sake I will continue to refer to Abel Zimba as the accused. The particulars of the offence are that on 24th November, 2009, at Lundazi, in the Lundazi District of the Eastern Province of the Republic of Zambia, the accused murdered Charles Banda. I will also for convenience continue to refer to Charles Banda as the deceased. In a bid to prove the charge against the accused, the prosecution called five prosecution witnesses. The first prosecution witness was Nelia Mwale. Nelia Mwale is aged 33 years and lives in Saonga village, in chief Magodi, in Lundazi District. For convince, I will continue to refer to Nelia Mwale as PW1.

PW1 recalls that on 24th November, 2009, around 20:00 hours, her husband, Charles Banda, (the deceased) who was a polygamist, arrived home having just visited the third wife. PW1 was the second wife. PW1 recalls that on the material day the

deceased requested her to make him a cup of tea. PW1 attended to her request. In the meantime, the deceased went back to the third wife's house to bath. PW1 also decided to bath. Whilst PW1 was bathing, she heard a voice shouting that he had caught a thief. When it dawned on PW1 that the person shouting was in fact her husband, she called her brother-in-law; Micheal Banda. Together with Micheal Banda, PW1 rushed to where she had heard her husband shouting that he had apprehended a thief. When PW1 and Micheal Banda arrived at the scene, they heard the deceased exclaim that "*Abel has killed me with a knife.*" At that point, PW1 testified that Abel was on top of the deceased, and the duo held each other tightly.

PW1 asked Abel what he was doing, Abel replied that he had killed the deceased. When asked why he had killed the deceased, Abel replied that he did not know. And he immediately ran away from the scene of the crime. Later, the body of the deceased was collected from the scene of the crime, and taken to the house of the deceased's first wife, where it lay in state for a night before it was taken to the mortuary the following day.

The second witness for the prosecution was Micheal Banda. I have already stated that Micheal Banda is PW 1's brother in law. However, I will continue to refer to him as PW2. PW2 is aged 24 years. And also resides in Saonga village, chief Mogodi in Lundazi District. PW2 is the younger brother to the deceased. PW 2 recounted the events leading to the demise of his elder brother; the deceased. PW2 testified that on 24th November, 2009, PW1 came to his home, and informed him that she heard the deceased shout that he had apprehended a thief. Thus PW1 and PW2 rushed to the scene. When PW 1 and PW2, arrived at the scene, PW2 testified that the deceased exclaimed that Abel had stabbed him in the ribs. PW2 tried to apprehend Abel. However, Abel ran away from the scene of the crime.

The third prosecution witness was Kateka Mbewe. For convenience, I will continue to refer to Kateka Mbewe as PW3. PW3 is 25 years old. He resides in Saonga village in chief Magodi, in the Lundazi District. PW3 recalled that the deceased was killed on 24th November, 2009. PW3 testified that he was not present at the time when PW3 was

killed. PW3 was informed about the death of the deceased by PW1. After PW3 learnt about the death of the deceased, and further that he had been killed by Abel, he went in search for Abel. Abel was eventually apprehended at Chikolongo village. And ultimately handed over to the police station in Lundazi.

The fourth prosecution was John Banda. John Banda also lives in Saonga Village in Chief Magodi, Lundazi District. John Banda is also another younger brother of the deceased. I will continue to refer to him as PW4. PW4 recalled that on 25th November, 2009, he was informed about the death of the deceased. On the material date, when he arrived at the funeral house, he was informed that the body of the deceased had already been taken to the mortuary.

Later on 28th November, 2009, PW4 identified the body of the deceased at Lundazi General Hospital and also attended the post mortem examination. Present during the post mortem examination was a detective inspector Mutale, who is based at Lundazi Police Station. During the post mortem examination, PW4 observed that the deceased had sustained a deep cut on the neck. PW4 also confirmed that the last time he saw his brother he enjoyed very good health.

The fifth prosecution witness, was Detective Inspector Charles Mulenga Mutale. I will continue to refer to him as PW5. PW5 is based at Lundazi police station. PW5 recalled that on 24th November, 2009, he received a report from PW1 that the deceased had been killed by Abel Zimba of Chalo Chamala village in chief Magodi, Lundazi District. Acting on the report, PW5 mobilized officers and proceeded to Siaonga village. At Siaonga village, PW5 found the body of the deceased in a pool of blood. PW5 also observed at the scene that the shrubs were sprinkled with blood. PW5 collected the body of the deceased and took it to Lundazi General Hospital mortuary.

