

THE STATE
versus
CLEVER KADZA

HIGH COURT OF ZIMBABWE
MANYANGADZE J
HARARE, 5 - 8 September 2022 & 27 July 2023

Assessors: Mr *Barwa*
Mr *Mpofu*

Criminal Trial

A Mupini, for the State
T. Mubi, for the accused

MANYANGADZE J: The accused was charged with the crime of murder, as defined in s 47(1) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] (“the Criminal Law Code”). It is alleged that on 15 August 2020, at Kadza village, with intent to kill, the accused struck one Tendai Manhanzva (“the deceased”), with a log all over the body, causing injuries from which the deceased died.

In the summary of the State’s case filed of record, it is alleged that the accused arrived at his homestead on 14 August 2020, around 8 pm. He found the deceased in the kitchen hut. There was also the accused’s wife and deceased’s wife in that kitchen. The deceased’s wife, Laina Size, had left her matrimonial home after an altercation with the deceased. She headed for the accused’s residence. She regarded the accused as “father-in-law”, within the extended family framework.

The deceased followed Laina to the accused’s homestead. He accused her of stealing his property, which included utensils and groceries. The accused asked the deceased to leave his homestead, as he was not interested in mediating the marital dispute the deceased was having with his wife. Deceased refused to leave. There was some pushing and shoving between the two men. The deceased eventually left the accused’s residence.

Later that night, around 1.00 am, the deceased was found dead at the accused’s goat pen. The deceased was ferried to the local clinic, and subsequently to Chitungwiza General

Hospital, where he died the following day. It is alleged he died from injuries inflicted in the assault perpetrated by the accused at the goat pen.

The accused pleaded not guilty to the charge. His defence outline is filed of record. Salient features of the defence outline are that the deceased came to the accused's residence in the evening of 14 August 2020. He was in a belligerent mood, accusing Laina of stealing his goods. The accused ordered the deceased to leave his residence, as he was insulting and harassing Laina together with the accused's wife. An altercation ensued between the accused and the deceased, after which the deceased left. As he left, he continued hurling insults at the accused.

Much later, around 1.00 am, the accused was woken from his sleep by noise coming from the goat pen. It was the sound of goats bleating. Alarmed, the accused proceeded to the goat pen, armed with a log which he took from the fireplace.

The accused avers that on approaching the goat pen, he saw the deceased, whom he had not yet recognised, holding a goat. He shouted "Thief!" and struck the deceased with the log. The deceased fell, hitting the stones in the goat pen. The accused realised it was the deceased with the help of a cell phone torchlight, which was brought to the scene by his son, Paul Kadza.

The accused then sought assistance to transport the deceased to hospital. The deceased was first ferried to Marirangwe clinic, and later to Chitungwiza Hospital, where he succumbed to his injuries.

The accused avers, in his defence, that he feared for his livestock. The attack on the deceased was only intended to immobilise him and not to kill him. The accused did so in defence of his property.

In order to substantiate its allegations, the State adduced oral evidence from Laina Size, Annah Kadza, Paul Kadza, Mudhara Banda, and Wellington Mungofa. Only salient features of this evidence will be highlighted. Details of the witnesses' evidence appear on record.

LAINA SIZE, as already indicated, was the deceased's wife. She stated that on the fateful evening, she had a dispute with the deceased. He told her to pack her belongings and leave. She did as she was told and left the matrimonial homestead. She went to the accused's homestead. The deceased followed her there.

Laina stated that when the accused later arrived home, he found them already there. The accused immediately objected to the presence of the deceased at his homestead. He ordered the deceased to leave. The deceased refused to leave. The two men started pushing and shoving each other. At this point, Laina left for the safety of a neighbour's house.

Under cross-examination, the witness said she did not see a physical fight between the accused and the deceased. It was only a verbal altercation, in which the deceased was demanding his things from the accused. The things were not specified.

Laina later learnt of the deceased's death. She has no knowledge of what transpired at the goat pen.

