

Successfully raise a  
defence of necessity



Necessity and Private Defence are closely linked therefore; many of the requirements of private defence are also requirements for necessity. The difference between these two grounds of justification is that private defence stems from and is directed at, an unlawful human attack while in necessity a person finds him/herself in a situation in which he/she must choose between two evils: either suffer personal harm or break the law.

The act of defence in private defence is always directed at an unlawful human attack whereas; in cases of necessity it is directed at either the interests of another innocent party or a mere legal provision. (Snyman, 2008, p. 115)

## **Necessity**

There must be an urgent and immediate threat to life which creates a situation in which the defendant reasonably believes that a fair response to that threat is to break the law. This reflects the distinction between the defenses of necessity and duress in that the former is pressure of circumstances arising naturally, whereas the latter is a threat from an entirely human agency that overpowers the will of the defendant. The subjective frame of mind of the person who is relying on necessity the courts will not consider this but rather whether the act of necessity was in accordance with the legal conviction of society. The courts will also weight the option of whether a reasonable person would have acted in the same way as a person that claims to have acted in necessity. They are using the concept of the reasonable person to practically embody the legal convictions of society and not to determine negligence. (Joubert, 2001, p. 61)

## **REQUIREMENTS TO SUCCESSFULLY RAISE A DEFENCE OF NECESSITY**

The author will no discuss five (5) requirements that must be met in order for a person to successfully raise a defence of necessity:

A legal interest must be endangered

The danger must have begun or be imminent

The defensive act must be necessary to avert the danger

The defensive act must be reasonable

The endangered person must know he/she is acting in necessity

### **A legal interest must be endangered**

The purpose of the specific conduct must be clearly to protect a legal interest. Although the law recognizes many interests the most obvious are a person's life, limb, personal safety and integrity. A person may act in a situation of necessity to protect property but cannot relay on necessity to protect his/her job. If a person is not able to perform his job without breaking the law he must find another way to earn a living. For example a person cannot operate an illegal shebeen and claim it is to sustain his family when apprehended. The person must rather apply legally for a shebeens license. A person may also act in necessity in defence of some else. (S v Pretorius, 1975)

### **The danger must have begun or be imminent**

When danger has already passed or will possibly occur in the distant future a person cannot rely on necessity. Therefore, the danger must already have begun or the situation must be immediately threatening. In the trial *Regina v. Dudley & Stephens* four stranded sailors were adrift in a small boat without supplies. The three strongest decided to eat the fourth, a seventeen (17) year old cabin boy to save themselves. There was some degree of necessity arising from the threat of starvation, even though the cabin boy would almost certainly have died of natural causes the sailors killed the boy intentionally and the court ruled that cannibalizing the boy was not urgently necessary and found them guilty of murder. (*Regina v. Dudley & Stephens*, 1884)

### **The defensive act must be necessary to avert the danger**

When a person relies on necessity the action taken should have to avert the danger. When there is less drastic measure to avert the danger a person a person should take this option. If it was not taken a person cannot rely on necessity. For instance when a man are awake by a noise in the middle of the night and found a person at his fridge busy eating food and killed the person by shooting him he thus cannot rely on necessity. If there is a possibility that a person can flee from the immediate or imminent danger he should do so. (*S v Pretorius*, 1975). The danger does not take the form of an unlawful attack and removing oneself from the danger in most cases of necessity.

## **The defensive act must be reasonable**

A person must act reasonable if he wants to rely on necessity as ground of justification. The interest that is being protected must not be disproportionate of the defence act. Not more harm than is necessary to avert the attack must be inflicted by the person who wants to rely on necessity. According to Snyman this “proportionality requirement” is sometimes explained by requiring that the protected interest should be of greater value than the interest that is infringed upon. (Snyman, 2008, p. 119). The protected and infringed interests are a totally different nature, but if the infringed interest is a legal provision only, the defence of necessity would most probably succeed. For example a correctional exceeding the speed limit because he is rushing to the Prison where inmates are in the process of escaping, he will most probably be allowed to justify his actions by relying on necessity as a defence, since he infringed a legal provision only.

## **The endangered person must know he/she is acting in necessity**

If a person is conscious of the fact that an emergency exists and knowingly acted in necessity than he can rely on necessity as a defence. A person cannot thus rely on necessity as a ground of justification if he throws a brick through a window in an attempt to break into a house but his action saves the occupants lives who are sleeping in a room filled with poisonous gas.