On 28th November, 2009, PW5 also attended the post mortem examination. Abel Zimba was with the help of the community apprehended. PW5 recorded a long warn and caution statement in which Abel Zimba revealed how the deceased met his death.

After the warn and caution, PW5 made up his mind to charge Abel Zimba with the offence of murder contrary to section 200 of the Penal Code.

After hearing the fifth prosecution witness, I formed the opinion that there was a *prima facie* case for the accused to answer. I therefore ordered that the accused be put on his defence. Abel Zimba is the accused in this matter. I will therefore continue to refer to him as the accused. The accused recalls the morning of 24th November, 2009. The accused went to his field. The accused's field is adjacent to Saonga village. The accused went to his field to put herbs around his field in order to prevent persons from harvesting from the field through witchcraft practices. In order to carry out the task, the accused required some wooden pegs. The wooden pegs were fashioned from the knife that he had carried along. Eventually, the accused carved out four wooden pegs.

In the course of fulfilling his mission, the accused was approached by the deceased who asked him what he was doing. The accused is said to have replied that he was protecting his field with some herbs. The deceased is said to have retorted that he was lying. The deceased alleged that the reason why he was in the vicinity is that he was waiting for woman, so that he would have sexual intercourse with her. The accused asked the deceased to name the woman whom he was allegedly waiting for. The accused in a bid to protest his innocence, showed the deceased the herbs that he was administering in the field.

Further, the accused suggested to the deceased that they should go to their respective fathers to assist them resolve the allegations that the deceased had just raised. According to the accused, the deceased is said to have replied that he would not release the accused until the woman he arranged to meet arrived. And when that woman arrived, the deceased is said to have told the accused that he would shout that he had apprehended a thief. The accused refused to be held in captivity. As a result, the accused claims that the deceased started punching him with his fists on his face.

In the process, the accused testified that the deceased declared that he would detain him for a period of twenty four hours.

A fight ensued. The accused testified that he asked the deceased why he was beating him because he had not found him with any of his wives. According to the accused the deceased did not respond to the accused's question. He instead held him very tightly because he was huge. The accused felt overwhelmed by the grip. And in the process, the deceased is said to have shouted that he had apprehended a thief. He shouted at least twice. The accused asked the deceased what he had stolen. The accused testified that at the point he was apprehensive about being killed by a instant justice mob. Thus, the accused reached for his knife and stabbed the deceased so that he could set himself free. Since it was dark, the accused testified that he did not know where he stabbed the accused.

After the accused stabbed the deceased, he was released. And he ran away. Later the accused reported to the police, that the deceased had assaulted him. Since the accused had suffered some pains, he testified that he was given a medical report in order to be attended to at the hospital. The accused also obtained summons, popularly known as "*call out*," for the deceased to attend on the police.

At the hospital the accused testified that he was given some tablets to ease the pain. After the treatment, the accused testified that he returned to Chikolongo village where he briefly stayed with his sister by the name of Elinda. It is at Chikolongo village where the accused was eventually arrested.

On 18th February, 2011, Ms. Soko filed written submissions on behalf of the prosecution. Ms. Soko submitted that it is not in dispute that the accused stabbed the deceased with a knife which resulted in his death. From the submissions of Ms. Soko, the following propositions can be distilled:

- (a) that it was not possible for the accused to claim that he was picking herbs at that late hour because it was virtually impossible to distinguish the herbs from the ordinary grass;
- (b) when the deceased alleged that the accused was waiting for woman to have sex with, the accused enquired from the deceased whose wife that was. That response was in itself proof of guilty knowledge;
- (c) the deceased called the accused a thief because he suspected that he was having an affair with his third wife. And that in Zambian Communities to take another man's wife is tantamount to theft and it is referred to as such;
- (d) the accused was not assaulted by the deceased. And further, if the deceased had overpowered the accused, why then would he have shouted for help;
- (e) if the deceased had overpowered the accused he would not have allowed him to escape; and
- (f) there is no evidence on record to show that the accused was provoked, or that he feared for his life. Thus, a defence of provocation cannot be available on the facts of this case.