ANNAH KADZA is an aunt to the accused. She told the court that on 15 August 2020, around 1.00 a.m., she received a call from the accused. She was in fact woken from sleep by that phone call. The accused asked her to come to his residence immediately, as he had assaulted someone. He did not disclose the identity of the person he had assaulted. She left at once for the accused's homestead. She went to the goat pen, where the accused was.

Annah went on to state that at the goat pen, she saw the deceased lying down at the entrance to the goat pen. The accused was standing next to the deceased. She observed a bleeding wound on the forehead. She was not able to see how deep it was. She used a cell phone flashlight and recognised that it was the deceased, whom she called Tindo.

Annah pointed out that the accused was still holding the log which he had used to assault the deceased. She assisted the accused in finding transport to ferry the deceased to the clinic.

The witness explained that she was concentrating on rendering assistance to the injured deceased and did not get the time to ask the accused what had happened. It was much later that the accused explained to her that the deceased paid part of his lobola with a goat. The accused, in hindsight, assumed that probably that was the goat the deceased wanted to take from the goat pen.

Nothing significant came out of the witness's evidence, in so far as the attack at the goat pen is concerned. Like the preceding witness, she has no personal knowledge of what transpired there. She arrived at the scene after the assault had occurred.

PAUL KADZA, the accused's 15-year-old son, told the court that on the night of 14 August 2020, he was in the kitchen hut when the deceased arrived. Also in that hut were the deceased's wife and the accused's wife. Paul then went on to explain how the accused arrived, and an altercation ensued between the accused and the deceased. The same account has already been narrated by Laina.

Paul went on to state that later that night, around midnight, he was awakened from his sleep by the accused, who told him to bring a torch to the goat pen. At the goat pen, deceased was lying down. The accused instructed the witness to go and call Banda. It is at this point, after Paul left to call Banda, that the preceding witness, Annah, arrived at the scene.

Like all the other witnesses, Paul was unable to shed light on what happened at the goat pen. He also arrived after the deceased had been assaulted.

MUDHARA BANDA is a member of the police special constabulary. He was called to the scene by the accused. He also arrived at the scene after the event. He therefore is in no different position from the preceding witnesses. He is the one who assisted the accused with the logistics of ferrying the deceased from the scene to the hospital.

WELLINGTON MUNGOFA is a duly attested member of the Zimbabwe Republic Police. He was the investigating officer in this matter. At the scene of crime, the accused made indications to him and the other officers who came in his company. He was shown where the deceased had fallen. It was by the side of the goat pen entrance. He was also shown the weapon used. He described it as a small log, about 5 cm thick and half a metre long. The log was produced as an exhibit through this witness. The defence challenged the witness's identification of the log, suggesting it may not be the one he recovered at the scene. The witness insisted it was the one, to the best of his recollection.

The rest of the witnesses had their evidence formally admitted in terms of s 314 of the Criminal Procedure and Evidence Act. It was the evidence of the other police officers, *viz* Sergeant Chihwa, Assistant Inspector Makanga, and Sergeant Tafa. Also tendered as exhibits were the post mortem report by Dr Mayedo and the certificate of weight of the log used in the assault. That constituted the State's evidence against the accused.

The accused gave evidence in his own defence. He told the court about his first encounter with the deceased in the kitchen hut. When he arrived home in the evening on 14 August 2020, he found the deceased already at his residence. It was around 8 pm. There was commotion in the hut, as the deceased was demanding his things. The things were not specified. The accused told the deceased to leave his house as he (accused) did not want to be involved in the domestic dispute between the deceased and his wife.

The accused had to push the deceased out. The deceased eventually left, shouting insults.

The accused went to sleep after this scuffle. He slept in the kitchen hut, which he said is about 3m from the goat pen. Around 1.00 am, he heard some noise from the goat pen. He took a log from the fireplace. He quietly opened the door to the kitchen and saw the deceased coming out of the goat pen. He said he shouted "thief!" three times. He further stated that in order to protect himself and his livestock, he raised the log he had picked from the kitchen. He struck the deceased three times, asking, "Who are you". The deceased fell down.