## **PRIVATE DEFENCE**

The onus is on the state to prove beyond reasonable doubt that the accused action cannot be justified, if private defence is raised as a ground of justification. Private defence involves a person who takes the law into his

own hands. Therefore, it is a drastic measure that should not be used for corrective purposes. Snyman alleged that this ground of justification has no history, but exist from the beginning of time. (Snyman, 2008, p. 103). Every person has a right to defend himself against an unlawful attack a right that is recognised in section 51 of the Charter of the United Nations.

The two theories for the existence of private defence are protection theory, which emphasises each person's right to defend oneself or another against an unlawful attack whereas in upholding-of justice theory is where people acting in private defence perform acts assist in upholding the legal order. (Snyman, Criminal Law, 2004, p. 178). It is the primary duty of the state to protect the life and property of individuals but no state no matter how big its recourses can afford it. Therefore, this right has been given by the state to every citizen to take the law into his own hands for their safety.

## **REQUIREMENTS TO SUCCESSFULLY RELIANCE ON PRIVATE DEFENCE**

The requirements of private defence can be divided into two groups for the purpose of classification namely: the requirements with which the attack must comply and the requirements with which the defence must comply.

### **Requirements of the attack**

It must be unlawful

A legal interest deserves protection.

It must be imminent, but not yet completed

## **The attack must be unlawful**

When the attack on a person is unlawful only then can a defender rely on private defence. A suspect who was lawfully arrested by a police official cannot rely on private defence in resisting the arrest. On the other hand, when a police official exceeds his powers by arresting a person he is not allowed to arrest the person may resist and can rely on private defence to justify his resistance.

## **A legal interest deserves protection.**

Normally a person acts in private defence to protect his life, limb, bodily integrity and property. These are not the only interest worth of protection as the courts also recognized a person's right to defend personal freedom, sexual integrity, self-respect and chastity. To protect the interest of other person's is also an act of private defence but than the third party should want the defender to act on his behalf. However, the defender will not be able to rely on private defence if the victim does not want the help of the defender. (Joubert, 2001, p. 52)

## **The attack must be imminent, but not yet completed**

If it is clear that an attack is about to happen than a person can rely on private defence. The defender doesn't have to wait for the attacker to attack first if the attack is imminent he can avert the attack by defending himself before the attack actually arise. But if the attack have been already completed the defender no longer defend him but get even. In the case of S v Moghlwane it was find that if the attack formed part of one and the same immediate and continued act of resistance, the defender can rely on private defence even if he left the scene temporarily. (S v Mogohlwane, 1982)

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## **The defence requirements**

Before private defence can succeed the defensive action have to comply with certain standards.

The defence must be directed at the attacker

It must be necessary

It must be reasonable

### **The defence must be directed at the attacker**

When the defence is directed at anyone else than private defence as a ground of justification will not succeed therefore, it may only be directed at the attacker. (Snyman, Criminal Law, 2004)

### **The defence must be necessary**

If there is another way that the attack can be averted in a less serious way than that option should be used. The law must not be taken into their own hands if the defender can rely on another remedy. Therefore, the defence should be absolutely necessary in order to protect the interest threatened.

The question arises than should a person rather flee an attack than resort to private defence? But than once there is a duty to flee it will imply that justice will have to give up to injustice. Therefore, it is not expected of a police official on duty to flee if he is being attacked while lawfully performing his duties.

### **The defence must be reasonable**

There should be a balance between the attack and the defence. The defence act may not be more harmful than necessary to ward of the attack.

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Therefore, it would be unreasonable to kill a person who attempts to steal bread. Proportionality also plays a very important role in determining whether the defence was reasonable or not. The proportionality requirement will be met if the defence act is reasonably proportionate to the attack.

The right of private defence is a good weapon in the hand of citizens to defend themselves but it is not revenge rather towards the threat and imminent danger of an attack. The courts find it difficult whether this right had been exercised in good faith or not.

## **Conclusion**

It can be said that the confusion arise between Necessity and private defence are that they are closely related to each other. The difference are than is that private defence is an act of defence directed at an unlawful human attack while necessity is directed at either the interests of another innocent party or a simple legal provision.