After advancing the preceding propositions, Ms. Soko went at length to address the defences of provocation and self defence. I will in the first instance refer to the submissions on the defence of self-defence. Ms. Soko in explaining the defence of self defence went on to quote extensively from the classic pronouncement upon the law relating to self defence the English case of *Palmer v R* [1971] 1 ALL E.R. 1088, as follows:

"In their Lordships view the defence of self defence is one which can be and will be readily understood by any jury. It is a straightforward conception. It involves no abstruse legal thought. It requires not set words by way of explanation. No formula need be employed in reference to it. Only common sense is needed for its understanding. It is both good law and good sense that he may do, but may only do what is reasonably necessary. But everything will depend on the particular facts and circumstances. Of these a jury can decide. It may in some cases be only sensible and clearly possible to take some simple avoiding action. Some attacks may be serious and dangerous. Others may not be. If there is some relatively minor attack it would be common sense to permit some action of retaliation which was wholly out of proportion to the necessities of the situation. If an attack is serious so that it puts someone in immediate peril, then immediate defensive action may be necessary. If the moment is one of crisis for someone in imminent danger he may have to avert the danger by some instant reaction. If the attack is all over and no sort of peril remains then the employment of force may be by way of revenge or punishment or by way of paying off an old score or may be pure

*aggression. There may be no longer be any link with a necessity of defence. Of all these matters the good sense of a jury will be the arbiter. There are no prescribed words which must be employed in, or adopted in a summing up. All that is needed is clear exposition, in relating to the particular facts of the case, of the conception of necessary self-defence. If there has been attack so that defence is reasonably necessary it will be recognized that a person defending himself cannot weigh to a nicety the exact measure of his necessary defensive action. If a jury thought that in a moment of unexpected anguish a person attacked had only done what he honestly and instinctively thought was necessary that would be most potent evidence that only reasonable defensive action had been taken. A jury will be told that the defence of self-defence, where the evidence makes its raising possible will only fail if the prosecution show beyond doubt that what the accused did was not by way of self-defence. But their lordships consider in agreement with the approach in *De Freitas v R* ([1960] 2 W.L.R. 523), that if the prosecution have shown that what was done in self-defence then that issue is eliminated from the case. If the jury considers that an accused acted in self-defence or if the jury are in doubt as to this then they will acquit. The defence of self-defence either succeed so as to result in acquittal or it is disapproved in which case as a defence it is rejected."*

Ms. Soko also drew my attention to the case of *The People v Njovu* (1968) Z.R. 123, in which it was held that to stab a person is unlawful, unless it appears that the stabbing was justifiable in the exercise of the right of self-defence. Ms. Soko pressed that the right of self-defence extends no further than doing what is necessary to repel the attack. Ms. Soko submitted that if a person exceeds the bounds and kills his attacker the charge of murder can be reduced to manslaughter. In the instant case, Ms. Soko argued that the accused did not even attempt to fight the accused or inflict some form of pain so that he could loosen his grip in order to afford him an opportunity to retreat. Instead, Ms. Soko argued, the accused decided to kill the deceased in order to free himself.

Ms. Soko went on to address the defence of provocation. Ms. Soko drew my attention to the case of *Liyambi v The People* (1978) Z.R. 25. And submitted that there are three inseparable elements to the defence of provocation. Namely, the act of provocation; the loss of self-control (both actual and reasonable); and the retaliation proportionate to the provocation. Ms. Soko argued that all these three elements must be present before the defence is available.

Ms. Soko also argued that on the facts of this case, there was no act of provocation, because of the doubt cast upon the accused testimony that he was beaten by the deceased. Ms. Soko argued that there is also no evidence whatsoever to suggest that the accused lost his self-control both actual and reasonable, or indeed whatsoever. The accused's only reaction Ms. Soko submitted, was that he was surprised at the allegations leveled against him that he was waiting for a woman to have sexual intercourse with.

Furthermore, Ms. Soko argued that the retaliation by the accused was without cause, and cannot be said to have been proportionate to anything. For arguments sake, Ms. Soko posited that if the accused claimed that he was provoked by the deceased's allegation that he was waiting for a woman he wanted to have sex with, was the retaliation proportionate to the provocation? Ms. Soko contends that the accused acted with gross and savage violence which was out of all proportion to the provocation offered. Ms. Soko further contends that the provocation was trivial mainly consisting of an accusation that the accused was waiting for a woman to have sexual intercourse with, as well as the beating that had in any case ceased.