The accused called his son, Paul, who brought a torch. After flashing the torch onto the deceased, he then realised it was Tendai Manhanzva. The accused said the deceased was holding one of his goats, as he was exiting the goat pen. On what transpired thereafter, the accused's evidence was the same with that of the rest of the witnesses. It was about how the deceased was ferried to Marirangwe Clinic and later to Chitungwiza Hospital. There is no need to repeat those details.

The accused called his neighbour, Evelyn Chiruka, as the next defence witness. She is the one who had been called to intervene during the scuffle between the accused and the deceased earlier on. Her evidence on what transpired in the kitchen hut was along the same lines as that of the preceding witnesses.

The witness stated that she was later called by Anna Kadza and told that the accused had seriously injured the deceased. She followed Anna to the accused's goat pen, where she saw the deceased lying down. She said she had no close observation of the deceased as she stood a bit far, scared. Again, her evidence on what she saw at the goat pen carried the case no further than that of the other witnesses.

As already indicated, the accused has advanced the defence of property. It is noted that during his evidence-in-chief, he indicated that he was also protecting himself. This suggested that he was combining the defences of self-defence and property. However, much of his evidence focused on the defence of property. Indeed, the closing submissions filed on his behalf by his legal practitioner do not advert to the defence of self-defence. They are wholly focused on the defence of property. Thus, the evidence adduced by the State must be examined against this defence. The defence is encapsulated in paragraph 3. 9 of his defence outline in the following terms:

“The Accused feared for his livestock which is his livelihood or lifeblood and sought to defend his property from the ongoing theft. He took a log from the fireplace and ran in the direction of the Pen. It is at this point that he had sight of the unidentified deceased at the point, holding a goat, it was at this point that the accused shouted out “Thief” three times and struck the deceased to demobilise (*sic*) him and potentially disarm him in the event that he may have been weaponised. The deceased fell forwards and hit the stones in the Pen.”

The requirements of this defence are clearly set out in the Criminal Law Code. The relevant provisions are found in sections 257, 258 and 259. Section 257 sets out the requirements in relation to a crime in general. Section 258 sets out the requirements in relation to a crime involving the killing of another person. It seems the provisions should be read

together, starting with s 257. Where homicide is involved, additional requirements are imposed in s 258.

Section 259 makes it a partial defence. It reduces a charge of murder to that of culpable homicide if the means used to avert the unlawful attack are not reasonable in the circumstances.

The above-cited provisions read as follows:-

“257 Requirements for defence of property to be complete defence

- (1) Subject to this Part, the fact that a person accused of a crime was defending his or her or another person’s property against an unlawful attack when he or she did or omitted to do anything which is an essential element of the crime shall be a complete defence to the charge if—
 - (a) when he or she did or omitted to do the thing, the unlawful attack had commenced or was imminent; and
 - (b) his or her conduct was necessary to avert the unlawful attack; and
 - (c) the means he or she used to avert the unlawful attack were reasonable in all the circumstances; and
 - (d) any harm or injury caused by his or her conduct—
 - (i) was caused to the attacker and not to any innocent third party; and
 - (ii) was not grossly disproportionate to that liable to be caused by the unlawful attack.
- (2) In determining whether or not the requirements specified in subsection (1) have been satisfied in any case, a court shall take due account of the circumstances in which the accused found himself or herself, including any knowledge or capability he or she may have had and any stress or fear that may have been operating on his or her mind.
- (3) In determining whether or not any means used by a person to avert an unlawful attack were reasonable, or whether or not any harm or injury caused to an attacker was proportionate to that liable to be caused by an unlawful attack, a court shall have regard to the nature of the property which the person was trying to protect and its value to him or her.

258 Killing in defence of property

A person accused of a crime involving the killing of another person shall not be entitled to rely upon a defence in terms of this Part unless—

- (a) the accused resorted to killing after taking all other possible steps to protect the property concerned; and
- (b) the property concerned could not have been defended by any means except by killing; and
- (c) the property concerned was of vital importance to the accused; and
- (d) the accused believed on reasonable grounds that he or she would not receive adequate compensation for any destruction, damage or injury caused to the property concerned by the unlawful attack.

