

SOUTH AFRICA / JUDGMENT

S v Mkutoane (386/2010) [2010] ZAFSHC 151 (25 November 2010) [2010] ZAFSHC 151

COURT

Free State High Court, Bloemfontein

BEFORE

Mocumie, Radebe

CASE / FILE NUMBER

386/2010

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

Source record

FREE STATE HIGH
COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH
AFRICA

Review No. : 386/2010

In

the review between:-

THE
STATE
versus

JANE MKUTOANE

CORAM:

MOCUMIE, J et RADEBE, AJ

JUDGMENT

BY: MOCUMIE, J

DELIVERED ON: 25 NOVEMBER 2010

MOCUMIE, J

- [1] The matter came before me on review in terms of section 302 of the Criminal Procedure Act 51 of 1977 (“the CPA”). The accused appeared in Bethulie Magistrate court, on a charge of assault with intent to do grievous bodily harm. She pleaded not guilty but was convicted as charged.

- [2] I was of the view that, based on the questions and answers proffered in her plea, the accused had in actual fact raised a plea of necessity. It is critical to look at and assess her answers to determine why I had held and still hold such a view. The following is an extract of the transcribed record at pages 2 and 3.

“Accused: Yes, Your Worship.

Hof: Het die voorval in die dag of in die nag plaasgevind?

Beskuldigde: In die nag, Edelagbare.

Hof: Vertel vir die Hof in u eie woorde wat het daar gebeur wat gemaak het dat u op hierdie saak in die hof is.

Beskuldigde: Ons het van Pendile se plek af gekom, Edelagbare, waar ons gaan kyk het. Ons het van daar af na Donny se taverne gegaan om te gaan sit. Toe ek inkom Mamazala het uitgegaan. Ons het vir mekaar by die deur gestamp en in die proses van om uit te gaan, Edelagbare, toe sy vir my stamp het ek vir haar meegedeel dat sy vir my stamp. Toe ek probeer om in te gaan, sy het die deur toegemaak en vir my buitekant toe gestoot. Toe ons buitekant aankom sy het vir my met iets wat ek op my kop ingesit het getrek. Die mense wat saam met ons geloop het, het vir ons gekeer en van daar af ek het na oom Charles toe gegaan. Oom Charles het ook na haar toe gegaan en vir haar gekeer. Sy het by hom gesê dat hy gestop het. Ek het van daar af na die badkamer of toilet toe gegaan. Toe ek terugkom toe trek sy my weer met die hare wat ek in my kop gesit het. Oom Charles het weer gekom en van daar af oom Charles het

gesê dat hy moeg is van Mamazala en daarna het ons verder baklei. Nadat ons baklei het, ek het buitekant toe gegaan en sy het vir my agtervolg. Toe ons buitekant kom sy het vir my gevang en weer geslaan en ek het vir haar gevra wat het ek aan haar gemaak, en sy het gesê dat ek weet wat ek gedoen het. Ek het omgegaan in ‘n poging om vir die polisie te gaan bel. Toe ek die foon in my hand gehad het, sy het aangekom en dit gegryp en van daar af het ons verder baklei. Van daar af ek het na die deur van die taverne beweeg. Toe ek by die deur aankom dit is waar sy vir my weer gevat het en agtertoe getrek het. Ek het omgedraai, toe was daar ‘n bottel neer, ek het dit gevat en vir haar gesteek sodat sy vir my moet kan los. Van daar af ons het na die polisiestasie toe gegaan. Dit is al, Edelagbare.”

- [3] The presiding officer went to town in an eleven-paged document to justify why she did not consider what the accused said in her plea as a defence of necessity in response to my query. It is clear from the above quotation that the accused acted out of necessity. Had she been legally represented that is what the legal representative would have, in all probabilities, stated and pleaded. According to C R Snyman, Criminal Law, 5th ed, 115,

“A person acts in necessity and her act is therefore lawful, if she acts in protection of her or somebody else’s life, bodily integrity, property or other legally recognised interest which is endangered by a treat of harm which has commenced or is imminent and which cannot be averted in another way, provided the person is not legally compelled to endure the danger and the interest protected by the protective act is not out of proportion to the interest infringed by the act. It is immaterial whether the threat of harm

takes the form of compulsion by a human being or emanates from a non-human agency such as force of circumstance”

- [4] The requirements for a successful plea of necessity therefore closely resemble the requirements for a successful plea of private defence but are distinguishable. They are the following:

Some legal interest of the accused, such as her life, bodily integrity or property must be threatened.

One can also act in a situation of necessity to protect another's interest, as where the accused protects her child for instance against an attack by an animal.

The emergency must already have begun or be imminent, but it must not have terminated, nor be expected only in the future.

- (d) The defence of necessity can be raised even if she herself is responsible for the emergency.
- (e) If somebody is legally compelled to endure the danger, she cannot rely on necessity.

The accused must be conscious of the fact that an emergency exists, and that (s)he is therefore acting out of necessity.

The accused's act must be necessary in order to avert the threat or danger.

The harm occasioned by the defensive act must not be out of proportion to the interest threatened. In other words the accused must therefore not cause more harm than is necessary to escape the danger.

- [5] In the seminal decision of *S v GOLIATH* 1972

- (3) SA 1 (A) on 29 H Rumpff J A pointed out that only somebody “who is endowed with a quality of heroism” would intentionally sacrifice her life for that of another. There is nowhere on the record where it can be shown that the accused had any other option between the two evils she was faced with. The action she took did not even exceed the threat posed by the complainant. I am satisfied that the presiding officer misdirected herself materially on the conviction which warrants this Court to interfere.

- [6] Lastly it is important for the presiding officer in this matter not to regard a query directed by a Judge as an irritation. When a Judge directs a query it means (s)he is *prima facie* not satisfied that justice was done. The magistrate can, by furnishing proper reasons contribute to the removal of the Judge's

initial doubt and/or to the confirmation of the conviction and/or sentence. See *S v JOALE* 1998

- (1) SACR 293 (O). By the same token of what Malherbe JP (as he was then) said with reference to short and curt answers, in my view, the same is applicable to long winded and unnecessary retorts. In fact what the presiding officer noted in her eleven paged response is what she should have taken into account during the proceedings not ex post facto. If she had, she would not have come to the conclusion she came to.
- [7] Since I have come to the conclusion that the presiding officer misdirected herself materially with regard to the conviction, it is unnecessary to consider the sentence imposed even if I am of the view that it is not balanced. In the eventuality that I have reached above the sentence automatically falls away.
- [8] Under the circumstances the conviction is set aside and the matter is referred back to the Magistrate Court for a trial de novo before another Magistrate.

B.C. MOCUMIE, J

I concur.

N. RADEBE, AJ

BCM/eb

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZAFSHC/2010/151.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/s-v-mkutoane-unknown-topic-afshc-2010>

Prepared on 10 October 2026 · Esheria