Ms. Soko drew my attention to the case of *Walker v R* [1969] 53 Cr. App R. 195, in which it was observed that:

"It has never been the law that the man who completely loses his temper on some trivial provocation and reacts with gross and savage violence which kills his victim can hope for a jury to find a verdict of manslaughter on grounds of provocation."

Ms. Soko argued that if the accused was provoked at the point that the deceased held on to him and shouted that he had caught a thief, he should have retaliated by striking a blow at the deceased at most. Ms. Soko pressed that there were other options available other than striking the deceased with a knife in the neck. In aid of the preceding argument, Ms. Soko drew my attention to the observation of Lord Diplock in *Phillips v R* [1969] 53 Cr App R. 135 as follows:

“Before their Lordships, counsel for the appellant contended, not as a matter of construction, but as one of logic, that once a reasonable man had lost his self-control, his actions ceased to be those of a reasonable man, and that accordingly he was no longer fully responsible in law for them, whatever he did. This argument is based on the premise that loss of self-control is not a matter of degree, but is absolute:

There is no intermediate stage between icy detachment and going berserk. This premise, unless the argument is purely semantic, must be based upon human experience and is, in their lordships view, false. The average man reacts to provocation according to its degree with angry words, with a blow of the hand, possibly, if the provocation is gross and there is dangerous weapon to hand with that weapon.”

Ms. Soko argued that an ordinary person of the accused’s community could not have reacted in the manner that the accused did. Furthermore, Ms. Soko argued that the retaliation did not bear any relationship to the provocation if any. Be that as it may, Ms. Solo submitted that a reasonable man of his community could have reacted as did the accused after realizing that he had committed a heinous crime.

On 17th February, 2011, Mr. Zulu, SC, filed written submissions on behalf of the accused. After setting out the facts of the case and the evidence for both the prosecution, and defence, Mr. Zulu, SC, immediately drew my attention to section 17 of the Penal Code. Section 17 of the Penal Code enacts that:

“Subject to any provisions of this Code or any other law for the time being in force, a person shall not be criminally responsible for the use of force in repelling an unlawful attack upon his person or property, or the property of any other person, if the means he uses, and the degree of force he employs in doing so are no more than is necessary in the circumstances to repel the attack.”

Mr. Zulu, SC, submitted that in the instant case the defence of self -defence is available to the accused and therefore is entitled to be acquitted. In aid of this submission Mr. Zulu, SC, drew my attention to the case of the *People v Lewis* (1975) Z.R. 43, in which Cullinan J, held *inter-alia*, that in considering the defence of self-defence, two aspects arise. First, is the question of retreat. And second is the degree of retaliation, Mr. Zulu, SC argued that a failure to retreat is only an element in considering the reasonableness or otherwise of the accused’s conduct. Mr. Zulu, SC, submitted that it is not the law that a person threatened must take to his heels. What is necessary, Mr. Zulu, SC, argued, is that the accused must demonstrate that by his

actions he does not want to fight. The preceding proposition, Mr. Zulu, SC, submitted is premised on the dictum of *Widyery L. J. in R v Julien* [1969] 2 ALL E.R. 856, which was in any event affirmed in the *Lewis* case referred to above.

Mr. Zulu, SC, in dealing with the aspect of retreat in the defence of self-defence in more detail, drew my attention to the English case of *R v Mc Innes* [1971] 3 ALL E.R. 295. In the *Mc Innes* case, the Criminal Division of the Court of Appeal observed at page 300-301 that:

“The first criticism of the learned judge’s treatment of self-defence is that he misdirected the jury in relation to the question of whether an attacked person must do all he reasonably can to retreat before he turns on his attackers.”

The direction in question was in the following terms:

“In our law if two men fight and one of them after a while endeavours to avoid any further struggle and retreats as far as he can, and then when he can go no further turns and kills an assailant to avoid being killed himself, that homicide is excusable, but notice that to show that homicide arising from a fight was committed in self-defence, it must be shown that the party killing had retreated as far as the fierceness of the assault would permit him.”