259 When defence of property partial defence to murder

If a person accused of murder was defending his or her or another person's property against an unlawful attack when he or she did or omitted to do anything that is an essential element of the crime, he or she shall be guilty of culpable homicide if all the requirements specified in sections *two hundred and fifty-seven* and *two hundred and fifty-eight* are satisfied in the case except that the means he or she used to avert the unlawful attack were not reasonable in all the circumstances."

The accused urged the court to accept his defence. He contends that the requirements of the law are satisfied when due regard is paid to all the circumstances surrounding the commission of the offence. In particular, the accused has drawn the court's attention to the following facts:

1. The deceased was found in the accused's goat pen, which goat pen was located inside accused's plot or yard. Thus, the unlawful act had commenced.
2. The accused picked up the nearest available object which he used to ward off the attack on his livestock. This was the piece of wood he pulled from the fireplace, in the kitchen hut where he was sleeping.
3. Only the deceased was harmed in the attack.
4. The accused called out "thief!" three times before attacking the deceased, who did not disclose his identity.
5. It was very dark and fear operated on the accused's mind at the time.
6. The accused then hit the deceased three times, in quick succession, with the stick, intending to immobilise him. He cannot be said to have used excessive force in the circumstances.
7. The accused was the lawful occupier and owner of the plot, the goat pen and the goats secured therein.
8. The goats are of vital economic value to the accused.

On the other hand, the State urged the court to reject the accused's defence. In doing so it drew the court's attention to the following aspects:

1. The accused knew that the person he was attacking was the deceased, as the deceased was a person already known to the accused.
2. The accused approached the deceased from behind and struck him twice on the head with a log.
3. The accused aimed at a vulnerable part of the deceased's body, the head.
4. The deceased was unarmed.

5. The scene was not mobile. Thus, the accused had ample time to observe the deceased and deliberately aimed his blows at the head.

The State submitted that given the circumstances it pointed out, the court must find that the accused acted with actual intention when he struck and killed the deceased in the manner he did. This is reflected in Section B of the State's closing submissions, under the sub – heading **“Whether Accused Acted with Actual Intent,”** wherein is stated:

“State is of the view that the accused acted with actual intent when he struck and killed the deceased in the manner he did. The accused person struck the deceased twice on the head, causing the deceased serious deep cuts which were evident in the eyes of Mudhara Banda who made efforts to bandage the head and stop the bleeding. This conduct alone speaks volumes on intent. The State considers it only sensible for the accused to have aimed at any other part of the body and not the head, which is a delicate or vulnerable part of the body of any human being.....The State humbly submits that intention can easily be inferred from the manner of assault and the body part to which the blows were directed.”

In this regard, the court was referred to the cases of *S v Mugwanda* SC 19/02, *S v Mtisi* MTHC/28, where the concepts of actual and legal intention were clarified. In *S v Mugwanda*, CHIDYAUSIKU CJ, after referring to some South African authorities and G. Feltoe's book, *A Guide to Criminal Law in Zimbabwe*, succinctly summed up the position as follows, at pages 9 – 10 of the cyclostyled judgment:

“Professor G. Feltoe, in his book, *The Guide to Zimbabwean Criminal Law* discusses the distinction between positive or actual intent, and constructive intent or legal intent in a manner that is very lucid and instructive. The learned author characterises the distinction as follows:

Actual Intention

- (a) Desires death. Death is aim and object.
- or
- (b) Death is not aim and object but in process of engaging in some activity foresees death as a substantially certain result of that activity and proceeds regardless as to whether this consequence ensues.

Legal Intention

Does not mean to bring about death but foresees it as possibility whilst engaged in some activity and proceeds with the activity regardless as to whether death ensues.

- (a) subjective foresight
- (b) as to possibility not probability
- (c) recklessness.

On the basis of the above authorities it follows that for a trial court to return a verdict of murder with actual intent it must be satisfied beyond reasonable doubt that:-

- (a) either the accused desired to bring about the death of his victim and succeeded in completing his purpose; or
- (b) while pursuing another objective foresees the death of his victim as a substantially certain result of that activity and proceeds regardless.

