

FIREARM USE

The Namibian Police are requested to answer this question on a daily basis. This would seem to be a simple question but, it is in fact an extremely complex one. It is virtually impossible for the Namibian Police or Jurists to prescribe hard and fast rules that one can adhere to in any given situation. When defending oneself by using a firearm against your attacker, it is an equally complex matter for a court of law to determine if, the threat or impending threat was of such a nature, that the use of such firearm was justified under the given circumstances.

The use of force, which under normal circumstances would be criminal, may be justified if it goes hand in hand with the unlawful attack on your person, or property, or with the need to protect other lawful concerns. Seen in the light that force is justified in certain circumstances, even to the extent of protecting a third party, or property, the term 'self defence' would, by definition, seem to have a limited interpretation. The term Private Defence is thus the term more readily accepted by jurists.

Private Defence is one of the oldest and most common grounds of defence. A person who thus acts within the confines of this ground of defence, does not act unlawfully but acts lawfully, if the conduct complies with the prerequisites of Private Defence. In a situation or conduct wherein Private Defence is offered as a ground of defence or justification, the courts in determining whether the defence was lawful, will consider the following aspects of both the attack and the defence:

THE ATTACK

A situation requiring private defence will only be justifiable in the event of (i) an unlawful attack, (ii) only if such attack is directed against a legally recognized interest and (iii) such attack must also have begun or be eminent.

Before a person can use private defence as a jurisdiction ground, he must prove that the attack on him was unlawful. For example, if a Police Officer is effecting a lawful arrest and using a baton to overcome any resistance, a person may not "defend" himself against such arrest by, for example, shooting the Police Officer. If a person is attempting to stop you from assaulting another, you may not use a firearm against him.

WHAT IS A LEGALLY RECOGNISED INTEREST?

Life, limb, honour, dignity, possessions and even a third party can be a legally recognised interest. There need not be a specific relation between defender and the third party.

Private defence will not be a justification ground if you use violence against another for an attack which may only realize in the future. In such a case only defensive action might be taken. This would include preparing yourself against a possible attack. It would be absurd, though, to expect from a person to first wait for a physical blow or strike before defensive action is initiated. Defence against an eminent attack will thus be excusable. Any defensive action after the attack has ceased, will in itself constitute an attack, and is illegal.

THE DEFENSIVE ACTION

This action:

- (i) must be directed against the attacker
- (ii) must be necessary to ward off the attack and
- (iii) the defensive action taken must not be more harmful than necessary to stop the attack.

If X is attacked by Y and Y in defending himself, throws stones in the direction of X and hits Z who is a passer by, X cannot raise private defence as a justification ground, should Z file a complaint of assault against X.

In cases where the threatened interest can be defended in ways other than by launching another attack as defence, such other ways should be employed. Private defence is a justification against an unlawful attack but it is not a justification for taking the law into your own hands where the law could have been employed. The question now arises whether a person under attack may defend himself if he could have evaded the attack by fleeing. Jurists are of the opinion that a person under attack need not flee, if fleeing would put him in more dangerous a position than that in which he would be if he or she rather protected him/herself. It therefore appears that the courts will accept private defence as a justification ground if a person defends him/herself rather than fleeing, if fleeing would have put him/her in greater danger.

It seems as if there is no satisfactory test to determine whether a defender has acted reasonably or not in warding off an attack. The courts will judge every case on its own merit. As an example, if you are attacked with a firearm, and you grab your firearm and point it at the attacker and if the attacker throws his firearm away, you may not shoot him/her as the attack has stopped and is not eminent. Shooting would clearly be unreasonable and unlawful in such a case.

IS IT ALLOWED TO KILL ANOTHER IN THE DEFENCE OF YOUR PROPERTY?

According to law, X may kill Y if Y interferes with his property to such an extent that X's life is in danger or that he is facing grievous bodily harm. This in effect is Self Defence rather than the defence of property. A problem however arises when the question is whether you may kill another person in defence of your property, if your life is not threatened, or if you are not facing grievous bodily harm.

In S van Wyk the court amongst others held that you may kill another in defence of your property even if your life is not in danger or if you are not facing grievous bodily harm.

You must however remember that all the circumstances of each case (which will in almost every case be different) will be considered by the courts and that the outcome of the court decision may not always be the same as in this case. The ruling in this case is therefore not to be construed as a permission to shoot at a person merely because your property is threatened.

In the mentioned case, X positioned a shotgun in his shop in such a way that if a person were to break into his shop and move behind the counter, that such person would then be shot in the legs. X also erected a notice at his shop informing that a trap was erected in the shop with a shotgun. Y broke into the shop, the shotgun went off and killed Y.

Before X put up the shotgun in his shop he had also employed other measures to prevent break-ins at his place but without success. (These measures included burglar bars, a night watch man, etc). The reason why he went to such an extreme measure was also because the break-ins were financially crippling him. All these circumstances were taken into consideration before the court decide as it did.

From the above it is quite clear that each case is judged according to its individual ' circumstances. The best outcome therefore would be not to shoot at all if you have doubts as to whether you are allowed under the law to shoot or not.