Mr. Zulu, SC submitted that in the *Mc Innes*, case the Court of Appeal preferred the approach taken in the Australian case of *R v Howe* [1958] 100 C.L.R., 448 where it was held that a failure to retreat is only an element in considering the reasonableness of an accused conduct. It is simply a factor to be taken into account in deciding whether it was necessary to use force, and whether the force used was reasonable. Mr. Zulu, SC, submitted that in the *Mc Innes* case, the Court of Appeal went on to observe that the modern law on the topic is set out in the case of *R v Julien* [1969] 2 ALL E.R. 856, by *Wilbery L.J.* when he observed:

“It is not as we understand it, the law that a person threatened must take to his heels, and run in the dramatic way suggested by counsel for the appellant; but what is necessary is that he should demonstrate by his actions that he does not want to fight. He must demonstrate that he is prepared to temporize and to disengage and perhaps to make some physical withdraw; and to the extent that is necessary as a feature of the justification of self-defence. It is true, in our opinion whether the charge is a homicide charge or something less serious.”

Mr. Zulu, SC, submitted that the preceding passage seems to resonate with a passage in a judgment delivered by Tredgold C. J. in *Mwale v R* (1958) R. N. R. L. R. 530 as follows:

“We consider that in this application of the law to the facts of the case, the learned trial judge did not make sufficient allowance for the extremity of the situation in which the appellant found himself. When a man is the object of a murderous assault it is too much to expect a nice discrimination in the method he chooses to defend himself. In calm retrospect other alternatives may appear, but it must always be remembered that, in such circumstances, a man acts under the stress of the moment. He has to act swiftly and decisively, and the reasonableness of the course he adopts must be judged accordingly. The obligation on a man so assailed to retreat rather than to strike down his assailant is not absolute. If by retreating he enhances rather than avoids the danger to himself, and it is easy to envisage circumstances in which this would be the case, it would not be reasonable to expect him to retreat. For example, a man threatened in an open country with a firearm is not obliged to run away. To do so will be merely foolish, and if the threat is determined and he can shoot first, he would be fully entitled to do so. The situation should not be judged by rule, but on the particular facts of each case, and there is no better approach than that the trier of the same issue should imagine himself in the position of the accused, and asked how he himself would have acted.”

Mr. Zulu SC, also appropriately directed his mind to the requirement of retaliation in the defence of self-defence. In this regard, Mr. Zulu SC, drew my attention to a passage that appears *Palmer v R* [1971] 1 ALL E.R. 1077, and is also quoted in the *Mc Inner* case that was referred to by Ms. Soko in explaining the defence of self-defence.

Mr. Zulu, SC, argued that on the facts of this case self-defence is available to the accused. Mr. Zulu, SC, submitted that the accused was attacked without reasonable cause by the deceased; a jealous husband who held that accused by a tight grip. Mr. Zulu, SC, also argued that when the deceased shouted; *“thief, I have caught a thief,”* the accused honestly believed that he was in imminent danger, and feared for his life from an instant justice mob. Mr. Zulu, SC, argued that since it was at night the accused would not be able to defend himself against the villagers if they had run to the scene to assist the deceased apprehend the accused. In this respect Mr. Zulu, SC, recalled the testimony of PW5 in cross examination that when an instant justice mob apprehends a suspected thief, it either takes him to the police, or kills him instantly. Mr. Zulu, SC, submitted that in the instant case, the accused had to take some

defensive action. Thus, in order to free himself from the tight grip of the deceased who was more built than himself, the accused stabbed him once using a knife which he had earlier on used to fashion wooden pegs for his fields. And when the deceased loosened the grip on him, following the stabbing, the accused ran away fearing that the villagers would come to the aid of the deceased. In sum, Mr. Zulu, SC, submitted that the prosecution has not proved beyond reasonable doubt that the accused did not act in self-defence.

Mr. Zulu, SC in his submissions advanced an alternative argument. He submitted that in the event that he has not sufficiently persuaded me that the defence of self-defence is available to the accused, then he would rely on the defence of provocation to the charge of murder. Mr. Zulu, SC, argued that the act of grabbing the accused by the deceased on suspicion that he was waiting for his wife; the act of preventing the accused from going away until an unknown woman came along; and the act of shouting "*thief, I have caught a thief,*" constituted serious provocation.

Mr. Zulu, SC, drew my attention to the case of *Simatenda v The People* (1975) Z.R. 294, in which the Supreme Court held, *inter alia*, that provocation consists mainly of three elements; the act of provocation; the loss of self control both actual, and reasonable and the retaliation to the provocation. Mr. Zulu, SC, submitted that these elements are not detached. Mr. Zulu, SC, posited that the central question is not whether or not an accused was provoked into losing his self-control, but also whether a reasonable man would have lost his self-control. And having done so, would have acted as the accused did.