On the other hand, a verdict of murder with constructive intent requires the foreseeability to be possible (as opposed to being substantially certain, making this a question of degree more than anything else). In the case of culpable homicide the test is - he ought to, as a reasonable man, have foreseen the death of the deceased.”

The facts in that matter were that the appellant and his two sons had an altercation with the deceased at a local business centre, during the day. They scuffled over an amount of \$50,00 the deceased allegedly owed the appellant. Later in the day, when it was getting dark, the deceased left the business centre going home. He was in the company of his brother. The accused and his sons followed them. They assaulted the deceased and his brother. The appellant inflicted the injury that killed the deceased. He stabbed the deceased with a knife in the chest region.

After analyzing the judgment of the court *a quo* and the submissions made by the State and the defence, the learned Chief Justice then substituted the conviction of murder with actual intent with that of murder with constructive intent, in respect of the appellant. The sentence of death was substituted with that of life imprisonment. The appellant’s sons had their conviction for murder with constructive intent substituted with one for culpable homicide. In returning a verdict of murder with constructive intent for the appellant, the judge held that:

“On these facts, I am satisfied that it cannot be said that the only reasonable inference to be drawn is that the appellant did foresee the death of the deceased as a substantially certain consequence of his activity. These facts however, in my view, are sufficient to establish beyond reasonable doubt that the appellant did foresee the possibility of the death of the deceased as a consequence of the assault and persisted with the assault regardless. On this basis the appellant should have been found guilty of murder with constructive and not positive intent. Accordingly the verdict of the court *a quo* is altered to one of guilty of murder with constructive intent.”

Relying on the *Mugwanda* case, *supra*, the State urged the court to find the accused guilty of murder with actual intent, or at the very least, murder with constructive intent.

Further reliance was placed on the case of *S v Mtisi*, *supra*. The facts in that case are both tragic and dramatic. They are briefly summarized on page 2 of the cyclostyled judgment as follows:

“The accused is being charged of murder in that on 29 December 2019 and at Caravan Park Lodge, Chipinge the accused unlawfully caused the death of Kudakwashe Msindo by assaulting and throttling him with intent to kill him or realising that there was a real risk or possibility that his conduct might cause death and continued to engage in that conduct despite the risk or

possibility, resulting in injuries from which Kudakwashe Msindo died. The brief facts of the State case are that the accused, while carrying out his security duties at Caravan Park in the middle of the night intruded into the room in which deceased and his girlfriend had booked and retired to bed. The accused entered through the window with an intention to steal. When a bag fell, it made noise which roused the deceased. The accused in a bid to escape tussled with the deceased. The deceased maintained grip of the accused's t-shirt while accused was assaulting him so as to escape. The two fell outside through the window and the struggle continued leaving deceased injured and accused shirtless."

The court found the accused guilty of murder with legal intention, another term for constructive intention. In returning this verdict, MWAYERA J (as she then was) made the following findings, at page 5 of the cyclostyled judgment:

"The deceased's aim was to apprehend the intruder while the accused's aim was to escape out at all costs. The blows inflicted by the accused were severe and aimed at the chest and neck which are vulnerable parts of the body. This speaks volumes to intention. The accused is the one who had intruded and the deceased sought to defend himself and property from the intruder. The accused even after falling outside was determined to make good his escape and thus he consciously continued to severely physically assault the already injured deceased so as to disable and foil any apprehension. Severe trauma to the chest and neck was inflicted in a bid to avoid apprehension. Intention can easily be inferred from the manner of assault and the body parts to which the blows were directed. Considering the circumstances of this case the accused foresaw that by assaulting the deceased in the manner he did, death would occur. Despite that foresight the accused persisted thus intentionally causing the death of the deceased. The accused is accordingly found guilty of murder with legal intention as defined in s 47 (1) (b) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]."

The State has indicated that there are somewhat similar issues in the cases referred to, with the instant case. The assault was on vulnerable parts of the body, the neck and chest region. The force used was severe enough to cause fatal injuries.

There are, however, significant dissimilarities in these cases when compared with the instant case. In the first case, the accused persons followed the deceased long after the initial altercation at the shopping centre. They then attacked the deceased under cover of darkness. They knew who their victim was, and they caught up with him at an isolated spot. They were the aggressors.