Mr. Zulu, SC, argued that there was provocation by the deceased which led to the accused losing his self-control. The question however, Mr. Zulu, SC, submitted is whether a reasonable man would have acted in the manner the accused did. Mr. Zulu, SC, submitted that the answer to his question is in the affirmative. In this respect, Mr. Zulu, SC, pointed out that on the fateful day it was dark; at about 22:00 hours, the nearest village to the scene was approximately 80 metres; the accused feared that if he did not free himself from the deceased's grip, the villagers would descend upon him,

and perhaps even kill him. Thus, as a reasonable man, the accused without necessarily aiming at a particular part of the body stabbed the deceased with a knife once. Mr. Zulu, SC, submitted that the force used was not out of proportion. In the premises, Mr. Zulu, SC, urged that the defence of provocation is available to the accused on a charge of murder.

I am indebted to counsel for their spirited submissions and well researched arguments in this matter. On the basis of the prosecution evidence and the evidence of the accused I, have reached, the following findings of fact: that on 24th November, 2009, PW1 around 20:00 hours heard the deceased exclaim that he had apprehended a thief. PW1 and PW2 rushed towards the scene of the crime, and heard the deceased exclaim that: “*Abel has killed me with a knife.*” On the material day the accused was in his field, where he was administering herbs to prevent his crop being stolen through witchcraft practices. In due course, the deceased confronted the accused, and alleged that the accused was waiting for a woman to have sexual with. The accused denied the allegation. The deceased held the accused in captivity, and shouted that he had caught a thief. In a bid to free himself, the accused stabbed the deceased with a knife, resulting in the death of the accused.

Clearly, the accused admits that he caused the death of the deceased. However, his contention is that he did not kill the deceased intentionally, or with malice aforethought. The accused has called in aid the defence of self-defence. The defence of provocation has also been pleaded in the alternative. The erstwhile Chief Justice Ngulube in the case of *Mwandema v The People* (1995-1997) Z.R. 133, observed that the essence of self-defence is that the accused acts quite deliberately to preserve his life or to prevent grave harm to himself.

According to Archbold Criminal Pleading, Evidence and Practice, 2010 (Thomson Reuters (Legal) Limited) in paragraph 19 – 41 at P – 1928; “Where a defence of self-defence is raised, the burden of negating it rests on the prosecution, but the prosecution are not obliged to give evidence in chief to rebut a suggestion of self – defence before that issue is raised, or indeed to give any evidence on that issue at all. If on consideration of the whole evidence, the Jury are either convinced of the innocence of the prisoner are left in doubt whether he was acting in necessary self – defence, they acquit. R v Lobell [1957] IQ.B. 547, 41 Cr App.R. 100CCA. Before the issue of self – defence is left to the Jury there must be evidence, whether from the prosecution or the

defence, which if accepted, could raise a prima facie case of self- defence; if there is such evidence, the issue must be left to the jury, whether it is relied on by the defence or not: See DPP (Jamaica) v Bailey [1995] 1 Cr App. R. 257, PC.

It will be recalled that, in the English case of *Palmer v R* 1971 1 ALL E.R. 1088, it was held that if a person is under a serious attack, and is in immediate peril, then immediate defensive action may be necessary. Thus, if the moment is one of crisis for someone in imminent danger, he may have to avert the danger by some instant reaction. In so doing, it is recognized that a person defending himself is not expected to weigh to a nicety the exact measure of his necessary defensive action. When a person is the object of a murderous assault it is too much to expect a nice discrimination in the method he chooses to defend himself. In calm retrospect other alternatives, may appear. However, it is always important to bear in mind that in such circumstances any man acts under the stress of the moment. Quite often in such circumstances a person has to act swiftly and decisively.

The defence of self-defence has two aspects. The first is a question of retreat. And the second is the degree of retaliation. A failure to retreat is an element in considering the reasonableness of an accused conduct. Thus it is a factor to be taken into account in deciding whether it was necessary to use force, and whether the force used was reasonable. The obligation to retreat rather to strike down is not absolute. Thus, it is not the law that a person threatened must take to his heels and run in a dramatic fashion. What is necessary is that a person threatened, or attacked must demonstrate by his actions that he does not want to fight. He must demonstrate that he is prepared to temporize, and to disengage. And perhaps to make some physical withdrawal.

The learned authors of Archbold, (supra) state in paragraph 19 – 42 at page 1928 as follows: “ *The old rule of law that a man attacked must retreat as far as he can has disappeared. Whether the accused did retreat is only one element for the jury to consider on the question of whether the force was reasonably necessary. Failure to demonstrate unwillingness to fight is merely a factor to be taken into consideration in determining whether the defendant was acting in self - defence, although evidence that he tried to call off a fight is likely to be the best evidence to cast doubt on a suggestion that he was the attacker, retaliator or acting in revenge and was thus not acting in self - defence: R v Bird (D) 81 Cr. App. R 11C A.*

The learned authors of Archbold (supra) continue in the same paragraph 19 – 42 as follows:

“There is no rule of law that a man must wait until he is struck before striking in self - defence. If another strikes at him he is entitled to get his blow in first if it is reasonably necessary so to do in self - defence: R v Deana, 2 Cr. App. 75 CCA And the mere fact the defendant was the initial aggressor does not of itself render self - defence unavailable as defence to what he does in any ensuing violence; availability must depend on all circumstances, and allow for the possibility that the initial aggression may have resulted in a response by the victim which was out of proportion so as to give rise to an honest belief on the part of the defendant that it was necessary for him to defend himself, with the amount of force used for that purpose being reasonable: R v Rashford [2006] Crim. L. R. 547 CA”

On the facts of this case, I am satisfied that after the accused was apprehended, and held in a tight grip by the deceased, he did not have the opportunity to retreat. However, I consider on the facts of this case that the act of stabbing the deceased was excessive, or disproportionate to the threat. The question that therefore arises is this: what is the legal effect of exercising more force than is reasonable? The legal effect of the use of excessive force was considered in the Australian case of *R v Howe* 100 C.R.L. 448 32 H.L.I. R 212. In that case the prisoner had shot a man whom he alleged had made sexual assault on him. One of his defences was self-defence to protect himself from further assault.

The trial judge directed the jury that if the force used was excessive i.e greater than was necessary for mere defence, the defence of self-defence was not maintainable, and the resulting crime was murder. He was convicted of murder. On appeal, the Supreme Court of South Australia sitting as a Court of Criminal Appeal held that this direction was erroneous and that the law was that:

“a person who is subjected to a violent attack, exercises more force than a reasonable man would consider necessary, but no more that he honestly believes to be necessary in the circumstances, is guilty of manslaughter, and not murder.”

On further appeal by the Crown, the High Court of Australia after an exhaustive review of English, Australian, Canadian, and United States decisions, upheld the ruling of the Supreme Court.

Furthermore, in *Jackson v R* (1962) R and N 157, the Federal Supreme Court also considered the same point and came to the same conclusion. The judgment of the Court was delivered by Briggs F. J., and was largely based on the case of *Howe*. The substance of the judgment is summed up in the following passage:

“In cases where all other necessary conditions for a defence of self-defence exist but more force than is necessary or proper is used, and death is caused, I think the true principle of English law must be similar to that of the Scottish, or the Roman Dutch law. I would say that because the assault is prima facie a lawful not an unlawful act, malice aforethought is not ordinarily to be inferred from an intent to cause grievous harm, or even in some cases to kill. It must be shown either from collateral circumstances, such as an antecedent expression of intention, or taking up an offensive weapon before the attack is anticipated or from so gross a disparity between the attack, and means of retaliation not to defend oneself, but to take violent and murderous revenge. I do not think such a disparity is shown merely because in the heat of the moment the accused has used a dangerous weapon, or instrument which chanced to be at hand.”

The facts of this case in my opinion show that the accused was not moved by a premeditated motive to kill the deceased, but rather by his desperate act to disengage from the tight grip of the deceased. Thus on the authority of *Howe* the cases of *and the case of Jackson*, , and *Jackson* which cases were cited with approval by the Court of Appeal in the case of *Mulenga v The People* (1966) Z.R. 118, I find the accused not guilty of murder but guilty of manslaughter contrary to section 199 of the Penal Code and I convict him accordingly.

In view of the position I have taken, it is *otiose* for me to address the alternative defence of provocation.

Dr. P. Matibini, SC
HIGH COURT JUDGE