In the second case, the accused was also the aggressor. He was the intruder into the deceased's private space.

In casu, the intruder was in fact the deceased. He went to the accused's premises in the dead of night. In a state of panic, the accused rushed to his goat pen, grabbing whatever weapon was near him. This happened to be the piece of wood that was in the fireplace next to where he was sleeping.

No evidence has established that the accused knew who or what he was confronting. He only realised it was the deceased after a torch was brought to the scene. No evidence from the State has rebutted that crucial aspect of his defence.

It must be noted that the goat pen was within the accused's yard. It was not located far from the homestead. It was an integral part of the homestead. Thus, the intrusion by the deceased, around 1.00 am, must certainly have induced enormous fear and triggered a strong sense of self-preservation in the accused. His conduct ought to be viewed in the context of what surrounded him at the material time. It seems to us his conduct was within the range of normal human behaviour under similar circumstances. See *S v Sifelani* HB 84/21, *S v Zhakata* HCC 32/22, *S v Ginya* HB 69/23. In *S v Ginya*, KABASA J was seized with similar facts where the accused confronted the deceased, who had stolen his goats. The learned judge stated, at p 3:

“There is no doubt the now deceased stole the accused's goats in the very early hours of the morning. There is also no doubt he posed a threat to the accused. Can it be said the accused ought not to have followed in an attempt to recover his goats? Can it also be said once he followed and realised that the now deceased was aggressive he ought to have turned back? In considering the defence of person the court ought not to adopt an armchair approach. In *S v Kapenya & Anor* HH 14-2018 HUNGWE J (as he then was) articulated this as follows:-

“The question whether an accused can successfully claim the defence of private defence is determined by examining objectively the nature of the attack and defence to determine whether they conform to the principles of law that are set out above. This means that each requirement of the attack and defence must be judged from an external perspective rather than in terms of the accused's perceptions and his assessment of the position at the time he resorted to private defence. In applying the test the court must be careful to avoid the role of armchair critic...weighing the matter in the secluded security of the room. Instead the court must adopt a robust attitude, not seeking to measure with nice intellectual calipers the precise bounds of legitimate self-defence. See *State v Ntuli* 1975 (1) SA 42 (A) at 436 D.”

Even the State, in the instant case, appears to appreciate the accused's predicament. Its final submissions are contradictory to its earlier hardline stance. It is virtually conceding to the accused's defence. The State sums up its closing submissions with the following remarks:

“Whilst the State intends on persisting that the accused knew the identity of the deceased at the time of the assault, it is rather difficult to convincingly conclude that when the accused got out of his kitchen hut, he had set out to go and kill the supposed “thief” when he armed himself with a log. In other words, that he had the desire to kill the deceased in the manner that he did. The State is not deaf to his plea that the accused armed himself with that log in order to protect himself too, seeing that he did not know what awaited him outside since it was very dark. The State has also not closed its eyes on the accused's actions in trying to assist the deceased in order to save his life.” (underlining added)

Taking into account the totality of the facts and circumstances of this matter, we are of the considered view that the accused's conduct in defending both himself and his property was

not out of place and was justified. Whilst we sympathise with the tragic end to the deceased's life, we note that he conducted himself in a grossly irresponsible manner. It was the height of folly for him to proceed, unannounced, at 1.00 am, to the accused's goat pen. There was nothing that prevented him from waiting until daybreak to present his story about the retrieval of his lobola goat. If he could not confront the accused over the matter, there are dispute resolution structures in the village involving the village head and the chief. His clandestine and nocturnal visit at the goat pen roused the goats into panic, as they started bleating. This further roused the lawful owner of the premises into a state of panic, and he reacted in a manner any home owner would react under the circumstances in order to protect himself and his property.

In the circumstances, we are of the considered view that the accused is entitled to an outright acquittal. He is accordingly found not guilty and acquitted.

MANYANGADZE J:

National Prosecuting Authority, State's legal practitioners
Legal Aid Directorate, accused's legal practitioners